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

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This is a Key-Numbered Volume

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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.*

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OF THE

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[1] Appointed Circuit Judge August 21, 1916.
[2] Appointed August 23, 1916, to succeed Charles M. Hough.

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Hon. SAMUEL ALSCHULER, Circuit Judge ....Chicago, Ill.

[3] Died August 30, 1916. [4] Appointed Associate Justice of Supreme Court, July 24, 1916.

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

[5] Died October 24, 1916. [6] Died September 13, 1916.

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

CHICAGO, K. & S. RY. CO. v. KINDLESPARKER.

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

No. 2757.

1. COMMERCE ⟹27—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT.

A railroad lying wholly within a state, which formed a link between carriers whose lines extended without the state, and which indiscriminately transported interstate shipments and intrastate shipments, is an interstate carrier, within the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 1, 35 Stat. 65 [Comp. St. 1913, § 8657]), declaring that every common carrier by railroad, while engaging in commerce between the several states, shall be liable in damages by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, roadbed, etc.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟹27.

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

2. COMMERCE ⟹27—INTERSTATE COMMERCE—INSTRUMENTALITIES THEREOF.

A railroad lying within a state, forming a link between interstate carriers, transported both interstate and intrastate shipments and passengers. The freight and passengers of both kinds were commingled, and the several engines of the road were indiscriminately used in hauling trains transporting both kinds of freight and in switching cars similarly loaded. *Held*, that an engine devoted to such purposes was an instrumentality of interstate commerce, and therefore one injured in repairing such an engine may sue under the federal Employers' Liability Act; the repairer's services partaking of the nature of the instrumentality.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟹27.]

3. COMMERCE ⟹27—INTERSTATE COMMERCE—INSTRUMENTALITIES THEREOF.

Where an engine used in interstate commerce was withdrawn from service for repairs, and on being repaired was again used to transport interstate commerce, the engine, though the repairs extended over several months, was not withdrawn from interstate commerçe, and a repairer injured might sue under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟹27.]

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

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

Action by Gale Kindlesparker against the Chicago, Kalamazoo & Saginaw Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

S. E. Knappen, of Grand Rapids, Mich., for plaintiff in error.

C. F. Hext, of Grand Rapids, Mich., for defendant in error.

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

WARRINGTON, Circuit Judge. Kindlesparker recovered a verdict and judgment under the federal Employers' Liability Act for personal injuries sustained while in the employ of the railroad company; it will be convenient to refer to Kindlesparker as plaintiff, and the railroad company as defendant. The sole issue presented here is whether plaintiff was engaged in interstate commerce at the time he received his injuries. The southern terminus of defendant's railroad was at Kalamazoo and the northern terminus at Woodbury, within the state of Michigan, and the business consisted of general passenger and freight traffic. The railroad, however, connected with "all of the roads" passing through Kalamazoo, and at Woodbury with the Pere Marquette line. It is not shown what railroads pass through Kalamazoo, though the superintendent testified that defendant's local agent in that city "would have the records of shipments, say from any station on our line to Chicago." Further, it was conceded by defendant, at the trial below, that the freight trains operated on its line "contained indiscriminately cars bound between—cars and freight generally bound between—points entirely within this state, and points from outside of the state to this state, and from points in this state to points outside of the state"; and admittedly the defendant's connection at Woodbury was with an interstate road—the Pere Marquette line.

The defendant owned and operated six locomotive engines; only three of these engines were used daily, one in the passenger service, and one in the freight traffic over the line, and one in the switching service at Kalamazoo. The other three, except on extraordinary occasions, were kept in the roundhouse and ready for service, or in the shops under repair; in other words, subject to this rotation in service, five of the engines were used alike in general service and one of them in switching service; and the engines were all used indiscriminately in the movement of intrastate and interstate traffic, regardless of the particular service in which they were employed.

Plaintiff received his injuries from engine No. 4, July 3, 1914, and while engaged in repairing it. He was in the employ of defendant as helper in its shops at Kalamazoo, and at times acted as fireman. April 15, 1914, engine No. 4 was placed in the shops for general repairs, and the repairs were completed July 4th. July 3, engine No. 4 was removed under its own steam from the shops to the turntable, where the boiler maker "set the pops"; it was then taken to the cinder pit, and plaintiff, acting under instruction to enter the pit beneath the engine and place the grease cellar upon it, received his injuries while so engaged. This was the last work required in the repair of the engine, and it was completed by another person on the day following. As regards this engine it was agreed at the trial, as follows: That for eleven days in March, between the 3d and 31st, and for four days in April, from the 1st to the 4th, inclusive, the engine was used in the switching service at Kalamazoo; March 12th, 13th, and 14th it was used in the passenger service between Kalamazoo and Woodbury; on all other days between March 1st and April 15th it was not in use; and after the repairs were completed, the engine was used for six days in July, between the 7th and 16th, in the switching service at Kalamazoo, for four days in that month, between July 13th and 20th, in the freight service between Kalamazoo and Woodbury, and on all other days between the 3d and 20th of July it was not in service of any kind. It was further stipulated that while engine 4 was used in switching operations, as stated, "it handled indiscriminately intrastate and interstate freight," and while used in freight operations as pointed out, the freight trains were "composed of cars containing intrastate and interstate commerce."

[1] In determining whether plaintiff was engaged in interstate commerce at the time of his injuries, consideration must be given to the character of the instrumentality upon which he was working and the nature of the work he was performing. The character of the locomotive, the instrumentality, may be ascertained both from the nature of the railroad on which defendant was accustomed to operate the engine and of the traffic handled by it. In view of all the facts above pointed out, it would seem plain enough that defendant's road constituted a link in interstate lines for all purposes of interstate and intrastate traffic. At the time in question, as we have seen, defendant was transporting freight both ways upon its line, and also handling freight in its yards, which originated upon its connections at points without and was destined to points within the state and also freight which originated within and was destined to places without the state; and, it is true, defendant was also transporting freight originating and destined locally within the state. The former fact, however, concerning freight interstate cannot be ignored because of the latter fact touching freight intrastate. Every road, which physically extends into or through two or more states and is so operated, necessarily carries both classes of freight, interstate and intrastate, and yet we do not see how it can in reason be said of such a carrier that it is any more certainly "engaging in commerce between any of the several states," within the meaning of the Employers' Liability Act, than the present defendant was at the time plaintiff received his injuries; the latter situation as well as the former answers to the language of the act, "that every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages * * * by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed," etc. 35 Stat. 65 (Comp. St. 1913, § 8657). True, defendant's railroad, in a physical sense, was entirely within the limits of the state of Michigan, but this did not prevent defendant from connecting the road with admittedly interstate lines and so engaging in interstate commerce; in every prac-

tical sense, according to the present record, defendant had at the time in question appropriated its road as well as its yards to the transportation and handling of interstate traffic as definitely as it had of traffic of an intrastate character, and these conditions existed at the time of the accident and afterwards. When a company thus in effect dedicates such a road and the yards to a dual use—interstate and intrastate—it invests the road with the characteristics of an interstate line and subjects it to the obligations of that sort of a line. It makes it a part of the through line and becomes entitled to a part of the receipts derived from the through service. Its duties must correspond with the benefits it seeks; it must respond to federal law and regulation; this, however, is not in any true sense violative of its rights and and duties as an intrastate carrier; nor does it open either the defendant or its road to the objectionable features found in the first Employers' Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The principle declared in relation to rates over an intrastate road in Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com., 162 U. S. 184, at page 192, 16 Sup. Ct. 700, at page 703 (40 L. Ed. 935), is applicable as regards the interstate character of the present railroad. It was there said:

"Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points."

In United States v. Union Stockyards, 226 U. S. 286, 304, 33 Sup. Ct. 83, 88 (57 L. Ed. 226), when speaking of an intrastate service in connection with an interstate movement of freight, it was held:

"That the service is performed wholly in one state can make no difference if it is a part of interstate carriage."

It results that such an appropriation as defendant has made of its railroad and yards subjects it to the exactions of the federal Employers' Liability Act, since it prevents effective distinction from the rule laid down in the opinion of the court in the Pedersen Case, 229 U. S. 146, 152, 33 Sup. Ct. 648, 650 (57 L. Ed. 1125, Ann. Cas. 1914C, 153):

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

[2] We are therefore not convinced of the soundness of an argument urged by the learned counsel that defendant's road is primarily an instrument of intrastate commerce and that the plaintiff's rights must be tested upon the theory that the engine he was engaged in repairing was of the same character. We thus come to a consideration of the locomotive as an instrument of commerce, and of the kind of commerce in which plaintiff was engaged when injured. The considerations which have induced us to believe that defendant's road is an essential part of an interstate line, would naturally lead to a similar conclusion as respects the interstate character of the locomo-

tive. This does not mean that in point of character of instrumentalities —that is, whether interstate or intrastate—there is necessarily identity, not to say interdependence, between the railroad line and a particular locomotive passing over it; and yet it is apparent, and we understand counsel to claim, that in the present instance the nature of the service in which plaintiff was engaged when injured must depend largely upon the character of the engine he was repairing.

It has already been shown that defendant possessed six engines and used three of them respectively in the passenger, freight and switching service daily; that it used the engine in question, No. 4, in the switching service at Kalamazoo for fifteen days in March and April, 1914, in the passenger service for three days in March, in such switching service for six days between the 7th and 16th of July, and in the freight service for four days between the 13th and 20th of that month; that the engine was undergoing necessary repairs in the shops between April 15th and July 4th; that, except as to the service described, the engine was either idle or under repair between the dates of service in March and July, as stated; and that while this engine was used in switching operations, as stated, "it handled indiscriminately intrastate and interstate freights." It is to be observed that in describing the traffic operations in which the engine was used there is no showing of any specific intrastate service; such service as to switching was interstate and intrastate indiscriminately, and as to freight operations on the road the trains were "composed of cars containing intrastate and interstate commerce."

The nature and effect of such service as this, both before and after the period of repair, now becomes still more evident. It was the same double service to which the road and yards and (when in use) all the engines of the company were alike constantly devoted; the strong tendency of the evidence is that the service was uniformly of such a nature that the engine in issue could not at any time have been placed in use at all (it certainly was not put in use) except in this double and unitary character of service—if indeed this was not true as to all the engines. The inevitable effect of this service was to impress every instrumentality, so used, with an interstate character, quite as certainly as with an intrastate character, and also to impose upon the carrier the same degree of duty and liability respecting the fitness and condition of the instrumentality for use under the federal act as if it had been designed and used exclusively for interstate service; indeed, while such conditions as are here shown prevailed, the instrumentality was not susceptible of use or repair without regarding and treating it as an instrument of interstate commerce. This is not to say that if plaintiff had been engaged as engineman or fireman and injured in operating this engine while handling purely intrastate commerce, he could have recovered under the federal act; nor is it to say that in such event the service which the engine may have performed either before or after the accident, would have changed the nature of the service he was so performing as engineman or fireman at the time of his injury. The theory of the carrier's nonliability in the situation thus assumed is for present purposes sufficiently illustrated by the decision of the Supreme Court in Chicago, Burlington & Quincy

R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, decided May 1, 1916, and by the decisions there commented on. But those decisions are a class of their own, and as a rule the cases they determine are respectively dependent upon their own peculiar facts (Pittsburgh, C., C. & St. L. Ry. v. Glinn, 219 Fed. 148, 150, 135 C. C. A. 46 [C. C. A. 6]); however, the situation so assumed is not involved here. We are concerned with an injury suffered in the course of repairing the engine, not in its use or operation.

When the decisions are considered, which, on the one hand, allow recovery, and on the other disallow recovery, under the federal act, a marked distinction is found concerning the responsibility of a carrier for injuries suffered by an employé engaged in repairing an instrument interstate in character, and injuries received by an employé using or operating the same kind of an instrument while handling only intrastate traffic. As to the repairer, his service partakes of the character of the instrumentality; as to the operative, his service partakes of the character of the traffic. The reason for this distinction is that the repair is so directly and vitally related to commerce between the states as to characterize the work of the employé engaged in the repair as an act of interstate commerce. This distinction, for example, is well stated by Judge Woolley in Boyle v. Pennsylvania R. Co., 228 Fed. 266, 142 C. C. A. 558, where, in view of the facts of that case, the reason for denying application of decisions which concern the repair and not the use of the instrumentality in question received expression (228 Fed. 269, 142 C. C. A. 561):

"There is a distinction between employment in preparing an instrument of commerce for use, and employment in using such an instrument in commerce. Preparation of an instrument for use in commerce of both kinds necessarily means preparation for use in commerce of either kind, and as one kind is interstate commerce, it follows logically that such preparation is for use in interstate commerce, but employment connected with the actual use of such an instrument is a part of intrastate or interstate commerce according as the instrument is in use in commerce of one kind or the other."

Under the facts of the instant case, however, the controlling illustration of the distinction thus sought to be made clear, appears in the Pedersen Case, where it was held that a railroad company engaged in interstate commerce was liable to its employé who suffered injury while carrying bridge bolts for use in repairing one of the company's railroad bridges, Mr. Justice Van Devanter saying (229 U. S. 151, 152, 33 Sup. Ct. 649 [57 L. Ed. 1125, Ann. Cas. 1914C, 153]):

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

Aside from a claim urged by counsel that the length of time consumed in repairing engine No. 4 amounted to a withdrawal of the engine from use in interstate commerce, which will be considered later, further relevant instances of liability under the federal act for injuries incurred by employés while engaged in repair work may be seen in the following decisions: Walsh v. N. Y., N. H. & H. R. R. Co., 223 U. S. 5, 6, 59, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, affirming recovery for injuries received by plaintiff while engaged in replacing the drawbar of a car then in use in interstate commerce; Central R. Co. of New Jersey v. Colasurdo (1911) 192 Fed. 901, 903, 113 C. C. A. 379 (C. C. A. 2), approving judgment in favor of plaintiff, who, while engaged in the repair of a yard switch, was struck and injured by a car employed by defendant in interstate commerce—the fact that the carrier and the employé may also have been engaged in intrastate commerce being regarded as immaterial; Northern Pacific Ry. Co. v. Maerkl (1912) 198 Fed. 1, 4, 5, 117 C. C. A. 237 (C. C. A. 9), sustaining recovery in favor of an employé injured while engaged at shops in repairing refrigerator car, which had been "indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired"; B. & O. R. Co. v. Darr (1913) 204 Fed. 751, 753, 124 C. C. A. 565, 47 L. R. A. (N. S.) 4 (C. C. A. 4), affirming judgment for injury suffered by an employé when replacing hanger bolt in brace beam of engine's tender while it was standing on "fire track," to which removal had been made for the purpose; Law v. Illinois Cent. R. Co. (1913) 208 Fed. 869, 871, 126 C. C. A. 27, L. R. A. 1915C, 17 (C. C. A. 6), reversing denial of recovery by boiler maker's helper, who was injured in shops while repairing freight engine regularly employed in interstate commerce, though 21 days had been consumed in making all the repairs; Thomas v. Boston & M. R. R. (1915) 219 Fed. 180, 181, 182, 134 C. C. A. 554 (C. C. A. 1), reversing judgment sustaining demurrer to declaration alleging injuries to railroad carpenter while engaged in repairing roundhouse, which, under allegations, was regarded as an instrumentality of interstate commerce; and see, although case not finally disposed of, Gaines v. Detroit, etc., R. Co. (1914) 181 Mich. 376, 148 N. W. 397, reversing judgment under common-law count and remanding for further proceedings, on ground that case arose under federal act, plaintiff having been injured while engaged at defendant's yards in repairing drawbar of car carrying interstate freight, although the railroad, like the one involved in the instant case, lies wholly within the state of Michigan.

We are not unmindful of the contention of counsel that analysis of the decision in the Pedersen Case fairly shows that the court did not intend the rule there laid down as to railroad tracks and bridges to be extended to an ambulatory instrument like an engine, which may be used entirely for one or the other kind of commerce, or both kinds. It is true that after enumerating tracks, bridges, engines and cars as instrumentalities in interstate commerce, the court mentioned the fact that it was then concerned "only with the work of maintaining them in proper condition after they had become such instrumentalities and during their use as such"; but this is in recognition of the fact that engines and cars are as essential to commerce and as fit to be invested with a status in commerce, and so to become the subjects of maintenance therein, as tracks and bridges are, and Congress has made no distinction between the two classes of instrumentalities. The federal act, as we have seen, points out the objects as to which duty and liability are imposed by distinctly associating engines and cars with appliances, machinery, tracks and roadbed; and the *power to enact* such legislation was sanctioned in the Second Employers' Liability Cases, 223 U. S. at 46, 47, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, by the announcement of certain propositions which were declared to "have come to be so firmly settled as no longer to be open to dispute"; one of which (223 U. S. 47 [5], 32 Sup. Ct. 174 [56 L. Ed. 327, 38 L. R. A. (N. S.) 44]) is:

"Among the instruments * * * to which the power extends are the railroads over which transportation from one state to another is conducted, (and) the engines and cars by which such transportation is effected. * * *"

In view of that decision and the other decisions before cited, it cannot be necessary to dwell upon this feature of counsel's argument.

[3] It is, however, earnestly claimed, as stated, that the engine in dispute had been withdrawn from use in interstate commerce, and consequently that the engine cannot be regarded as an instrument, nor the plaintiff's work thereon as an act, of such commerce. No evidence was offered tending to show any intention on the part of defendant to withdraw the engine from active use, except only for the purpose of necessary repairs. This results from the testimony of defendant's employés, among whom was the superintendent who stated that he could not tell how long the engine had been out of repair, but that it had been "in a general decrepit state for some time." It is not suggested that the engine was kept in the shops for a longer time than was required for its repair; and certainly such a fact is not to be presumed. We need not repeat that within three days after completion of the repairs, the engine was placed in the same service as that in which it was used before; nor is it necessary to point out again the fact that defendant's service on the road and in the yards comprised a constant double use—interstate and intrastate. Plainly, in view of the evidence actually introduced, the burden rested upon defendant affirmatively to show an intent on its part, if such was the fact, to make a permanent withdrawal of this engine from use in interstate commerce; in the absence of such proof, its admitted conduct in so quickly returning the engine to its former service cannot be explained, except upon the theory that the purpose of the withdrawal was to refit the engine for the same service and therefore but temporary in character. This court, in Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, supra, 219 Fed. 148, 150, 135 C. C. A. 46, 48, had occasion to say of certain decisions there commented on:

"They hardly go beyond fixing the burden of proof and declaring that, where the facts show the case may well have been within the statute (federal Employers' Liability Act), the initial burden is satisfied, and it is for the defendant to show the contrary."

Nothing then remains to consider in regard to the claim of withdrawal save its legal effect; and this must be tested by the reasonable inference that may be deduced from the fact that the engine was undergoing repair in the shops during a period of 79 days. In the Law Case the engine involved was under repair 21 days; and of this we said (208 Fed. 872, 126 C. C. A. 30 [L. R. A. 1915C, 17]):

"Under the existing facts, can the length of time required for the repairs change the legal situation? If, so, where is the line to be drawn? How many days' temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?"

No sufficient answer to this could be found in that case; and the only difference perceived here is in point of time, not in principle.

We conclude upon the whole that the engine was at the time of the repair in question an instrument of the interstate commerce in which the defendant was engaged, and that the work of plaintiff thereon was a part of such commerce.

The judgment must be affirmed, with costs.

PRYOR v. BISHOP.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2240.

COMMERCE ⚷27—EMPLOYERS' LIABILITY—SERVANT EMPLOYED IN INTERSTATE COMMERCE.

A member of a train crew was not at the time of his injury employed in interstate commerce, as is necessary to make the employer carrier liable under federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), his crew though subject to call for an interstate trip, to which, when given, they had to respond in an hour, not having been called for service, but being merely for their own convenience in their caboose, which was being moved by a transfer train between local stations.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⚷27.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by James F. Bishop, administrator of Orville Bordner, deceased, against Edward Pryor, receiver of the Wabash Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, with direction for new trial.

Plaintiff in error, herein described as defendant, was sued by defendant in error, termed plaintiff herein, under the so-called federal Employers' Liability Act, in an action on the case for damages arising out of the negligence of defendant resulting in the death of plaintiff's decedent. Defendant pleaded the general issue. The only question involved is: Was plaintiff's decedent, at the time of the injury, employed by defendant in interstate commerce? The evidence disclosed the following state of facts:

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

On December 19 and 20, 1913, plaintiff's decedent was in the employ of defendant as a member of a train crew, consisting of an engineer, a fireman, a conductor, and two brakemen, as a brakeman in charge of freight train No. 95, covering the run between Forty-Seventh street, Chicago, and Montpelier, Ohio, a distance of 171 miles. The employment in making said run was in interstate commerce. The train arrived at the Forty-Seventh street yard of defendant at about 12:30 p. m. on the 20th of December, 1913. At Forty-Seventh street the engine was sent to the roundhouse, the cars were taken in charge by a switching crew, while the caboose was left on the track in the yard. The conductor thereupon registered for his crew in the usual manner at the defendant's office. The crew was then entitled to take an 8-hour rest. The conductor and the two brakemen, hereinafter termed the train crew, all being residents of Montpelier, Ohio, proceeded to the caboose, where as a convenience to themselves they cooked their meals, and at night went to bed in the car, themselves providing the food and bed and cooking utensils. They, as a rule, used the same caboose in their runs, no matter what run they took. While there was no arrangement in regard to the use of the caboose for meals and sleep, the defendant knew of such use. The caboose in question was expected to be used in interstate service on the next day or soon thereafter, though it had no definite scheduled starting time. As a matter of fact, the next train was called at 6:15 o'clock the following morning, December 21. 1913, but did not actually leave until 8 o'clock. Why so late the record does not state. But for the accident, decedent's crew and caboose would have been then next in line for service, though that fact did not absolutely determine whether or not his crew would take charge of that train. Landers was 7 miles from the Forty-Seventh street station. In order to be within call, it was necessary for the members of decedent's crew, being, as above stated, the crew of incoming train No. 95, to go from Forty-Seventh street to Landers which they might do in several ways. They could take the street cars to Seventy-Fifth street, a distance of about 5 miles, at their own expense, and then take a dummy, or so-called "hurdy-gurdy" train from Seventy-Fifth street to Landers, a distance of two miles. This train was for the accommodation of defendant's employés, and ran every half hour up to midnight. The other and more convenient way was to stay in the caboose and be included in a transfer train moving cars from Forty-Seventh street to Landers, which train was made up by and was in control of other employés of defendant, and ran regularly every night for that purpose. At about 11:30 p. m., December 20, 1913, decedent's crew and caboose were picked up by the transfer train at Forty-Seventh street as usual, and were located next in front of the regular caboose of the transfer train. This latter train then proceeded to Landers on defendant's tracks. While standing at Sixty-Fourth street, at about 12:50 a. m., and about a mile from Landers, the rear of the transfer train was run into through the negligence of defendant's servants, whereby the two cabooses on the transfer train were badly broken up and plaintiff's decedent killed while in bed. Under defendant's rules, train crews were called from Landers an hour and a half before trains were scheduled to leave, and were required to be on hand half an hour before leaving time. They were, in a general way, subject to call at any time after the expiration of their 8-hour rest period; that is, they were not exempt from service. There was some uncertainty whether the crew and caboose would stay at Forty-Seventh street or be taken to Landers. Often the men would go to sleep at Forty-Seventh street and wake up in Landers. As a rule they were taken to Landers. When stationed at Forty-Seventh street, the crew were usually called at the caboose or the office, unless they or some of them went away for their own purposes, in which case they were expected to leave their addresses for calling them.

At the close of all the evidence, defendant moved to dismiss the suit for want of jurisdiction, which motion was overruled. Thereupon the defendant moved the court to instruct for defendant, which motion was also denied. Exceptions to these rulings of the court were saved. No exceptions were taken to the instructions. The jury found defendant guilty, and assessed damages at $18,000.

The errors assigned are: (1) The court erred in denying said two motions; (2) in entering the said judgment; (3) in holding that the evidence proved or tended to prove facts constituting a cause of action under the federal Employers' Liability Act; (4) the verdict and judgment are against the law and the evidence.

John M. Zane, of Chicago, Ill., for plaintiff in error.

C. Helmer Johnson, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). While the record cites that decedent's caboose and crew were subject to call at any time after the expiration of the 8-hour rest period, viz., 8:30 o'clock p. m., December 20, 1913, it also appears that the several members of the crew were masters of their own time and whereabouts up to the period of 1½ hours preceding the departure of a train to which they were to be assigned. They were then expected to be within call for the purpose of necessary notice. After notice, they still had an hour during which they were subject to no control by defendant.

The so-called federal Employers' Liability statute under which this suit is brought provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce, or, in case of the death of such employé, to his personal representative for the benefit of certain parties named for such injury or death resulting in whole or in part from the negligence of the carrier or his employés, etc.

The question here presented is: Was decedent at the time of his death in the employ of defendant in the sense in which the word "employed" is used in said act? "The true test of employment in such commerce in the sense intended is," says the Supreme Court in Shanks v. The Delaware, Lackawanna & Western R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, decided on January 10, 1916: "Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The court in that case further says:

"Thus it is essential to a right of recovery under the act, not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce."

In the case just cited the plaintiff was employed in the machine shop of the defendant, which was engaged in both intrastate and interstate commerce. His work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead countershaft, a heavy shop fixture, through which power was communicated to some of the machinery used in the repair work. "The question for decision is," says the court, speaking through Mr. Justice Van Devanter: "Was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered." It was there held that Shanks was not employed in interstate commerce within the meaning of the Employers' Liability Act—citing Walsh v. New York, New Haven & Hartford R. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Pederson v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1155, Ann. Cas. 1914C, 153; St. Louis, San Francisco & Texas Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; New York Central R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397.

The accident was caused by defendant's engine, which was running behind the transfer train without any cars, operated by defendant's servants. Said engine was at the time bound for the Landers yard, there to take out and haul a train from Landers to Forrest, Ill., an intrastate haul. Those in charge of the transfer train, which was also engaged in intrastate commerce so far as the record discloses, were also chargeable with negligence and conceded to have been guilty of not using due care. Thus neither defendant's transfer train nor the said engine were at the time of the death engaged in interstate commerce.

In St. Louis & San Francisco Ry. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, where the train consisted of intrastate and interstate cars, one whose business it was, as a yard clerk, to examine in-coming and out-going trains, make a record of the seals on car doors, check the cars with conductors' list, and put labels on the cars to guide switching crews in breaking and making up out-going trains, and who was killed while on the way to meet an in-coming train, for that purpose, was held to be in the employ of the railroad in interstate commerce. Suit was begun in the state court by those authorized under the Texas statute. Held, that the suit was one which arose exclusively under the federal Employers' Liability Act, which requires suit to be brought by the legal representatives. It was therein further decided that decedent's service was in interstate commerce notwithstanding the train had arrived at its terminus hauling both intrastate and interstate cars.

In Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 151, 33 Sup. Ct. 648, 649 (57 L. Ed. 1155, Ann. Cas. 1914C, 153), the court says:

"Among the questions which naturally arise in this connection are these: Was that work [of the plaintiff] being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

In that case the plaintiff was engaged at the time of the injury in carrying bolts or rivets from a tool car to a bridge which he was helping to repair, when he was run down by an intrastate passenger train. The tracks and bridge at that point were used by defendant both in intrastate and interstate commerce. Held, that the plaintiff was in the employ of defendant in interstate commerce. "There can be no doubt," says the court, "that a right of recovery thereunder [federal Employers' Liability Act] arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce." This rule is approved in Illinois Central R. R. Co. v. Behrens, Adm'r, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. In this case the decedent was engaged at the time of his death as a member of a switch engine crew, operating only within the city of New Orleans. Sometimes the switch engine handled interstate cars, sometimes intrastate cars, and sometimes both. At the time of the accident it was handling only intrastate cars. Held, the act did not apply.

In North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 260, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, which was a case in which decedent, a locomotive fireman, had been oiling up, firing, and preparing his engine for an interstate trip, but had left his engine to go to his boarding house within the limits of the railroad yard, on a personal errand, with intention shortly to return to his engine to take his run, and was killed. Held, that decedent had entered upon his interstate duties and was, when killed, employed by defendant in interstate commerce. This case is approved in N. Y. C. & H. R. R. R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, decided by the United States Supreme Court on June 14, 1915.

In St. Louis S. W. Ry. Co. v. Harvey, 144 Fed. 806, 75 C. C. A. 536, the Circuit Court of Appeals for the Eighth Circuit states the rule as follows:

> "The second query is: Was there substantial evidence that the act of running this car upon the track at night without a light was done in the conduct of any of the business of the master? For if a servant step aside from the business of his master for never so short a time to do any act that is not a part of that business, the relation of master and servant is for the time suspended, and the acts of the servant during that interval are not his master's, but his own."

In Harvey v. Texas & Pacific Ry. Co., 166 Fed. 385, 92 C. C. A. 237, the Circuit Court of Appeals for the Fifth Circuit said:

> "We are of the opinion that the servant should be deemed in the master's service whenever present to perform his duty and subject to orders."

Plaintiff in that case was on his way to the place where he was to work, but was subject to orders and ready to help, if needed, in moving an engine. Where one had finished his day's work and was taking a hand car back to a designated place under the direction of his employer, he was still in his master's employ. San Pedro, Los Angeles & Salt Lake R. R. Co. v. Davide, 210 Fed. 870, 127 C. C. A. 454.

In Lamphere, Adm'r, etc., v. Oregon R. R. & Navigation Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1, the decedent, a fireman, was proceeding to his work under explicit orders when killed. Held that, even though his work had not yet begun, he was acting in the capacity of a servant of defendant in interstate commerce.

Where, after hours of work, one Dishon was attempting to pass from a section house, where he boarded, across defendant's tracks through an opening between the cars, maintained for that purpose by the other employés, which opening was at the time of the accident closed while Dishon was going through, it was held by the Circuit Court for the Eastern District of Kentucky, in Dishon v. Cincinnati, N. O. & T. P. Ry. Co., 126 Fed. 195, that those closing the gap were fellow servants of Dishon. On appeal, however (133 Fed. 471, 477, 66 C. C. A. 345), the court failed to sustain the judgment on the fellow-servant theory, but held that decedent was guilty of contributory negligence.

In Best v. N. Y. C. & H. R. R. R. Co., 117 App. Div. 739, 102 N. Y. Supp. 957, the plaintiff was an extra brakeman. He was notified that he might be called to go out on a run. He was crossing the tracks to the company's clubhouse in order to be on hand, if called, when he was struck. Held, not employed by the defendant at the time.

It was held in Harris v. City & E. G. R. R. Co., 69 W. Va. 65, 70 S. E. 859, 50 L. R. A. (N. S.) 706, Ann. Cas. 1912D, 59, that one who was riding on defendant's train, going to his work before the hour when his work began, must be regarded as a passenger, and not a servant.

Plaintiff relies upon the case of Moyse v. Northern Pacific Ry. Co., 41 Mont. 272, 108 Pac. 1062. Moyse was conductor of a freight train. He was required at all times to be within call, was subject to discipline if he was not, and was expected to occupy the caboose while waiting. He had a right to use the caboose, a right which the company was not at liberty to withdraw at will. He was injured by defendant's employés after his pay had stopped on registration. Held, that he was in the caboose in the course of his employment, and that the company was liable for injuries caused by the negligence of its other servants under a statute abolishing the fellow-servant rule as to railroad employés.

Assuming that the court correctly held that the jury in the Moyse Case was justified in finding the relation of master and servant actually to exist at the time of the injury, it is to be noted that this was based upon the finding of a contractual right as well as a duty to be in the caboose at the time. Moyse was there pursuant to a definite obligation and, even though merely awaiting a call, might be held to be acting as an employé in so occupying the caboose. In the instant case, however, there was no such duty; the deceased could as well have been at a city hotel; his only duty at the time was to be within call, either personal or telephonic. That he was on the company's property at the time of the injury was due, not to an obligation, but to a privilege, a license; in being there, he was acting, not as an employé, but as a licensee.

If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the city of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act.

Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started with the caboose upon their home run. Neither does it appear from the evidence that the caboose and train crew were at the place of the injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they should be at Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of a call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the decedent within the provisions of the federal Employers' Liability Act.

We are unable to discover from the evidence or the law upon what ground plaintiff's decedent's presence at or near Landers at the time of the accident can be said to have been a step in the performance of any actual service to defendant in interstate commerce. He was there in no sense under the direction of defendant growing out of the relation of master and servant. He was his own master. As was said in Illinois Central R. R. v. Behrens, supra:

"That he [the servant] was expected, upon the completion of that task [moving intrastate cars], to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employés who, while in the actual discharge of their duties in interstate commerce, are injured.

The facts pertaining to the question of jurisdiction are conceded. The record presents no other ground of federal jurisdiction than the bringing of the suit under the federal Employers' Liability Act, so called. It was error on the part of the District Court to deny the motion to dismiss.

The judgment of that court is therefore reversed, with direction to grant a new trial.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SAMSON IRON WORKS.*

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2674.

1. SALES ⚷340—ACTIONS—PURCHASE PRICE.
To sue in indebitatus assumpsit is not to sue for the purchase price of goods sold.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927–942; Dec. Dig. ⚷340.]

2. SALES ⚷384(7)—ACTIONS FOR BREACH—PURCHASE PRICE.
Defendant breached its contract to purchase machinery from plaintiff, and thereafter plaintiff, the contract providing that title should not vest in defendant until payment, disposed of part of the machinery to third persons. Plaintiff then sued in indebitatus assumpsit for damages. *Held*, that as title to the property had never passed to defendant, though part of it was delivered, as a suit in indebitatus assumpsit is not one for the purchase price, plaintiff cannot complain that under the instructions its recovery was limited to damages resulting from defendant's breach.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1107; Dec. Dig. ⚷384(7).]

3. SALES ⚷388—ACTIONS—INSTRUCTIONS.
In an action for breach of contract to purchase machinery, part of which was delivered and installed, instructions on plaintiff's measure of damages are not objectionable, as precluding the jury from awarding damages for expense of installation and removal of part of the machinery, where the court elsewhere expressly instructed that, if the jury found for plaintiff, they should allow such damages as expense of delivery, installation, and removal.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. ⚷388.]

4. SALES ⚷382—ACTIONS—EVIDENCE.
In such case, where the machinery was to be installed by defendant in a building, and defendant contended that because of plaintiff's delay the owner repudiated his contract with it, evidence of a conversation between the owner and defendant's manager, wherein the contract was repudiated, was admissible.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. ⚷382.]

5. EVIDENCE ⚷155(10)—ADMISSIBILITY—EVIDENCE ADMISSIBLE BECAUSE OF OTHER EVIDENCE.
Where plaintiff's witness testified to statements by defendant's manager, wherein he detailed a conversation with a third person, defendant is entitled to prove the conversation with such third person.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 455; Dec. Dig. ⚷155(10).]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the Westinghouse Electric & Manufacturing Company against the Samson Iron Works. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error and the defendant in error were respectively plaintiff and defendant in the court below, and they will be so designated here.

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

*Rehearing denied October 9, 1916.

The defendant had undertaken to install in the Spalding Building at Portland, Or., then under construction, an electric power plant of three units, each unit to be composed of a generator and a gas engine. On May 25, 1910, the defendant entered into an agreement with the plaintiff whereby the latter agreed to deliver and erect on foundations in the basement of the building, three generators, the first generator to be shipped immediately from San Francisco, the other two to be built and sent from the plaintiff's factory at Pittsburg. The contract provided that the first generator with its gas engine was to be in operation by July 1, 1910, that payment in the amount of $1,500 should be made on the total contract price immediately upon the installation and acceptance of the first generator, or not later than July 15, 1910. As to the other generators it was agreed that delivery should be made from the factory in approximately 90 days from May 25, 1910, the date of receipt of order. The plaintiff in its complaint alleged that it was ready to comply with its contract as to the delivery and erection of the first generator, but that by reason of the fact that the building was not in readiness for the installation, and that the defendant failed to furnish proper appliances for operation, the plaintiff was prevented from furnishing, delivering and erecting said generator on or about July 1, 1910, but that as soon thereafter as the building was in readiness, and as soon as defendant complied with its contract as to appliances for operation, plaintiff furnished and delivered and erected said generator; that within approximately the 90 days stipulated in the contract the plaintiff was ready and able and willing to deliver the other two generators, and to comply with its contract as to the same; that the defendant failed and neglected and refused to pay the $1,500 agreed to be paid immediately upon installation and acceptance of the first unit, and still fails to pay the same; that on or about August 25, 1910, and before the time specified in the contract for the delivery of the second and third generators and apparatus, the defendant notified the plaintiff that it would not accept plaintiff's generator or any other part of plaintiff's machinery; and that the contract was void and of no effect. The plaintiff claimed damages in the sum of $3,100. The defendant answered denying its indebtedness to the plaintiff, or that the plaintiff had performed its contract, and alleging that the plaintiff failed and neglected to install the first unit by July 1, 1910, and neglected to deliver the other two generators within 90 days from the receipt of the order, or at all, and alleged that in consequence of the plaintiff's failure to keep and perform its contract, defendant was prevented from completing the installation of the electrical apparatus and appliances in the said building, according to its contract with the owner thereof, and was otherwise put to large cost and expense in attempting to perform said contract, and was thereby damaged in the sum of $7,693; that on September 6, 1910, the defendant notified the plaintiff that the owner of the building had by reason of plaintiff's failure to carry out its portion of the contract, rescinded his contract with the defendant, and that the defendant would hold the plaintiff liable for all loss and damage accruing therefrom, and that on September 12th the defendant rescinded its contract with the plaintiff. Upon the conclusion of the trial the jury returned a general verdict in favor of the defendant, and judgment was thereupon rendered for the defendant.

David L. Levy, Walter Shelton, and Campbell, Weaver, Shelton & Levy, all of San Francisco, Cal., for plaintiff in error.

Nathan H. Frank and Irving H. Frank, both of San Francisco Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The plaintiff relies principally upon alleged errors in the instructions of the court to the jury on the subject of the plaintiff's claim for damages. It was agreed in the contract between the plaintiff and the defendant that no property in or title to any part of the apparatus furnished by the plaintiff, and no right to use the same, should pass to the defendant, but that all thereof should remain the personal property of the plaintiff until fully paid for, and that, on default of the defendant in making stipulated payments at the time specified, plaintiff should be entitled to immediate possession of the apparatus and free to enter upon premises wherever the same might be located and remove its property. The court, referring to this provision of the contract, said to the jury:

"If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff, or any part thereof, since it remains its property, and there is no evidence that it has been lost or injured, but it will only be entitled to recover such damages as it has sustained in the endeavor to carry out the contract, such as the expense of delivery and installation thereof, and the necessary steps to have it returned to it."

As to the plaintiff's claim for damages in connection with the second and third generators, the court charged the jury that if they found that the two generators which were not shipped, but were subsequently sold by the plaintiff, were sold for as much as the plaintiff would have realized for them under the contract, the plaintiff could not be allowed anything for the failure of the defendant to accept them. The plaintiff, while excepting to these instructions, requested the court to instruct the jury that, if they found for the plaintiff, its damages should be the whole contract price, $7,850, deducting therefrom, first, the market value of the second and third generators at Portland, Or., in September, 1910; second, the value of the component parts of the switchboard at Portland, if the jury found that they had no value as a permanent switchboard, but only as dismantled articles; third, freight charges on the switchboard from Pittsburg to Portland, had it been shipped; fourth, cost of labor and material necessary to erect and install the second and third generators, permanent switchboard, and other apparatus.

To the alleged error in the instructions and refusal to instruct the plaintiff cites authorities to the proposition that if, notwithstanding the reservation of the title of goods in the vendor, he elects to sue the vendee for the purchase price thereof, he waives his claim of title to the goods, and the title passes to the defendant. That proposition is not applicable here, for the reason that the plaintiff did not and could not under the facts sue for the purchase price. It set forth in its complaint the provision of the contract whereby the title was to remain in the plaintiff, and it sued in the first count for damages in the sum of $3,100 for the alleged failure of the defendant to carry out its contract, and in the second count it sued upon indebitatus assumpsit for goods sold and delivered and labor and material furnished, of the reasonable value of $3,100. To sue upon an indebitatus assumpsit is not to sue for the purchase price. Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572. By the contract there was a single sum agreed upon as the total purchase price for all the machinery included therein. Before the action was begun, the plaintiff had sold to others the second and third generators. The plaintiff was no longer in condition to waive its title to the property or to transfer the title to the defendant. It had elected to retain the title.

[3] Nor do we find that the instructions so given by the court were subject to the objection that the jury were thereby precluded from awarding the plaintiff damages for the expense of installation and removal of the first generator. The court elsewhere instructed the jury that, if they found for the plaintiff, it would be entitled to such damages as it sustained in its endeavor to carry out the contract, such as the expense of delivery and installation, and the necessary steps to have it returned, together with such profit as it would have realized on its sale, had the contract been fully executed.

The plaintiff contends that the evidence was insufficient to justify the verdict, and that it showed without conflict that the plaintiff performed the contract. There was no exception taken, and there is no assignment of error to present to this court any question of the evidence or the want of evidence. There was no request that the jury be instructed to return a verdict for the plaintiff, and the record suggests no error of law in any of the rulings of the trial court on the effect of the evidence. The trial court, in instructing the jury, said that the whole sum and substance of the case was, Who was responsible for the failure to have the contract carried out? and that as to that question the evidence was "more or less conflicting." With that statement we agree.

[4] The plaintiff contends that the court below erred in admitting testimony given by Head, the defendant's manager, as to a conversation between him and Spalding, the owner of the building. The defendant, in making out its case, relied upon the allegation that by the plaintiff's default it was prevented from carrying out its contract, and it alleged in its complaint that on September 6, 1910, it informed the plaintiff that Spalding had rescinded his contract with the defendant on account of the plaintiff's failure to perform its contract. Under the issues it was proper for Head to testify to the fact that Spalding gave notice that he canceled the contract. He testified that Spalding said:

"It is impossible to get power. I must have it. The only thing for me to do is to contract with the Electric Company. I will cancel your contract now, and you must take your things out."

It is impossible to see how the evidence could have prejudiced the plaintiff.

[5] Again, the admission of the evidence was not error for the reason that Wernicke, a witness for the plaintiff, had testified to a conversation with Head, in which Head had told him what Spalding had said to him on that occasion, and thereby the plaintiff had opened the way for the defendant to prove by Head what the conversation was. His version, however, did not differ materially from that of Wernicke.

We find no error. The judgment is affirmed.

ALWART BROS. COAL CO. v. ROYAL COLLIERY CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2313.

1. SALES ⚷181(11)—BREACH OF CONTRACT—CANCELLATION AND RESCISSION.

Evidence *held* sufficient to sustain a finding that buyer breached a contract for the sale and delivery of coal, by failing to order the amount of coal contracted for, and that seller was within its rights in canceling the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 486, 487, 490; Dec. Dig. ⚷181(11).]

2. SALES ⚷152—CONTRACTS—BREACH.

Where buyer failed to order from defendant coal in quantities as contracted for, to be delivered monthly, and thereafter demanded monthly deliveries in excess of the contract requirements to make up the deficiency, and threatened suit for failure to deliver such deficiency, the seller was relieved from any obligation to make further deliveries as for want of proper order.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 357; Dec. Dig. ⚷152.]

3. NEW TRIAL ⚷165—ON MOTION OF BOTH PARTIES—VACATION ON MOTION OF ONE PARTY.

Where the court granted a new trial on motion of both plaintiff and defendant, a vacation of the order thereafter on motion of plaintiff *held* proper, since the evidence was not in dispute, and there had already been three nisi prius hearings.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⚷165.]

4. TRIAL ⚷251(4)—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

In a suit upon contract, the court properly refused to submit the issue of an alleged agreement in modification or settlement of the original obligation; such agreement not being within the issues pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 591; Dec. Dig. ⚷251(4).]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Alwart Bros. Coal Company against the Royal Colliery Company. From a judgment for defendant, plaintiff brings error. Affirmed.

See, also, 211 Fed. 313, 127 C. C. A. 599.

For the purpose of enabling it to fill its contract with the board of education of the city of Chicago, plaintiff in error, termed plaintiff herein, entered into a written agreement with defendant in error, termed defendant, whereby defendant undertook to sell and deliver to plaintiff in approximately equal monthly quantities between July 25, 1911, and March 31, 1912, as ordered by purchaser, four-sevenths of the requirements for the schools of certain districts mentioned, approximately 20,000 tons of coal as specified in the contract, at the price of $1.07½ per ton at the mine in Virden, Ill. Both contracts contained a certain clause L, by which the board of education should charge back to plaintiff coal that it necessarily purchased in the market to supply the schools during such times as plaintiff failed to supply the prescribed amount of coal, as to which defendant in its turn agreed to indemnify plaintiff for any such loss as might be ascribed to its failure to comply with the contract. Plaintiff was required to pay defendant on or before the 20th of each month 50 per cent. of the value of all coal shipped during the previous month. The

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

remaining 50 per cent. was to be paid on or before the 10th day of the second succeeding month. If payments were not made within the agreed time, the seller could suspend further shipments, on five days' notice, until payment, or could treat the contract as broken by plaintiff. The present demand covers only the right of plaintiff under said contract for the months of January, February, and March, 1912. Other contentions between the parties were disposed of by this court in Alwart Bros. Coal Co. v. Royal Colliery Co., 211 Fed. 313, 127 C. C. A. 599.

From the evidence it appears that plaintiff ordered and received on the contract less than 6,000 tons of coal up to January 1, 1912. During January, 1912, plaintiff ordered 2,500 tons and received but 1,690. During February, 1912, plaintiff likewise ordered 2,500 tons and received but 1,570 up to February 20, 1912. On February 17, 1912, plaintiff demanded that defendant deliver between that date and March 31, 1912, 7,500 tons of coal not ordered or delivered prior to January 1, 1912, in addition to the 2,500 tons, which coal plaintiff was entitled to have had delivered, had it been ordered, prior to January 1, 1912. On February 19, 1912, plaintiff threatened suit if defendant did not deliver 12,000 tons of coal, to apply upon the 20,000 tons covered by the contract, before April 1, 1912. In the meantime the price of coal had advanced materially. Paul J. Alwart and Frederick W. Alwart, of the plaintiff company, testify that on February 19, 1912, they called upon defendant, asking for more coal, and that Maloney, representing the defendant company, promised, "I will give you 6,000 tons in two weeks." This promise was not declared on.

On February 20, 1912, plaintiff wrote to defendant as follows: "We tried to get you on the phone this morning. Since talking with you yesterday, we have found the school supply is very low. In order that there may be no misunderstanding, we thought it well to write you confirming what our Mr. Alwart said in his interview with you Saturday, and to let you know our needs in the matter of delivery of coal under our contract with you. Although this contract calls for 20,000 tons of coal, we had received only about 6,000 to February 1st. For the month of January we gave orders for 5,000 tons of coal, but received only 1,600 tons. The loss on this in money actually paid out or now due is not less than $3,000, and it is probable that will not nearly cover our loss. For the next two weeks we will require 6,000 tons of coal under our contract, and would ask you to commence delivering it at once at the rate of 8 to 10 cars a day. Between now and April 1st we want you to deliver the balance of our 20,000 tons. Please let us hear from you, and let us know what we may expect in the way of immediate deliveries. Your early reply will greatly oblige. Referring to the question of releasing you on part of your deliveries, we decided to wait till we see what effort you make to supply us between now and April 1st."

To this defendant replied on February 21, 1912: "Your letter of February 20th received. You have failed to comply with the terms of your contract in important respects, and we have elected to rescind the contract, and accordingly hereby so notify you. As stated to you orally, we have been willing to ship the coal which the schools will consume during the remainder of this month and the next month, notwithstanding the fact that you have deprived us of all benefit of the contract by failure to take the coal in monthly installments as provided, and notwithstanding this notice, we stand ready to help you out to any reasonable extent. We offer to ship, under the same terms and conditions provided in the contract, the coal which the schools will consume during the remainder of this month and next month."

On February 22, 1912, plaintiff wrote to defendant: "This is to confirm conversation had between your Mr. Maloney and our Mr. Alwart to-day. Our understanding is that if you deliver us 8,000 tons of coal of the kind required by our contract with you, between now and April 1st, commencing shipments promptly and continuing at the rate of about 300 tons per day for 10 days, and thereafter approximately equal daily deliveries, so as to make the 8,000 tons by April 1st, we will release you from further liabilities on your contract with us dated July 25, 1911. If we do not receive the full 8,000 tons as specified in this letter, you will not be released from any of your obligations under the contract of July 25th."

Defendant, on February 23, 1912, replied: "Your letter of February 22d received. We have no such understanding as you therein say you have. Our position is defined in our letter of the 21st instant. We still offer to ship, under the same terms and conditions, the coal which the schools will consume during the remainder of this month and next month. This offer is made in the spirit of concession, and is subject to withdrawal at any time before acceptance."

On the same day plaintiff replied: "We have your letters of the 21st and 23d inst. Our contract with you has been lived up to by us in every particular. It is evident that you do not intend to comply with the terms of your contract with us, and of course you have not complied with it to date. You say that you offer to ship us the coal necessary for the schools. It is not enough to offer to do it; we want you to do it. Please get busy and ship us the coal for the schools. We renew the demands contained in our letter to you of the 20th inst., and, unless shipments are commenced at once, we will buy coal in the open market to supply the school and to make up the amount due us under our contract with you for 20,000 tons, and charge you with the difference between what we pay for it and the price you agreed to furnish it to us for, and also charge you with the other damage we sustain by reason of the school board paying extra prices for any coal that we may not be able to deliver and other damage that we may sustain by reason of your failure to fulfill your contract with us."

To this defendant answered on February 24, 1912: "We acknowledge receipt of your favor of the 23d instant. As per our letter of the 21st instant, we have rescinded the contract and will make no further shipments under it. We repeat, however, that we are willing to ship four-sevenths of the coal the schools will consume until April 1, 1912, at the same price and on the same conditions as specified in the contract. You are demanding practically 12,000 tons, and at the same time admitting that the requirements will not be for that tonnage. You are asking us to ship you coal to be used several months after March 31, 1912. If you care to accept our proposition and will advise us of the actual requirements, we will ship the coal, or we will engage to ship a specified tonnage."

On February 24, 1912, plaintiff writes: "We have your letter of the 24th inst. You owe us about 12,000 tons of coal under our contract with you of July 25, 1911. We estimate that the requirements of the schools by the end of the school year will be 35,000 tons of coal, of which you were required to ship 20,000 tons. The future requirements of the schools we estimate to be 20,000 tons, and the immediate requirements for the next month or two will be some 15 cars per day. We again demand that you proceed to ship us coal under your contract to supply the schools. Failing to do so, we will hold you liable for such damages as we may sustain by reason of your breach of contract."

And again, on March 2, 1912: "On account of your failure to deliver coal to us according to our demands during January and February, we are short in our supplies for the schools, and will require much larger shipments during the month of March on that account. Please ship us coal all during the month of March at the rate of 500 tons a day, to take care of our requirements in supplying the schools. We are making this demand under our contract with you dated July 25th, 1911. Any coal shipped us during the month of March by you, in excess of our requirements for the school, will be applied on the shortages of your shipments for the months of January and February, and will consequently release you to that extent from the damages that we are entitled to recover from you on account of your failure to ship us during January and February."

To which defendant makes a final reply on March 4, 1912: "Your letter of March 2d received. It is not in accordance with our conversation. We are willing to make reasonable concessions to close up the situation. To put the matter finally at rest, we state our position as follows: (1) The contract has been terminated by our letter of February 21st. (2) Under the contract you would be entitled to receive no more than 2,500 tons in any one month. (3) You cannot, under the contract, ask us to ship in February and March what you should have taken in August, September, and October. (4) Under the contract, we could not ship until you gave us orders. Your failure to give orders when the market was way below the contract price materially damaged us. (5) In January and February we shipped your proportion of our output as provided in the contract. But, as repeatedly stated to you, we are willing to, and hereby offer to, ship during March the actual requirements of the schools, not to exceed 2,500 tons; or we will agree to ship a specified tonnage —giving you not only the 2,500 tons, but an additional 1,000 tons. We will, in addition, waive our claim for damages. This is to be open for acceptance until Wednesday next."

Payments were not made by plaintiff as provided in the contract, to collect which defendant brought suit. 211 Fed. 313. No shipments of coal were made after February 20, 1912. As will be seen from the letters, defendant treated the contract as broken by plaintiff as of about February 20, 1912, for failure to pay as agreed, and for the demands and threats made by plaintiff with regard to the amount of coal claimed. The amount of coal charged back to plaintiff which defendant agreed to pay for was, in January, roundly 353 tons, and, for the first 20 days of February, roundly 74 tons. Evidence in regard to these items, together with the evidence as to claim for damages for coal which should have been and was not delivered according to the contract on the 2,500 orders in January and up to February 20, 1912, the court submitted to the jury. The latter were instructed that the contract was ended February 20, 1912, and that no case was made for damages for failure to deliver 6,000 tons of coal before March 31, 1912. After verdict both parties moved for a new trial, which was granted. On request of plaintiff's associate counsel, the order for a new trial was vacated. The instruction of the court to the effect that the contract called for the delivery on order of 2,500 tons of coal each month—month by month—spread out reasonably over each month, and not bunched, even though not so ordered, is assigned for error, as are the instructions that the contract was ended on February 20, 1912, and the direction to the jury to ignore the conversation with regard to the alleged settlement on 6,000 tons of coal. No other errors are assigned.

John A. McKeown, of Chicago, Ill., for plaintiff in error.
Frank Crozier, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] When this cause was before us with case No. 1999, on January 6, 1914, we held that the contract called for monthly shipments as near as might be, and that in the absence of orders no obligation rested on the shipper to deliver such monthly installments of coal up to January 1, 1912, either during the month or thereafter; that each monthly requirement was severable. Alwart Bros. Coal Co. v. Royal Colliery Co., supra. We find no material variation in the evidence there adduced, as disclosed in the opinion, and here, sufficient to justify any different conclusion. The only change consisted in adding the words "within two weeks." The evidence herein fully sustains the contention, there assumed, that defendant had the right to and did cancel the contract on February 20, 1912, under the provisions of the contract.

[2] We are, moreover, of the opinion that, by reason of its demands for deliveries far in excess of 2,500 tons per month, together with its threats to bring suit for failure of defendant to make good the shipments neither ordered nor attempted to be delivered prior to January 1, 1912—which deliveries we held, in effect, in the above-named case, it was not bound to make—and the intimations contained in the letters to the effect that delivery of 2,500 tons of coal per month would

not be accepted as a compliance with the contract, defendant was relieved from any obligation to make further deliveries after February 20, 1912, as for want of proper order as well so to do. Park Steel Co. v. Staver Carriage Co., 125 Ill. App. 105. No shipment was made after February 20, 1912.

[3, 4] With regard to the plaintiff's failure to take a new trial, it was not bound to do so. It had had three nisi prius hearings, and was advised of the court's judgment as to the matters here involved. The evidence was not in dispute. Plaintiff was entitled to this court's judgment upon that evidence. There was no merit in the assignment of error upon the District Court's failure to submit the alleged agreement to deliver 6,000 or more tons of coal between February 20, 1912, and April 1, 1912. The suit was on the original agreement. No case was made out upon the pleadings with regard to that agreement, which, if made, was a new one, and in the nature of a settlement.

We find no error, and the judgment is affirmed.

MOY WING SUN v. PRENTIS, Immigration Inspector.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2273.

1. HABEAS CORPUS ⟹30(1)—WRIT—SCOPE.

   A Chinese person arrested under a warrant signed by the Assistant Secretary of Labor will not be discharged on habeas corpus because the warrant should have been signed by the Secretary of Labor as the object of the writ is merely to ascertain whether the petitioner can be lawfully detained.

   [Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⟹30(1).]

2. SEARCHES AND SEIZURES ⟹7—UNLAWFUL SEIZURES—WHAT CONSTITUTES.

   Where government witnesses took a bunch of letters from a rack in a laundry where petitioner, a Chinese person, and others, were employed, and with the consent of the proprietor retained some of the letters, petitioner's constitutional rights against an unlawful search and seizure of his papers were not violated, as he claimed the letters were not addressed to him.

   [Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ⟹7.]

3. ALIENS ⟹32(8)—CHINESE PERSONS—EVIDENCE.

   Evidence that letters were written to petitioner, a Chinese person, by a woman in China who claimed him as her husband and referred to a recent parting, do not, there being no showing that petitioner answered the letters, establish that he was born in China and had entered the United States at a recent date.

   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟹32(8).]

4. ALIENS ⟹54—CHINESE PERSONS—DEPORTATION.

   Where a Chinese laborer entered in violation of Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (Comp. St. 1913, § 4285), and was unlawfully in the United States, because not in possession of a certificate of residence as required by Chinese Exclusion Act May 6, 1882, c. 126, §

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

6, 22 Stat. 60 (Comp. St. 1913, § 4293), he may within three years after his entry be summarily deported under Immigration Act, §§ 20, 21 (Comp. St. 1913, §§ 4269, 4270); but after the expiration of that time proceedings for his deportation must be brought under Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 (Comp. St. 1913, § 4313) providing for a hearing before a United States commissioner with right of appeal to a judge of the District Court for the remedy provided in the Immigration Act only exists for a period of three years after entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⚿=54.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Petition by Moy Wing Sun for writ of habeas corpus against Percy L. Prentis, Immigration Inspector. From an order discharging the writ, petitioner appeals. Reversed and remanded, with directions to discharge petitioner.

Frank T. Milchrist, of Chicago, Ill., for appellant.

Chas. F. Clyne and Benjamin Epstein, both of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. This appeal brings for review a proceeding by habeas corpus whereby the petitioner, a Chinese, ineffectually sought discharge from custody under a warrant of deportation.

[1] The original warrant of arrest, dated December 8, 1914, was signed "Louis F. Post, Assistant Secretary of Labor," and recited that petitioner landed at an unknown port on or about July 10, 1913, and was subject to be taken into custody and returned under section 21 of the Immigration Act of 1907, and was subject to deportation under the provisions of section 6 of the Chinese Exclusion Act, being a Chinese laborer not in possession of a certificate of residence. The warrant of deportation contained like recitals.

It is contended that petitioner should be discharged because the original warrant was signed "Louis F. Post, Assistant Secretary of Labor," and not by the Secretary of Labor. The writ of habeas corpus was sued out after the hearing and the issuing of the warrant of deportation. Objection to the original warrant comes too late. As was said by the Supreme Court in Ekiu v. United States, 142 U. S. 651, 662, 12 Sup. Ct. 336, 339 (35 L. Ed. 1146):

"A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. Ex parte Bollman & Swartwout, 4 Cranch, 75, 114, 125 [2 L. Ed. 554]; Coleman v. Tennessee, 97 U. S. 509, 519 [24 L. Ed. 1118]; United States v. McBratney, 104 U. S. 621, 624 [26 L. Ed. 869]; Kelley v. Thomas, 15 Gray (Mass.) 192; The King v. Marks, 3 East, 157; Shuttleworth's Case, 9 Q. B. 651."

[2] It is next objected that certain letters used against appellant at the hearing were taken in violation of the constitutional provision against unlawful search and seizure.

Petitioner denied knowledge of the letters, and denied that he had a wife (the only letters of any possible relevancy, purporting to be written by a wife in China to her husband here). From the uncontradicted testimony of government's witnesses Kan and Brekke, who took the letters, they were not in petitioner's possession at all. It appears they took a bunch of letters from a rack in the laundry where petitioner and others were employed, and with the consent of the proprietor of the laundry took away some of these letters and returned the balance to the proprietor. Since petitioner himself disclaims the letters, and as they were not in fact in his possession, nor taken from him, his constitutional rights were not in any event thereby invaded.

[3] The Secretary of Labor found that petitioner entered the United States on or about July 10, 1913. Is there evidence to warrant this finding? Petitioner claims he was born and has always lived in the United States; that he came to Chicago between three and four years prior to his arrest, and lived there ever since. An uncle and another Chinese testified in corroboration of this claim. Five white witnesses connected with a Sunday school in Chicago testified to petitioner's attendance at the Sunday school since about the middle of 1912, but that they knew of him for a considerable period—perhaps six months—before that time. Aside from the letters, nothing appears in the record to show a different state of facts.

The two letters purport to be written to Dong Shok (which petitioner testified was his school name), and the writer of them terms him "husband." One is dated April 2, 1914, and refers to the fact of their having been parted for a year past. The other, dated September 25, 1912, refers to his going from Canada to Chicago, but it does not appear how the writer of the letter got information of that fact. There is no evidence that petitioner departed the United States between these two dates. Petitioner testified without contradiction that another man known as Dong Shok also worked at the same laundry. But for anything to the contrary in the letter of September 25, 1912, the person therein referred to as husband may have entered the United States indefinitely prior to its date; and so, conceding the admissibility of the letters, they alone do not warrant the finding that petitioner entered on or about July 10, 1913, nor indeed at any time within three years before his arrest.

But in the absence of proof that petitioner replied to these letters, or in some way recognized them, or acted in pursuance of them, they afforded no competent evidence against him. In Razor v. Razor, 149 Ill. 621, 36 N. E. 963, it was said:

"This letter, if addressed to the wife and found in her possession, would not be evidence against her unless the contents had been adopted, or sanctioned by some reply or statement or act done on her part, shown by proof aliunde the letter itself."

The same rule was reaffirmed by that court in Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312. In Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, the court said:

"The letters, however, if properly identified, would not of themselves authorize any inference against the defendants. They were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants."

And to like effect are Consolidated Grocery Co. v. Hammond, 175 Fed. 641, 99 C. C. A. 195 (C. C. A. 5th Cir.), and Securitv Trust Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302 (C. C. A. 3d Cir.).

[4] The warrant of deportation recites also that petitioner has been found within the United States in violation of section 6 of the Chinese Exclusion Act, being a Chinese laborer not in possession of a certificate of residence, and that he entered the United States in violation of section 36 of the Immigration Act. If it be granted there is evidence to support these conclusions, yet if it does not appear that the entry into the United States was within three years of petitioner's arrest, can he be deported under the summary proceedings of sections 20 and 21 of the Immigration Act, which provide for arrest and deportation on the warrant of the Secretary of Labor, or must the deportation proceedings be under section 13 of the Chinese Exclusion Act, which provides for a hearing before a United States commissioner, with right of appeal in case of conviction, to a judge of the District Court?

Prior to the decision of the Supreme Court in United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, it was much mooted whether in the deportation of Chinese aliens the provisions of the Chinese Exclusion Act must alone be followed, or whether the procedure of sections 20 and 21 of the Immigration Act might also be employed. In section 43 of the Immigration Act it is provided that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese. In the last-cited case the Chinese were arrested in transitu on charge of having entered the United States surreptitiously from Canada at a point not designated as a port of entry, and without having produced a certificate of examination as required by the immigration laws of the United States, and were ordered by the Secretary of Labor to be deported in a proceeding brought under sections 20 and 21 of the Immigration Act. The District Court held that, while the Immigration Act did not repeal any provision of the Chinese Exclusion Act, it did provide for its enforcement the additional and more summary remedy afforded by the former for deporting Chinese who came within its provisions, and the Chinese there seeking relief by habeas corpus were remanded. 176 Fed. 933. On appeal it was held by the Circuit Court of Appeals, Second Circuit, that Chinese could not be deported under the provisions of the Immigration Act, but only under the Chinese Exclusion enactments, which alone applied to Chinese aliens. 181 Fed. 316, 104 C. C. A. 535. But the Supreme Court, holding the Circuit Court of Appeals erred in its interpretation, said (Wong You v. United States, supra):

"By the language of the act [Immigration Act] any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier, more cumbrous proceeding which this partially overlaps."

Sections 20 and 21 of the Immigration Act provide for deportation only where the entry was within three years of the arrest, and concluding as we do that this record affords no basis for finding that this petitioner entered the United States within three years before his arrest, his deportation under the Immigration Act is unauthorized.

The order of the District Court, discharging the writ of habeas corpus and remanding the petitioner, is reversed, and the cause remanded to that court, with direction to discharge the petitioner.

WONG YUEN v. PRENTIS, Immigration Inspector.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1916.)

No. 2308.

1. ALIENS ⚷54—CHINESE PERSONS—DEPORTATION.

To deport a Chinese person on the ground of his being in the United States in violation of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (Comp. St. 1913, §§ 4242–4289), in that he was a person likely to become a public charge and that he entered without inspection, it must appear that deportation proceedings were begun within three years after his entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⚷54.]

2. ALIENS ⚷54—ENTRY—UNLAWFUL ENTRY.

That a Chinese person was found in a freight car billed and sealed from a point in New York, and passing thence into and out of Canada and back into the United States, after the car returned to the United States, does not show that the Chinese person entered the United States in violation of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⚷54.]

3. ALIENS ⚷54—DEPORTATION—UNLAWFUL ENTRY.

Proof that a Chinese person had been deported in November, 1910, for attempting to enter on a fraudulent certificate, does not show, nearly four years later, that his subsequent entry into the United States was within three years of the institution of proceedings for his deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⚷54.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Petition by Wong Yuen for a writ of habeas corpus against P. L. Prentis, Immigration Inspector. From an order dismissing the writ and remanding petitioner, he appeals. Reversed, and cause remanded, with directions to discharge petitioner.

Wm. R. Medaris, of Chicago, Ill., for appellant.

Chas. F. Clyne, M. L. Igoe, and Benjamin Epstein, all of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. [1] In a proceeding under the Immigration Act, the Secretary of Labor ordered the deportation of ap-

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

pellant, a Chinese, on the ground of his being in the United States in violation of the Immigration Act of February 20, 1907, as amended, in that he was a person liable to become a public charge at the time of his entry into the United States, and that he entered without the inspection contemplated by said act. Section 36, rule 12. Writ of habeas corpus to obtain his release was dismissed by the District Court, and the petitioner was ordered remanded, such action of that court being involved in this appeal. Being brought under the procedure of the Immigration Act, we are met at the outset with the question whether there is evidence from which it may be fairly concluded that the proceedings were begun within three years of petitioner's entry into the United States, an essential prerequisite in proceedings under that act, as we held in Moy Wing Sun v. Prentis, No. 2273, 234 Fed. 24, — C. C. A. —.

Petitioner claims he was born in the United States, and that he never departed therefrom. That he lived at Chicago quite a number of years, prior to about 4 years before his arrest, is without contradiction shown by the evidence. He maintains that on leaving Chicago he went to Boston, remaining there until, traveling west and intending ultimately to go to Chicago, he was arrested at Gary, Ind. The government contends that he, with two other Chinese, was taken from a sealed Wabash Railroad freight car, which had started from New Jersey, passed into Canada, and again back into the United States at Detroit, on its way to Chicago; that at Gary one of the trainmen became aware that there were persons inside of the car, and upon opening the car found petitioner and the other two, and had them placed in jail. Petitioner testified he was not in any freight car at all, but that he came to Gary on a passenger train, and was walking along the railroad tracks when arrested.

No evidence was offered to prove this contention of the government, save that on the hearing Mr. Ebey, an immigration inspector before whom the hearing was had, and who also conducted it on the part of the government, made the following offer:

"The government offers in evidence the transcript of an examination of R. H. Deadman and C. M. Ritchey made in the immigration office September 22d, and advises counsel for the alien that, if he desires to submit any counter statement from these witnesses, it will be received in evidence."

The statements appear to be an unsigned transcript of what purport to be stenographers' notes of some conversation with Mr. Ebey, or examination by him, out of the presence of the accused or any one representing him, some days prior to his hearing. The statement recites that Deadman was sworn, but no certificate of any oath appears, nor anything to indicate who administered the oath. It does not appear that Ritchey was sworn at all.

These men were Wabash train employés, running through Gary, and probably to Chicago, and it is fair to presume that, had the government desired, they would have been present at the hearing, quite regardless of whether or not their attendance could have been compelled. Where the issue is far less grave than the right to reside in this country of a human being claiming to be a citizen thereof, witnesses are frequently and properly brought long distances and at much expense to testify. The use by the government of ex parte statements of persons whose oral testimony would have been conveniently, readily, and inexpensively available might bear on the fairness of an administrative hearing such as this. Mr. Ebey's proposal to receive in evidence any counter statement of these men which counsel for the Chinese might succeed in procuring, while probably made in good faith and as an intended act of grace, did not confer a privilege of any appreciable practical benefit.

[2] But the statements themselves merely say that three Chinese were taken from the car. Petitioner was not identified as one of those so taken. Some photographs of Chinese were submitted to Deadman, who said Chinamen all looked alike to him. Deadman says the car was originally billed from Hoboken, N. J., and rebilled from Black Rock, N. Y. If sealed at one of these places, and the seal was first broken at Gary, Ind., then petitioner entered the car in the United States and remained in it continuously till he left it in the United States, and the fact that the car en route passed into and out of Canada would not of itself make unlawful petitioner's entry into the United States.

Petitioner may have lied in saying he came to Gary on a passenger train, but it is not material whether he came thus or by freight; and, besides, proving him a liar does not of itself show his entry into this country within three years of his arrest.

[3] It is claimed that he answers the description of a Chinese who was deported in November, 1910, for attempting to gain entry on a fraudulent certificate. But that deportation took place nearly four years before this arrest, and does not prove petitioner entered within three years before his arrest on the charge here in issue.

There is an entire want of evidence to show that the petitioner's arrest was within three years of his entry into the United States, and we therefore hold invalid this deportation proceeding under the Immigration Act.

The order of the District Court, dismissing the writ of habeas corpus and remanding the petitioner, is reversed, and the cause is remanded, with direction to the court to discharge the prisoner.

FRONTIER S. S. CO. v. CENTRAL COAL CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2243.

SHIPPING ⟹150—ACTIONS—BILL OF LADING—PRESUMPTIONS.

Defendant entered into a contract with a shipping company to carry its coal for a whole season. Such company contracted with a second company to transport defendant's coal, and the second company's manager engaged one of libelant's steamships for such purpose. The bill of lading issued by the master of libelant's vessel referred to the contract for the freight rate. In case of previous shipments in libelant's vessels, defend-

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

ant paid the company with which it contracted, and such company paid the actual carriers. *Held* that, while the law implies a promise to pay the freight, where there is a bill of lading, and acceptance by the consignee is proven and unexplained, yet, in view of the knowledge of libelant and the previous method of freight payments, such implied promise was rebutted, though defendant accepted the coal transported in libelant's ship, and the bill of lading issued by the master provided for payment at the agreed freight rate.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 511; Dec. Dig. ⚿150.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit by the Frontier Steamship Company against the Central Coal Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant, a New York corporation, is engaged in transportation upon the Great Lakes. Appellee is a corporation of Wisconsin, and is a large dealer in coal. Appellant, on September 25, 1912, brought this suit against appellee in the District Court to recover freight charges earned by its steamer Munro in carrying coal from Lorain, Ohio, and delivering same to appellee at Milwaukee, Wis. The record discloses the following facts and circumstances with reference to the transaction:

Appellee contracted with Franklin Steamship Company and Fremont Steamship Company, jointly, for the transportation of all coal which should be received by it at Milwaukee and Green Bay, Wis., and Escanaba, Mich., during the navigation season of 1909, and agreed to pay freight at the rate of 40 cents per ton for coal delivered at Milwaukee, and 35 cents for coal delivered at the other two ports. Said Franklin and Fremont Companies subsequently, on May 27, 1909, through Herbert K. Oakes, their respective manager, entered into a contract with the Weston Transit Company, through W. M. Mills, its manager, whereby the latter company agreed to carry a part of such coal. The provisions of this latter contract essential to a consideration of the case are as follows:

"For and in consideration of the rates of freight hereinafter named, the party of the second part [Weston Transit Company] hereby agrees to transport from Lake Erie ports, during the season of navigation of 1909, all coal required by the Central Coal Company, of Milwaukee, Wis., * * * and said first parties agree to furnish such coal to said second party. * * * It is hereby agreed that the rate of freight to be paid for transporting said coal from Lake Erie ports shall be as follows: To Escanaba, Michigan, 35 cents per ton of 2,000 pounds; to Green Bay, Wisconsin, 35 cents per ton of 2,000 pounds; to Milwaukee, Wisconsin, 35 cents per ton of 2,000 pounds. All of said coal to be consigned to Central Coal Company, and unloaded at its docks at said ports."

At the time this contract was executed, appellant, through its agent, the Lake Transportation Company, was advised that the Franklin and Fremont Steamship Companies had the contract for carrying all of appellee's coal delivered at its docks at Milwaukee, Green Bay, and Escanaba. The contract follows the terms of and makes evident reference to the contract between appellee and the two steamship companies—Franklin and Fremont. So that there can be no doubt that both Mills and Speddy, managers respectively of the Weston and Frontier Companies and the Lake Transportation Company, knew that appellee's contract was with the so-called Oakes companies.

Under the above contract the Weston Transit Company transported and delivered to appellee during the season coal aggregating about 115,000 tons. Having but three boats of its own, it found it necessary to engage additional vessels for carrying this tonnage. Its manager, Mills, being also manager of appellant, as well as of other steamship companies, was in a position to and did place at the disposal of the Weston Transit Company, in performing its said contract of carriage, a number of boats which he thus controlled, including appellant's steamer Munro. It also appears that the Lake Transportation Company as agent of appellant and under the management of said Mills, had to do with directing the movements of the latter's boats. On November 17th and 30th respectively, the Munro, at the direction of the Lake Transportation Company upon instructions from Mills, transported two cargoes of said coal, aggregating between 19,000 and 20,000 tons, from Lorain, Ohio, to Milwaukee, as above stated, where appellee presented the bills of lading which had been issued by the master of the ship, and received the coal at its docks. It appears from the evidence that on all coal transported by appellant's boats and delivered to appellee previous to the two November cargoes in question, appellant received its freight charges from the Lake Transportation Company, the latter having received the same from the Franklin and Fremont Steamship Companies, to whom appellee had contracted to make payment for the carriage of its season's coal. No demand for the freight charges was made upon appellee by the master of the ship or appellant at the time of making delivery of these Munro cargoes. Thereafter, on November 24th and December 7th, as it had done in all previous like instances, and without any notice other than the said bills of lading that it was expected to pay appellant the freight therefor, appellee in good faith paid said freight charges to the Franklin and Fremont companies. Appellant, not having received the freight thus earned by its steamer Munro, brought suit to recover the same from appellee, basing its suit upon the bills of lading covering said cargoes. These bills of lading were in the usual form. One of them, omitting its number and date, is as follows:

"Shipped in good order and condition by the Lorain Coal & Dock Company for account and at the risk of whom it may concern on board the steamer J. G. Munro, whereof ——— is master, bound for Milwaukee, Wis., the following articles as here marked and described, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (danger of navigation, fire and collision excepted).

"In witness whereof the master of said vessel hath affirmed to ——— bills of lading, of this tenor and date, one of which being accomplished, the others to stand void.

Consignee and Destination.		Description of Articles
Central Coal Co.,		400
Milwaukee,	786......	Net tons #8 Pittsburg
Wis.		Crescent ¾ coal

"Rate of freight hereon is as agreed per net ton. C. E. Sayre."

The District Court found the issues for the respondent and dismissed the libel, with costs. The decision of the court that the receipt of the cargoes of coal with knowledge of the bills of lading set out in the libel was not conclusive as to appellee's liability and that libelant was in law chargeable with knowledge of all the facts pertaining to respondent's relation to the transportation of the two cargoes in question, is assigned as error.

John B. Richards, of Buffalo, N. Y., for appellant.

Frank S. Masten, of Cleveland, Ohio, for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). It is appellant's contention that the receipt of the bills of lading by appellee and its acceptance of the two cargoes of coal covered thereby created an absolute liability on appellee's part to pay the freight charges to appellant. It is also contended that appellee is liable for the freight as consignor. It is no doubt the general rule that the fact that a consignee named in a bill of lading received by him which provides that the cargo is to be delivered upon his paying the freight, who accepts the goods described therein, is evidence sufficient to establish an implied promise to pay the freight charges to the carrier or shipowner, in the absence of other qualifying circumstances. Philadelphia R. R. Co. v. Barnard, Fed. Cas. No. 11,086; Hatch v. Tucker, 12 R. I. 501, 34 Am. Rep. 707. In the latter case, after reviewing the authorities, both English and American, the court concludes that:

"The weight of authority, therefore, seems to be that where there is a bill of lading, and the acceptance by the consignee is proven and unexplained, the law will imply a promise to pay freight."

To the same effect is Union Pacific R. Co. v. American Smelting & Refining Co., 202 Fed. 720, 723, 121 C. C. A. 182, citing Hatch v. Tucker, supra; Cock v. Taylor, 13 East, 399; Dougal v. Kemble, 3 Bing. 383; Merian v. Funck, 4 Denio (N. Y.) 110; Pelayo v. Fox, 9 Pa. 489; Blanchard v. Page, 8 Gray (Mass.) 281; North German Lloyd v. Heule (D. C.) 44 Fed. 100, 10 L. R. A. 814; Taylor v. Fall River Iron Works (D. C.) 124 Fed. 826; Neilsen v. Jesup (D. C.) 30 Fed. 138; Gates v. Ryan (D. C.) 37 Fed. 154; Davidson v. City Bank, 57 N. Y. 81, 85; Grant & Stone v. Wood, 21 N. J. Law, 292, 295, 47 Am. Dec. 162.

And the reason for this rule, as said by the court in Union Pacific R. Co. v. American Smelting, etc., Co., supra, "is that the consignee accepts the goods with knowledge that the carrier looks to him for payment of the transportation charges and waives his lien for them by delivery in reliance upon the consignee's implied promise, evidenced by his acceptance of the goods, that he will pay the charges." The same implication arises if there be no bill of lading, provided the consignee accepts the goods knowing that the carrier expects him to pay the charges. Same case, citing a number of authorities.

In either case, the acceptance of the goods under such circumstances constitutes but prima facie evidence of such promise on the part of the consignee. The question then is: Are the bills of lading here involved, notwithstanding the other facts bearing upon that question, to be taken as conclusive evidence of such knowledge on the part of appellee? If not, and the other evidence in the record is considered, it is very clear, not only that appellee had no such knowledge, but also that, so far as the record discloses, there was wanting sufficient notice to advise appellee that appellant, at the time of making delivery of the Munro cargoes in question, had any intention of holding appellee for the freight charges.

It is legally deducible from the evidence that appellant was advised of the circumstances attending the whole transaction. Its agent, the Lake Transportation Company, was actually told by Oakes, manager of the Franklin and Fremont Steamship Companies, that those companies had the whole contract for carrying appellee's coal for that season. As such agent, it received all payments for other cargoes of said coal from those companies. The contract between those companies and the Weston Transit Company discloses the existence of the original contract. Mills, manager of appellant, signed that contract, while the bills of lading themselves make such reference to that contract as to charge appellant with knowledge of its terms. Thus appellant was chargeable with knowledge that appellee had contracted with the Franklin and Fremont Steamship Companies for carrying all its season's coal, that the latter two companies had contracted with the Weston Transit Company to carry part of that coal for them, and that through their common manager appellant was assisting the Weston Transit Company in that service.

These facts, we hold, were sufficient to overcome any presumption which may have arisen from the circumstances attending the bills of lading in the premises.

The judgment of the District Court is therefore affirmed.

NORTHERN COLORADO COAL CO. v. UNITED STATES.

UNITED STATES v. NORTHERN COLORADO COAL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

Nos. 4437, 4438.

1. Public Lands ⟹120—Suit for Cancellation of Patents—Burden of Proof.

Where the United States has shown that patents to public lands were obtained fraudulently, a subsequent purchaser, claiming through the patentees, has the burden of proving affirmatively that he was a good-faith purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟹120.]

2. Mines and Minerals ⟹45—Suit for Cancellation of Patents—Bona Fide Purchaser.

A coal company acquired a bond for a deed to a large quantity of land, 800 acres of which was then a part of the public domain and was known coal land. Subsequently the obligor obtained patents through dummy locators and conveyed the land to the company. *Held*, that the company was chargeable with knowledge of such facts that it was not entitled to protection as a bona fide purchaser.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. ⟹45.]

3. Mines and Minerals ⟹11—Entry of Coal Lands—Corporations.

A corporation, which purchased coal lands previously patented to other entrymen, did not by such act "take the benefit" of the statute authorizing a single entry only by an association or its members, within the meaning of Rev. St. § 2350 (Comp. St. 1913, § 4662), so as to disqualify its stockholders from making personal entries.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 14, 17; Dec. Dig. ⟹11.]

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

Suit in equity by the United States against the Northern Colorado Coal Company and others. From the decree, both parties appeal. Affirmed.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

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

Henry McAllister, Jr., of Denver, Colo. (N. E. Corthell, of Laramie, Wyo., and Joel F. Vaile and William N. Vaile, both of Denver, Colo., on the brief), for defendants.

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

AMIDON, District Judge. This is a suit brought by the United States to cancel patents for 1,280 acres of coal land situated in Larimer county, Colo. Title to 800 acres of the property is held by the defendant Coal Company as purchaser. The remaining 480 acres is held by the defendants Miller, Peters, and Smith under patents issued upon their individual entries. The bill asserts that the company derives its title through dummy entrymen, and further asserts that the individual defendants at the time they made their entries were stockholders of the Coal Company; and as it had already acquired coal lands in excess of the 320 acres allowed by the United States Revised Statutes, §§ 2348–2350 (Comp. St. 1913, §§ 4660–4662), they, as stockholders, were disentitled to file individual claims. The trial court entered a decree in favor of the government against the Coal Company, canceling the patents under which it claims, and dismissed the bill on the merits as against the individual defendants. Cross-appeals are brought to review the decree.

To understand the case the facts must be stated more fully. Two brothers by the name of Riach executed a bond for a deed in favor of a Mr. Lee, bearing date December 16, 1902, binding them to convey to him by perfect title 4,240 acres of land, specifically described by tracts, and including the 800 acres involved in this suit. The bond was acknowledged and presumptively delivered January 9, 1903. On December 26, 1902, Mr. Lee organized the defendant corporation, and became its secretary, and a member of its board of directors. January 15, 1903, he entered into an agreement with the company binding himself to convey to it 3,600 acres of land, including 160 acres of the 800 acres here involved, also three mining claims, and a controlling interest in the stock of a gold and copper mining company. This agreement is acknowledged and was presumptively delivered March 22, 1903. August 5, 1904, Lee released the company from all existing obligations under this contract. On the same day he assigned to it his bond with the Riachs, the company acquiring all his rights and assuming all his obligations under the bond.

Nearly two years afterwards one of the brothers, James C. Riach, employed dummy entrymen to give him the use of their names for the purpose of acquiring title to the 800 acres under the coal land statutes. These entrymen appointed Mr. Riach their attorney to make and perfect the entries. He paid all the expenses and the purchase price of the land. The first of the entries was made in April, 1905, three of them in March, 1906, and the fifth in August, 1906. Receiver's receipts were issued on the first claim in April, 1905, and on the other claims in 1906, at about the time the entries were made. As soon as the receiver's receipts were issued, deeds were executed for the property by the several entrymen to James C. Riach. Patents were issued on the five claims as follows: Three in August, 1906, and two in July, 1907. James C. Riach executed a warranty deed for the 800 acres to the company in October, 1907.

[1] It is conceded that under the law as declared by the Supreme Court in U. S. v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230, and U. S. v. Munday, 222 U. S. 175, 32 Sup. Ct. 53, 56 L. Ed. 149, the patents as against the entrymen and Riach are void. The Coal Company must prevail, if at all, as a good-faith purchaser. The law in regard to that defense, when title is derived through fraudulent patents, has been greatly clarified by the decision of the Supreme Court in Wright-Blodgett Company v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637. In many opinions language will be found to the effect that, when the government seeks to set aside a patent for fraud, the respect due to such instruments and the stability of titles emanating from the government demand that the case be established by clear and convincing proof. This rule has sometimes been extended so as to require the government to show, not only that the patent was obtained by fraud, but also that a purchaser acquiring title upon the faith of the patent had actual notice of the fraud. Such is not the law. All that the government is required to do is to show that the patent was obtained by fraud. It is then entitled to a cancellation of the patent, except as against a holder who can show that he acquired title to the land as a good-faith purchaser. That defense is affirmative. The burden of proving it rests upon the purchaser. The government is not required to show that he took the title with notice of the fraud. On the contrary, the burden is upon him to show that he acquired the title for a valuable consideration and without notice. Under the law as thus declared in the Wright-Blodgett Case, the government here is entitled to a cancellation of the patents, unless the coal company has shown by a preponderance of the evidence that it is a good-faith purchaser. Has it discharged that burden? For two reasons we think the trial court properly held that it has not.

[2] First. By taking from Mr. Lee the assignment of his bond for a deed, the Coal Company stepped into his shoes and sustains the same relations to the lands which he sustained. At the time this assignment was made the lands were still a part of the public domain, and remained such for nearly two years before the fraudulent entries were made. The company had actual knowledge that the lands were public lands. This is a fair inference from the language of the bond for the deed, and from the whole course of dealing between the parties. The officers of the company were also intimately familiar with the lands. Mr. Miller, its vice president, had visited the properties from time to time every year subsequent to the year 1902. He also had a coal claim of his own, which was situated within one mile of the several tracts which made up the 800 acres. During all of this time he was on intimate terms with James C. Riach, and made his home when visiting the property at Mr. Riach's house. Other officers of the company had a similar, though less extensive, knowledge of the properties. What is the fair import of the bond for a deed in the light of this

knowledge? The company knew that the land was coal land, and that title could properly be obtained for it only in accordance with the coal land laws. These laws limited Mr. Riach to 160 acres, and he had already exhausted that right. The only way in which he could acquire the title called for by his bond was to induce other entrymen to make entries for his benefit. The direct effect of the bond for a deed was to induce the Riachs to do just what they did. There was no other way in which they could fulfill their contract. Notwithstanding the protests of the officers of the company that they did not know the entrymen personally, and did not know of the specific fraudulent acts of the Riachs, it is incredible that they did not intend that the Riachs should get title by means of entrymen who should be at all times under their control. Counsel say in their brief:

"The Riachs contract did not require that Riach must pursue a dishonest course in order to comply with its terms. It was entirely possible that other persons might in their own interests lawfully acquire these lands before Riach was obliged to convey title under his contract, in which event he would have to treat with them in order to fulfil his contract."

But is that argument based upon reasonable probability? Did the company intend that the Riachs should wait until independent entrymen should file upon these lands, and then take the chance of acquiring title from them, after they had obtained title from the government? To indulge in such an assumption would render the contract itself illusory. Whether the company would ever get title to the property would depend upon two events, indefinite in time and wholly beyond the control of the company and its vendors, viz.: First, the making of entries by independent entrymen; and, second, the willingness of such entrymen to part with their title after they had obtained it from the government. If the law is a practical science, courts must draw from circumstances and proofs the inferences which sensible and experienced men would draw from them. Acting upon that principle, it is our judgment that the bond for a deed contemplated that entries should be made for the benefit of the Riachs, and be at all times subject to their control. Upon that interpretation the bond was an illegal contract because of its natural and probable tendency to induce a violation of the law. By acquiring that bond the Coal Company became a party to its illegal purpose.

The defendants here crossed the line to which defendants in United States v. Clark, 138 Fed. 294, 70 C. C. A. 584, Id., 200 U. S. 601, 26 Sup. Ct. 340, 50 L. Ed. 613, and United States v. Barber Lumber Company, 194 Fed. 24, 114 C. C. A. 44, drew perilously near. In those cases, however, there was no contract to convey specifically described portions of the public domain. In the Clark Case the defendant loaned money to one Cobban, and knew that it was to be used by him in acquiring lands, and there was further an understanding between them that Clark would purchase timber lands of Cobban if, upon inspection, the timber and the title were found to be satisfactory; but there never was, at any time, any agreement between them for the acquisition or conveyance of any specific tracts of public lands, and all the courts found as a fact that Clark had no knowledge of any fraudulent practices of Cobban. In the Barber Lumber Company Case defendant went one step nearer the line. In that case the defendant entered into a contract in writing with one Steunenberg for the conveyance within six months of 25,000 acres of timber land. At the date of the contract the vendor had title to only 6,400 acres of the land and claims had been filed on only 5,000 acres more. This left 13,600 acres for which entries would have to be made and title obtained. The contract, however, did not relate to any specific parcels of the public domain and the evidence clearly showed that the entries had been and were being rapidly made by persons acting independently of both Steunenberg and the defendant, and in antagonism to them. In the present case the bond was between defendant and the Riachs, and bound them to acquire and convey title to specific tracts of coal land, which at the time were part of the public domain. For reasons which we have already explained, we think this contract contemplated a violation of the coal land statutes.

Second. The trial court found, and in our judgment, was amply justified by the evidence in finding, that the Coal Company had actual knowledge of the fraudulent practices of James C. Riach in obtaining the patents for the land. As already stated, Mr. Miller, its vice president, was on the most intimate terms with Riach during all the time down to the issuance of the patents. When examined as to whether he ever talked with Mr. Miller in regard to the character of the entries, Mr. Riach's testimony is evasive. Again and again he was asked whether he discussed that subject with Mr. Miller, and he evaded answering the question. Finally, when pressed, he stated that he thought there was some discussion of the subject. Mr. Miller testified at first that there was no such conversation, but, when pressed, he would do no more than say that he did not remember any such conversation. A plat of the various lands will show how important the 800 acres were to the entire coal property. It is incredible to us that the subject was not fully discussed between the Riachs and the officers of the company. The company was paying out large sums of money for the title before the entries were made and while they were pending. It would require us to depart from the ordinary inferences of life to believe that the company did not keep itself informed as to the steps which were being taken to obtain the property for which it was paying. If its officers did not acquire such knowledge, they studiously avoided doing so for the purpose of making the defense which they have interposed in this suit.

Some point is made of the fact that under the bond for the deed the consideration was double the purchase price paid to the government, and under the contract with Mr. Lee it was some four times the price fixed by the statutes for coal lands. The evidence does not support this argument. It is based upon the assumption that all the lands were of equal value. The contract, however, with Mr. Lee, covered gold and copper mining properties, and a controlling interest in a mining corporation. Both the bond and the contract also covered water rights. We cannot attempt, therefore, to apportion the consideration and assume that all the lands were of equal value. So far as the evidence shows, the consideration paid for the lands here involved may have been no greater than that paid to the government.

In our judgment, the decree canceling the patents for the 800 acres was right, and should be affirmed.

[3] The other branch of the decree requires only a few words. The appeal of the government rests upon the theory that the Coal Company in acquiring title to the 800 acres "took the benefit" of the coal land laws within the meaning of that phrase as used in section 2350 of the Revised Statutes. We do not think this contention is sound. In our judgment the phrase quoted requires that the corporation shall either file an association claim itself, or that it shall directly cause such a claim to be filed by others for its benefit. The Coal Company here obtained its title not as a locator but as a purchaser. It did this, however, with guilty knowledge, both actual and presumed, of the fraud practiced by its grantor. But, as it took as purchaser, it cannot properly be said to have "taken the benefit of the act," which requires that title shall be obtained either directly or indirectly by location.

In the briefs there is some argument of the question whether a person who becomes a stockholder in a corporation that has previously taken out an association claim under the coal land laws becomes disentitled to file an individual claim. We do not deem it necessary to decide that question in the present case. It can properly be disposed of without such a decision, and we deem it better to defer deciding the question until its decision shall become necessary.

The decree of the trial court will be affirmed upon both its branches.

HILL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1916.)

No. 4383.

1. PUBLIC LANDS ⚷120—SUIT FOR CANCELLATION OF PATENTS—BURDEN OF PROOF.

   In a suit by the government for cancellation of patents to coal lands obtained by fraud, the defendant has the burden of establishing the defense that he was a good-faith purchaser without notice by affirmative evidence.

   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⚷120.]

2. EVIDENCE ⚷77(1)—INFERENCE FROM FAILURE TO PRODUCE EVIDENCE.

   Failure of a party to produce the only witness who knows the facts authorizes the inference that the testimony would be adverse to him.

   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. ⚷77(1).]

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

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

Suit in equity by the United States against Charles B. Hill. Decree for complainant (217 Fed. 841), and defendant appeals. Affirmed.

J. Foster Symes, of Denver, Colo. (Ivor O. Wingren, of Denver, Colo., on the brief), for appellant.

Frank Hall, Sp. Asst. Atty. Gen. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

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

AMIDON, District Judge. This is a suit by the government to cancel a patent and deed for 320 acres of coal land located in Colorado. The trial court entered a decree in accordance with the bill, and the defendant, Hill, appeals.

The lands were filed on by a joint entry in the name of Lewis M. Allen and Charles D. Richards. Allen was a witness for the government, and testified that he gave the use of his name for $2.50; that he signed all the papers at one time, including the deed and a power of attorney to perfect the location. After signing the papers he never had anything more to do with the entry, and never received any payment, except the $2.50. He did not know his associate, Richards, and the government was unable to trace or discover him.

[**1, 2**] It is too plain for discussion that this entry was fraudulent, and the defendant must prevail, if at all, upon his defense as a bona fide purchaser. He himself resided in New York, and acquired title to the property through his brother, who resided in Colorado. The defense of good-faith purchaser is affirmative, and must be pleaded and proved by the defendant. Wright-Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; Northern Colorado Coal Co. v. United States, 234 Fed. 34, — C. C. A. —. To establish it he must show that he paid the consideration to his grantor, and that he had no notice of his grantor's fraud. The defendant here failed to establish either ground. He testified that he sent about $3,400 to his brother to be used in acquiring the property. He had no knowledge of what his brother did with the money—whether he paid it to the entrymen as a consideration for the deed, or paid $3,200 of it to the government as the purchase price of the land, and used the balance for incidental expenses in perfecting the entry. The circumstances of the case justified the inference that the money was used for the latter purpose. The brother was not called as a witness. He alone knew the actual facts of the transaction. It was clearly in the defendant's power to have produced him, and the defense of good faith required him to do so. Failure to call this witness justifies the inference that, if he had been called, his testimony would have been fatal to the defendant's case. Choctaw, etc., Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; Wigmore on Evidence, § 285. The evidence clearly showed that the brother was defendant's agent in the transaction. To establish the defense of good faith it was necessary to show that he had no knowledge of the fraud underlying the entries, for notice to him would be just as fatal to the defense as notice to the defendant himself. Story's Equity Pleading, § 808.

The judgment is affirmed.

CHICAGO MILL & LUMBER CO. v. BOATMEN'S BANK.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1916.)

No. 4570.

CORPORATIONS ⚷380—LIABILITY FOR DEBTS OF ANOTHER CORPORATION—PARTICIPATION IN MANAGEMENT.

Where one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, it is responsible for the obligations of the controlled corporation; but such responsibility does not follow because a corporation, which is a large creditor of another of doubtful solvency, takes an interest in the business of the latter, or even because it takes an active part in its management for the sole purpose of protecting its own interest as a creditor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1540; Dec. Dig. ⚷380.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by the Boatmen's Bank against the Chicago Mill & Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Haid and James C. Jones, both of St. Louis, Mo. (Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the brief), for plaintiff in error.

Sears Lehmann, of St. Louis, Mo. (Lehmann & Lehmann, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and ELLIOTT, District Judge.

ADAMS, Circuit Judge. The Boatmen's Bank, plaintiff below, sued the Chicago Mill & Lumber Company, a business corporation organized under the laws of Illinois, on a promissory note of $25,000.

The defendant, for its answer, admitted liability on the note, but pleaded a counterclaim against the plaintiff of this kind: It alleged that the bank was a creditor in a large amount of a corporation known as the Tiger Tail Mill & Land Company, and also an owner of a large part of its capital stock, and as such had the control and management of its business and property, for its own use and benefit; that the Paepcke-Leicht Lumber Company, another corporation, was the agent of the defendant; that, as such agent, it made certain loans and advances to the bank, under the name of Tiger Tail Mill & Land Company, and agreed to make certain purchases of lumber from it, the value and agreed price of which to be applied in reduction of the ad-

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

vances made and to be made; that afterwards the Paepcke Company, acting as such agent, entered into certain contracts with the bank, under the name of the Tiger Tail Mill & Land Company, by the provisions of which the bank agreed to deliver to the Paepcke Company, as agent for the defendant, all the output of its mill located at Tiger Tail, Tenn., during the period from September 8, 1910, to October 1, 1912; that the defendant, acting by and through its said agent, agreed to make certain advances of money as the lumber output of the Tiger Tail Company should be loaded on barges for shipment to the defendant, and did from time to time make such advances, and from time to time loaned to the plaintiff other sums of money in addition to such advances; that the defendant from time to time received from plaintiff, under its name of Tiger Tail Mill & Land Company, various shipments of lumber, the value and contract price of which were credited to the plaintiff; that the difference between the amount so advanced to plaintiff and the value of the lumber received from plaintiff was $32,387.57, which (less the credit of $4,445.18, which it concedes) it avers the plaintiff agreed and promised to pay to the defendant, but has failed to do so.

Plaintiff, for its replication, denied each and every allegation of the counterclaim, and alleged that any such contract or agreement as defendant claims to have been made with it was beyond its power as a banking corporation.

The case was tried to a jury, the defendant taking the burden of proof, and at the close of defendant's evidence the trial court, at the request of plaintiff's counsel, instructed the jury to find a verdict for the plaintiff for the full amount of the note sued on, and to find a verdict against the defendant and in favor of the plaintiff on defendant's counterclaim. On a verdict returned accordingly, judgment was entered for the plaintiff, and the defendant Lumber Company prosecutes this writ of error, not complaining of the judgment against it on plaintiff's cause of action, but complaining of the action of the court in directing a verdict against it on its counterclaim.

The proof showed that the Tiger Tail Company was organized in 1892 with a capital of $25,000, divided into 250 shares of $100 each, practically all of which was taken by Henry C. Bagby and Joanna L. Bagby; that some time after its organization Luther H. Conn became the owner of one-half of its capital stock, or 125 shares, the remaining 125 shares being owned by the original incorporators—Henry C. Bagby and his wife, Joanna L. Bagby. Mr. Bagby became the president of the company, and as such its chief executive officer, and continued so until 1906, during which time he secured for and on behalf of his company financial assistance from time to time from the Boatmen's Bank. During that time, and prior to July 25, 1906, the Tiger Tail Company became indebted to the bank in the total sum of $115,000, represented by its several promissory notes for various sums given from time to time as the exigencies of business required, upon which Luther H. Conn and Mrs. Bagby were indorsers; and Mrs. Bagby was also then personally indebted to the bank in the sum of $14,000, represented by notes, upon which both Conn and McRee were indorsers.

At about this time the St. Louis Clearing House began to criticize the loans of the bank to the Tiger Tail Company, and the amount of the loan not being reduced gradually, or at all, the indorsers became uneasy about the matter, and the bank itself became dissatisfied with the management of the company under Bagby, as its chief officer. As a result, a new deal was arranged by the parties interested, which was formally expressed in a contract of which the following is a copy:

"For and in consideration of the sum of two thousand dollars ($2,000.00) to us this day in hand paid by Luther H. Conn, of the city of St. Louis, we, H. C. Bagby and Joanna L. Bagby, of the city of St. Louis, do by these presents jointly and severally bargain and sell, transfer, assign, and set over unto the said Luther H. Conn, and unto his heirs and assigns, forever, all and every of our right, title, and interest in and to the stock of the Tiger Tail Mill & Land Company, a corporation, organized under the laws of the state of Missouri, with its principal office at the city of St. Louis; it being our intention, for the consideration above named, that all right, title, and interest of whatever kind and description of either of us in or to our stock holdings in said company shall pass absolutely to said Luther H. Conn, free from any rights or claims on our behalf. And we do by these presents deliver to the said Luther H. Conn all and every of the certificates of stock as they appear of record in the record books of said corporation, issued to or in the name of either of us, or in the name of any other person or persons, and do authorize the said Luther H. Conn to cause necessary transfers to be made on the record books of said company. The undersigned do further transfer, assign, and set over unto the said Luther H. Conn any and all claims of whatever kind and description which we may have against the Tiger Tail Mill & Land Company.

"Said Luther H. Conn by these presents undertakes and agrees that the indorsement of Joanna L. Bagby on notes of the Tiger Tail Mill & Land Company, held by Boatmen's Bank, aggregating approximately one hundred and five thousand five hundred dollars ($105,500.00), shall be canceled, so that the said Joanna L. Bagby shall be released from any liability under said indorsement. The said Luther H. Conn further undertakes and agrees that the said Joanna L. Bagby shall be released from all liability on account of the execution by her of a certain note of fourteen thousand dollars ($14,000.00), now held by Boatmen's Bank.

"Said Luther H. Conn further covenants and does hereby release the said Joanna L. Bagby from any further liability on account of a certain contract of sale between the said Joanna L. Bagby and the said Luther H. Conn of one hundred and twenty-five (125) shares of said Tiger Tail Mill & Land Company; said contract being dated St. Louis, Missouri, February 1, 1898. And the said Luther H. Conn does hereby further undertake and agree to secure from the Tiger Tail Mill & Land Company a release to the said H. C. Bagby and Joanna L. Bagby of any and all indebtedness which may be due by either of them to the said company, as they appear on the books of the company as of this date.

"In witness whereof the undersigned have set their hands at St. Louis, Missouri, this 25th day of July, 1906. [Signed] H. C. Bagby.
"Joanna L. Bagby.
"Luther H. Conn.

"Witness: Simon L. Boogher."

Pursuant to the terms of this contract Mr. Conn secured cancellation and surrender by the bank of all the notes upon which Mrs. Bagby was indorser, and the substitution in lieu thereof of the notes of the Tiger Tail Company, indorsed by himself, and secured by a pledge of all the stock of the Tiger Tail Company, which was put up with the bank as collateral security therefor. Afterwards, E. M. Hubbard, assistant cashier of the Boatmen's Bank, was elected president of the company, to succeed Mr. Bagby in that office, and, as frequently expressed by all concerned, to incidentally protect the interests of the bank, which was, as a creditor, so largely interested in the success of the company, and one Harold J. Richards, was employed to be general manager of the company, and as such to take charge of the actual conduct of its business at the mill. Mr. Conn, being then the owner of all the capital stock of the company, transferred to Hubbard and Richards, each, 82 shares, or one-third thereof, subject, however, to the pledge of the same to the bank for the payment of its debt.

The new régime started out then with a debt of $115,000 due to the bank, represented by new notes upon which Mr. Conn, who was then considered entirely solvent, was indorser, and further secured by a pledge of all the capital stock of the company. The Tiger Tail Company soon made a contract with the defendant in this case, through its agent, the Paepcke Company, to ship its entire output to the defendant, the Chicago Company, and to secure from that company advances of money from time to time on shipments made and to be made to that company. In the meantime the business demanded the use of more money for its successful operation, and the bank undertook to furnish it, and did make such advances from time to time as were required by the Tiger Tail Company, until its debt had increased to $283,000. Bankruptcy of the Tiger Tail Company then supervened, and the bank was relegated to such relief, so far as the Tiger Tail Company was concerned, as the administration of the estate in bankruptcy afforded.

The foregoing are the substantial and uncontroverted facts of the case. In addition to them, Mr. Richards, who was the manager of the company at its mill at Tiger Tail, Tenn., testified that he got his directions from Mr. Hubbard, who frequently conferred with Mr. Lackland, the president of the bank, and that on one occasion Mr. Hubbard told him the property was to be run by the bank. Mr. H. C. Bagby testified that Mr. Lackland told him he had put Hubbard in as president of the Tiger Tail Company. Mr. William Wilms, vice president and treasurer of the Paepcke Company, agent of the defendant, testified as follows:

"Throughout our entire dealings in connection with the operations of the Tiger Tail Plant, we were led to believe, and it was affirmed to us and stated to us repeatedly, that the Boatmen's Bank owned and controlled the property; that Mr. Hubbard was in charge of the Tiger Tail Mill & Land property in order to protect the bank's interest in that investment."

In addition to this, it appears that the bank loaned the Tiger Tail Company money without security, other than that already mentioned, and when the Clearing House examiner criticized the loan of the bank to the Tiger Tail Company, a statement of its assets was obtained by Mr. Hubbard. It also appears that Mr. Conn took no active personal participation in the affairs of the company, and that the bank was the holder of all the bills payable of the Tiger Tail Company.

On this state of facts the defendant's contention was, and now is, that the bank so owned and controlled the Mill Company as to make it liable for debts contracted in the name of the latter company, and also that the bank so undertook and promised to pay the excess due to the defendant as to render itself liable to it as on a direct promise to pay the same. The trial court ruled against these contentions, and held the proof to be insufficient to warrant, either a finding that the bank was the owner of the Tiger Tail Company, and, as such, liable for the payments of its debts, or that the bank ever promised to pay the debt due to the defendant; and on the defendant's evidence alone the court directed a verdict, and rendered a judgment, for the plaintiff on the defendant's counterclaim, as well as the plaintiff's cause of action. An exception was taken to this ruling, and upon it the assignment of error is predicated.

We think there was no error in this ruling. It is true that, apart from the question of ultra vires, not presently involved, when one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations incurred in so doing. American National Bank v. National Wall Paper Co., 23 C. C. A. 33, 77 Fed. 85; Westinghouse Electric & Manufacturing Co. v. Allis Chalmers Co., 100 C. C. A. 408, 176 Fed. 362; Phillips v. Railroad, 211 Mo. 419, 438, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; Union Savings & Trust Co. v. Krumm (Wash.) 152 Pac. 681.

Was the proof that the business of the Tiger Tail Company was a part of the business of the bank, or that the bank had control and management of its business, as a department of its own, sufficient to make its obligations the obligations of the bank? Counsel for plaintiff in error contend that there was such actual evidence, or such fair and reasonable inferences deducible from that which was produced, as required a submission of this issue to the jury.

They argue that Conn paid no consideration for the Bagby stock, and that the pretended purchase by him was fictitious; the real purchaser being the Boatmen's Bank. In our opinion, this argument is not well taken. There is some controversy as to whether the $2,000 cash payment to Mrs. Bagby was ultimately paid by Conn, the Boatmen's Bank, or the Tiger Tail Company; but this is of little importance when the greater consideration paid by Conn is considered. Money was not the only consideration for the trade. Conn undertook to and did secure the release of Mrs. Bagby from all liability to the bank. He not only did that, but he subjected himself alone to liability as indorser on notes upon which Mrs. Bagby had been cosurety with him, amounting to $115,000. In other words, he took upon himself the sole liability for that debt and surrendered all right of contribution from Mrs. Bagby. This manifestly was a good, valuable, and sufficient consideration for the transfer of the stock to him.

They argue that the transfer by Conn of a substantial part of the capital stock to Hubbard and Richards, without consideration, demonstrates that Conn placed little or no value upon the stock. They forget, however, that it is a very common thing in business to stimulate the zeal of employés by giving them an interest in the business, with a view of promoting their efficiency. They also argue that, because the assistant cashier of the bank was made president of the Tiger Tail Company, a purpose was manifested to control the company by the bank. This argument overlooks the fact that the bank was a large creditor, and as such largely interested in the prosperity of the company, and most naturally should desire to keep an oversight over its doings.

It is further argued that proof of the declarations of the president of the bank and of Mr. Hubbard, the assistant cashier, to the general effect as already pointed out, and of Mr. Wilms as to the general understanding, indicate that the bank was the owner of the business of the company, or was conducting it in its own behalf, or at least constituted evidence, taken in connection with other facts of the case, sufficient to require submission of the case to the jury. But, when the generality and doubtful import of those statements are considered, it is apparent that, in so far as the one attributed to the president of the bank is concerned, it cannot afford the basis of a finding that the president intended to admit that his bank was the owner of this extraneous business, and in so far as the statements are attributed to the assistant cashier, they are manifestly so outside the general usage, custom, and course of dealing of banks and banking as to fall without the scope of his employment as assistant cashier, and in so far as they consist of a statement of Mr. Wilms, the vice president of the Paepcke Company, as to what was generally understood the bank was doing, they were totally incompetent and valueless.

Comprehensively speaking, they are all easily and naturally referable to a legitimate and customary practice of keeping an oversight by a creditor over the business, management, and operations of a debtor of doubtful solvency. All the facts of this case and all the reasonable inferences deducible from them would not, in our opinion, have warranted a jury in finding either that the Boatmen's Bank was carrying on the business of the Tiger Tail Mill & Land Company as a part of its own, or that it ever promised to pay the defendant its demand against the Tiger Tail Company.

We think there was no error in the direction by the District Court to find a verdict in this case in favor of the plaintiff on both its cause of action and the defendant's counterclaim. This conclusion renders any consideration of the question of ultra vires, debated by counsel, unnecessary.

The judgment is affirmed.

DOYLE v. HAMILTON FISH CORP.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 274.

1. JUDGMENT ⟹725(1)—CONCLUSIVENESS—SCOPE OF ESTOPPEL.
As to matters which need not be determined, a judgment is not conclusive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255–1257; Dec. Dig. ⟹725(1).]

2. JUDGMENT ⟹713(1)—ESTOPPEL—SCOPE OF ESTOPPEL.
Where the finding of fact on which a conclusion of law is based can be ascertained with certainty from the judgment roll, such finding will constitute an estoppel.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1234–1237, 1239; Dec. Dig. ⟹713(1).]

3. CONTRACTS ⟹23—ACCEPTANCE—PROPOSAL OF NEW CONDITIONS.
A proposal of new conditions in response to an offer is a refusal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 96–99, 160; Dec. Dig. ⟹23.]

4. JUDGMENT ⟹526—CONCLUSIVENESS—OPINIONS.
It is improper to determine the scope of a judgment by the opinion rendered by the appellate court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 969; Dec. Dig. ⟹526.]

5. JUDGMENT ⟹622(1)—CONCLUSIVENESS—MATTERS CONCLUDED.
Defendant was the assignee of a lease containing provisions for renewal. Plaintiff, the lessor, after expiration of the term, sued in the state courts, to dispossess defendant, on the ground that as no renewal had been effected, he was holding over, but was defeated. Thereafter defendant, who claimed a right to the appraised value of the buildings on the leasehold on the ground that no renewal had been offered him, sued plaintiff, who counterclaimed for the use and occupation of the premises down to the date of his answer. Defendant's suit was dismissed, and plaintiff was defeated in its counterclaim for use and occupation, save as to the period between the expiration of the lease and appraisal of the premises. *Held*, that as defendant would have been entitled to the value of the buildings, unless plaintiff offered a renewal, and as the denial of recovery on plaintiff's counterclaim in defendant's action in the state court was a finding that the offer of renewal had been made and accepted, and a lease existed, such judgment is conclusive between the parties, in a subsequent suit by plaintiff for rent accrued, that plaintiff had offered a renewal, which had been accepted, and will bar a counterclaim by defendant for the value of the buildings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. ⟹622(1).]

6. JUDGMENT ⟹622(1)—CONCLUSIVENESS—FORMER JUDGMENT.
Despite Code Civ. Proc. N. Y. § 1209, declaring that a final judgment dismissing the complaint does not prevent a new action, unless it expressly declares or appears by the judgment roll to be rendered on the merits, a judgment dismissing the counterclaim of a lessor for use and occupation, save as to a small portion of the time during which the tenant was in possession and for which recovery was sought, is a conclusive adjudication that the lessor was not entitled to recover for the remainder of the

period, and in that manner rendered the judgment conclusive that a lease existed between the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. ⇐622(1).]

7. Judgment ⇐719—Jurisdiction of Court—Pleadings.

The lessee, holding under lease providing for renewal, sued to recover the appraised value of the buildings, on the ground that the lessor had not offered him a renewal, and the lessor counterclaimed for use and occupation of the premises after the expiration of the lease, on the ground that its offer of renewal had been rejected. *Held*, that in such case the pleadings did not prevent the court from finding that a lease existed between the parties, and a judgment so finding is a conclusive adjudication of that fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1249, 1250; Dec. Dig. ⇐719.]

8. Election of Remedies ⇐15—Effect of Election.

Where a lease actually existed, the fact that the lessor, under the mistaken belief that no lease existed between the parties, sued for use and occupation of the premises, will not preclude recovery on the lease on the ground that there was an election of remedies, for there can be no such election unless there is a choice.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 17; Dec. Dig. ⇐15.]

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

Action by the Hamilton Fish Corporation against Alexander Doyle. There was a judgment for plaintiff, and defendant, whose counterclaim was dismissed, brings error. Affirmed.

The statement of the case and opinion of Learned Hand, District Judge, in the court below, is as follows:

This is an action for rent upon the renewal of a lease of premises on East Twentieth street in the city of New York. The defendant was the assignee of the former lease to the premises which had provisions for a renewal that are the cause of the controversy. The old term expired on the 1st of November, 1907, but before that time the parties had not completed the appraisal required by the terms of the lease for its renewal, nor had they in consequence renewed the same. During the first two weeks of November, 1907, however, an appraisal was completed by fixing the value of the premises at $15,000 and of the buildings at $5,000, as required. Thereupon, on the 13th day of November the plaintiff sent a letter to the defendant stating that the directors of the plaintiff had decided to renew the ground lease and had placed the matter in the hands of their attorney. A considerable correspondence ensued, which it is not necessary to set forth in full, but it never resulted in the lessee's accepting or executing a written renewal lease. The plaintiff now insists that the defendant became bound by accepting the offer of renewal made by the letter of November 13th. The defendant urges that the minds of the parties never met upon a new contract because the plaintiff always attached to the renewal certain terms which the defendant never accepted.

The right of renewal itself, as provided in the original lease, of which the defendant was the assignee, provided that the lessor should have the option either to grant a renewal for 21 years at the appraised rent or to pay to the lessee the appraised value of the buildings. In the case of Zorkowski v. Astor, 156 N. Y. 393, 50 N. E. 983, the Court of Appeals of the state of New York had declared that the landlord must either pay for the buildings, or offer a renewal to the tenant which the latter might accept, but which, if he did not, gave the landlord the buildings without payment. It was therefore only if the landlord refused to renew, as he might do, that the tenant got his right to the appraised value of the buildings. The plaintiff having failed to compel the defendant to execute or receive a written renewal lease, owing to the conditions imposed, sued to dispossess him in the Municipal Court, alleging that there was no lease outstanding between them, and that he was holding over. In this he was unsuccessful, as well before the Municipal Court as upon appeal to the Appellate Term of the Supreme Court. Thereupon, in June, 1908, more than six months after the expiration of the lease, the defendant sued the plaintiff for the appraised value of the buildings, contending that the defendant had not offered him a renewal of the lease. The plaintiff answered and counterclaimed for the use and occupation of the premises from the 1st of November down to the date of his answer, which was November 30, 1908. When this cause came on for trial the defendant (who was the plaintiff therein) was defeated in his claim, and the plaintiff (who was the defendant) got judgment on his counterclaim for use and occupation up to the date claimed. The defendant (plaintiff therein) then appealed to the Appellate Division, which reversed the judgment (144 App. Div. 131, 128 N. Y. Supp. 898), upon the ground that there had been a renewal of the lease on the 13th of November, 1907, and that therefore the plaintiff (defendant therein) could not recover on his counterclaim for use and occupation beyond that date. On the new trial the complaint was again dismissed and the plaintiff (defendant therein) recovered judgment for use and occupation at the rate of the old rent, but only from the 1st to the 13th of November. The plaintiff (defendant therein) did not appeal from the judgment on the counterclaim, but the defendant (plaintiff therein) appealed from the judgment dismissing his complaint on the merits, both to the Appellate Division and to the Court of Appeals, and in each case was defeated.

The plaintiff, having failed to recover for the use and occupation after November 13th, thereupon sued the defendant in the state court for rent, the defendant removed to this court, and thereupon counterclaimed again for the value of the buildings. The plaintiff now is claiming for rent upon the renewal which was found to have existed in the judgment in the state court, and bases his claim upon two theories: First, that as matter of fact the lease was renewed, as shown by the correspondence between the parties; and, second, that it was conclusively determined that the lease had been renewed in the judgment in the state court. The defendant denies each of these positions, and bases his counterclaim to the value of the buildings as appraised upon the theory that the landlord has never offered to renew the lease and has at length dispossessed him.

[1-5] I shall first consider the effect of the judgment in the state court in Doyle v. Hamilton Fish Corporation. I agree with the defendant that that judgment, in so far as it dismissed the complaint upon the merits, does not create an estoppel here, though I think it does raise a bar to the counterclaim. The plaintiff, indeed, does not urge that it does create an estoppel, and the New York Court of Appeals has said that the second conclusion of law was not necessary to the judgment of dismissal when that was before them. This is true, because in Zorkowski v. Astor, 156 N. Y. 393, 50 N. E. 983, it was held that, in a lease of this sort the lessee's right to the buildings depended upon the lessor's failure to offer him any renewal but that, when the lessor did offer the renewal, he must either accept or reject the renewal, and in either event lose all rights, except to the lease. Therefore it was wholly immaterial, in ascertaining whether the lessee should recover for the buildings, to decide more than the question whether the lessor had offered a renewal. If the court had found that the offer of renewal had been accepted, it would not have been an estoppel. Landon v. Clark, 221 Fed. 841, 137 C. C. A. 399. In disposing of the counterclaim, however, this question became necessary of solution, and its answer created an estoppel for the following reasons:

The plaintiff (defendant therein) in his counterclaim had sued for use and occupation from November 1, 1907, to November 30, 1908, at the rate of $1,300 per annum and it recovered $20.58 for the use and occupation during the period from November 1, 1907, to November 13, 1907, which is in fact the old rent though not so stated. The facts which led to this denial of the plaintiff's (defendant's therein) claim for use and occupation from November

13, 1907, to November 30, 1908, therefore became a necessary condition to the rendition of the judgment itself and created an estoppel. What were these facts? The eighth finding of fact is that the lessor elected to renew and notified the lessee. The fourteenth finding of fact is that the lessee still remains in possession. The second conclusion of law finds that the parties after November 13, 1907, were in the relation of landlord and tenant, under the renewed lease. This last is neither in form nor in fact a finding of fact, and as such it does not create an estoppel; but it presupposes some finding of fact, and if that finding of fact can be ascertained with enough certainty from the judgment roll and the evidence, and was necessary to the judgment, it will in turn constitute an estoppel. Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.

The relevant issue upon this question was joined by the thirteenth article of the amended answer, which alleged that "the plaintiff" (defendant herein) "refused to accept the said renewal," and by the fourth article of the reply, which denied that allegation of the thirteenth article and no other. The issue was therefore, whether the lessee had or had not refused to accept the renewal, and the second conclusion of law could, under these pleadings have proceeded only upon the lessee's success upon that issue by a finding that the lessee had not so refused. It is true that the lessee might not have refused to accept the lease, and yet might not have accepted it; he might have made no answer to the offer whatever, but this an examination of the evidence shows that he did not do. He answered the letter of November 13, 1907, by his own letter of November 14, 1907, and then followed much further correspondence between the parties. This answer to the letter was either an acceptance of the offer of renewal or it was a refusal, for to propose new conditions to an offer is to refuse the offer as it stands, as the defendant truly urges. Minn. & St. Louis R. Co. v. Columbus Rolling Mill Co., 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376. When therefore the issue of the lessee's refusal to accept was found against the lessor it could only be because the court interpreted the letter of November 14, 1907, as an acceptance, and upon this finding of fact only could it have concluded as matter of law, that there had been a renewal. The judgment roll and evidence show that the second conclusion of law which was necessary to support the judgment on the counterclaim, was itself supported by the finding of fact that the lessee had accepted the offer.

While it is not proper to decide the scope of the judgment by the opinions rendered, at least it does not militate against my conclusion that this was in fact the ratio decidendi.

[6] One of the defendant's answers to this is that the judgment is not a bar, because it does not expressly say that the counterclaim was dismissed on the merits for the period after November 13th, and that this is necessary under section 1209 of the New York Code. All the cases that have arisen over that section have been where the complaint was altogether dismissed; nowhere has it been suggested that, where judgment is given upon a part only of a claim, it must recite that the complaint is dismissed as to the balance. Such a requirement would be an idle refinement, unnecessary and artificial. A judgment for part only of several installments of rent upon a complaint is a bar to a second action for those not recovered. Davies v. New York, 93 N. Y. 250. I do not forget that the judgment in the case cited was entered on consent, but that does not affect its scope as a bar, because the consent is to be read as extending to no more than the same judgment after trial.

[7] The defendant further insists that the whole judgment, not only that part which disposed of the counterclaim, but that which dismissed the complaint, was void, because the court had no jurisdiction of the matter under the pleadings. His argument upon this point is as follows: The defendant (plaintiff therein) asserted that there was no outstanding lease between the parties, because the lessor had refused to renew the lease. The plaintiff (defendant therein) had also asserted that there was no outstanding lease between the parties, because, although the lessor had elected to renew the lease, the lessee had refused to accept it. Hence the parties went to trial upon the fact, conceded in the pleadings, that the lease had not been renewed. In giv-

ing judgment upon a finding that the lease was renewed on November 13, 1907, the court, therefore, disregarded the conceded facts in the pleadings and exceeded its jurisdiction, under the rule, thoroughly well settled, that jurisdiction is always limited to claims submitted to the court in the pleadings.

This reasoning confuses the legal effect of the pleadings with the facts pleaded. The parties did not plead that there was no renewal but each pleaded a separate version of the facts from which it chanced to follow, if true, that there was no renewal. The lessor pleaded that he had offered to renew and that the lessee had not accepted. It so happened that, if both allegations were false or both true, there was no renewal; but, when each issue was separately made, the court could not be compelled to decide them both in the same way. It is only in case every possible combination would have resulted in no renewal that the court would have necessarily reached the result of no renewal.

The matter may be further illustrated by the demands of the parties. The lessor demanded the buildings free without the incubus of a renewal. The lessee demanded the price of the buildings without the incubus of a renewal. Therefore the defendant says the court was bound, however it found, to find that there was no renewal. The fallacy is that the parties, by making opposite claims having a common condition, do not assent to the condition taken alone. The court got no consent from either party to decide the fate of the buildings without regard to the lease. The lessor may well have preferred the buildings with a renewal to no buildings at all, and the lessee the price with a renewal to no price at all; at least, nothing in the pleadings gave the least warrant to the court to disregard such alternatives. The court had no right to break up the integrity of the claim of each by selecting out a common term, as though they had agreed upon that term independently.

It is quite clear that the New York Court of Appeals interpreted the second conclusion of law in this sense when the same arguments were made before it. Judge Bartlett, on the motion for reargument, in answer to the argument that the pleadings, conceded the absence of a renewal, said that the rule invoked applied only to facts, and that no finding of fact contradicted the pleadings; that the finding of a renewal was only an inference based upon findings of fact which the court was bound to suppose sufficiently supported in the evidence, and open to the court to find. He must have meant that it was open under the pleadings. It is quite true that he went on to say that the conclusion was immaterial, but this was true only because the court had before it only the judgment dismissing the complaint, to which no finding upon refusal or acceptance was necessary. I do not think that the opinion is to be taken as holding that the implied finding was unnecessary to so much of the judgment on the counterclaim as refused any allowance for use and occupation after November 13, 1907.

[8] As to the defense of an election, based upon the unsuccessful effort to dispossess the lessee upon allegations that there was no lease, it is enough to say that a party has an election only between existing, not supposed, rights. Bierce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828. The plaintiff could not destroy his rights under the lease by mistakenly following other supposed rights which turned out not to exist. That would be to put him, not to an election, but to a correct estimate of his right under pain of forfeiture.

I shall not decide the question independently as to whether the Appellate Division of the Supreme Court was right in its original decision which found in the defendant's answer of November 14, 1907, an unequivocal acceptance of the election of November 13, 1907. Obviously the case was not like Stanley v. Dowdeswell, L. R. 10 C. P. 102, because here every detail of the lease was settled, and nothing remained except to notify the lessee of his election. The letter of November 14th might well be thought to contain no condition on its acceptance, nothing more than a warning against the lessor's possible wrong construction, a caution justified by the future as it developed, but nevertheless not a condition to the assent. That on November 14th the parties' minds had come to a complete accord is certainly a most reasonable conclusion, but, however much I may agree with it, it is redundant, as I view the effect of the judgment, and I shall make no finding upon it.

Finally it is plain that unless the plaintiff can obtain relief in this action it must lose all return for the defendant's occupation of the premises from November 13, 1907. It has been beaten in the attempt to recover for the reasonable value, including that based on the old rent, upon the theory that there was a lease. If it cannot now recover on the new lease, it can recover nothing. Thus the defendant will have enjoyed possession without paying any rent, certainly an inequitable result. It is true that he will have to pay the new rent, but that was fixed by three disinterested persons, and is not likely to be unfair in amount. He had it in his power to refuse the lease, but he clearly was unwilling to do this, and so to lose his buildings. If he made no beneficial use of his possession while he had it, the fault was his, not the defendant's.

As to the defendant's counterclaim in the case at bar, it needs no independent consideration, in view of the foregoing.

The plaintiff may take judgment on the complaint, with costs, and dismissing the counterclaim upon the merits.

Max J. Kohler, of New York City, and Alexander Doyle, for plaintiff in error.

Montgomery & Peabody and John S. Montgomery, all of New York City, for defendant in error.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

PER CURIAM. We have read the clear and comprehensive opinion of Judge Learned Hand and nothing need be added to its reasoning. We think his conclusions of law are fully sustained by the evidence, and therefore affirm the judgment, with costs, upon his opinion.

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE v. BUMP.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 293.

1. SHIPPING ⚷166(5)—CARRIAGE OF PASSENGERS—ACTIONS—JURY QUESTION.

In an action by a passenger on a ship, injured by a fall resulting from a sudden lurch during a storm, the questions whether the passenger was guilty of contributory negligence, and whether the shipowner was negligent in failing to provide safeguards and in leaving a loose mat sliding about the passageway where the accident occurred, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 550; Dec. Dig. ⚷166(5).]

2. SHIPPING ⚷166(1)—CARRIAGE OF PASSENGERS—ACTIONS—NEGLIGENCE.

For a shipowner to leave a loose mat sliding about a passageway used by passengers when a violent storm was raging was negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–546, 549; Dec. Dig. ⚷166(1).]

3. SHIPPING ⚷166(1)—CARRIAGE OF PASSENGERS—SHIPOWNERS.

Where the servants of a shipowner placed a passenger in a position exposing her to injury, and under the circumstances she was unable to help herself, the shipowner is liable for not extending to her required protection.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 538–546, 549; Dec. Dig. ⚷166(1).]

4. EVIDENCE ⚷517—FOREIGN LAWS—INTERPRETATION.
In an action against a French steamship company, where relevant sections of the French Civil Code were clear and plain, a translation is admissible, without interpretation by an attorney learned in the law of France.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2327; Dec. Dig. ⚷517.]

5. APPEAL AND ERROR ⚷1026—REVIEW—HARMLESS ERROR.
Errors in the conduct of a trial, which are inconsequential, do not warrant a reversal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. ⚷1026.]

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

Action by Teresa M. Bump against the Compagnie Générale Transatlantique. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The District Court entered a judgment upon the verdict of a jury for $15,056.33 in favor of the plaintiff for injuries received by her while a passenger upon the steamship Rochambeau, owned by the defendant. The parties will be alluded to hereafter as they appeared in the District Court—as plaintiff and defendant.

Joseph P. Nolan and John M. Nolan, both of New York City, for plaintiff in error.

Abram I. Elkus and William M. Wherry, Jr., both of New York City, for defendant in error.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

COXE, Circuit Judge. [1-3] The plaintiff was a passenger upon the defendant's ship, the Rochambeau. While in the custody and under the direction of the ship's captain she was seriously and permanently injured by reason of a fall occasioned by the violent lurching of the ship during a storm of more than ordinary violence. The plaintiff had a dog on board for which she had paid passage. She was not satisfied with the accommodation given the dog and complained to the captain regarding it. In reply he requested her to follow him, saying that he would show her where the dog could be cared for. They proceeded down two companionways to the main deck, the captain leading the way. After inspecting the dog's quarters they started to return and when they reached a broad passageway extending to a tide door which was closed and bolted, the ship took a sudden lurch and the plaintiff was thrown against the bolts and projections on this closed door and received the injuries complained of. There were no railings on either side of this passageway and the plaintiff testified that there was a loose mat, or jute runner, which slipped when the sudden lurch came and threw her off her feet. The question is, not what we would have found if we had been sitting as triers of the facts, but, was there suffi-

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

cient evidence of the defendant's negligence to warrant the jury in finding a verdict for the plaintiff. We think there was.

The question of defendant's negligence and of the plaintiff's contributory negligence were for the jury. It cannot be successfully asserted that the place where the accident happened was a dangerous place per se; it was rendered dangerous by the prevalence of an unusually violent storm. The plaintiff was, however, in the custody of the master of the ship, on whose judgment she had a right to rely. When he said, "Come with me. I will show you where your dog can go," she was justified in relying upon his superior knowledge and intelligence. It was tantamount to saying "I know my ship and I know the force of the present storm; come with me and you will be safe." With such an implied assurance can negligence of the plaintiff be predicated of a compliance with the captain's direction? What passenger would have the temerity to say directly, or by implication, "Captain, I do not think you know what you are talking about; this storm is one of unusual violence and we may be thrown down and seriously injured. I propose to stay where I am." Again, the plaintiff was warranted in assuming, if the way led through dangerous passages, that rails or ropes would be provided and that the rugs and mats on the floor would be securely fastened. There is no pretense that any ropes or rails were provided where the passageway crossed the broad space where the accident occurred. Whether there was a loose mat, or runner, at the point where the plaintiff slipped and fell was a question for the jury. She testified, "I had already started and felt myself going, and at that moment the rug, the jute runner as it were, slipped."

It can hardly be questioned that it was negligence to leave a loose mat sliding about the passageway when such a storm was raging. The jury may have found that this was what happened; it was clearly a question of fact. We think it plain that the court could not say as matter of law that the defendant was free from negligence or that the plaintiff was guilty of negligence. Both of these were questions for the jury and their verdict was not against the evidence. Chicago Co. v. Lynch, 201 Fed. 70, 119 C. C. A. 408; The Prinzess Irene (D. C.) 139 Fed. 810; The Annie L. Van Sciver (D. C.) 161 Fed. 640; Smith v. Steam Packet Co., 86 N. Y. 408. In Smith v. Steam Packet Co., the Court of Appeals of New York says, at page 412:

"If the plaintiff was placed in a position, by the act of the defendant's servants, which exposed her to injury, and, under the circumstances, was unable to protect herself, the defendant was liable for not exercising proper care in extending to her such protection as was required."

In Chicago Co. v. Lynch, the Circuit Court of Appeals for the Seventh Circuit says:

"Error is assigned for not excluding evidence of the slippery condition of the cabin floor. As we have seen, this was one of the attending circumstances to be considered by the jury in determining whether there was any negligence. It was as pertinent, though perhaps not as influential, as the lurching of the vessel or the physical condition of the plaintiff."

[4] The relevant sections of the French Civil Code, 1382, 1383 and 1384, were received in evidence. They seem clear and understandable

and do not need the interpretation of a lawyer learned in the law of France. If there was anything esoteric or complicated about these provisions it is possible that the services of a French lawyer might be required, but, with the translation admitted, the meaning of the law is so plain that no explanation was necessary.

[5] Other alleged errors are argued, but we deem it unnecessary to discuss them in detail. In every hotly contested jury trial a lawyer who reads the record with a desire to find some action by the trial judge which is open to criticism, will generally be successful. The most learned and conscientious judge will frequently make a ruling which subsequent testimony and further reflection show to have been of doubtful propriety. But if it appears that the ruling was inconsequential and that the result was a just and proper one, it would be a manifest injustice because of such ruling to start the parties again upon the weary pilgrimage through the courts. The principal question was one of fact—was the defendant acting through its agent, the master of the Rochambeau, guilty of negligence in inviting the complainant to go to the main deck of the vessel when a storm of extreme violence was raging? Should he have taken her to a part of the vessel where there were no railings or supports and where the mat or runner was loose on the floor?

These were questions of fact and the verdict has solved both of them in favor of the plaintiff. The place where the master took the plaintiff was not ordinarily dangerous, but the severe storm rendered it an unusually dangerous place. At least the jury were justified in finding it to be a dangerous place. The questions of negligence were properly submitted to the jury and their verdict in favor of the plaintiff was fully justified by the evidence.

The judgment is affirmed with costs.

WARD, Circuit Judge, concurs in the result.

ALCO FILM CORP. v. ALCO FILM SERVICE OF MINNESOTA.

SAME v. PROGRESSIVE INV. CO. OF PORTLAND, OR.

(Circuit Court of Appeals, Second Circuit. June 10, 1916.)

Nos. 149, 237.

BANKRUPTCY ⚷293(4)—SUMMARY ORDERS—JURISDICTION.

Though appellants were adverse claimants, residing in other states, and the property, for the surrender of which the bankrupt's receiver moved, was in other states, appellants, by their failure to move to quash the service of summons, or to except thereto, waived any right to object that the court of bankruptcy was without jurisdiction to enter a summary order in the premises.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⚷293(4).]

⚷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.

In the matter of the bankruptcy of the Alco Film Corporation. On motion by receivers for an order against the Alco Film Service of Minnesota (the Sherman Feature Service) and against the Progressive Investment Company of Portland, Or. From orders in favor of the receiver, the Alco Film Service of Minnesota (Sherman Feature Service), appeals. Affirmed.

The following is the opinion in the court below of Mayer, District Judge:

The receivers have moved for an order directing respondents to turn over certain motion picture films now in their possession and 70 per cent. of the receipts obtained by them from the rentals of said motion pictures from the time they obtained them to date. Under date of September 12, 1914, the bankrupt corporation (hereinafter called "Alco") and a partnership known as the Sherman Feature Company entered into a written agreement by which the Sherman Company obtained from Alco what the parties called the exclusive agency or franchise, which permitted the Sherman Company the exclusive right to obtain and exhibit pictures released through the Alco. This "franchise" covered Minnesota, North Dakota, South Dakota, and Wisconsin. Alco retained title and Sherman Co. is referred to as the "lessee."

Paragraph 15 provided: "It is distinctly understood and agreed that all film furnished to the lessee is the property of the company and is leased to the lessee, and not sold or donated, and that all films must be returned to the company within 12 months of their delivery to the lessee unless such time is extended by written agreement. * * *"

Paragraph 14 fixed the compensation, or rental, or whatever the money requirement may be called, as follows: "14. A sum equal to 70 per cent. of the gross receipts from all pictures supplied hereunder shall be remitted by the lessee promptly * * * not later than 6 p. m. of Monday of each week; and failure so to remit may, at the option of the company, constitute a breach of this contract and justify the company in withholding the production for the next ensuing week, while a repetition of the offense may, at the option of the company, constitute sufficient reason for a termination of this agreement, and a conclusion and determination of the relationship herein and hereby established in the manner hereinafter set forth for the cancellation of the said contract." The remaining 30 per cent. was to be the property of the "lessee."

Certain pictures were forwarded to and received by the Sherman Company, and were exhibited by it in its allotted territory, and the Sherman Company accounted and paid rentals up to about December, 1914. On January 26, 1915, the receivers were appointed and duly qualified, and were authorized to continue business. After demand, the Sherman Company has refused to account for the 70 per cent. or to return the films. The ground of refusal is that the Alco was guilty of breach of its contract, and did not live up to its representations, all to the great damage of the Sherman Company.

The Sherman Company (who were to do business as Minnesota Film Service) among other things alleges that certain films promised to it were not delivered and as a result: "(14) That owing to the said breach of contract by the said Alco Film Corporation, and the failure to deliver any further film productions or photo plays, the said Minnesota Film Service was in turn unable to perform or carry out its contracts with exhibitors and others, and has suffered and will suffer great damage by reason of said breach; that said Minnesota Film Service had assumed obligations to provide films to said exhibitors and others under more than 20 contracts, all of which contracts and obligations they have been compelled to break, and many claims for damages are now being made and will be made against them."

It is further alleged: "(15) That the said Minnesota Film Service now has certain film productions or motion pictures delivered by the Alco Film Corporation in its possession and under its control and outside the state of New York, but by the terms of the said contract with the said Alco Film Corporation it was to be and is entitled to retain all films received by it until the expiration of twelve months from delivery. * * * "(17) That neither of the copartners above referred to, nor any of the officers of the Minnesota Film Service, reside in the Southern district of New York, and the said Minnesota Film Service has its principal office and place of business in the city of Minneapolis, state of Minnesota, and has no office or place of business in the said Southern district of New York."

A summary order is resisted on the following grounds: (1) That respondents are adverse claimants. (2) That the order will be ineffective outside of the Southern district of New York, the property not being here.

The first objection proceeds upon the theory that, where facts are undisputed, and only a question of law is involved, and the question of law is debatable, the person resisting is an adverse claimant. Such is not the law. What Judge Hough said in Re Michaelis & Lindeman, 27 Am. Bankr. Rep., 299, (D. C.) 196 Fed. 718, has recently been clearly reiterated by the Circuit Court of Appeals for the Second Circuit, in Matter of R. & W. Skirt Company, 222 Fed. 256, 138 C. C. A. 67, March 9, 1915, opinion by Judge Coxe.

Assuming the facts to be as set forth by Mr. Davies in his affidavit submitted on behalf of the respondents, it becomes the duty of the court, upon an application of this kind, to determine the law of the case. First, respondents have no lien; and, secondly, under the principle of Michaelis & Lindeman, supra, respondents cannot set off the receipts since the date of the filing of the petition against their claim for damages for a breach prior thereto. Thirdly, the "twelve months" provision in section 15 merely means that the "lease," so called, is for that period.

Upon failure to account (remembering always that the title to the property remained in Alco), Alco was entitled to have its property returned. The respondents might refuse to pay over gross receipts and fight that battle to its finish, but I see no theory upon which they could successfully retain the films.

As to the second ground, I may observe that, while respondents have cited many cases, it will be found that with a possible single exception they are not applicable. In Re Waukesha Water Co., 116 Fed. (D. C.) 1009, for instance, service was made outside of the jurisdiction. In Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355, it is not entirely clear whether service was within the Northern district of California, or in Nevada. I am inclined to think it was in Nevada; but, in any event, as respondents in the proceedings at bar were served in this jurisdiction and the order is in personam, I think there is power in this court to make the order.

If respondents should not return to the Southern district of New York and should refuse to deliver, the receivers may or may not find it necessary to take proceedings ancillary to lay hold of the property; but that bridge may be crossed if the journey takes the receivers that far. I conclude, therefore, that the receivers are entitled to a summary order directing the respondents to return the films.

As the situation is a practical one, which should be dealt with promptly and equitably, so far as possible, and as these films, from the production standpoint, have an uncertain life, I will authorize and direct the receivers to let respondents keep the films upon payment of the 70 per cent. for the period from filing petition to date and hereafter, leaving the question as to receipts prior to the bankruptcy and the claims for damages to be settled later on.

In respect of the various petitions to intervene, the motions will be granted; but those rights and relations cannot be determined until the receivers get the films or the money. As the same principles apply to all the pending applications, a recital of the particular facts is not necessary, and similar orders will be made in all the applications.

While, in a sense, it is not the court's business to compromise disputes, I think it would be to the interest of all concerned if some fair and reasonable settlement could be arrived at, in order that everybody should get his just share while the films have an earning capacity. If Mr. Watkins states the facts correctly, his experience has been especially unfortunate.

H. W. Goddard, of New York City, for appellant.

Milton M. Goldsmith, of New York City (L. Frankel and David Cohen, both of New York City, of counsel), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The appellants in this case appeared specially, but not to raise the question of jurisdiction of their persons. Their theory was that they were adverse claimants, and that because they resided in other states, and the films which the court was asked to require them to surrender were in other states, the United States District Court for the Southern District of New York had no jurisdiction to make any summary order in the premises. No motion was ever made to quash the service of process nor was any exception taken to it, either in the District Court or in this court. Conceding the service of process to have been invalid, the objection was waived.

The orders of Judge Mayer are affirmed, except that the reference to the film known as "Tillie's Punctured Romance" should be stricken out from the order in the case of the Progressive Investment Company.

In re CONTINENTAL ENGINE CO.

BAIRD v. SMITH.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2309.

1. BANKRUPTCY ⚷100(1)—ADJUDICATION—PERSONS ESTOPPED.

Where the alleged bankrupt and a creditor resisted an involuntary petition because a petitioning creditor's claim was invalid and not provable, but later consented to the adjudication, *held*, that the trustee was not estopped from contesting the claim on behalf of all, or any noncontesting, creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. ⚷100(1).]

2. BANKRUPTCY ⚷339—CLAIMS—REDUCTION.

The reduction of an alleged debt to judgment in a state court before bankruptcy does not exempt it from attack by or on behalf of creditors who would be injuriously affected by its allowance in bankruptcy proceedings.

[Ed. Notes.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. ⚷339.]

3. BILLS AND NOTES ⚷63—DELIVERY—ADDITIONAL DELIVERY.

Where the maker's president signed and handed a note to the payee as evidence of a commission he was to receive, and with the understanding that it was not to be effective until signed by the maker's treasurer, *held*, there was no delivery.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 95–103; Dec. Dig. ⚷63.]

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

4. CORPORATIONS ⊂⊃429—PRESUMPTIVE AUTHORITY OF PRESIDENT—TO WHOM AVAILABLE.

Any presumptive authority that the president of an Illinois business corporation may have to execute notes for its ordinary business transactions is not available to a payee who knew the notes were given for other purposes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720–1723, 1725; Dec. Dig. ⊂⊃429.]

5. CORPORATIONS ⊂⊃406(2)—AUTHORITY OF OFFICERS—PRESIDENT.

Neither the securing of new capital by selling additional stock, nor agreeing to pay commissions for such sales, is an ordinary business transaction, within the implied power of a corporation's president, who acted as its general manager.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1612; Dec. Dig. ⊂⊃406(2).]

6. CORPORATIONS ⊂⊃414(2)—AUTHORITY OF OFFICERS—PRESIDENT—NOTE.

A note signed by a corporation's president for commissions to be earned by selling the corporation's stock is invalid between the parties, when its making was unauthorized by the corporation's directors or shareholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1641; Dec. Dig. ⊂⊃414(2).]

7. BILLS AND NOTES ⊂⊃97(1)—REQUISITES—FAILURE OF CONSIDERATION.

Where a note is given by a corporation for commissions to be earned by selling its stock, and the payee does nothing, there is a failure of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 166; Dec. Dig. ⊂⊃97(1); Contracts, Cent. Dig. §§ 399, 400.]

8. BILLS AND NOTES ⊂⊃354—ASSIGNMENT—RIGHTS OF ASSIGNEE—STATUTE.

Under Negotiable Instrument Law Ill. (Laws 1907, p. 410) § 54, a transferee can recover only the amount paid for a note before receiving notice of defects in it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905; Dec. Dig. ⊂⊃354.]

9. BILLS AND NOTES ⊂⊃332—BONA FIDE PURCHASER—ACTUAL NOTICE OF CONDITION.

The transferee of a note *held* to have taken it with notice, where he admitted having known where the payee got it and what it was for.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 805, 815, 816; Dec. Dig. ⊂⊃332.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois.

In the matter of the bankruptcy of the Continental Engine Company. From an order overruling the referee's disallowance of a claim filed against the bankrupt's estate, the trustee appeals. Reversed and remanded, with directions.

Wm. H. Hartzell, of Quincy, Ill., for appellant.

Wm. E. Rafferty, of Chicago, Ill., for appellee.

Before MACK and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

MACK, Circuit Judge. Appeal from an order overruling the referee's disallowance of a claim filed against the bankrupt's estate and allowing it for $5,026, something less than the amount claimed.

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

[1] 1. Smith was one of three petitioning creditors. The bankrupt and one creditor contested the petition, asserting, inter alia, that Smith's claim was not valid and provable. Subsequently, however, and after a partial hearing, the adjudication was expressly consented to and the order of adjudication was entered. For the reasons fully stated by Judge Sanborn in his dissenting opinion in Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144, with which we entirely agree, this adjudication cannot estop the trustee acting on behalf of all creditors or any non-contesting creditors from denying the validity and provability of Smith's claim.

[2] 2. The claim was founded on a judgment rendered by default in the state court. The reduction of an alleged debt to judgment in a state court before bankruptcy does not exempt it from attack by or on behalf of creditors who would be injuriously affected by its allowance, when such allowance is sought in bankruptcy proceedings. Chandler v. Thompson, 120 Fed. 940, 57 C. C. A. 230.

3. The judgment was rendered on a demand note for $5,000, dated March 27, 1913, and executed in the name of the bankrupt by its president. It was purchased by the claimant on April 10, 1913, for $2,500, of which $600 was paid in cash and $320 in driblets thereafter. No more appears ever to have been paid. Suit thereon was begun April 18, 1913, and the bankruptcy petition was filed June 16, 1913.

[3] (a) The note was never delivered as a note. Under the uncontradicted testimony, it was handed to the payee simply as evidence of a commission that he was to receive for selling bankrupt's increased capital stock, but not to be effective until signed by bankrupt's treasurer in accordance with the by-laws requiring both signatures. Storey v. Storey, 214 Fed. 973, 131 C. C. A. 269.

[4-6] (b) Whatever may be the presumptive authority of the president of an Illinois business corporation to execute notes for its ordinary business transactions (see cases cited in Hallett v. St. Vincent College, 201 Fed. 471, 119 C. C. A. 647), there is no such presumption in favor of a payee who knows that the notes were given for other purposes. Neither securing fresh capital by the sale of additional stock, nor contracting to pay commissions therefor, is an ordinary business transaction of the corporation, within the implied powers of the president acting as general manager; so that, irrespective of the by-laws or the specific condition upon which alone the note was to become effective, it was invalid as between the parties, because unauthorized either by the directors or the shareholders of the bankrupt.

[7] (c) The consideration totally failed; the payee did absolutely nothing that would have entitled him to commissions, even had the execution of the contract or note been duly authorized; and the deal was off before the transfer to Smith.

[8, 9] (d) As Smith has not even paid the agreed purchase price, his claim could in no event exceed the amount paid (Illinois Neg. Instr. Act [Laws 1907, p. 410] § 54), even if he were otherwise a holder in due course. But in view of his own testimony, that he knew where the payee got the note and what it was for, and irrespective of

any possible charge of constructive notice because of the inadequate price paid, he must be held to have had actual notice of all the facts.

The order allowing the claim must be reversed, and the cause remanded, with directions to sustain the objections and to disallow the claim.

THE EDWARD G. MURRAY.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 260.

1. COLLISION ⊂⊃67—STARBOARD HAND RULE—APPLICATION.
   The starboard hand rule does not apply where one of the vessels is not on any course, but is maneuvering a tow and in effect stationary.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 85, 86; Dec. Dig. ⊂⊃67.]
2. COLLISION ⊂⊃72(2)—TUGS WITH TOWS—COMMON FAULTS.
   A collision in the daytime near the middle of East River between a loaded car float, which her tug had taken out from a slip on a hawser and was turning, so as to take her in tow alongside, and a tug and tow coming upstream, *held* due to faults of both tugs; the tug of the car float, which was on her up-river side pushing, being in fault for not maintaining a lookout on the tow, in consequence of which she did not see the approaching tug, and the latter for not stopping sooner.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. ⊂⊃72(2).]

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

Suit in admiralty for collision by the Susquehanna Coal Company, owner of the steam tug Paoli and barge Devon, against the steam tug Edward G. Murray, the Edward G. Murray Lighterage & Transportation Company, claimant, and the New York Central Car Float No. 46, the New York Central & Hudson River Railroad Company, claimant. Decree for respondents, and libelant appeals. Modified.

Oscar Dibble Duncan and Warner C. Pyne, both of New York City, for appellant.

William J. Martin and George V. A. McCloskey, both of New York City, for appellee Murray Lighterage & Transportation Co.

T. Catesby Jones, of New York City, for appellee New York Cent. & H. R. R. Co.

Before COXE and WARD, Circuit Judges, and HOUGH, District Judge.

COXE, Circuit Judge. The collision in question occurred in the middle of the East River at about 3:30 p. m. on February 20, 1914. The steam tug Paoli was proceeding up the river with the coal barge Devon in tow on her port side. She collided with the New York Central car float No. 46 which was lying in the river about opposite Wall Street. The tug Murray had towed the No. 46 from between Piers 14 and 15 East River to the position as stated above and had

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

cast off her lines. She intended to shove the bow of the float down stream and take her alongside prior to towing her to her destination, which was the West Shore Railroad docks at Weehawken. The float had on board twelve loaded cars. It was necessary for the Murray to tow the float out of the slip between Piers 14 and 15 by a short hawser and so maneuver in the middle of the river that she could get the float's toggle end down stream. Up to this time the Murray had done nothing to warrant holding her liable for the collision which afterwards followed. She was on the Brooklyn side near the center of the river. While in that position the Paoli with her tow came up the river. The Paoli's master saw the car float and the tug's stack when they were about a third of a mile away. The Murray's master could not see over the float and there was no lookout thereon. The Paoli saw the car float in the middle of the river as stated above and kept on until, as the District Judge finds, she took a rank sheer just before the collision. As there was plenty of room in the river, there was no necessity for the Paoli to keep on when it was plain that the float and tug were stopped—the tug apparently in distress and without control.

[1] We do not think the starboard hand rule applies to this situation for the reason that the vessels were not approaching each other; the tug and car float were lying in the middle of the river and were not under way at all.

The boats were not approaching on courses which involved risk of collision. The Murray and the car float were not on any course but were moving back and forth on the Brooklyn side of the center of the river. Unless an observer knew of her general destination from the business in which the tug and float were engaged, he could not have told whether the Murray's ultimate course was up or down the river.

[2] We are inclined to think that both vessels were negligent. The Murray should not have attempted to turn the unwieldy car float around and make fast to her side when her master could not see over the car float and did not know the exact course and destination of the Paoli. There was no lookout on the float to warn him of the approach of the Paoli and her tow. The car float was not negligent as she was wholly under the control of the Murray and could do nothing to prevent the collision.

We are of the opinion that the damages should be divided between the two tugs. The Paoli is liable for proceeding until it was plain that she could not do so without collision and the Murray is liable for blocking the center of the river without a lookout on the float and without informing the Paoli by proper signals of the danger in attempting to pass such an unwieldly structure as the loaded car float until the Murray had got full control of her. Apparently the Murray neither saw the Paoli nor heard the whistles which she says were sounded. If there had been a lookout on the car float, he would have seen the approaching danger and warned the Murray in time. Such knowledge would probably have prevented the collision or at least lessened its force and the failure to take so obvious a precaution was a serious fault. Especially was this so in view of the testimony of the master of the Murray as follows:

"Q. Before the collision occurred did you see something of the approach of the Paoli? A. I did not. Q. Did you hear anything? A. I did not. Q. What were you doing at the time the collision happened, were you pushing on the carfloat? A. Pushing under one bell, yes, sir."

It seems obvious that if a lookout had been stationed on the float the situation would have been known in time to prevent the collision or greatly to mitigate its force.

The decree is reversed with costs of this court to the appellant and the decree is modified so as to hold both vessels jointly liable.

FRANSIOLI et al. v. PREST-O-LITE CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No. 2691.

TRADE-MARKS AND TRADE-NAMES ⟹100—INJUNCTIONS—CONDITIONS.

Where defendants, who had engaged in the practice of refilling Prest-O-Lite tanks, which are tanks filled with acetylene gas and are used on motor cars, without obliterating the Prest-O-Lite Company's name and trade-mark, they will, on appeal from an order enjoining them from continuing such practice, be presumed, the Prest-O-Lite Company consenting to modification of the order to conform to an order in another case, which did not necessarily require absolute obliteration, to agree to such modification, it being in their favor.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. ⟹100.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit by the Prest-O-Lite Company against Frank T. Fransioli and others. From an order granting a temporary injunction, defendants appeal. Remanded, with directions to modify order.

P. M. Canale, of Memphis, Tenn., for appellants.

Wright, Miles, Waring & Walker, of Memphis, Tenn., for appellee.

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

PER CURIAM. The Prest-O-Lite Company, a manufacturer and distributor of acetylene gas for lighting automobiles and other vehicles, brought suit to restrain alleged unfair competition and infringement of trade-mark by the copartnership called the Bluff City Welding Company, which acted as sales agent for the Memphis Acetylene Gas Company, which latter company was permitted to become a codefendant. Plaintiff stores its gas in portable, copper-plated steel cylinders, the container being marked "Prest-O-Lite Gas Tank" and bearing plaintiff's corporate name as manufacturer, etched in the metal surface of the cylinder, together with a notice licensing its sale and use only when filled with gas and acetone compressed by plaintiff, who

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

furnishes its customers in the first instance with the filled package, the empty container being exchanged for filled packages under a system and on terms described in the opinion of this court in Prest-O-Lite Co. v. Davis, 215 Fed. 349, 131 C. C. A. 491, where also plaintiff's trade-mark rights are set forth. The gist of the charge against defendants is that they are recharging empty Prest-O-Lite containers with gas made by the Memphis Company, and in effect selling Prest-O-Lite tanks charged with the gas referred to. Collins and others, who own Prest-O-Lite tanks, and have been in the habit of having them refilled by defendants (as well as by another party) at prices said to be much less than charged by the Prest-O-Lite Company, were given leave to intervene for the protection of their asserted right to continue such practice. The appeal is from an order granting a temporary injunction restraining defendants, in substance, from refilling Prest-O-Lite tanks with any material, and from dealing in such tanks refilled by others than plaintiff, without in all cases removing or obliterating plaintiff's trade-mark, and from passing off such refilled tanks as Prest-O-Lite gas tanks, exchanges, or refills.

The prominent grounds on which defendants contest plaintiff's right to the relief granted are: (1) That defendants have not been guilty of fraud or unfair trade; and (2) that the attempt to limit the use to which plaintiff's gas tanks shall be put after sale by plaintiff is void, whether rested upon trade-mark rights or the system of exchanging filled for empty tanks.

The case differs in no essential feature from the Davis Case, and defendants' contentions in the instant case are, with one exception, fully covered by what was said in the former case and in the opinion rendered by Judge Hollister in that case in the District Court. 209 Fed. 917. The views announced by us in the Davis Case are in harmony with the decision of the Circuit Court of Appeals of the Seventh Circuit in Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626, and the decision of the Circuit Court of Appeals for the Eighth Circuit in Prest-O-Lite Co. v. Heiden, 219 Fed. 845, 135 C. C. A. 515, L. R. A. 1915F, 945. On the authority of these decisions, the order appealed from must be affirmed except in one particular: it forbids the refilling of or dealing in Prest-O-Lite tanks without "completely removing and permanently obliterating from said cylinders or tanks the said trade-mark 'Prest-O-Lite,'" etc. Defendants' only attempt to obliterate the trade-mark "Prest-O-Lite" is by covering it over with black paint. Such covering is no more permanent than the covering by printed paper label, held in the Searchlight, Davis, and Heiden Cases to be an insufficient obliteration. But by an amendment of the obliteration provision of the order in the Davis Case (made after the decision of the District Court in the instant case and subsequent to the amendment of the order in the Searchlight Case) the refilling or dealing in refilled Prest-O-Lite tanks was forbidden without "replating or enameling the outer surface of such cylinders or tanks so that the name of the Prest-O-Lite Company and the word 'Prest-O-Lite' shall be obliterated to the complete extent that either plating or enameling can be made to so obliterate, and such obliteration by plating or enameling shall not be dispensed with, no matter how such name and trade-mark appear, whether plated, etched, or otherwise, and without in addition thereto plating or stamping on the outer surface of the tank in legible and permanent form notice that such tank has been refilled or recharged by the defendants or their agents."

Defendants, by their brief (presumably written before they learned of our amended order in the Davis Case), ask that the order, unless reversed, be made to conform to that in the Searchlight Case, which differs somewhat from that in the Davis Case. Plaintiff now consents to amendment conformably to that had in the latter case. We take it for granted that defendant would rather have the order conformed to that in the Davis Case than to have it affirmed.

The record is accordingly remanded to the District Court, with directions to modify the order so as to conform substantially to the amended order in the Davis Case. The costs of this court will be divided.

In re LESSER.

In re INTERNATIONAL TRUST CO.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 283.

BANKRUPTCY ⚷408(1)—DISCHARGE—GROUNDS FOR REFUSAL—PERJURY IN OTHER PROCEEDINGS.

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. 1913, § 9598), provides for the granting of discharges unless the bankrupt shall have committed an offense punishable by imprisonment, or shall have been guilty of certain other enumerated acts. Section 29a (section 9613) denounces the offense of conversion or misappropriation by a trustee of property belonging to a bankrupt estate, as well as the offense of making false oaths in bankruptcy proceedings. *Held*, that any perjury committed by a bankrupt in any bankruptcy proceeding, though it be not his own case, is ground for refusal of a discharge; the statute plainly indicating that it was not limited to the bankruptcy in which the discharge was sought.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 732; Dec. Dig. ⚷408(1).]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Joseph S. Lesser. On petition to revise an order of the District Court (232 Fed. 368) sustaining an exception to specifications of objections to discharge by the International Trust Company. Order reversed, with directions.

"On petition by the International Trust Company, a creditor of the bankrupt, to revise an order of the District Court for the Southern District of New York which sustained an exception to the third specification of objection to granting a discharge. This specification alleged that the bankrupt had made false oaths in a proceeding in bankruptcy other than his own. The court held that the alleged false oath having been made in a different bankruptcy proceeding from the one at bar the objection was radically defective and no amendment could cure the defect. The exception was therefore sustained and leave to amend was refused."

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

Selden Bacon and Saul S. Myers, both of New York City, for petitioner.

Montague Lessler and Leonard J. Obermeier, both of New York City, for bankrupt.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The only question involved in this review is whether the false oath which bars the bankrupt's discharge must be made in the pending bankruptcy proceeding. The bankrupt contends for the affirmative and the petitioner for the negative of this proposition. The District Judge followed the decision in the Blalock Case (D. C.) 118 Fed. 679, in which it was held that the making of a false oath by a bankrupt in a proceeding in bankruptcy not against himself, but against a corporation of which he was an officer, was not a sufficient ground for refusing his discharge. The judge says in his opinion:

"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 refusing a discharge unless the oath be made in the bankruptcy proceedings of the bankrupt himself."

We are unable to agree with this ruling, principally for the reason that the statute contains no such limitation. Section 14b provides that:

"The judge * * * shall discharge the applicant unless he has committed an offense punishable by imprisonment as herein provided."

"As herein provided," means as provided under the head of "Offenses" in Bankruptcy Act, § 29a. If a bankrupt applying for a discharge has committed an offense covered by section 29a, his discharge must be refused. It would be an absolute impossibility for him to commit some of these offenses in his own bankruptcy. One of the offenses punished by section 29a is the embezzlement by a trustee in bankruptcy of property belonging to the estate of the bankrupt. If the trustee is convicted of such embezzlement and subsequently becomes a bankrupt himself, he can, if the ruling of the District Judge is correct, obtain his discharge, notwithstanding his conviction under section 29a of an offense which section 14 declares is an absolute bar to a discharge. There is nothing in the act which confines the perjury which bars a discharge to that committed in the bankrupt's own proceeding. On the contrary, many of the offenses conviction of which bars a discharge cannot, as before stated, be committed in the bankruptcy proceedings of the applicant for a discharge. We cannot think that the lawmakers intended a result so illogical as to permit a trustee, who has embezzled the estate of the bankrupt placed in his care by the court, to file a petition of his own and procure a discharge, notwithstanding his crime, because it was committed in a bankruptcy proceeding other than his own. There is nothing compelling such a construction; on the contrary a harmonious and logical interpretation of the law forbids it. The construction urged by the bankrupt would eliminate entirely many of the offenses which the law says shall bar a discharge. He might be convicted in another bankruptcy proceeding of perjury, of presenting a false proof of claim, of receiving money from a bankrupt after petition filed against him, of extorting money from a person for acting or forbearing to act in bankruptcy proceedings; and yet he would receive his discharge if these crimes were committed in other bankruptcy proceedings and many of them could be committed only in other proceedings. It seems to us that the construction contended for by the bankrupt will defeat the intention of the lawmakers and involve the interpretation of the sections in question in inextricable confusion. We think that the intention of the lawmakers was to refuse a discharge to a bankrupt who has taken a false oath in any bankrupt proceeding. If he can commit perjury once and succeed he will be quite likely to attempt it again. The contention that the perjury must be committed in his own bankruptcy is contrary to the letter of he law and if sustained may lead to deplorable results.

The order is reversed and the District Court is instructed to permit an amendment to the third specification.

In re SOLOWAY & KATZ et al.

Appeal of BAY STATE MILLING CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 96.

BANKRUPTCY ⚿384—COMPOSITION.

Where nearly five years had elapsed since bankruptcy, and much of the assets had been wasted by fruitless litigation, an offer of composition, approved by 98 per cent. of the creditors in number and amount of claims, will, where fair and for the benefit of creditors, be confirmed, notwithstanding objections of the remaining creditors; the object of bankruptcy proceedings being to settle insolvent estates as speedily as possible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⚿384.]

Appeal from the District Court of the United States for the District of Connecticut.

In the matter of the bankruptcy of Soloway & Katz, Maurice Soloway, and Samuel Katz. From an order confirming bankrupts' offer of composition, the Bay State Milling Company appeals. Affirmed.

Walter J. Walsh and William J. McKenna, both of New Haven, Conn., for appellant.

De Forest & Klein, of Bridgeport, Conn., for respondents.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This matter was before this court January 13, 1914, when we decided that the order of the District Judge giving the two creditors, objecting to the proposed composition, an opportunity to be heard in opposition thereto was within his discretion and should be affirmed. In re Soloway & Katz, 211 Fed. 333, 128 C. C.

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

A. 12. The controversy was submitted to the referee as special master and after notice and hearing he found, inter alia, as follows:

"These bankruptcy proceedings have been pending since December, 1911, and from the records and files of these proceedings it appears that a great deal of litigation has been indulged in, and a great deal of money, part of the assets of said bankrupt estate, was expended in said litigation for counsel fees and disbursements, and no results whatever accomplished. Out of a very large number of creditors, in all exceeding 100, the 2 creditors who filed specifications alone oppose the confirmation of this composition, thereby preventing the closing up of said bankrupt estate.

"In view of the history of these bankruptcy proceedings, as shown by the records and files pertaining thereto, the inference is justifiable that the conduct of the 2 opposing creditors is captious and perhaps vexatious. * * * That the confirmation of said composition will be for the best interests of creditors, and is made in good faith and not procured by any means, promises, or acts prohibited by said Bankruptcy Law, nor have the bankrupts been guilty of any of the acts, or failed to perform any of the duties, which would be a bar to their discharge. That because of the prolonged litigation, and the amount of money expended out of the assets of said bankrupt estate, it is for the best interests of creditors to approve the recommendation of my predecessors, and to confirm the offered composition. * * *

"Upon the foregoing facts it is my opinion, and I do therefore recommend, that the bankrupts' offer of composition be confirmed, and that an order to that effect be passed."

The Bay State Milling Company, being one of about 100 creditors, is the only one now opposing the composition. The matter has been delayed for more than five years and nothing has been accomplished. This delay was partly due to the death of the first referee, but it is principally due to other causes which it is unnecessary to characterize. The result is that a law which was intended to produce quick results has kept the estate in statu quo during this long period with the result that the estate has been depleted. The opinion of the District Judge filed March 26, 1915, contains the following:

"Nearly five years have elapsed since bankruptcy proceedings were instituted in this court and the matter is still unsettled. Much of the assets have been wasted and what the dividend creditors will ultimately receive has been reduced as a result of the prolonged litigation over this estate. No one has profited thereby save various attorneys. Up to this point creditors have received no dividend whatever, even though it is conceded that a substantial fund for distribution is in the hands of the trustee, who is the custodian of the fund. More than 100 creditors whose claims in all represent about 98 per cent. of the creditors in number and total amount of obligations, strenuously urge the denial of the motions of the objecting creditors and the granting of the bankrupts' motion to confirm the composition offer in order to save something from this financial wreck. Further litigation ought therefore to cease unless there is something substantial presented as a reason for granting the motions of the objecting creditors now under consideration."

The specifications of objection to the composition are vague and general in character and were excepted to, or demurred to, for these reasons, among others. A motion made to strike out the specifications was granted. In other words, they were treated as demurrable and in most cases they clearly were so and as to all we are not convinced that the court erred in considering them as insufficient.

We see no reason for prolonging further a controversy which can only result in delay and in depleting still further the funds which all the other creditors wish divided. A proceeding in bankruptcy is intended to get the assets as speedily as possible into the hands of the creditors, whose rights are first of all to be considered. We are convinced that a just result has been reached by the District Court and do not think the proceedings should be longer delayed to enable the objecting creditor to make another attempt to defeat the composition.

The decree is affirmed with costs.

THERMOGENE CO., Limited, v. THERMOZINE CO., Inc.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 275.

TRADE-MARKS AND TRADE-NAMES ⚿=3(4)—NAMES SUBJECT TO TRADE-MARK—DESCRIPTIVE NAMES—"THERMOGEN."

The word "thermogen," which is an English word derived from the Greek, is practically synonymous with the word "caloric," while the word "thermogene" is the French equivalent for that same word. *Held* that, as such word is a descriptive term, no trade-mark therein can be acquired, so as to prevent other manufacturers of similar goods from using a similar designation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. ⚿=3(4).]

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

Bill by the Thermogene Company, Limited, against the Thermozine Company, Incorporated. From a decree (225 Fed. 446) dismissing the bill, complainant appeals. Affirmed.

On appeal by the complainant from a final decree dismissing the complaint which alleges infringement of the complainant's trade-mark "Thermogene." Judge Augustus N. Hand held that the word "thermogene" is not arbitrary or fanciful, but is a descriptive term and is, therefore, not the subject of a trade-mark. (D. C.) 225 Fed. 446.

Lanier McKee and Arthur W. Barber, both of New York City, for appellant.

Frederick M. Czaki, of New York City, for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

COXE, Circuit Judge. The word "thermogen" is an English word derived from the Greek and is practically synonymous with the word "caloric." It means to bring forth heat. Either of these words could be used by the parties to this controversy in describing its wares. This being so, it seems contrary to reason to assert that the addition of the final "e" so changes the word "thermogen" that it may be monopolized by an individual or a corporation to designate a particular line of merchandise. It is the same word whether we adopt the French spelling "thermogene" or the English spelling "thermogen." In both cases it has the same meaning and if one cannot be monopolized by a single individual to designate his wares, neither can the other. The complainant might as well have attempted to pre-empt "chlorine" or "caloric."

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

There can be no doubt that the word which is the subject of the trade-mark—thermogene—whether it be spelled with or without the final "e," whether it be treated as having an English or a French derivation, is a word descriptive of that which owes its birth to heat. No one person can monopolize such a word by procuring a trade-mark. We agree with the District Judge that the reasoning of the Supreme Court in the case of Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, is applicable to the case in hand. In that case the trade-mark of the Paint Company was "Ruberoid" and the court said at page 455 of 220 U. S., at page 458 of 31 Sup. Ct. (55 L. Ed. 536):

"The word, therefore, is descriptive, not indicative of the origin or the ownership of the goods; and, being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning, as different, to bring the example to the present case, as the character of an article is from its origin or ownership."

The decree is affirmed with costs.

FREEDMAN et al. v. DAVOPLANE BED CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2305.

PATENTS ⚷328—VALIDITY AND INFRINGEMENT—SOFA BED.

The Holmes, Bostrom & Bostrom patent, No. 848,305, is for a sofa-bed, the main element of which is such an arrangement of the parts when closed as to form a receptacle for the bedding in its made-up form. While showing only a slight advance, the combination also embodies other improvements on prior structures which, reinforced by the presumption arising from the grant and a marked commercial success, is sufficient to disclose patentable invention. Claims 2 and 4 also *held* infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Davoplane Bed Company against Hyman Freedman and Nathan Freedman. Decree for complainant, and defendants appeal. Affirmed.

Appellants prosecute this appeal from the decree of the District Court finding claims 2 and 4 of patent No. 848,305, granted to Holmes, Bostrom & Bostrom on March 26, 1907, for sofa-bed, to be valid and infringed by the two forms of appellants' sofa-beds, shown as "Plaintiff's Exhibits. Defendants' beds 1 and 2."

Claim 2 reads as follows, viz.: "In a sofa-bed, a pivoted and overturning seat, and a bed-bottom in three sections hinged to each other, adapted to be folded to form a clothes-receptacle under the seat and to be unfolded to form an expanded bed-bottom in a plane above the seat."

Claim 4 reads as follows, viz.: "In a sofa-bed, a pivoted and revolubly-overturning seat, a bed-bottom in three longitudinal sections, the two marginal sections being comparatively wide and the medial section being comparatively narrow, means supporting the medial section pivotally whereby it can be swung to horizontal position and in the same plane with the marginal sections and also can be swung to vertical position and the two marginal sections to opposite and parallel positions at a distance apart substantially equal to the width of the medial section."

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

Drawings 2, 4, and 5 of the patent are here reproduced.

"The invention," say the patentees, "is directed chiefly to the novel structure of the auxiliary bed-bottom and to the means related thereto whereby it is snugly packed away in the sofa when not in use and can be easily and quickly converted into a usable bed-bottom, including the means for properly supporting and securing the bed-bottom in position. * * *

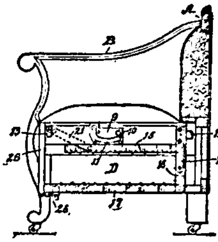


Fig. 2.

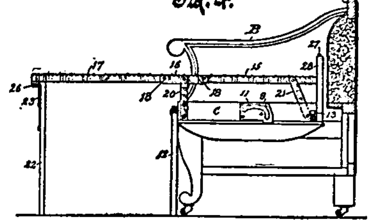


Fig. 4.

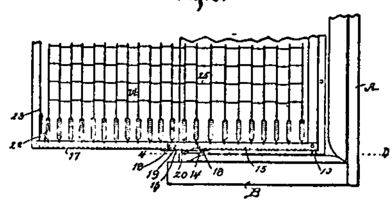


Fig. 5.

"In the drawings there is shown a sofa frame or body consisting of a back *A* and the arms or ends of the sofa *B B*. These parts are of any suitable size and form to make up a sofa frame or body like or similar to those in common use, the arms or ends being rigid to the back, making a strong and durable frame or body of the sofa-bed.

"The sofa-seat *C* is also of a form in common use and consists of a rectangular frame having thereon an upholstered or other cover forming the seat proper of the part. This rectangular or box-like seat in this sofa-bed is mounted on the frame pivotally, so that it is adapted to be turned over upside down, the pivotal support of the seat being at its respective ends and medially of its width. * * *

"In connection with the sofa-seat *C* there is a bed-bottom, composed in a general way of side and end rails and a spring-wire mattress, which bed-bottom is in three sections or members —an inner section *15*, an intermediate or medial section *16*, and an outer section *17*. The transverse end rails of these inner and outer sections are hinged to the end rails of the medial section in the manner shown best in Figs 2, 4, and 7, the rails being of angle-bar and the vertical flanges of the rails of the sections *15* and *17* being made to overlap the vertical flange of the rails of the sections *16* and being hinged thereto by pivot-pins *18*. The horizontal flanges of these thus-hinged rails are cut away near the ends of the rails to permit of the overlapping and fitting close together of the flat sides of the vertical flanges at and adjacent to the pivot, and the vertical flanges of the rails of sections *15*, *17*, and *19* severally project rearwardly underneath and fit upwardly against the horizontal flange of the rails of the thereto-hinged section when the sections are unfolded and extended in the same horizontal plane in the manner shown in Fig. 4. This construction strengthens the structure and assists in preventing the sections *15* and *17* from tilting downwardly out of the plane of the section *16* when the bed-bottom is extended. The section *16* is pivoted at each end on legs *20*, secured rigidly to the frame of the seat *C* in such manner that the section *16* can be swung to the horizontal position with reference to the legs *20* when in an upright position, as shown in Fig. 4, or can be swung to a vertical position in the manner shown in Fig. 2 when the bed-bottom is folded up with reference to the sofa-seat *C*. * * *

"The bed-bottom may be provided with a flexible wire mattress of any character adapted to serve as a mattress and at the same time to permit of the folding up of the sections. * * *

"It will be observed that when the structure is folded up and in the condition for use as a sofa, as shown in Figs. 1 and 2, that the inner section *15* of the bed-bottom is held close to and practically against the under side of the frame of the sofa-seat and that the outer section *17* of the bed-bottom is located at a distance below the section *15*, thus providing a space or receptacle *D* between these sections, which is utilized for holding bedclothes. The bed is made up on the bottom, and is folded up in this space at the time of folding up the bed-bottom and before the sofa-seat, with the bed-bottom thereon and the bed therein, are turned over from the position of the seat as shown in Fig. 4 to the position shown in Fig. 2. Of course by the reverse operation the bed is opened out for use on the extended bed-bottom.

"It will be understood that because of the construction of the bed-bottom, consisting of the leaf-like sections *15* and *17*, hinged to the intermediate sections *16*, which is pivoted medially on standards, and because of the arrangement of the folding legs *21* the two leaf-like sections *15* and *17* of the bed-bottom are held apart when the bed-bottom is folded up, thus forming the receptacle for the bed. It will also be noted that in unfolding the bed-bottom the swinging of the sections *17* and *15* into horizontal positions as illustrated in Figs. 7 and 4 the section *15* will be elevated from its position as shown in Fig. 2 by reason of the interlocking end of the rails of the sections at the locality of their hinges, as shown in Fig. 7 in connection with the elevating effect of the folding legs *21*, caused by their being swung upwardly and rearwardly by the unfolding of the sections to the position shown in Fig. 4."

The specification proceeds to describe a modified form of construction, which we deem it unnecessary for our purposes to consider at this time. In this device a non-rotating sofa-seat is employed.

Appellants' alleged infringing devices 1 and 2 are both of the so-called rotary seat and bed type. Appellants concede that, if the claims of the patent are valid, their form No. 1 infringes. They deny that form No. 2 infringes. The record contains drawings of this device, of which those numbered 2, 4, and 5, to correspond with Figs. 2, 4, and 5 of the drawings of the patent, are herewith reproduced.

FIG. 4

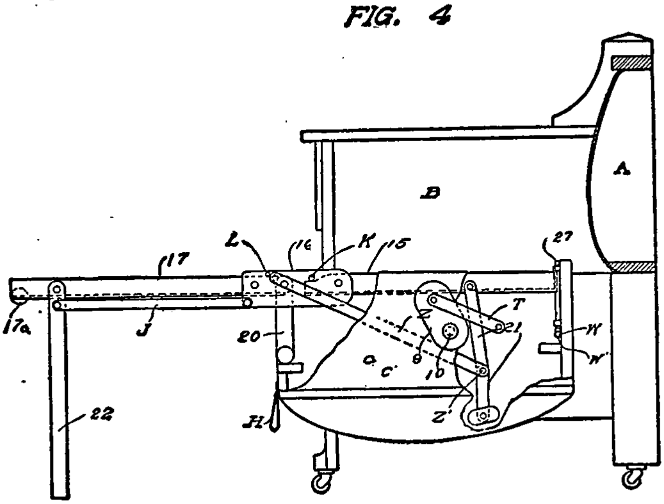


FIG. 5.

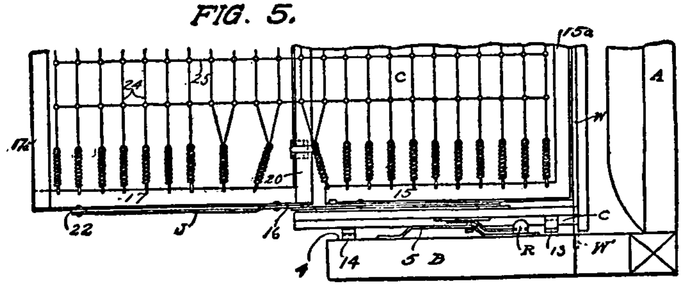
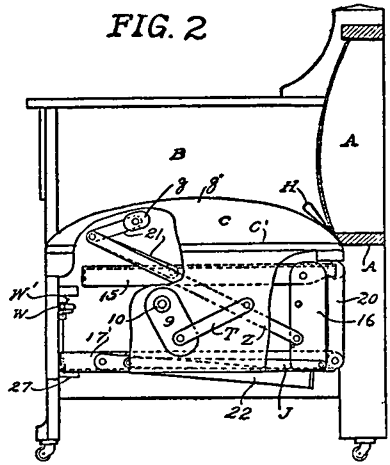


FIG. 2



Both the patented and the alleged infringing forms contain a sofa bed-frame *A B*, having rotatably mounted thereon the seat *C*. The seat on its under side carries a folding sectional bed-bottom constructed to retain the bedding in a made-up form, both when the bed is made up and when the sofa is in position. The seat is provided with a standard *20*, which serves, in each case, as a partial support for the folding bed-bottom, and with a link *21*, the lower end of which is pivoted to the seat frame while the upper end is pivoted to the rear part of the bed-bottom.

The beds are alike as to the relative size, shape, and arrangement of the several sections. Each has a jointed border frame in combination with a continuous flexible wire mattress carried thereby, which is stretched across the space bounded by the frame, and forms the bed-bottom. In each case, the inner section comprises the inner side rail *15a* and those parts of the two end rails *15* extending from said side rail to the nearest section joint pivots, in combination with that part of the wire mattress which is attached to and lies between said side rail and said parts of the end rails *15*. In like manner, the outer section in each case comprises the outer rail *17a* and those parts of the two end rails *17* extending from said side rail to the nearest section joint pivots in combination with that part of the wire mattress which is attached to and is disposed between said outer side rail *17a* and said parts of the end rails *17*. The middle section in all the forms in question comprises the middle or connecting rails *16* in combination with that part of the wire mattress which is disposed between said middle rails, and is connected to the jointed border frame at points substantially opposite the joint pivots in such manner as to cause the middle part of the mattress to lie at all times between and substantially parallel with said connecting rails *16*, and to operate substantially as though attached thereto, though, in fact, actually connected to the inner portion of the adjacent end rails *15* and *17*. With respect to the features here involved, appellants' devices differ from the patent, in so far as the sectional character of the bed-bottom is concerned, only in that the spring fabric is not directly attached to end rail *16*, but instead has the wires and spring members at each end of its middle part extending diagonally and attached directly to end rails *15* and *17* at the ends of rails *16*, leaving the rails *16* free from the wire mattress fastenings, but carrying the support thereof to a point slightly removed from said rails *16*, and there uniting with a section of the wire mattress which spans a space in the mattress corresponding exactly to the medial section *16* of the patent, and constituting, through means not here in question, the upright section of the book-cover like receptacle which serves to space apart the so-called wing sections *15* and *17* of the bed-bottom when adjusted to form a compartment in which the bedding will be contained when the device is in use as a sofa.

It will be observed that the claims nowhere call for the attachment of the wire or spring fabric of the medial section directly to the end rails of that section. This latter feature constitutes the only difference between the patent in suit and appellants' sofa-bed, Exhibit 1. In both of appellant's structures, the spring fabric is flexed in the same lines to form the same bedding receptacle. When the structure is in the sofa position, the wire or other spring fabric forms the top, bottom, and back of that receptacle, while the apron *28* forms the fourth wall. Both appellee's and appellants' devices are provided with this apron *28* in the form of a wooden panel which extends down from the front of the sofa-seat when in sofa position. This gives a finished look to the sofa front and removes all appearance of the device being anything else than a sofa. In the prior art the sofas either show a hinge in front, or a break in the face of the structure, or are of two sections, or otherwise vary from the patent in suit.

The term "bed-bottom" of the patent includes the end and side rails of the three bed sections and the mattress. That of the patent and those of the alleged infringing devices are practically identical in form so far as here involved, both when extended and when folded under the sofa-seat. The flexing lines indicate the three sections in each, when folded. These are the lines upon which the bed-bottom is folded and unfolded. The term "in a plane above the seat" refers to the fact that when the sofa-seat is rotated it passes beneath the bed portion, which is thereby rotated to the top or sofa-seat proper position. The alleged fact that by measurement the bed-bottom is found in Figs. 2 and 4 of the drawings to be slightly higher from the floor than the normally positioned sofa-seat is not deemed proof of a different significance. By the arrangement of the patent, space for spring action of the bed-bottom is attained, as well as space for bedding. It is appellants' contention that they have only a two-section bed-bottom. The claims were allowed in the Patent Office without amendment.

In support of the defense of invalidity in view of the prior art, appellants have introduced a number of prior patents, of which, however, we need mention only patent No. 29,832, granted to Tendler and Moeshlin, for a sofa bedstead, on August 28, 1860, patent No. 248,959, granted to O. Stechhan for a bed lounge on November 1, 1881, patent No. 453,474, granted to Hallquist and Wennberg for a sofa-bed on June 2, 1890, patent No. 497,191, granted to R. Lundberg for a sofa-bed on May 9, 1893, patent No. 617,754, granted to A. Martenson for a bed-sofa on January 17, 1899, patent No. 749,307, granted to H. A. Linderoth for a bed-chair or bed-sofa January 12, 1904, patent No. 779,819, granted to W. Thompson for a divan folding bed on January 10, 1905, and patent No. 368,472, granted to F. W. Heringhausen for a sofa-bed August 16, 1887.

"What the patentees in suit did in one exemplification of their so-called invention," says the appellants' counsel, "was to take the old bodily-revoluble or overturning sofa-seat (Hallquist, Lundberg, Martenson, Linderoth) and substitute for the particular form of sectional bed therein disclosed a specific form of old three-section bed (Thompson, Tendler, Stechhan). Or, to state it differently, they took an old form of three-section bed (Thompson) constructed, so far as the bed-frame and wire mattress were concerned, exactly like that of the patent in suit, and hitched it onto an old revoluble sofa-seat in the place of the folding bed thereon. The specific way in which the hitching was accomplished, that is, by pivoting the medial section or hinge or link medially to the supporting post, was novel, but, we urge, not patentably novel."

These prior patents and other evidence will be dealt with in the opinion.

The findings of validity and infringement by the District Court are relied on as error.

Walter H. Chamberlin, of Chicago, Ill., for appellants.

William R. Rummler, Cyrus W. Rice, and Fred M. Davis, all of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The main element of the combination patent in suit is that which makes provision for a bedding receptacle—the three-section bed-bottom. By means of it, the bedding can be stored in a made-up form, so that, when the sofa-seat is overturned and the bed-bottom extended, the bed will be ready for occupancy. Other features are achieved, such as those which deceive the eye by the almost perfect representation of a device which is a sofa and nothing more. Other advantages are found in the ease with which the device may be manipulated, whereby it can be operated by a woman; the fact that it need not be pulled away from the wall when rotated to bed form; the resilient character and mounting of the spring feature; the cheapness of manufacture and simpleness of construction. All these desirable ends are found within the patent. Its success as an article of commerce was and is marked. The combination of all these and others in one symmetrical and attractive whole, other things being equal, furnishes patentable novelty. It is, however, a matter of common knowledge that this field of invention has been prolifically exploited. The record presents a number of prior patents covering sofa beds, as above noted.

The Tendler and Moeshlin sofa bed-bottom contains but two sections. It does not appear to have been on the market. The sofa-seat is hinged to the front face of the sofa-bed frame and, when the device is to be changed to a bed-form, is swung forward on the hinges, thus exposing the bed. It is not of the rotary form of sofa-beds. Its two bed-bottom frame sections are connected by a link or bar placed flatwise against the end, and so as to lap an equal distance on each frame. "The distance between the centers of both of the pins *c, c,* of each of the bars *C, C,*" says the specification, "should be somewhat greater than double the thickness of the mattress in order that such mattress may be bent in its middle and one-half of it be turned over upon the other half during the process of turning the front half of the bed foundation toward and over the rear half thereof."

It is evident that if the connecting links are extended to space the so-called foundation parts sufficiently to receive the doubled-up mattress and other bedding, there will be presented a chamber or receptacle having only a top and bottom and having no back wall. Moreover, this device does not utilize the clearance space between the bed-bottom and the sofa-seat for spring action of the bed-bottom. These facts, together with the failure to disclose a merchantable article, seem fairly to disqualify this patent as an anticipation. Its slatted bed foundation or mattress does not permit of expansion. The hinges on the front would clearly indicate the double character of the sofa-bed.

Stechhan also provided a bed-bottom with but two sections. It has no medial section. "The invention," says the specification, "principally consists in the application of a peculiar form of double hinge to the lounge." The device presents no adequate bed clothing receptacle. It resembles the Tendler and Moeshlin structure. It is not of a rotary character. Even when extended, the bed-bottom parts are separated by an appreciable space which must make itself felt even when covered by a mattress. It comes far short of the combination of the patent.

The Hallquist and Wennberg patent was cited by the Patent Office during the prosecution of the patent, against claim 1. The device is of the rotary type. No provision is therein made for retaining the bedding, though space is not wanting if properly inclosed. The structure of the patent does not seem to have been deemed in the Patent Office as suggestive of claim 2 in suit. The patent shows a bodily revoluble and overturning sofa-seat with a three-section bed-bottom in which the medial section is wide and the wing sections may be folded onto the medial section, but not in such a manner as to produce a receptacle for the bedding. The device lacks any suggestion of the concept of the patent in suit. The wing sections serve and can serve no such purpose as those in suit. There is no receptacle. While these wing members carry a woven wire mattress and stretch it for use as a bed, they are not intended to, and do not, serve to form any room or receptacle. In the patent sofa-bed it is the medial section that does this, and no amount of adjustment could effect that end in Hallquist's device.

The Lundberg patent calls for a sofa-bed of the rotary kind. It is not pertinent as a reference here. Its folding head and front boards do not justify its citation as against the wing sections of the patent in suit.

The Martenson bed-sofa calls for a construction whereby, when folded or closed to serve as a sofa, the clothing of the bed is contained therein, and all parts so adjusted and secured as to make the article look like a sofa. The seat is rotatable. When rotated there is disclosed a bed folded in two sections which are hinged together, the one folding over upon the other. The edges of the rails of the two sections "stand higher than the surface of the mattress so as to form a space between the frames [edges] when folded for the retention of the bed clothes," etc. This is not apparent from the drawings. Space for storing the bedding is not shown. Certainly if any there be, it must be very inadequate and not suitable for compassing the bedding in a made-up form. To provide such a space must inevitably interfere with the closing of the sections, and consequently the operation of the sofa. The hinge or folding line cannot fail to present what is known as a hard-center, by reason of the cross-piece of the frames. Each section has its own bed spring and bed-bottom. It comes far short of an anticipation of the patent in suit.

Linderoth shows a bed chair or sofa of the rotary construction. The combined sofa or chair and bed is rotated upside down, presenting the bed portion in folded form. The upper frame is turned on its hinges to a plane with the lower section. This is further extended by drawing out a third section having slidable support in the second section. The device makes no provision for bedding space, and in no way anticipates the patent in suit.

Thompson's particular object was to produce such a bed suitable for a divan. It is not rotatable. While it makes provision for storing a mattress and other bedding, it lacks almost entirely the concept of the patent. It would require a degree of adjustment amounting to invention to change it into the sofa-bed of the patent. The bed-bottom is not in a plane spaced above the seat. The operation of the device involves the shifting of bearings and pivots. Its parts could not be combined with Tendler or any other of the prior art devices to produce that of the patent in suit without adjustments made in the light of the patent, which, but for the patent in suit, would be patentably new.

Heringhausen's sofa-bed is of the non-rotatable type, and has no bearing upon the features here in suit, except that it may be unfolded into bed form, though by means entirely foreign to those of the patent in suit. No provision is made for the storage of bedding. There is nothing in it to suggest the Holmes and Bostrom construction.

Thus we see that there is nothing in the prior art which, without serious modification, can be said to anticipate appellee's device as covered by either claim 2 or claim 4. As stated by its counsel:

"The patentees of the patent in suit were the first to place a resilient bed-bottom capable of flexing in three sections, in a new situation, in which it was spaced above a supporting substructure in such manner as (1) to utilize the space for clearance to permit proper spring action of the bed-bottom, and (2) also to utilize said space for collapsing one of the sections upon the substructure so as to permit part of the bedding to occupy part of the space before used for such clearance, and to suitably support and retain the bedding therein in a made-up form."

We are not impressed with the claim of appellants that the patent covers rather an aggregation than a combination. All the parts claimed are—

"associated in a unitary structure and there co-operate to produce either a new mode of operation or a new result, or the old result in a modified or improved way." Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23.

The advance made by the patent upon the prior art is slight. Indeed, there seems to have been little room for marked advance. Perhaps there is no article designed for man's comfort in which slight advances are more appreciated. The elements entering into what constitutes a perfect sofa-bed are set out in the record by a dealer in supplies for sofa-beds of many years' standing. Among these are the following: That the sofa-seat should be of the usual height from the floor when in sofa form; that the sofa should not suggest adaptation to beds or other forms; that there should be a substantial spring fabric forming the main part of the bed-bottom with clearance below for spring action; that there should be cushion springs for the seat and a flat spring mattress for the bed-bottom, independent of each other; that the bed spring should be continuous and free from contact with under rigid braces; that the sofa-bed be capable of containing the bedding at all times in made-up form; that the device should be easily operated by women; that the operating parts be simple and not liable to get out of order; that the bed be operable without moving it away from the wall; that it be inexpensive and easily handled for shipment and reassembling. All of these, the sofa-bed of the patent possesses. The most marked novel element is the three-section bed-bottom, whereby provision is made for storing the made-up bed. Another feature is the simplicity, whereby ease of operation and cheapness are attained, as above set out.

Two forms of sofa-bed are covered by both the claims in suit, viz., that wherein the standards upon which the bed frames are pivoted are mounted upon the stationary frame, and that in which said standards rest wholly upon and are carried by the sofa-seat. Claim 2 is broad enough to include sofa-seats hinged at the front of the sofa frame. Claim 4 specifically calls for a medial section which is wider than the wing sections and limits the device to a revolubly overturning seat.

As above stated, appellants admit that if the patent in suit is valid, their form No. 1 infringes. Appellants' expert testified that claim 2 reads on both forms 1 and 2 of appellants' device—

"unless the court finds the language used in the claim to the effect that the bed-bottom when unfolded forms an expanded bed-bottom in a plane above the seat, to mean such a form of structure as is illustrated in Fig. 4 of the patent in suit in which this bed-bottom plane is actually above a horizontal plane which would pass through the top of the upholstered surface of the sofa-seat when in its assembled form as a sofa."

As we have above stated, that language of claim 2 applies to the sofa-seat when overturned. Appellants' attempt to avoid the patent by alteration of some detail of the frame construction claimed to be taken from Tendler fails entirely to escape the concept of the patent in suit or of either of the claims in suit. In the form 2 of appellants' device the end rails of the medial sections are not directly supported by the uprights *20*, the end rails *17* being extended beyond the point of their pivoted attachment to the medial section end rails, and the extended parts of said end rails *17* being pivoted to said uprights *20*. While in appellants' device 2 the ends of the rails *17* and *15*, when in bed position, are spaced apart only slightly, yet when the sections are folded in preparation for the sofa position, they are very considerably spaced apart. In the first form they may resemble Tendler, but in the latter the variance is emphatic—practically the equivalent of the medial section of the patent in suit as to spacing. Moreover, the mattress of the bed-bottom flexes just as does that of the patent and on the same lines. We concur in appellee's statement that the bed-bottom "sections are divided from each other by the lines on which they are folded and unfolded." The appellants' sofa bed-bottom No. 2 is therefore the full equivalent of appellee's three-section bed-bottom.

The utility of the device, appellants' appropriation thereof concedes. While not decisive of the question of invention, the commercial success of the patented sofa-bed adds probability to its patentable character. None of the alleged prior art devices have survived, if, indeed, any of them ever went into commerce. Both the sofa-bed of the patent and that of the appellants have found considerable favor in the market.

The foregoing, re-enforced by the presumptions growing out of the grant of the patent, lead us to the conclusion that the patent is valid, and that both of the claims in suit are infringed by each of appellants' sofa-bed forms.

The decree of the District Court is therefore affirmed.

BUSH & LANE PIANO CO. v. BECKER BROS.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 265.

1. PATENTS ⚷318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS—COST OF PRODUCTION.

A corporation infringer cannot reduce the amount for which it is liable as profits of the infringement by voting the greater part of its gross profits as salaries to its officers, who with the president's wife were the only stockholders; but in such case the court will determine upon evidence the usual cost of superintending and managing the business, and only such amount will be allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 576; Dec. Dig. ⚷318(6).]

2. PATENTS ⚷318(3)—INFRINGEMENT OF DESIGN PATENT—PROFITS RECOVERABLE.

On an accounting for profits made by an infringer of a patent for a design of a piano case, the evidence showed the profits made from the sale of pianos having cases of the patented design, and also the cost of such cases and of the completed instruments; but there was no instance in which either the case or the mechanism was sold separately, and no evidence from which it could be determined to what extent the use of the patented design contributed to the sales. *Held* that, under Act Feb. 4, 1887, c. 105, § 1, 24 Stat. 387 (Comp. St. 1913, § 9476), complainant was entitled to recover all of the profit made on the cases as the "article to which the design had been applied," and that on the evidence the court properly awarded that proportion of the total profits which the cost of the case bore to the cost of the completed piano.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 570, 571, 575; Dec. Dig. ⚷318(3).]

Ward, Circuit Judge, dissenting.

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

Suit in equity by the Bush & Lane Piano Company against Becker Bros., a corporation. From a decree awarding damages for infringement of a patent, both parties appeal. Affirmed.

For prior opinion, see 222 Fed. 902, 138 C. C. A. 382.

Cross-appeals from a decree awarding to plaintiff damages for infringement of its design patent, No. 37,501. The patent in suit covers a "design for a piano case." Defendant made and sold 958 pianos for $158,302.95. The factory cost to defendant of that number of pianos was (by its own books) $113,044, and the expense of marketing, with allowance for overhead charges, brought up production cost to $122,441.98, leaving a profit of $35,860.95, on the pianos containing the infringing design.

It was proven that the piano cases (as distinct from the piano mechanism) were assembled and finished by defendant from partly prepared material procured from other manufacturers, that the construction of the finished piano was such that the case and works were merely component parts of an integral whole, and that there was no instance of a sale of a piano without a case, or a case without works. The names indicate no more than two portions of a product commercially unitary.

This cause was before this court in 222 Fed. 902, 138 C. C. A. 382, and was remanded for further proceedings before the master. By his report the court below was informed of the cost of the piano case and of the completed instrument, as well as the profits above set forth. Thereupon decree was en-

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

tered for that proportion of the profits which the cost of the case bore to the cost of the completed piano. The appeal of defendant assails the method of fixing profits. Both parties complain of the amount awarded; plaintiff demanding all the profits derived from all pianos containing the patented design, and defendant contending that no more than $250 can be granted. The other matters raised by assignments of error require neither mention nor comment.

John J. O'Connell, of New York City, for plaintiff.
John McCormick, of New York City, for defendant.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge (after stating the facts as above). [1] The piano business of Becker Bros. is an incorporation of the trade created by Jacob H. Becker, its president. The stockholders have always been Becker himself, his wife, and his attorney. The corporate books of account show that Becker drew on the pay roll only $15 weekly, in what capacity does not appear. At the year's end, the excess of receipts over expenses was for a time transferred to the "Capital Account of Jacob H. Becker." This practice continued until after this suit was threatened, if not begun, when the end of the year was marked by charging up salaries to president and secretary (the attorney), which for the year 1912 produced an apparent loss of over $20,000. The justification for this procedure is a directors' vote that J. H. Becker should receive for his services 85 per cent. of gross profits, and the secretary 5 per cent. Whether this vote was taken and entered on the very informal minute book of this corporation before or after suit brought is a matter of contest, into which we need not enter, because it makes no difference when 90 per cent. of gross profits was voted to the president and secretary for services. Such disposition was but one method of distributing earnings to stockholders in a "close corporation" (as Becker called it) which has never paid a dividend. The formality was unnecessary, for if the owners of the concern drew 90 per cent. of profits, it made no difference to them by what name their gains were called.

Defendant's contention that it is only answerable for such profits as remain after paying out nearly all the difference between expenses and receipts in salaries credited at year's end is absurd. The District Court rightly took evidence as to the usual cost of superintending and managing a business of the kind and extent shown by Becker himself, added that to factory cost of product, and, having thus fixed manufacturing and selling expense, credited the same against receipts acknowledged by Becker. The difference is the profit of the business.

[2] The question as to how to ascertain a patentee's share in the gains of an infringer, when the infringement constituted but a part, possibly a small part, of the business from which profits flowed, has several times received our attention on occasions other than the first appeal in this cause. Tuttle v. Claflin, 76 Fed. 227, 22 C. C. A. 138; Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250; Westinghouse v. New York Air Brake Co., 140 Fed. 545, 72 C. C. A. 61; Force v. Sawyer-Boss Mfg. Co., 143 Fed. 894, 75 C. C. A. 102; Un-

derwood, etc., Co. v. Stearns & Co., 227 Fed. 74, 141 C. C. A. 622. Whether the decree below is consonant with these rulings as modified or enlarged by Westinghouse v. Wagner, etc., Co., 225 U. S. 617, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, Dowagiac, etc., Co. v. Smith, 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398, and Hamilton-Brown, etc., Co. v. Wolf Bros. Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, is one way of putting the chief problem here presented.

There is said to be a radical difference between the principles governing recovery on design, as compared with other, patents. This is thought to arise from the act of February 4, 1887. That act (after granting $250 for any infringement of design) provides that in case the total profit made by an infringer from the manufacture or sale of the article or articles to which the design has been applied exceeds $250, the infringer shall be further liable for the excess of such profit over and above $250. Plaintiff asserts that, having shown infringement by something sold with and as part of a piano, the "article to which the design" was applied must be the whole piano. Defendant insists that under the statute all recoveries for design infringement are penalties, and therefore strictissimi juris; consequently, plaintiff not having shown any separate or special profit derived from the case, recovery can be $250 only, because it was to the case, and not to the piano as a whole, that the design was applied.

As pointed out on the previous appeal, the act of 1887 was intended to mitigate the harsh rule of the Dobson Cases, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63. It is true that in Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, the minimum recovery of $250 was said to be "in the nature of a penalty," and it has usually been referred to as a penalty since that time. Lichtenstein v. Phipps, 168 Fed. 62, 93 C. C. A. 483; Frank v. Geiger (C. C.) 121 Fed. 126. But when a design patentee seeks to recover more than $250, because either he lost a greater sum by the infringement, or the infringer made a greater profit thereby, no reason is seen for departing from the construction of the statute announced by us in Untermeyer v. Freund, 58 Fed. 212, 7 C. C. A. 190:

"The manifest purpose of Congress was to enlarge the remedy against infringers of design patents, and to declare that the measure of profits recoverable on account of the infringement should be the total net profits upon the 'whole article.'"

But there is no statutory definition of the phrase "whole article." Each litigation presents its own problem; it is impossible to define in advance. Probably each solution depends on the relation to the business whole of the part embodying the patent, and that relation must be considered from all viewpoints, technical, mechanical, popular, and commercial. Thus a patented design for a "portable house" would seem to apply to the whole structure; otherwise, if for an "entrance door." A patent for a "book binding" cannot, either justly or logically, be so identified with the entire book as to give all the profits on a work of literary genius to the patentee of a binding, although the binding was manufactured with and for that one book, and has no separate commercial existence. The binding and the printed record of thought respond to different concepts; they are different articles.

Accordingly we held on the former appeal herein that the article to which the patented design had been applied was the piano case, and all the evidence taken since mandate confirms that view.

Impediments to recovery of both damages and profits have arisen, not so much from difficulty in ascertaining in what the infringing thing or article consisted, as in assigning to that infringement any particular or specified portion of the gains made or prevented by a defendant's wrongdoing. The main source of such difficulties has been the narrow field of evidence, suggested by counsel or approved by the courts, in endeavors to precisely assign profits or damages to their source; after the act of infringement, the thing or article containing the infringement and the existence of profits or losses have been amply demonstrated. Great hardship has been wrought by the rule of impossibility enunciated in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, concerning the popularity of which case with infringers we entirely agree with the remarks of the court in Yesbera v. Hardesty, 166 Fed. 120, 92 C. C. A. 46. The other extreme is to treat an infringer as a trustee ex maleficio in the manner approved in Westinghouse, etc., Co. v. Wagner Co., supra.

It is not often that giving all the profits to the patentee can be justified, as in Wales v. Waterbury Co., supra, on the ground that there would have been no profits, had it not been for the appropriation of the patented idea. The enormous increase in improvement patents and minor inventions has of late greatly accentuated these long-recognized obstacles.

Dowagiac v. Smith, supra, related to an assessment of damages and a mechanical patent; but the court pointed out that the introduction of evidence as to what would have been a reasonable royalty should be regarded as a proper method of ascertaining damages, having regard to the nature of the invention, its utility, advantages, and extent of use involved. Such evidence was declared to be "quite as admissible as that of an established royalty." There is no reason why this view of proper evidence should not be applied to the estimation of profits, as well as the ascertainment of damages.

There is here ample proof that profit was derived from the use of plaintiff's design, which was chosen because it gave to the piano something which the trade demanded, namely, a "massive appearance." It also appears from the whole testimony (which largely consists of Becker's admissions and opinions) that there was just as large profit (proportionally) on the ornamented and infringing casing, which attracted the customer's eye, as upon the piano mechanism, which pleased the ear. The cost of each separate element of the finished product is known, and there is no difference perceivable between admitting expert opinions as to a proper royalty and similar opinions as to the origin and expense of the constituent parts of a piano. Indeed, as between expert opinions upon royalties and the statements of expert manufacturers and accountants, we consider the latter rather more reliable and persuasive.

Since, therefore, the plaintiff has shown a real profit attributable in some degree to the infringed design, the ends of justice are best served by apportioning, and thus separating, profits which were derived from the investment in infringment. Exactly this method was approved in Herman v. Youngstown Car Mfg. Co., 216 Fed. 607, 608, 132 C. C. A. 612; and of it the appellate court for the Sixth circuit remarked that:

"Semi-independent parts [of the whole device] may each involve substantially the same cost of material and labor and may each contribute equally to the final marketability. In that event, an equal division of the profits among these parts is both arbitrary and reasonable; arbitrary because of its form, but reasonable because obviously fair and just."

The Circuit Court of Appeals for the Sixth Circuit in Underwood, etc., Co. v. Fox, etc., Co., 220 Fed. 887, 136 C. C. A. 446, has referred to this decision with approval. We think there could be no better set of facts for the application of this method of separating or segregating profits than is presented by this case.

Some phrases in the opinion of this court upon the former appeal herein assumed for purposes of argument that the piano case could be shown to be a separate thing with possibly a separate market from the action or mechanism. This appears unsupported by the evidence; but it makes no difference in the rule of law, when once the article to which the design was applied has been ascertained.

It is not held that such evidence as was here received is always the best, nor that the method pursued is preferable to all others, nor that, where other and better means of measuring liability exist, they can be neglected. But it is held that this method of allotting profits in correspondence to cost of production between the whole and its parts is permissible.

As both parties have appealed, the decree below will be affirmed, without interest, and without costs in this court.

WARD, Circuit Judge (dissenting). The bill in this case was filed expressly upon the act of February 4, 1887. That act does not apply to all infringements of design patents, but only to such infringements as are willful and deliberate. Such infringements are punished by giving the patentee $250, even if no profits have been made by the defendant on the article manufactured or sold to which the patented design was applied, together with all profits, if any have been made, on the article in excess of that sum. These provisions are penalties, and have been so regarded in Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426; Monroe v. Anderson, 58 Fed. 398, 7 C. C. A. 272; Lowell v. Hogg (C. C.) 70 Fed. 787; Fuller v. Field, 82 Fed. 813, 27 C. C. A. 165; Gimbel v. Hogg, 97 Fed. 791, 38 C. C. A. 419.

The first section of the act is as follows:

"Sec. 1. *Unauthorized Use of Patented Design—Penalty and Liability—Suits.* That hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of 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; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any Circuit Court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement."

The second section provides that nothing in the act contained shall limit any remedy at law or in equity that the owner of a design patent might have, had it not been passed, except that he shall not twice recover the defendant's profits. Accordingly a patentee whose design patent has been willfully infringed may either pursue remedies existing before and outside of the act of 1887 or he may sue under that act. If he takes the latter course, he is bound by the act. Its purpose was to relieve a design patentee, in the case of a deliberate and knowing infringement, from any obligation to prove what part of the wrongdoer's profits were due to the infringement. If there were no profits on the article manufactured and sold, or if they were less than $250, the patentee could recover that sum. If they were more than that sum, then all in excess of it. This court, speaking through Judge Shipman, in Untermeyer v. Freund, 58 Fed. at page 211, 7 C. C. A. at page 189, said of the case of Carpet Co. v. Dobson (C. C.) 10 Fed. 385:

"Upon appeal, the Supreme Court disagreed with the conclusion of the Circuit Court, and held that the complainant must be required to establish the actual damages or profits by trustworthy legal proof; and, as there was no evidence in the case of the value which the patented designs had contributed to the infringing carpets, the decree must be reversed, and nominal damages only should be awarded. Dobson v. Carpet Co., 114 U. S. 439 [5 Sup. Ct. 945, 29 L. Ed. 177]. The statute of 1887 was passed in consequence of this decision. The manifest purpose of Congress was to enlarge the remedy against infringers of design patents, and to declare that the measure of profits recoverable on account of the infringement should be considered to be the total net profits upon the whole article. A construction which should limit a recovery above $250 to the amount which the complainant could clearly establish to be the value which the design had contributed to the infringing carpets would be at variance, not only with the apparent legislative intent, but with the language of the statute. The rule which Congress declared for the computation of profits was the total profit from the manufacture or sale of the article to which the design was applied, as distinguished from the pre-existing rule of the profit which could be proved to be attributable to the design."

A great deal that is said in the opinion of the court would be perfectly applicable if the suit in this case were not under the act of 1887, which made an entirely new rule to cover cases of willful infringement of design patents. No light is afforded by decisions in cases of infringements of other patents, especially upon the question of damages as distinguished from profits.

If the article sold to which the patented design was applied in this case had been the piano, then the complainant patentee would have been entitled to all the defendant's profits on the piano over $250, as Judge Hazel originally held. As, however, this court on appeal has held that the article sold was not the piano, but the piano case, the question is: What profits did the defendant make on the sale of the case? It is conceded, and indeed is obvious, that it is impossible to prove any such profit separately. The design contributes only to the selling of the piano; it does not affect either its tone, its durability, its economy, or its use. Therefore I think all the complainant can recover in this case is $250. The method adopted by the court below on the accounting and approved by this court is purely arbitrary. To say that the design contributes to the profits in the proportion that the cost of manufacturing the case bears to the cost of manufacturing the whole piano is a pure guess. It seems to me that the logical result of the opinion of the court should be that the complainant recover all the defendant's profits on the piano. We should not be dismayed by the consequences of a statute whose construction is plain.

HERZOG v. CHARLES KELLER & CO., Inc.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 243.

1. PATENTS ⚿328—VALIDITY AND INFRINGEMENT—METHOD OF FORMING CUFF BUTTON.
   The Herzog patent, No. 979,163, for a method of forming cuff buttons, construed, and *held* not infringed.

2. PATENTS ⚿328—VALIDITY AND INFRINGEMENT—CUFF BUTTON.
   The Herzog patent, No. 973,864, for a cuff button, construed as it must be to sustain its validity, *held* not infringed.

3. PATENTS ⚿20—INVENTION—UNITING SEPARATE PARTS IN ONE.
   The case is rare in which the bare idea of consolidating several members into one involves invention.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 20–22; Dec. Dig. ⚿20.]

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

Suit in equity by Joseph L. Herzog against Charles Keller & Company, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion below of Learned Hand, District Judge:

[1] I shall first consider the method patent, which I find not to have been infringed. The claims are all of the most specific character; they speak of forming the disks from the thin portions and the connecting bar, portion, or metal from the rib of a "ribbed blank." This by reference to the figures is

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plain language; it is still plainer when one examines the language of the specification. I start with "the blank *A*, having a rib or thickened portion *B* extending transversely across the same, as illustrated in Figs. 1, 2, and 3" (lines 64–67). Again, "the disks *D* and *E* being formed from the thin portions of the blank *A*, and the thickened portion *F* from the rib *B* of the blank *A*" (lines 23–76). Again, "it will be seen that thus far the disks *D* and *E* with their flattened edges *G–G* lie in substantially the same plane" (lines 82–85). All this language is wholly inapplicable to the defendant's process. The modifications suggested in the patent also both start with the same blank.

The plaintiff invokes the doctrine of equivalents, which as a doctrine no one denies. It does not apply here, because the method is not substantially the same. The patented button is to be made with the two disks in one plane, while the defendant's disks are made in parallel planes. The patented button is to be made with two disks of substantially the same thickness as the thin portion of the blank: one of the defendant's disks must be hammered out from a thick rib, while the other disk is not properly a disk at all. No one can call the defendant's I-beam a "ribbed blank" without altogether deserting the specifications. The plaintiff insists that this may be done if we measure the I-beam through its longer axis; then it may be called a "ribbed blank," but it is as little a "ribbed blank" measured one way as the other. The language is plain enough, till we treat it sophistically. If all these specified features be called unessential to the patent, I confess that I can see nothing left but the process of making the button by the use of dies out of an original blank, taken as nearly as convenient to the eventual shape. That was not the patent granted; it would not have been valid, if it had been granted. The doctrine of equivalents would destroy the patent itself.

Therefore I dismiss the bill as to the process patent for noninfringement, without passing upon its validity. It may well be that invention was required to devise the process of each party, but the first inventor could not cover all other processes arriving at the same result.

[2] I next come to the manufacture patent, which seems to me to be invalid unless so construed that the defendant does not infringe. The claim consists of three elements: First, a single piece cuff button; second, two disks connected by a bar; and, third, the bar merging into the disks at points within their outer edges. Solid cuff buttons were not in themselves new (Hills, 543,244), and the file wrapper shows that the thickness of the bar relative to the disks and the merging of the metal into a disk was not sufficient in the judgment of the examiner to differentiate from Hills. The single claim was allowed only in that the metal of the bar merged into the disks at points within their outer edges. This feature is, however, shown in three patents now in evidence, one of which was before the examiner, Allen, 645,307; the other two are Henerlau, 778,241, and Ball, 944,251. A close scrutiny of figures 2 and 4 of Henerlau show that each leg of the bar runs into the disk at points within its outer edge, probably as much within as the patent in suit. See Fig. 2. The same feature is even more clearly shown in Ball, which has a turned-up edge.

[3] The only possible invention involved in the patent is to make out of one piece Henerlau's or Ball's button. In view of Hill's patent for a one-piece button, this can hardly be regarded as invention; indeed, it would scarcely have been invention even if Hill had not shown a one-piece button. Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039; General Electric v. Yost, 139 Fed. 568, 71 C. C. A. 552; Lawson v. Metal Products Co., 209 Fed. 51, 126 C. C. A. 193. I do not mean that these cases decide that it is never invention to consolidate into one piece what has formerly been composed of three pieces. This may at times result in a consolidation of functions. The case must, however, be very rare in which the bare idea involves invention to consolidate several members into one. To overcome difficulties of manufacture involved in such a change may involve the very highest invention: but, since the patent does not concern such difficulties, it must rest solely upon the idea of the integrity of the button.

Nor do I think it fair to attribute the success of this button to this idea.

Its success rather, it seems to me, must be attributed to the fact that an integral button could be manufactured cheaply by ordinary machine processes. The success of Herzog's button may well have depended upon his being the first to secure a cheap process for an integral button.

However, it does not follow that this patent is invalid. The phrase of the claim, "merging into the metal of which the disks are formed," is defined in lines 70 to 80, particularly in lines 75 to 80, as follows: "This metal, therefore, not only serves to strengthen the article at the junction of the ends of the post and disks, but also tends to reinforce and strengthen the disks themselves." The word "merging" in the claim may be held to include the particular form of button shown in the figures and described in the language just quoted. If so, it may be valid, but the post of the defendant's button does not merge in such way as to strengthen the disks themselves.

It is urged that one cannot justly treat a combination patent by treating its elements as though separate. To this I agree, but I know no other way of determining the validity of a combination patent than to see how far the prior art shows all the elements in combination. If it shows all but one, and the necessary step does not involve invention, the combination itself is void. That seems to me to be the case here.

The bill will be dismissed for noninfringement, with costs.

Archibald Cox, of New York City, for appellant.

Livingston Gifford and Charles S. Jones, both of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and VEEDER, District Judge.

PER CURIAM. Affirmed, with costs, on the opinion of Judge Learned Hand.

IOWA WASHING MACH. CO. v. MONTGOMERY WARD & CO., Inc.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 252.

PATENTS ⚷328—VALIDITY AND INFRINGEMENT—WASHING MACHINE.

The Stocking and Mendenhall reissue patent, No. 12,733 (original No. 762,851), for a washing machine, is valid, and covers an invention of great utility and efficiency; also *held* infringed.

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

Suit in equity by the Iowa Washing Machine Company against Montgomery Ward & Co., Incorporated. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 227 Fed. 1004.

The decree of the District Court held valid reissued letters patent No. 12,733 granted to Stocking and Mendenhall, December, 1907, for a washing machine and that claims 3, 4, and 7 of said patent are infringed by the defendant's machine, as exemplified by complainant's Exhibit No. 7, sold by the defendant in the state of New York.

Ralph L. Scott and C. A. L. Massie, both of New York City, and Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for appellant.

Robert H. Parkinson and Wallace R. Lane, both of Chicago, Ill., for appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

COXE, Circuit Judge. That the patentees have invented a washing machine which is a manifest improvement over anything which preceded it in the art is too obvious for discusson. Very soon after the original patent was issued it became apparent that its single claim, which contained 20 separate elements, was absolutely valueless as a protection against infringers. Any one who had wit enough to omit one of these elements could infringe the claim with impunity. The patentees soon became aware of the fact that though they had made an invention of unusual merit, by solving the problem of a cheap and efficient washing machine, their patent offered them no protection whatever. Their only remedy was by reissue and that they were diligent in its prosecution is shown by the fact that the original was dated June 14, 1904, and the application for the reissue was filed February 14, 1905, eight months thereafter.

That the patentees made a most valuable contribution to the art is manifest; that the claim afforded them no protection is also manifest. The omission of one useless element avoided infringement. Prior to the passage of the statute regulating reissues, the Supreme Court, speaking through Chief Justice Marshall, said in the case of Grant v. Raymond, 6 Pet. 218, at page 243, 8 L. Ed. 376:

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"The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If, by an innocent mistake the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery, without paying the stipulated consideration. The attempt would be disreputable in an individual, and a court of equity might interpose to restrain him."

From that time to the present it has been the purpose not only of the courts, but of Congress as well, to protect an honest inventor who, through no fault of his, is deprived of the fruits of his invention. There is, in our opinion, no doubt as to the utility and efficiency of the invention. Any one who has seen it in operation as compared with the prior art machines must be convinced of this proposition. Some of its advantages are pointed out in the appellee's brief as follows:

"Continuous oscillation of the agitator can be effected by either pushing or pulling the hand lever in one direction only. It is unnecessary to bend over the tub when operating it, or bend at all, as in turning a crank, and the gears and other rotating mechanism, instead of inducing a tendency to capsize, as they would if mounted on the side of the tub, give increased stability and insure against any such tendency. Instead of exposing to injury the fingers and clothing of the operator or others (a very substantial peril if rotating gear were operated on the side of the tub by persons unaccustomed to machinery), they are completely housed and sheltered by their positions under the tub, within the circuit of the tub legs, where they neither threaten nor incur harm."

We have then, first, a meritorious invention which has proved to be popular and remunerative; second, a patent which, through inadvertence, accident or mistake, and probably through all these conditions combined, is rendered utterly worthless as a protection; third, an infringer who is making large gains out of sales of the patented device. In such circumstances the effort of the court should be to brush aside technicalities and give the inventors the full fruits of their invention.

We are unable to find that any rights were acquired by the defendant because of the inoperative claim of the original patent. Its act was an open appropriation of the complainant's property when the expiration of prior patents enabled it to use the machines of those patents legally if it had desired to do so. Instead of using the prior art machines it copied all the valuable features of the patent in suit. The defendant acquired no rights based upon the original patent. It began its infringement after the reissue and cannot successfully contend that it invested its money relying upon the invalidity of the patent, or the insufficiency of the claim properly to protect the invention. It entered the field deliberately and with full knowledge of all the facts.

We think the decree is correct and should be affirmed.

ÆOLIAN CO. v. WANAMAKER.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 184.

PATENTS ⚷328—INVENTION—PIANO.

The Votey patent, No. 780,078, a combined pneumatic and manually operated grand piano, is for the adaptation of the pneumatic mechanism long in use in upright pianos to use in grand pianos, which could be done by a skilled mechanic, and is void for lack of patentable invention.

Appeal from the District Court of the United States for the District of Connecticut.

Suit in equity by the Æolian Company against John Wanamaker. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 221 Fed. 666.

The decree of the District Court dismissed the bill alleging the validity and infringement of letters patent No. 780,078, granted to Edwin S. Votey January 17, 1905, for improvements in pianos.

George D. Beattys, of New York City, and George D. Seymour, of New Haven, Conn., for appellant.

Frederick P. Fish, John P. Bartlett, J. L. Stackpole, and R. C. Mitchell, all of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

COXE, Circuit Judge. The alleged invention relates to combined pneumatic and manually operated grand pianos, the object of the patentee being to enable a manually operated grand piano to be played by pneumatic apparatus and devices incorporated in the construction of the piano, without interfering with the manual playing devices. In brief, the patent seeks to monopolize the playing of a grand piano by pneumatic apparatus.

The patent contains 63 claims and of these 32 are said to be involved. In the view which we take of the present controversy it will only be necessary to examine a single claim. The first claim is as follows:

"1. In a combined pneumatic and manually operated grand piano and in combination with the frame and sounding-board thereof, pumping mechanism secured and supported upon said frame beneath the said sounding-board and provided with actuated mechanisms extending longitudinally of the frame and connected with actuating-treadles."

This claim, like all the rest, seeks to monopolize the old pneumatic playing devices which had long been in use in upright pianos, by placing them in grand pianos.

There can be no invention in transferring a mechanism from one machine to another, where it accomplishes the same result, because in one machine it is horizontal and in the other perpendicular. The mo-

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

ment the demand for a grand player piano became urgent the service of the skilled piano workman was in demand. To change the mechanism from one to the other did not require inventive genius; any skilled piano workman could make the change. If the claim dealt broadly with all pianos it will hardly be pretended that they could be sustained in view of the numerous pneumatic pianos of the prior art. The question, therefore, reduces itself to this: Can mechanism which was well-known and free to all, when applied to other types of pianos, become the subject of a monopoly when applied to a horizontal instead of a perpendicular piano? If so, the question of invention will depend not on whether any new and useful result has been produced but on whether the precise combination, no matter how plain and obvious it may be, had ever been produced before.

We cannot resist the conclusion that when a demand came for a pneumatic grand piano player the skilled mechanics of the piano factories were perfectly competent to make the change from the upright and that doing so did not involve invention.

The decree is affirmed with costs.

MURRAY v. C. L. GREENO CO.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2809.

PATENTS ⚷234—INFRINGEMENT—WHAT CONSTITUTES.

Where the only invention of complainant's patent No. 692,535 for a spring seat consisted in the particular means for attaching the springs to their supports, the springs being screwed through four perforations in an arched metallic support, all of which, being in a horizontal plane, the spring-ends were distorted, and the springs securely locked in place by the top and bottom friction induced by the rise of the spiral, a spring seat, whereby the spring coils were inserted through four perforations, but which were not in the same horizontal plane, so that the spring had to be locked in its position by compressing the lower coil against the support, does not constitute an infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. ⚷234.]

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

Suit by William A. Murray against the C. L. Greeno Company. From a decree for defendant, complainant appeals. Affirmed.

W. F. Murray, of Cincinnati, Ohio, for appellant.

W. R. Wood, of Cincinnati, Ohio, for appellee.

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

PER CURIAM. Suit for infringement of United States patent, No. 692,535, issued February 4, 1902, to Murray for spring seat. The district court found noninfringement.

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

The patent has already been twice considered by this court, and held to disclose patentable invention only in the particular means shown for attaching the springs to their support. These means comprise four perforations in an arched metallic support, through which the lower end of the spring is screwed; these perforations being all in the same horizontal plane, the spring-end is thereby distorted and the spring securely locked in place by the top and bottom friction induced by the rise of the spiral. Murray v. D'Arcy Co., 161 Fed. 352, 88 C. C. A. 364; Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 C. C. A. 371.

In the D'Arcy Case defendant was held not to infringe because the locking means of the patent in suit were absent. In the Detroit Spring Company Case defendant was held to infringe because it employed those means.

In the instant case, while the lower coil of defendant's spring is inserted through four perforations in the arched strip, these perforations are not in the same horizontal plane; on the contrary, the difference between the horizontal planes of the two sets of perforations is the same as the rise of the spiral. There is thus no appreciable distortion of the spring due to its entering the support; and it is not held in position by the friction due to the rise of the spiral, for there is no such appreciable friction. The spring is required to be locked in position by compressing the lower coil of the spring against the support. Defendant's device thus lacks the characteristic feature of complainant's device, constituting its only claim to patentability. The district court properly held that defendant does not infringe.

It becomes unnecessary to consider the alleged new anticipatory reference.

The decree of the district court is affirmed, with costs.

BURKE ELECTRIC CO. v. INDEPENDENT PNEUMATIC TOOL CO.

(Circuit Court of Appeals, Second Circuit. May 16, 1916.)

No. 117.

PATENTS ⚷76—VALIDITY—PRIOR SALE—RESALE—"ON SALE."

Within Rev. St. § 4886 (Comp. St. 1913, § 9430), denying patents for an article which has been on sale for more than two years prior to the application, articles for which a patent is sought, on hand ready to be delivered to any purchaser, are "on sale," regardless of whether any of them are sold; but where orders are taken only for subsequent delivery, the article is not on sale at that time, though the invention be complete.

[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.]

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

On petition for rehearing. Petition denied, and former opinion affirmed.

For former opinion, see 232 Fed. 145, — C. C. A. —.

Dyer & Taylor, of New York City (J. Edgar Bull, of New York City, of counsel), for appellant.

Edwards, Sager & Wooster, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The proofs in this case show that the patented motors were ordered two years and a few days before the application for the patent was filed, but were not delivered and could not have been delivered until a time within the two-year period. The question is as to the proper construction of the words "not in public use or on sale" in Rev. St. § 4886 (Comp. St. 1913, § 9430). The combination of the words indicates that the sale contemplated is such as creates an opportunity for present public use. It is a situation quite different from the reduction to practice necessary to sustain anticipation. Judge Learned Hand apparently had this in mind when he held that the completion of the invention, though very important in a competition as to priority, was not important upon the question whether the public was using or given the opportunity of present use of the invention. The provision ought to be construed favorably to patentees. If patented articles are on hand ready to be delivered to any purchaser, they are on sale, whether any of them has been sold or not. But, if they are not, they cannot be said to be on sale within the meaning of the act, though the invention itself has ceased to be experimental and is complete. This certainly should be true of articles which can be carried in stock, like the motors in question. Such was the case in Covert v. Covert (C. C.) 106 Fed. 183; National Cash Register Co. v. American Cash Register Co., 178 Fed. 79, 101 C. C. A. 569. Although in Dittgen v. Racine Co. (C. C.) 181 Fed. 394, it was the practice not to make the patented articles until after they were ordered, still thousands of them

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

had been made and delivered more than two years before the inventor applied for his patent. We incline to follow McCreery v. Fan Co., 195 Fed. 498, 115 C. C. A. 408.

The petition is denied.

KEYS v. MEYER et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 264.

PATENTS ⟹328—INVENTION—NECKTIE.

The Keys patent, No. 789,696, for a necktie, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by William A. Keys against William K. Meyer, Robert L. Bacharach, and Arthur Friedheim, copartners as Meyer, Bacharach & Friedheim. Decree for defendants, and complainant appeals. Affirmed.

Kenyon & Kenyon, of New York City, for appellant.

S. Bernstein, of New York City, for appellees.

Before COXE, Circuit Judge, and VEEDER and MAYER, District Judges.

COXE, Circuit Judge. The patent in question relates to neckwear and consists in a construction of ties whereby the strain is taken from the bow or knot. Claims 2 and 3 are involved. They are as follows:

"2. As an article of manufacture, a necktie consisting of a neckband and two end portions, these end portions being adapted to form a tie, and tabs on the inner side provided with a buttonhole adapted to fit over a collar-button, said tabs being integral with the inner face of the tie, substantially as set forth.

"3. As an article of manufacture, a necktie consisting of a neckband and two end portions adapted to form a tie, and tabs made out of the same material as the inner face of the tie and integral with said inner face, said tabs provided with buttonholes adapted to fit over the collar-button, substantially as set forth."

The District Court held that the defendant did not infringe, as the claims in question must in any event be narrowly construed. We are of the opinion that the change made by the plaintiff over the prior art did not amount to invention. All that can be said of the plaintiff's necktie is that it may be a trifle more symmetrical and may fit a little better than the neckties of the prior art. As Judge Hough points out there can be no novelty, where the prior art shows two tabs each containing a buttonhole, in sewing on one long tab with a buttonhole at each end. The basic idea was in use before Keys secured his patent and he merely improved upon some of the minor details of existing ties. He added nothing fundamental to the prior ties.

The decree is affirmed.

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

UNITED STATES v. SNOHOMISH RIVER BOOM CO. et al.

(District Court, W. D. Washington, N. D. May 10, 1916.)

INDIANS ⊂⊃12—RESERVATION—BOUNDARY—TREATIES.

Treaty and executive order construed with respect to boundary of an Indian reservation on the shore of Puget Sound.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. ⊂⊃12.]

Action by the United States against the Snohomish River Boom Company and the Everett Improvement Company. On motion by defendants to dismiss. Motion granted.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

J. A. Coleman, of Everett, Wash., and Francis H. Brownell, of Seattle, Wash., for defendants.

NETERER, District Judge. The United States seeks to recover from the defendants the possession of certain tidelands situated at Port Gardner, Snohomish county, Wash. The land was sold by the state of Washington to the Everett Improvement Company as tidelands, and was by the Improvement Company leased to the Boom Company. The issue involves the construction of executive order of December 23, 1873, and the Indian treaty of 1855 (Act Jan. 22, 1855, 12 Stat. 928). Section 2 of the treaty provides, among other things:

"That the amount of two sections, or 1,280 acres, on the north side of Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, * * * all of which tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use. * * *"

And further that:

"There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township, of land on the northeastern shore of Port Gardner, and north of the mouth of Snohomish river, including Tulalip Bay and the before-mentioned Kwilt-seh-da creek. * * *"

And article 4:

"The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. * * *"

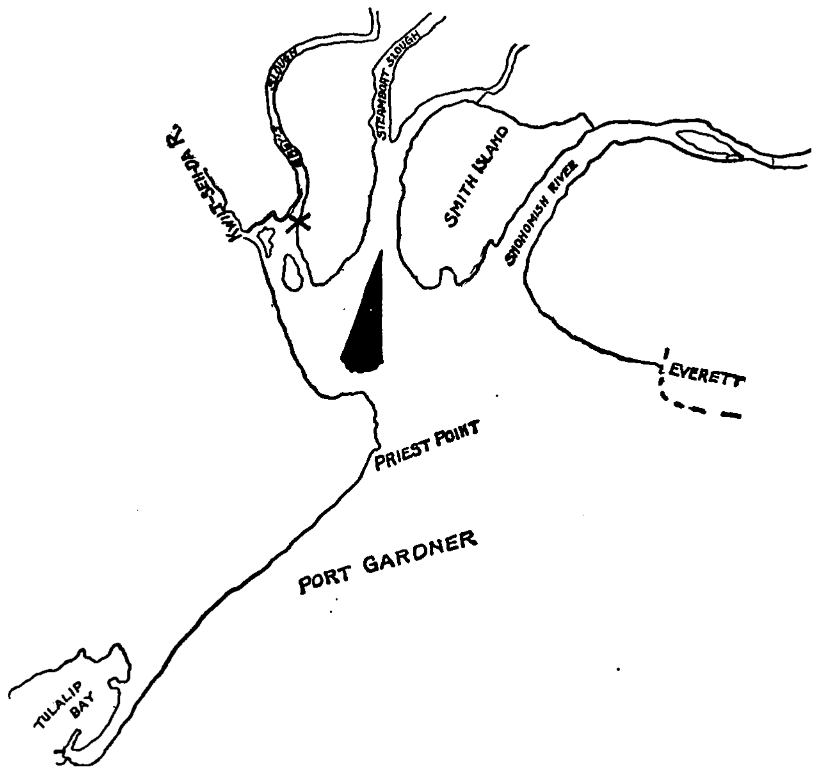
Article 5:

"The right of taking fish at usual and accustomed grounds and stations is further secured to the Indians. * * *"

President Grant, December 23, 1873, by executive order, fixed the boundaries of the Tulalip Indian reservation pursuant to the treaty, as follows:

"Beginning at low-water mark on the north shore of Steamboat Slough, at a point where the section line between sections 32 and 33 of township 20 north, range 5 east, intersects the same; thence north; * * * thence west * * * to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore to the shores of Tulalip Bay and Port Gardner, with all the meanderings thereof, and across the mouth of Ebey's Slough to the place of beginning."

The following sketch exhibits the land:



It is contended by the plaintiff that the meander line along the shore should extend from the most southerly point of the reservation (Priest Point) across the channel to Steamboat Slough, which would include the wedge-shaped tidelands colored black on the sketch; whereas the defendants contend that the boundary follows low-water mark along the channel to the mouth of Ebey's Slough, which, it is contended, is above the lands in question, and thence to the point of beginning. At the conclusion of the evidence defendant moved to dismiss.

According to the meander notes of the United States government, the mouth of Ebey's Slough is practically at "X," indicated upon the sketch. The testimony shows that the land in question is a part of the tidelands which extend from and adhere to Smith Island; that these lands are separated by a deep-water channel on the west and north, and are independent of the reservation; that Steamboat Slough, which is navigable, is north of the land, and the water of Port Gardner is west and forms a navigable channel between the reservation and the land in question entering into Ebey Slough. I think it must be apparent from an examination of the treaty and likewise of the executive order, that the purpose was to grant to the Indians tillable land with such accretions as would naturally belong thereto. I do not think that it could have been the intention of the executive order to have included tidelands which were entirely separated and segregated from the uplands of the reservation. If it had been the intention to grant any special water privileges across the navigable water upon which the reservation borders, fitting language would have been employed. A casual reading of the executive order, together with a consideration of the mouth of Ebey Slough as fixed by the United States government notes, however, is conclusive upon the plaintiff. The mere fact that the executive order, in general terms, reads "southeasterly" with the line of low-water mark "along said shore * * * of and across the mouth of Ebey Slough to the place of beginning," cannot be read to extend across the waters of Port Gardner, but must be carried to the mouth of Ebey Slough, even though the course may not be directly southeasterly to the point of commencement.

The motion to dismiss is granted.

PACIFIC COUNTY et al. v. ILLINOIS SURETY CO.

(District Court, W. D. Washington, S. D. April 15, 1916.)

No. 1962.

1. PRINCIPAL AND SURETY ⚷59—OBLIGATIONS OF SURETY—CONSTRUCTION.
   While there is a liberal construction of liability of a surety for compensation, a surety company for a consideration is entitled to have its contract interpreted by the ordinary rules of law, and its liability cannot be extended beyond the scope of the contract.
   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. ⚷59.]

2. PRINCIPAL AND SURETY ⚷71—LIABILITY OF SURETY—CONSTRUCTION.
   Where bond given by a bank in which county moneys were deposited was conditioned that the bank should from July 1, 1914, to July 1, 1915, in due and ordinary course of business pay all moneys deposited and should from July 1, 1914, keep and hold harmless the county treasurer from all liability of loss which might accrue by reason of the deposits, the bond did not render the surety liable for nonpayment of county moneys deposited during the years 1914-15, and remaining on hand after July 1st; the bank having fulfilled all conditions up to that time.
   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 117-119; Dec. Dig. ⚷71.]

At Law. Action by Pacific County and another against the Illinois Surety Company. On demurrer to complaint. Demurrer sustained.

John I. O'Phelan, of Raymond, Wash., and Bates, Peer & Peterson, of Tacoma, Wash., for plaintiffs.

Piles & Howe, of Seattle, Wash., for defendant.

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

NETERER, District Judge. A surety bond was executed by the defendant on behalf of the First International Bank of South Bend, Wash., to the county treasurer of Pacific county, in the sum of $10,000, which was to run one year from July 1, 1914. Various sums were deposited in the bank on behalf of the county during the year beginning July 1, 1914, and at the close of the year $51,175.14 was on hand and remained on deposit until the close of the bank on July 19, 1915. Action is commenced by the county and county treasurer to recover the amount of the bond, alleging suspension of the bank, notice of proof of loss, and demand for payment. The defendant has demurred to the complaint.

The defendant contends that its liability is limited by the express provisions of the bond and that the duration of its risk extends only for the period of one year. Plaintiffs' contention is that the defendant is liable for all deposits made and unaccounted for, irrespective of duration of time.

[1] The rule of strictissimi juris does not apply to sureties for compensation. This rule was only invoked for the protection of individuals acting gratuitously. Liberal construction of liability against sureties for value is the rule. Cowles v. United States, etc., G. Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838; American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. A surety company for a consideration is, however, entitled to have its contract interpreted by the ordinary rules of law. Gilmore & P. R. Co. v. United States Fidelity & G. Co., 208 Fed. 277, 279, 125 C. C. A. 477. And the liability cannot be enlarged beyond the scope of the terms of the contract, and where the language is unambiguous the question of construction does not enter.

[2] The pertinent part of the bond recites:

"If the said principal hereinbefore named shall, from noon of the 1st day of July, 1914, to noon of the 1st day of July, 1915, in due and ordinary course of business promptly pay to the said treasurer * * * upon demand * * * all moneys and proceeds * * * which have been or shall hereafter be deposited with, transferred to, or placed in charge of said principal, by or on behalf of the said treasurer, and shall from noon of the 1st day of July, 1914, keep and hold harmless the above named * * * as such treasurer, of and from all liability, loss, and damage which may arise or accrue against said treasurer by reason of the deposit * * * as aforesaid * * * then this obligation shall be void. * * *"

The language employed seems to be clear, and capable of conveying but one idea, and that is the limit of liability to the 1st day of July, 1915, and giving effect to every part of the contract. United States Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed. 144, 148, 76 C. C. A. 114. And applying the same rules to this as any other contract (American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 24, 80 C. C. A. 97, 9 L. R. A. [N. S.] 557, 10 Ann. Cas. 357), the intention of the parties appears to be conclusively established. The case of United States Fidelity & Guaranty Co. v. City of Pensacola, 68 Fla. 357, 67 South. 87, relied upon by plaintiffs, is readily distinguished from the case at bar, in this: That liability in that case was not limited, but the defendant obligated itself to account and pay over all moneys which may be deposited within the time, and was not merely to insure the payment by the city of its deposits during the contemplated period, but to pay over all moneys received by the bank by deposits of the city during the stated period, and this obligation continued though the time had expired during which deposits could be made under the obligation of the bond; whereas, in the instant case, the life of the bond is fixed on its face, and in view of the express stipulation of the bond it cannot be reasonably contended that liability would extend for an indefinite period during which the funds would be under the protection of the operation of the bond, and until the plaintiffs saw fit to withdraw them. United States Fidelity & Guaranty Co. v. American Bonding Co., 31 Okl. 669, 122 Pac. 142.

I think the demurrer must be sustained, and such is the order.

In re MUSGROVE MINING CO.

(District Court, D. Idaho, E. D. July 11, 1916.)

1. BANKRUPTCY ⚷59—"ACTS OF BANKRUPTCY"—STATUTE.

Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 (Comp. St. 1913, § 9587), declares that acts of bankruptcy by a person shall consist of his having transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over others, while section 3a (3) declares that one who shall, while insolvent, permit any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected, vacated or discharged such preference, shall have committed an "act of bankruptcy." *Held* that, where an insolvent confessed judgment with intent to prefer a creditor, the confession of judgment was an act of bankruptcy falling within section 3a (2), while, if the preference was effected without any intent or purpose on the part of the insolvent, the act falls within section 3a (3).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. ⚷59.

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

2. BANKRUPTCY ⚷81(4)—PETITION—SUFFICIENCY.

A petition in bankruptcy, which merely alleged that defendant confessed judgment with intent to prefer, is sufficient to charge that the confession was intended to secure a preference, without any averment of facts, and so to bring the act within Bankr. Act, § 3a (2).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 118; Dec. Dig. ⚷81(4).]

In Bankruptcy. In the matter of the bankruptcy of the Musgrove Mining Company, a corporation. On demurrer to the petition. Demurrer overruled.

Ariel C. Cherry, of Salmon, Idaho, for petitioning creditors.
O'Brien & Glennon, of Salmon, for Musgrove Mining Co.

DIETRICH, District Judge. [1] Certain of its creditors have filed a petition in involuntary bankruptcy against the Musgrove Mining

Company, to which it interposes a demurrer. The acts of bankruptcy alleged are two confessions of judgments by the mining company. No execution has been issued, but under the state statutes the judgments create liens upon all real estate owned by the debtor. Assuming that it was intended to charge acts of bankruptcy under subdivision a (3) of section 3 of the Bankruptcy Act, the mining company's objection is that it is not alleged that it failed to cause the preferences to be vacated or discharged five days before a sale or the final disposition of its property.

The petitioning creditors concede that the petition is insufficient under subdivision a (3), but contend that it does fully charge an act of bankruptcy under subdivision a (2), which provides that an act of bankruptcy by a person shall consist of his having "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." It appearing that the preference, if any there be, has been effected through a legal proceeding, the question arises as to what distinction could be made between cases covered by subdivision a (2) and those covered by subdivision a (3). If this case should be held to be embraced within subdivision a (2), would it not lie within the power of creditors to nullify the provision that a preference accomplished by a legal proceeding does not become an act of bankruptcy until notice of sale is given and the debtor fails to discharge the lien within the prescribed time? Upon consideration it is concluded that while a preference effected through judicial proceedings may fall within one class or the other, the two provisions do not necessarily overlap. The distinction is to be found in the presence or absence of an intent on the part of the debtor to give a preference, and by intent is meant an actual, and not merely a constructive, intent. If the debtor has acted in such a way as to give a preference with the intent and purpose so to do, it is quite immaterial by what means such purpose is accomplished, whether by judicial proceedings or in some other manner. In such case the act falls within a (2). Upon the other hand, if, through legal proceedings, a preference has in fact been permitted or procured, but without any intent or purpose on the part of the debtor to give it, then the act falls within the terms of subdivision a (3).

[2] The further objection that the petition is insufficient, in that it is alleged only that the confession of judgment was made with the intent to prefer, without setting forth the facts and circumstances from which such intent may be inferred, is not thought to be well taken. It would be quite impracticable to set out all the facts and circumstances upon which a party may rely to show intent, especially where, as here, it is necessary to show actual rather than constructive intent.

Accordingly the demurrer will be overruled, and the defendant will be given 10 days from this date in which to answer. In view of the great distance the parties live from any point in the district where court is held, I shall be very willing, if counsel so desire, to refer the case to a special master or examiner for the taking of the testimony. Such examiner may be a stenographer, and thus the ordinary compensation of a stenographer may cover the entire expense of such reference. It is suggested that, if possible, counsel agree upon such person and advise me.

THE SENATOR RICE.

THE RESOLUTE.

(District Court, E. D. New York. May 26, 1916.)

ADMIRALTY ⚷19—JURISDICTION—MARITIME TORTS.

A drilling platform erected upon posts or piles driven in the earth, although standing in navigable water and used for drilling in connection with the making of a channel for navigation, is a part of the land, and a suit to recover damages for injury to such platform through collision between two passing vessels is not within the admiralty jurisdiction; but damages for injury resulting from the collision to an attendant scow, from which power to operate the drills was furnished, and including demurrage for loss of use of the scow and wages of its crew during the making of repairs, are recoverable in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. ⚷19.]

In Admiralty. Suit by John D. Miller against the steam tugs Senator Rice and Resolute. On exceptions to report of master. Sustained in part, and decree for libelant.

Foley & Martin and J. A. Martin, all of New York City, for libelant.

H. H. Flemming, of Kingston, N. Y., and James K. Symmers, of New York City, for the Senator Rice.

Burlingham, Montgomery & Beecher and E. C. Rouse, all of New York City, for the Resolute.

CHATFIELD, District Judge. The facts with regard to the collision between two tows, and the resultant injury to a drilling platform standing on spuds with a scow alongside as tender, are shown in the decision rendered in this case. 212 Fed. 960. The court found fault resulting in some damage cognizable under admiralty jurisdiction.

Upon a reference the master has ruled that the scow, which was anchored independently in the river, was subject to admiralty jurisdiction, and has allowed the damages directly made up from the items of lost anchors, ropes, etc., attached to the scow.

Power from this scow was conveyed by piping to the plant, from which, by means of a rigid tube, adapted to resist the tide, the drills were actually operated. This plant consisted of a large, heavy, and firmly fixed platform, which stood upon the bottom of the river; but its four large legs, or spuds, with sharpened lower ends, were actually driven into the bottom like piles, wherever they rested upon the mud. If the structure rested upon hard bottom or rock, it would stand upon the surface. But in either case it was a stable and solid structure, and differed from one attached to piles driven in the bottom only in degree of stability.

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

Under these circumstances, the master has disallowed such damages as he attributes to injuries occurring upon or to this platform. This distinction seems to be correct. The cases of Phœnix Con. Co. v. The Poughkeepsie, 212 U. S. 558, 29 Sup. Ct. 687, 53 L. Ed. 651, affirming 162 Fed. 494, and the case of United Engineering & Contracting Co. v. N. Y., N. H. & H. Tug Transfer No. 5, The Moran, and The Lackawanna (unreported, but stated in the opinion in 162 Fed. 494), as also the case of Martin v. West, 222 U. S. 191, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592, show that injuries occurring upon a structure constituting a part of the land or carrying out land activities (Cleveland, T. & V. R. Co. v. Cleveland S. S. Co., 208 U. S. at page 321, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215) are not within the jurisdiction of the admiralty court. See, also, Postal Telegraph-Cable Co. v. P. Sanford Ross, 221 Fed. 105, in which these cases are generally discussed.

The rule apparently now well established is to the effect that a platform erected upon posts or piles and given the character of a dock or land structure, even though entirely isolated from the land and standing in navigable water, is a part of the land itself, and that acts occurring thereon are not within admiralty jurisdiction. Nor was the mere fact that the drilling was being done in connection with the making of a channel for navigation sufficient of itself to treat this entire plant as an aid to navigation, as was the beacon or buoy in the case of The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, and in the recent case of Latta & Terry Construction Co. v. The Raithmoor, 241 U. S. 166, 36 Sup. Ct. 515, 60 L. Ed. 937, decided by the United States Supreme Court on May 1, 1916, reversing 186 Fed. 849.

Hence the report of the master should be confirmed generally. Two items, however, should be allowed to the libelant which the master has excluded. The sums of $225 demurrage for loss of use of the scow, and $196.25 wages, were disallowed by the master upon the theory that the delay was caused by inability to use the platform. The master, therefore, held these items to be a part of the damage not recoverable in admiralty. But the proximate cause of all the damage was the collision. The loss of use of the scow was the loss of use of the floating vessel, and it makes no difference that the time for which demurrage is asked was coextensive with the time necessary to repair damage to something on land. If the proximate cause of the injury were something occurring on the platform, the master would be correct in his conclusion. The claimant contends that the word "damage" should be distinguished from "injury," which he claims was confined to the platform. But the "damage" in question is not the restoration or repair of the platform. It is for loss of use of the scow.

The libelant is entitled to recover in this case all the damage resulting *within admiralty jurisdiction* from the collision which happened over by the New York shore and (whether or not damage is also recovered for the losses on the platform) this court has the right to fix the loss from interference with the using of the scow itself. The item for demurrage will be allowed.

The item for wages of the crew of the scow is in the same category, but the libelant has admitted that at least one-half of these wages covered work devoted to repairing and resetting the platform, and hence one-half of the wage item will be disallowed.

The exceptions therefore will be sustained to the extent of allowing $225 for demurrage and $93.12 wages, for which the libelant may have a decree in addition to the sum of $244.49 found by the master. The libelant will be allowed a docket fee and one-half of other taxable costs.

HASTINGS et al. v. HOOG et al.

(District Court, M. D. Pennsylvania. January Term, 1915.)

No. 209-A.

1. COURTS ⚷308—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

   Where there are two or more joint plaintiffs and two or more defendants, each of the plaintiffs, having sued jointly, must be capable of suing each of the defendants in order to support jurisdiction of the federal court on the ground of diversity of citizenship, and where some of the plaintiffs are citizens of the same state as defendants the federal court has no jurisdiction.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. ⚷308.]

2. COURTS ⚷324—FEDERAL COURTS—JURISDICTION—MODE OF RAISING.

   In the federal courts, where jurisdiction is based on diversity of citizenship, the objection that the court was without jurisdiction may be raised after defendants, have answered to the merits.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 882-884; Dec. Dig. ⚷324.]

In Equity. Bill by Phillip Hastings and others against Dr. E. Hoog and others. On motion to dismiss. Motion sustained, and bill dismissed.

A. A. Vosburg, of Scranton, Pa., and J. B. Jenkins, of Carbondale, Pa., for plaintiffs.

John J. Toohey, of Scranton, Pa., for defendants.

WITMER, District Judge. [1] Defendant comes by motion to dismiss this suit for want of jurisdiction. The bill discloses the fact that not all of the parties, either plaintiffs or defendants, are citizens of states other than Pennsylvania. In fact, all are citizens here, with the exception of one of the numerous plaintiffs named in the bill. Where there are two or more joint plaintiffs, and two or more defendants, and as in this case, having sued jointly, each of the plaintiffs must be capable of suing each of the defendants, in order to support the jurisdiction founded on diverse citizenship. Strawbridge et al. v. Curtiss, 3 Cranch, 266, 2 L. Ed. 435; New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44; Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Bissell v. Horton, 3 Day, 281, Fed. Cas. No. 1,448; Ward v. Arredondo, 1 Paine, 410, Fed. Cas. No. 17,148; Anderson v. Jack-

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

son, 2 Paine, 426, Fed. Cas. No. 357; Ketchum v. Farmers' Loan & Trust Co., 4 McLean, 1, Fed. Cas. No. 7,736; Bargh v. Page, Fed. Cas. No. 980, 4 McLean, 10; Tuckerman v. Bigelow, 21 Law Rep. 208, Fed. Cas. No. 14,228. Accordingly the test was reiterated by Chief Justice Waite in delivering the opinion in Pacific R. R. Co. v. Ketchum, 101 U. S. 298, 25 L. Ed. 932:

"In the Removal Cases, 100 U. S. 457 [25 L. Ed. 593], it was held that, for the purposes of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of the dispute. If in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the cause proceeded with."

[2] But counsel argues that defendants may not take exception, having answered to the merits. The reply is that, if Congress has not conferred the authority upon the court to entertain the action, it is of no importance what the suitors do to invoke it. The federal courts have only limited jurisdiction. Their authorities and powers are strictly statutory, and they can acquire jurisdiction of a case only in the manner pointed out by the statute. Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114. Hence consent of parties to a suit cannot confer jurisdiction. Pacific R. R. Co. v. Ketchum, supra; Dawson v. Columbia Trust Co., 197 U. S. 181, 25 Sup. Ct. 420, 49 L. Ed. 713; Thomas v. Board of Trustees, etc., 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160. In the latter case, Justice Harlan, delivering the opinion of the court, says:

"It is equally well established that, when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. Mansfield Ry. Co. v. Swan, 111 U. S. 379 [4 Sup. Ct. 510, 28 L. Ed. 462]; Martin v. Baltimore & Ohio R. R. Co., 151 U. S. 673 [14 Sup. Ct. 533, 38 L. Ed. 311]; Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 98 [18 Sup. Ct. 264, 42 L. Ed. 673]. As late as in Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 63 [24 Sup. Ct. 598, 48 L. Ed. 870], we said both parties insisting upon the jurisdiction of the Circuit Court: 'Consent of the parties can never confer jurisdiction upon a federal court.' If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute."

The motion is sustained, and the bill is dismissed.

HAAS v. LEO FEIST, Inc., et al.

(District Court, S. D. New York. May 23, 1916. On Rehearing, June 8, 1916.)

1. COPYRIGHTS ⊂⊃83—INFRINGEMENT—EVIDENCE.

In an action for infringing a copyrighted song, evidence *held* to warrant a finding of infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. ⊂⊃83.]

2. COPYRIGHTS ⊂⊃52—INFRINGEMENT—DAMAGES.

One who publishes a song infringing an earlier copyrighted song is liable in damages, regardless of his innocence of intent.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 50; Dec. Dig. ⊂⊃52.]

3. COPYRIGHTS ⊂⊃87—INFRINGEMENT—ACCOUNTING.

Where a copyrighted song is infringed, and defendant is required to account, the accounting will follow the ordinary rules governing equity.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⊂⊃87.]

4. COPYRIGHTS ⊂⊃87—INFRINGEMENT—DELAY.

Those interested in a copyrighted song after learning of the infringement delayed proceedings. Thereafter the publisher, who was innocent of any intentional wrongdoing, expended large sums in pushing the sale of the song. *Held* that, as against him, the owners of the copyright could not recover any profits accruing after they discovered the infringement, but as against the actual infringer they might recover any profits, this being particularly true where the song was of a purely ephemeral nature.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⊂⊃87.]

5. COPYRIGHTS ⊂⊃90—INFRINGEMENT—ATTORNEY'S FEES.

Where the owners of a copyright, which was infringed, did not make objections on first discovering the infringement, and thus allowed defendant to expend large sums of money in advertising, an allowance of attorney's fees, being a matter of discretion, will not, in a suit for injunction and an accounting, be granted.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 85; Dec. Dig. ⊂⊃90.]

On Rehearing.

6. COPYRIGHTS ⊂⊃75—VALIDITY—APPLICATION.

Copyright Act March 4, 1909, c. 320, § 9, 35 Stat. 1077 (Comp. St. 1913, § 9530), declares that any person entitled thereto may secure a copyright for his work by publication with the required notice of copyright, while section 18 (Comp. St. 1913, § 9539) declares that the notice of copyright shall be accompanied by the name of the copyright proprietor. A copyright proprietor first took a copyright for a song in his own name, but the printed copies stated the copyright owner to be a company which had no existence. On being asked to correct the discrepancy, the proprietor again applied in his own name, but stated he was president and treasurer of the fictitious company, and all copies bore the name of the company. By the laws of the state in which the proprietor resided the use of such name was illegal. *Held* that, while a contract made under such fictitious name might be enforced in the courts, yet relief protecting such name could not be granted, and therefore no suit for infringement of copyright will lie.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 65; Dec. Dig. ⊂⊃75.]

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

In Equity. Suit by Harry Haas against Leo Feist, Incorporated, and another. Decree for an injunction and an accounting by defendants.

This is a suit in equity to enjoin the infringement of a copyrighted song entitled, "You Will Never Know How Much I Really Cared." In the spring of 1914 the plaintiff, who was at that time in the employ of one Adolph Deutsch, composed the melody and chorus of the song in question, which was reduced to notation by one Rouch, and for which one Cahalin wrote some words. A copyright to the song was taken in the name of the Haas & Cahalin Music Company, a trade-name of Deutsch. Haas was to get one-third of all the profits from the sale of the song, and Cahalin one-third, and Deutsch the remaining third. About 2,000 copies were struck off, 1,000 for sale and 1,000 to be distributed among singers and other performers in the hopes of popularizing it. All the copies were sold by the 1st of January, 1915, but the song proved a failure, except to the extent of the 1,000 copies mentioned, and no further edition was published. In November of 1914 Cahalin, who had a number of the songs for distribution, gave one to Samuel Smith, a cabaret singer, who at the time was in and out of the studio of the defendant, Leo Feist, Incorporated, where the defendant Piantadosi was employed. About the middle of December, 1914, Cahalin called at the defendant Feist's studio and there saw Smith and the defendant Piantadosi. Smith invited him to come in to hear a song which Piantadosi had just written and which they were both to exploit. He went in, and Piantadosi played upon the piano the infringing song, which is entitled, "I Didn't Raise My Boy to be a Soldier." Cahalin at once was struck with the similarity between the chorus of Piantadosi's song and Haas', but said nothing at the time. In December the defendant Feist began widely to advertise the infringing song in newspapers all over the country. It was copyrighted on December 19, 1914, as an unpublished work, and as a published work on January 5, 1915, after which it was put on sale, and at once sprang into the widest possible popularity. During the first three months of 1915 more than 650,000 copies were sold, but, being of a most ephemeral and trivial character, its vogue quickly diminished, and at present it has substantially disappeared from the market. Haas first heard the song in the latter part of January, 1915, when performed at a public restaurant, and the similarity between the choruses at that time struck him. He and Cahalin spoke of it together during the month of January, but did nothing until the following March, when they consulted a lawyer, who in turn took no action until this suit was brought on the 28th of January, 1916, at which time the song had long since run its course.

The defendant Feist has a large publishing house in the city of New York and employed the defendant Piantadosi as a casual composer of melodies, though he has small knowledge of musical notation and small skill in playing. His custom was, when he composed a song, to play it over to some other employé of Feist, in this case one Danks, who took down the simple theme upon a "lead sheet," as it is called, and afterwards worked it up into so much musical form as was necessary, for which work the defendant Feist paid Danks by the piece. The whole melody of the song, "I Didn't Raise My Boy to be a Soldier," Piantadosi gave to Danks during the week of November 21–28, 1914, as appears with certainty by the memorandum which Danks made at the time and upon which he charged the defendant Feist. Piantadosi swore that he had composed it about the middle or latter part of October in the year 1914, at which time he had never heard of the plaintiff's song. He testified that the words were in existence before that time, and that it was to them that he had written the music, although the author of the words was not called, nor was his presence accounted for. He denied that Smith had ever given to him a copy of the plaintiff's song, or that at the time when he wrote the song Smith was in the employ of the defendant Feist, or that he ever played over the song for Cahalin personally while Smith was present, as Cahalin testified. The plaintiff in rebuttal called Woods and Dully, who each swore that Piantadosi in December, 1914, played the song for Cahalin in their presence, as Cahalin had said. Neither party called Smith, who was said to be in Canada at the time of the trial.

William H. Griffin, of New York City, for plaintiff.
Nathan Burkan, of New York City, for defendant Leo Feist, Incorporated.
Charles Goldzier, of New York City, for defendant Piantadosi.

LEARNED HAND, District Judge (after stating the facts as above). [1] Piantadosi's piracy of the chorus seems to me sufficiently established for a finding. That Cahalin gave a copy to Smith and that Smith had access to Piantadosi I believe upon the weight of evidence. Cahalin was a better witness than Piantadosi, who did not impress me, and who was not only contradicted in one matter by Woods and Dully, but was proved untruthful as to his borrowing of themes upon other occasions. The opportunity I therefore find to have existed at about the proper time. For the remaining part of the inference, I rely upon such musical sense as I have. I am aware that in such simple and trivial themes as these it is dangerous to go too far upon suggestions of similarity. For example, nearly the whole of the leading theme of the plaintiff's song is repeated literally from a chorus of Pinafore, though there is not the slightest reason to suppose that the plaintiff ever heard the opera. Nevertheless, between the two choruses in question there is a parallelism which seems to my ear to pass the bounds of mere accident. If the choruses be transposed into the same key and played in the same time, their similarities become at once apparent. In certain of the bars, only a trained ear can distinguish them, and their form and rhythm is quite the same. It is said that such similarities are of constant occurrence in music, and that little inference is permissible. Perhaps I should not take them as enough without the opportunity proved, the habits of Piantadosi shown in other instances, and the serious question of his credibility; but it would be absurd not to regard them as evidence of the most impressive character in combination with the rest. The case is not of the mere suggestion of a bar common to each, but of a continuously suggestive melodic parallelism, except at the end. Identity was not to be expected, but derivation seems to me proved.

[2] The plaintiff's right to damages against the defendant Feist, regardless of its innocence, is unquestionable. Gross v. Van Dyk Gravure Co., 230 Fed. 412, — C. C. A. —. And in spite of some language in that opinion looking to the possibility of a different rule for profits, I think the same should apply to them as to damages. When, as in copyright, the law provides a form of notice, it imposes upon every one at his peril the duty to learn the facts conveyed by the notice. Without some such rule it could not be a tort innocently to copy a copyrighted work, because it could not be said that among the reasonable result of the defendant's acts was comprised an infringement. It becomes a tort only when the statute imposes a duty on every one to advise himself of the copyright. I cannot see why there should be any difference between damages and profits in this respect. Hence a decree for an accounting of profits will go against both defendants.

[3, 4] It does not necessarily follow, however, that the accounting shall be exempt from the usual principles of equity. Indeed, the con-

duct of the plaintiff may have a controlling effect upon it. West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 100 C. C. A. 303. The plaintiff's assumption that the statute always rigidly requires an accounting is shown by that case to be without warrant. The delay was of 16 years in that case, but the infringing publication took that long to appear, and the principle is as well illustrated in the case at bar as it was there. Equity will control its peculiar remedy of an account of profits according to its own sense of justice. It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win. If the defendant be a deliberate pirate, this consideration might be irrelevant, and I think it such as to Piantadosi; but it is no answer to such inequitable conduct, if the defendant Feist is innocent, to say that its innocence alone will not protect it. It is not its innocence, but the plaintiff's availing himself of that innocence to build up a success at no risk of his own, which a court of equity should regard. A few weeks' delay in the case of a song so ephemeral as this may have the same effect as 16 years, when the publication is a legal encyclopedia in 30 volumes.

This rule cannot be effectively applied until there is a reference. Cahalin had a beneficial interest in the song to the extent of one-third. His knowledge of the proposed infringement went back to December, and debars him from any profits whatever, since the defendant did most of its exploitation after that time. To the extent, therefore, of one-third of the profits, the plaintiff cannot recover. Haas learned of the infringement from Cahalin about the middle of January, and he cannot recover, to the extent of his interest of one-third, after that date, provided the defendant spent substantial sums in exploiting the song thereafter. It would be impossible to say how much of its subsequent success may have been due to its subsequent exploitation. Deutsch, who was the legal copyright owner, does not appear to have had personal notice of the song, and his interest may be affected by no estoppel. The relations of Haas, Cahalin, and Deutsch will be the subject of inquiry upon the reference. It may very well develop that the three stood in such relation that notice to one was notice to all; the master will exercise a reasonable degree of latitude in inference upon that subject. It is impossible, before such facts are ascertained, more precisely to fix the rights of the parties.

It may perhaps be impossible for the defendant Feist, under the rule in Dam v. Kirk La Shelle, 175 Fed. 902, 99 C. C. A. 392, 20 Ann. Cas. 1173, 41 L. R. A. (N. S.) 1002, to avoid a recovery of all the net profits subject to these limitations, although it is perfectly apparent to unsophisticated common-sense that the song's success was due to its sentiment and its appositeness to a certain strain of popular feeling at the time. This makes it all the more pressing that, if Haas and Cahalin allowed the matter to go on without protest, they should be defeated in such a speculative enterprise as far as the rules of law allow.

[5] There must be costs, since the statute requires it; but there will be no attorney's allowance, for that rests in discretion. There were no damages (for there was nothing of value to injure), unless the accounting turns out wholly in favor of the defendants, in which case the damages against Feist will be $250.

A decree may therefore pass for an injunction and an accounting. The defendant Piantadosi must account without condition; but, upon the defendant Feist's accounting, the master, after first stating the account in full, with proper credits for all the exploitation of the song, and ascertaining the net profits, will consider whether Haas' one-third shall be allowed after January 15, 1915, or whenever he finds Haas learned of the song, and report the proper figures upon the several hypotheses open. He will then consider whether Deutsch's one-third while he had title was not affected by notice of the proposed infringement, and, if so, to what extent.

On Rehearing.

The defendant now moves for a rehearing upon new proof, which I have heard, and upon a point of law raised in the answer, but not previously urged in the argument. As to the new proof it has not changed my conviction; the witness Gilhooly appeared much more convincing to me than Smith, and the result was only to confirm my belief that Smith got the song at about the time Cahalin originally says he gave it to him.

[6] The point of law is this: Deutsch, the copyright proprietor, was a maker of raincoats, and employed Haas and Cahalin on a salary to write songs and words for him, giving them each also a third interest in the profits. The agreement was that Deutsch should have title to the copyright and should take it out personally. His first application to the Copyright Office on April 22, 1914, was in his own name, but the printed copies of the song stated the copyright owner to be "Haas & Cahalin Music Company." When asked to correct the discrepancy by letter of April 27, 1914, he filed a new application April 28, 1914, again in his own name, and wrote a letter, saying that he was president and treasurer of the Haas & Cahalin Music Company, of which he was sole owner. The letter was certainly misleading, if not actually false. There was no such company, but the name was merely fictitious, chosen by him for his own purposes as a trade-name in the venture which he proposed with Haas & Cahalin. All the copies of the song bore the name "Haas & Cahalin Music Company"; none bore the name "Deutsch."

Section 18 of the Copyright Act requires that all copies shall bear the "name of the copyright proprietor," in compliance with section 9. Therefore the question is whether the name, "Haas & Cahalin Music Company," was the name of Deutsch, the copyright proprietor. It may be that a copyright proprietor may make his application for registration in his real name, and still use an assumed name upon his notices (Werckmeister v. Springer Lith. Co. [C. C.] 63 Fed. 808), although it is quite possible that in that case both the application and the notice were in the assumed name (Werckheimer v. Pierce & Bushnell Mfg. Co. [C. C.] 63 Fed. 445). I may assume, however, that the use of two names does not invalidate the copyright, provided the proprietor has the right to use either. No doubt he may use any name both in applying for registration and in making his notice of copyright; but it seems to me quite clear that the names which he uses must be legal where he uses them, else they cannot be called his name at all. The trouble in the case at bar was that Deutsch was forbidden by the laws of New York, of which he was a citizen, to use the name, "Haas & Cahalin Music Company." He was forbidden in the first place to use the name "Company" by section 22 of the Partnership Law (Consol. Laws, c. 39) and section 924 of the Penal Law (Consol. Laws, c. 40), and these same provisions forbade his using the name "Haas & Cahalin" as his partners when they were not partners. This prohibition is absolute regardless of any certificates. Nothing could have made it valid. If the name be thought to be a merely fictitious one, he was forbidden to use it by section 440 of the Penal Code, which is a quite independent provision and does not take the place of section 924. Jenner v. Shope, 205 N. Y. 66, 98 N. E. 325. At common law it is true that a man may adopt any name he chooses so long as he be engaged in no fraud, and he need not use it exclusively in all his businesses. But New York has regulated this common-law right, and limited it by the statutes mentioned, and so under the law of Deutsch's domicile, by which he was governed, he had not the common-law right to use any name that he chose.

This statute has been many times before the courts of New York, but in every case, so far as I have found, as a defense to actions upon contracts executed by one of the parties in an illegal name. Those defenses have failed each time, the courts as a rule saying that, no matter whether the name be illegal or not, the contract was actually made, and was no less an obligation because the obligee had used a name which he ought not to have used. On principle there can be no question of this doctrine, for a contract is made with a person, and not with a name, and it is an irrelevant defense in an action on contract that the party may have committed a crime provided it does not affect the contract itself. In some cases there is talk of the distinction between an executory and executed contract, but this was abandoned and the law of New York became settled, as I have stated. The most important cases are Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Wood v. Erie R. R. Co., 72 N. Y. 196, 28 Am. Rep. 125; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286. There are many cases in the Appellate Division which it is not necessary to cite, as the preceding cases control.

It so happens that in none of the cases, either in the Court of Appeals or in the Appellate Division, did the plaintiff sue in equity, and it therefore must be still held an open question whether his use of an illegal name would disqualify him from suing there. That question in my judgment does not arise here, as I shall show hereafter, and I wish it to be distinctly understood that I do not dismiss this bill on the theory that the plaintiff does not come into equity with clean hands. The vice in my judgment goes to the notice itself and the statute forbids a suit where notice has not been given. Section 12. Yet I can hardly think that the courts of New York would permit a plaintiff to protect an illegal name, for example, against unfair trade use, if that question arose.

In Jenner v. Shope, supra, it was held that a contract for the sale of a partnership name used illegally by the plaintiff's decedent was itself illegal and could not be enforced. The case shows, if proof be necessary, that the use is illegal for all purposes, and, that being so, I think that Deutsch had no right to use the name upon his notices. It was not, therefore, the "name of the copyright proprietor," as intended by section 18. The plaintiff urged that such a doctrine would allow a state statute to control the copyright law; but when that law required copyright proprietors to affix their names it certainly intended only such names as they may lawfully use under the law of their domicile. It cannot be supposed that Congress intended to make that lawful in this instance within a state which the state made unlawful for every other purpose. Doubtless Congress might have the power to make such an enactment, but so to interpret this statute would presuppose a wanton purpose of discord. It seems to me wholly fanciful to suppose that Congress intended to permit the use of names which it was a crime under the state law to use.

Judge Shipman's decision in Scribner v. Allen (C. C.) 49 Fed. 854, upon which plaintiff chiefly relies, is not in point, because in that case the plaintiff's name was not illegal under the statute as it then existed. Section 1, chapter 262, Laws of 1886 (now section 22 of the Partnership Law). That law then provided and now provides that the name of a partnership should not contain the name of a partner who was not a member of the firm, and that, if the word "Company" was used, it should represent an actual partnership. The plaintiff's name in that case was Charles Scribner's Sons, and Charles Scribner was the person doing business. The word "Company" did not appear, and the name is therefore not within the statute in fact. Section 440 of the Penal Code was not then in existence, nor was section 363b of the old Penal Code. On the facts, therefore, the case does not apply, and Judge Shipman's language gives no reason for thinking that he had in mind any such defense as is here presented The name, "Charles Scribner's Sons," probably in fact was quite legal under the then existing law, which has been re-enacted into sections 20 and 21 of the present Partnership Law. The case came before Judge Shipman on demurrer, and all he decided was that the allegation of ownership was sufficient without setting up all the facts requisite under sections 20 and 21. In effect his decision was that the facts, if relevant at all, were only matter of defense.

For these reasons I think that the present point taken by the defendant is good and that no suit lies under section 12 under the notice of copyright in its present form. The result is that the bill will be dismissed upon the merits, with costs.

HARTWELL et al. v. DELAWARE, L. & W. R. CO.

(District Court, N. D. New York. July 22, 1916.)

1. RAILROADS ⟹328(1)—CROSSING ACCIDENTS—DUTY OF CARE.

One about to drive from behind a railroad station onto the track, who could not see the tracks for any great distance, is bound to look and listen before venturing on the tracks and, if necessary, to stop.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057, 1060, 1069; Dec. Dig. ⟹328(1).]

2. RAILROADS ⟹347(2)—CROSSING ACCIDENTS—NEGLIGENCE.

Where the tracks of two railroad companies ran parallel and only a short distance apart, so that travelers on the highway could not distinguish whether a train was on one track or another, evidence that it was customary to equip much traveled crossings with an automatic bell is admissible in an action for the killing of a traveler at the crossing by a train, but the absence of a bell will not, as a matter of law, establish the company's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1125; Dec. Dig. ⟹347(2).]

3. RAILROADS ⟹350(1, 13)—CROSSING ACCIDENTS.

In an action for the death of one run down at a railroad crossing, questions of the railroad company's negligence and of deceased's contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152, 1166; Dec. Dig. ⟹350(1, 13).]

4. NEW TRIAL ⟹44(3)—MISCONDUCT OF JURORS.

Before a map, showing the crossing at which deceased was run down by defendant's train, was put in evidence, it was hung up in plain sight of the jury, and some of the jurors, their attention having been directed to it, examined it before it was introduced in the evidence. The attention of the court being called, the jurors were told that it was improper for them to examine or consider the map until it was placed in evidence, and they immediately desisted. *Held*, that as the map was subsequently put in evidence, that the jurors had previously examined it, coupled with the fact that they were heard discussing the case without any showing of the nature of the discussion, does not warrant a new trial, the court directing them not to discuss the case before it was submitted to them, because it must be assumed that the jurors do their duty.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 82-84; Dec. Dig. ⟹44(3).]

At Law. Action by Edward H. Hartwell and another, as administrators of the estate of Grace E. Hartwell, deceased, against the Delaware, Lackawanna & Western Railroad Company. There was a verdict for defendant, and plaintiffs move for new trial. Motion denied.

Motion to set aside the verdict of the jury in favor of the defendant and for an order directing a new trial on the grounds of error in the admission and rejection of offered evidence; that the verdict was contrary to the evidence; but principally on the ground of misconduct of certain of the jurors in examining a map showing the place of the accident with distances and structures before same was part of and offered in evidence, and in discussing the case in the corridors of the courthouse during the progress of the trial, and not in the presence of the court, and before the case was finally submitted to the jury.

Stephen Holden, of Mt. Vernon, N. Y., for the motion.
Thomson & Byrne, of Syracuse, N. Y., opposed.

RAY, District Judge. The negligence of the defendant alleged in the complaint was failure to ring the bell on the engine and blow the whistle, thereby giving warning to the plaintiffs' intestate of the approach of the defendant's passenger train, running past the station at Galena, N. Y., without stopping, at the rate of about 30 or 40 miles per hour. Early in the trial, and after the jury had been impaneled and sworn, the plaintiffs offered evidence, and proposed to give evidence, showing that there was in use at the time of the accident in question a gong or bell, located at railroad crossings on defendant's road and on other railroads, and well known, which would give notice and warning to persons about to cross the tracks, operated by the train itself as it approached the crossing, but that no such gong or bell had been installed or was in use at the crossing in question, and that the conditions were such as to make the installation of such bell or gong reasonably necessary, and that its absence was negligence on the part of the defendant in view of all the circumstances and surroundings and was the proximate cause of the collision and injury to the plaintiffs' intestate which resulted in her death, even if the bell was rung and the whistle was sounded. As no such negligence on the part of the defendant railroad company had been pleaded unless by mere suggestion, the court permitted an amendment to the complaint, fully covering that proposition, and then allowed proof that such gongs or bells were installed and in use at similar railroad crossings, not only by the defendant company, but by other railroad companies, and were a well-known appliance for giving warnings to travelers on the public highway about to pass over railroad crossings.

At Galena, a small hamlet in the town of North Norwich, about 6 miles north of the city of Norwich and for a distance of at least half a mile northerly and southerly from the station at that point, the Delaware, Lackawanna & Western Railroad tracks and the New York, Ontario & Western Railroad tracks parallel each other at a distance of about 100 feet from each other. The tracks of the Delaware, Lackawanna & Western Railroad are laid on a fill, and are at least 3, 4, or 5 feet higher at the highway crossing than those of the New York, Ontario & Western Railroad. A public highway running easterly and westerly crosses the tracks of both railroads leading from Galena westerly to Plymouth and South Plymouth some 5 or 6 miles distant. This highway is traveled mainly by farmers. The station at Galena of the Ontario & Western Railroad Company is north of this highway, and on the westerly side of its tracks, while the station of the Delaware, Lackawanna & Western Railroad Company is on the easterly side of its tracks, and some 12 or 15 feet south of the traveled part of this public highway. The depot of the defendant company is about 40 feet long, parallel with the tracks, and 20 feet wide, and its platform, 10 feet in width, extends to within 3 feet of the most easterly rail of the tracks. This depot is built into the side of the fill on which the tracks are laid, so that the easterly side of the depot is 3 or 4 feet lower down than the platform in front on a level with the tracks. At a distance of about 1,000 feet south of the depot there is a curve, which prevents a person at the depot and on the easterly side thereof from seeing whether a train approaching from the south is on the defendant's tracks or on the tracks of the Ontario & Western Railroad Company, which are east of the defendant's tracks. A person on the easterly side of the depot can see a train approaching from the south for 2,000 feet at least, but cannot determine whether the engine and train approaching is on the one road or the other, even if familiar with the locality. A passenger train passes north on the Ontario & Western Railroad nine minutes ahead of the train moving north on the defendant's road at about 4:50 p. m. each day.

The depot of the defendant railroad company at Galena is a combination depot, and used for passengers, freight, and express matter, so that people come and go at any hour of the day or evening, and are notified and permitted so to do by the railroad company. The ground is open and well trodden and beaten from the highway proper up to the north end of the depot all along on its easterly side and for some few rods on the south side of the depot, and here people drive in, and are accustomed to drive in, and are invited to drive in, for the purpose of receiving and discharging freight and express matter. It is obvious that a person on the easterly side of the depot and near thereto, even if he or she heard the sound of an engine whistle or the ringing of a bell, and even if they saw the approaching engine at a distance of 2,000 feet, would be uncertain which road the approaching train was on. Such was the situation on the day of the accident in question which resulted in the death of Grace Hartwell and of her aunt, who was in the buggy with her.

It appeared from the evidence and was uncontradicted that shortly before the north-bound train of the defendant company reached the Galena station, Grace Hartwell, the plaintiffs' intestate, with her aunt by her side in a buggy with the top up and back curtain down, but with no side curtains, drove in on the easterly side of the defendant's depot to the large doors near the south end and discharged a crate of eggs for shipment on the defendant company's road, either as freight or by express. The defendant's station agent acts both in that capacity and to receive and deliver express matter. A Mr. Frink, who was there for the purpose of receiving and conveying to the post office the mail bag when thrown from the train, was also present and assisted in discharging the eggs. The station agent and Frink testified that as the eggs were being discharged, or just as they had been discharged—and the latter seems to have been the fact—the sound of a train and the whistle of an engine approaching from the south was heard. The station agent remarked, as he testified, "There comes a train on our road," and Miss Hartwell remarked to the effect that, "You always have a train when I am here," or "Almost always have a train when I am here." Miss Hartwell was to have a receipt, and the station agent left the door on the east side and passed to the westerly side, where the train would pass, and thence along the platform to the door where passengers enter and then into his little office, for the purpose of drawing a receipt, and just then the train went by and struck the horse driven by Miss Hartwell with her aunt by her side, who had driven away from the door on the easterly side, moving first south and then around to her left or easterly, and who had driven the length of the depot and turned into the northerly side of the highway westerly, and was in the act, when her horse was struck, of driving over the defendant's tracks. As the railroad agent left Miss Hartwell to draw the receipt, he made a remark to the effect that she could go away or move away.

Two witnesses called by the plaintiffs testified that they were looking and observing and in a position to hear and see, but that they neither heard the bell nor whistle of the approaching train, although they saw it. The defendant called at least a dozen witnesses in addition to several employés of the railroad company, who testified that they were in a position to see and hear all that took place, and that they saw the approaching train and plainly heard the whistle which was a long, loud blast, but most of them testified that they did not hear the bell. The employés on the train testified, however, that the bell was rung continuously. If the whistle was blown, and the evidence was overwhelming to that effect, it must have been heard at the depot and by Miss Hartwell, if she was paying any attention whatever. Considering the distance she must have traveled before her horse was struck, it is very doubtful that the approaching train was in sight when she drove away from the door on the easterly side of the depot, and she had to go south a little distance, turn to the left and east, and then drive more than the length of the depot, and then more than its width, to bring her horse head and shoulders onto the track. She could not have moved rapidly in making these movements, and, considering the speed of the train, it is plain, I think, that she did not see the engine approaching. If she did, she could not have known which road the approaching train was on, as it is impossible to determine that fact from the position she was in at the time she made the turn to drive back around the depot into the highway and thence cross the track to the west. She may have heard the whistle, and it is possible that she saw the approaching train or engine, but believed it was on the Ontario & Western Road, and not on the Delaware, Lackawanna & Western tracks. In either event, it was her duty, of course, to proceed with care and caution, and to look and listen as she approached the defendant's tracks at the northerly end of the depot.

Miss Hartwell lived at Sherburne Four Corners, about 2 miles north of Galena, and near to and within plain sight of the Ontario & Western Railroad tracks, but not near or within sight of the defendant's tracks, as the Lackawanna road passes over the Ontario & Western and moves off to the east before reaching Sherburne Four Corners. The station agent lived nearer to the Ontario & Western tracks or road than to the Lackawanna tracks, and it was contended on the trial, and is quite probable, that Miss Hartwell understood the remark of the station agent, "There comes a train on our road," as a statement that the train was approaching on the Ontario & Western tracks, and not on the defendant's road, and that for this reason she was misled and turned to the west instead of the east. However, there was evidence tending to show that on prior occasions, when coming to the depot, she had driven over the Lackawanna tracks to a watering place for the purpose of watering her horse and on other occasions to call on a friend living near by.

[1-3] The evidence clearly showed that after turning round, and while moving northerly along by the side of the depot, towards the highway, and while passing the northerly end of the depot in the highway, Miss Hartwell could not have seen the approaching train, going, as it did, from the south to the north. After turning into the highway, while proceeding westerly to cross the defendant's tracks, the head and shoulders of the horse would have been upon the easterly rail of the defendant's road before Miss Hartwell could have seen past the northwest corner of the depot far enough to see an approaching train more than 100 or 200 feet away. This situation was apparent to her, and called for care and caution on her part, and if she heard the noise of a train, either the roar or of the whistle, it was her duty to exercise great care by looking and listening, and, in this case, perhaps stopping before going upon the tracks. It is obvious that the added precaution on the part of the railroad company of adding one of the gongs or bells to its warnings of the approach of its trains would have notified Miss Hartwell that a train was approaching from the one direction or the other on the defendant's tracks. The absence of such a warning by bell or gong located at the crossing was not however negligence as matter of law. It was evidence proper to submit to the jury, and it was for the jury to say whether, considering the situation, due care on the part of the defendant required it to establish such a bell at this crossing. That question, with others, was submitted to the jury. Mr. Byrne, for the defendant, excepted to the charge, to the effect:

"That if the jury found that this whistle was blown and the bell rung, then under those circumstances they might find negligence in not having a gong there in view of the situation at the crossing."

The court said and charged then:

"Yes, under all the circumstances and surroundings. Of course, before you come to that fact, you would have to find that the ringing of the bell and the sounding of the whistle at such a place was not sufficient warning; you would have to find that of course. The duty is to give reasonably adequate warning, use due care."

The jury was plainly instructed that if they found, considering all the circumstances and surroundings, that the ringing of the bell and sounding of the whistle on the train was not reasonable and ordinary care to be exercised at such a crossing, then they might find negligence in not having a gong at the crossing. The jury was plainly charged that, even if the railroad company was negligent in not sounding the bell and whistle, one or both, and in not having a gong, if in view of all the circumstances Miss Hartwell knew of or had reason to apprehend the approach of a train on the defendant's tracks, it was her duty to look and listen and perhaps stop, and that if she was guilty of contributory negligence, or negligence which contributed to her injury and death, then the plaintiffs could not recover.

[4] I do not think any competent evidence offered by the plaintiffs was rejected, or that any incompetent or improper evidence offered by the defendant was received. I think the question of the negligence of the defendant company, as well as the question of contributory negligence on the part of Miss Hartwell, were for the jury, and peculiarly for the jury to determine, and that their verdict should not be disturbed unless on the ground that the jury, or some of them, improperly discussed the case out of court during the trial, or got wrong impressions by looking at the map to which reference has been made. The map in question had been drawn to a scale by a civil engineer employed by the defendant, and who was subsequently sworn and fully explained it. It was then placed in evidence and frequently referred to during the trial. At the beginning of the trial this map was hung up without objection in plain sight of the jury, for purposes of reference, and at the time it was examined by some of the jurors, before it went in evidence, it had been referred to and the attention of the jury called to it without objection. The court dismissed the jury at an early stage of the trial, and before the map went into evidence, or was offered, but was proceeding with some other business when its attention was called by the clerk to the fact that some of the jurors were examining the map and conversing among themselves. The court immediately called their attention to the fact that it was not in evidence, and that it was improper to examine the map until it had been explained and put in evidence. The jurors immediately departed. This court is of the opinion that no harm was done, and that no harm could have been done, inasmuch as the map was thereafter fully explained and described by the sworn testimony of the civil engineer, and that of other witnesses to an extent, and there was no dispute or question as to its accuracy. The affidavits submitted show that at a subsequent stage of the trial some of the jurors were heard discussing the case in the corridors of the courthouse, but what was said does not appear, and it does not appear that any opinions were expressed, or that the evidence was under discussion or the credibility of the witnesses or the facts. So far as appears, the discussion may have been as to the length of the trial, etc. The jury had been cautioned, and was cautioned at each recess for the day, not to discuss the case among themselves, or to listen to any discussion from others, or by others, or remarks concerning the case. The presumption is that the jurors do their duty, and that they refrain from any discussion of the merits of the case or the weight or bearing of the evidence until the case is summed up and submitted under the charge of the court for final consideration and determination in the jury room.

The day was clear, and there was no wind, and it was broad daylight. Miss Hartwell, as the evidence showed, was not unfamiliar with the depot and its surroundings. It is evident that the jury either found that the defendant was not negligent; that is, that it sounded the whistle in due time, and that the situation and surroundings were such that the installation of a gong or bell operated by the approaching train was not necessary at this crossing, or that having found the railroad company negligent it further found that Miss Hartwell was herself guilty of negligence which contributed to the injury. There was sufficient evidence to establish negligence, but there was also sufficient evidence to establish contributory negligence; and, as the jury was fully and carefully instructed on every point, and no exception was taken to the charge, and I find no error in the admission or rejection of testimony, and it does not affirmatively appear that there was improper action prejudicial to plaintiffs on the part of the jurors, or any of them, during the progress of the trial, the court feels compelled to deny the motion to set aside the verdict and for a new trial.

So ordered.

In re FARMERS' DAIRY ASS'N.

In re LEVI.

(District Court, S. D. California, S. D. May 29, 1916.)

No. 2155.

1. BANKRUPTCY ⟹140(1)—RETURN OF PROPERTY—WHAT LAW GOVERNS.
In determining whether title to chattels passed to a bankrupt, or remained in the seller, the state law governs.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟹140(1).]

2. BANKRUPTCY ⟹140(1)—RETURN OF GOODS—RIGHTS OF SELLER.
Where, under the state law, the seller's reservation of title was good as against the bankrupt and his creditors, such reservation of title is good as against the trustee in bankruptcy, and the goods may be reclaimed by the seller.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟹140(1).]

3. SALES ⟹460—CONDITIONAL SALES—STATUTES.
A conditional sale, in the absence of statute, may be verbal.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1348; Dec. Dig. ⟹460.]

4. SALES ⟹454—CONDITIONAL SALES—EFFECT OF.
The assumption of a positive obligation by a buyer to pay the purchase price does not in itself serve to change a sale, which would otherwise be conditional, into an absolute one.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⟹454.]

5. SALES ⟹454—CONDITIONAL SALES—NOTE.
Where a buyer gave a note for the purchase price, that fact does not change the sale from a conditional into an absolute one, but the note must be taken as evidence of the debt owing rather than as a payment.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⟹454.]

6. BANKRUPTCY ⟹303(1)—CLAIM AGAINST TRUSTEE—BURDEN OF PROOF.
One claiming property which passed to the trustee in bankruptcy, on the ground that the sale to the bankrupt was conditional, has the burden of proof; there being a presumption that the sale was absolute.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⟹303(1).]

7. CORPORATIONS ⟹406(2)—PRESIDENT—POWERS OF.
A verbal understanding with the president of a corporation that title to horses should remain in the seller until payment is not binding on the

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

corporation, and where there was no further contract with the corporation, although the horses were delivered, there was no meeting of the minds of the parties as to the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1612; Dec. Dig. ⊂=406(2).]

8. BANKRUPTCY ⊂=228—ORDERS—REVIEW—REFEREE.

In reviewing an order of a referee in bankruptcy, all presumptions with respect to the want or sufficiency of evidence are in favor of the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⊂=228.]

9. BANKRUPTCY ⊂=140(1)—RIGHT TO GOODS—CONTRACTS.

Where there was no meeting of minds between a corporation and a seller of horses, there being no binding agreement as to whether title should pass, the seller may, upon surrender of notes given to evidence the purchase price and of all moneys paid, less the reasonable value of the use of the horses while in possession of the corporation, recover the animals from the trustee; the corporation having become a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⊂=140(1).]

In Bankruptcy. In the matter of the bankruptcy of the Farmers' Dairy Association. Proceeding by Adolph Levi for review of order of referee denying his petition for the return of property. Order of referee reversed, and matter remanded for further hearing.

Adolph Levi filed his petition "in reclamation" for an order for the return to him of certain horses held by the trustee and which he alleged had been sold to the bankrupt on conditional sale, title to remain in him till full purchase price was paid. The referee, after hearing, ordered that said petition be "dismissed and denied." A review by the judge was sought.

The referee's certificate on review contained merely a summary of the evidence on which his order was based, and showed that one Peavey, called in behalf of petitioner, testified that he, during the times mentioned in said petition, was the president of the said Farmers' Dairy Association, the bankrupt, and "at certain times during said period was manager of said Farmers' Dairy Association"; that he had certain dealings with the petitioner relative to the purchase of certain horses; that "on or about the ——— day of ———, 1915," witness had a conversation with petitioner relative to purchase of said horses for the association, another official of the association being present. Witness and petitioner negotiated for the sale of said horses, and witness understood that title to said horses was to remain in the seller until the purchase price therefor had been paid. The contract and the understanding were verbal; the promissory notes of corporation representing the purchase price were given by the corporation, as was understood by witness and petitioner should be done. Other transactions, involving other horses, and under similar circumstances, were also had between petitioner and the witness. The witness also testified "that the matter of said purchase was brought to the attention of the board of directors of said corporation, and they took action on same; that said corporation asserted indicia of ownership over said horses, and used said horses in the business of said corporation; that said horses were carried on the books of corporation as the property of said corporation, and monthly statements were gotten out by the corporation to the creditors, in which statements said horses were carried as an asset of the corporation." Witness further testified that one Stephenson was the secretary of the corporation at the time of the purchase of the last five horses, and witness did not state the horses were purchased on conditional sale, and did not state that title of said horses was to remain in seller until paid, nor was anything said to Mr. Stephenson concerning any conditions under which the horses

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes were purchased. Other evidence of similar import, given by other persons, was also set out in a summary way in the certificate of the referee.

The secretary of the corporation was called, and testified that he was informed by Mr. Peavey, the president, that he had purchased certain horses from the petitioner, and that the company would have to give its notes therefor; that no statement was made as to any condition attached to the sale of the horses, and that the witness considered that the notes were given in payment of the purchase price; "that witness did not know, nor did Mr. Peavey tell him, that the title to said horses was reserved in the seller; that witness was also a member of the board of directors of said corporation, and the board of directors took action on said matter." The only action shown by the certificate to have been taken by the board of directors was an excerpt copied from the minutes of the corporation, which excerpt in substance set forth that it was regularly moved and seconded that the horses in question "be purchased" at a certain price and on certain terms with respect to time of payment specified. It was also shown by the books of the corporation that the horses were entered on the books as an asset and that statements were issued showing this fact.

The promissory notes given by the corporation were in ordinary form, and contained no statement or intimation of any "conditional sale."

James E. O'Keefe, of San Diego, Cal., for petitioner.
A. L. Wissburg, of San Diego, Cal., for trustee.

BLEDSOE, District Judge (after stating the facts as above). In this case, from the certificate sent up by the referee, it is impossible to determine the reasons which actuated him in arriving at the conclusion as to which a review is sought, and which resulted in the conclusion complained of. The order entered by the referee is merely to the effect that the petition of reclamation filed by petitioner Levi is dismissed and denied. The court is not advised, therefore, of the findings of fact and conclusions of law, if any, arrived at by the referee.

[1-5] In a proceeding of this character, respecting ownership and title to property, the law of the state wherein such property is situate controls. In California, it may be considered as established that, in a contract of sale such as was relied upon by petitioner herein, the title to chattels sold may be retained by the seller pending full payment of the purchase price, or the performance of any other conditions named by him. This reservation of title by the seller is good as against creditors, and consequently as against the trustee in bankruptcy of the buyer. Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. The contract may be verbal, unless some local statute requires otherwise. Blackwell v. Walker (C. C.) 5 Fed. 419. No such statute of California has been called to my attention. The assumption of a positive obligation by the buyer to pay the purchase price does not in itself serve to change a sale which otherwise would be conditional into an absolute one. Neither is it to be assumed by the court, in the light of present-day business transactions, that the giving of a promissory note is to be considered as payment and complete satisfaction in itself of the obligation therein represented and thereby ordinarily sought to be evidenced. In other words, in the absence of any contrary proof, the court, in accordance with usual business procedure, must assume that a promissory note is given as evidence of a debt owing, rather than as payment and satisfaction thereof.

[6-8] Under the evidence in this case, therefore, if it were the fact that a contract was shown to exist, as between the petitioner and the bankrupt corporation, providing for the conditional sale of the horses mentioned in the petition, and title was to vest only upon full payment therefor, it would follow that the petition should have been granted, and that the order made by the referee should be reversed in its entirety. There is a matter involved, however, which arises upon the record, and which has impelled the court to give to the proceeding some consideration other than that suggested by arguments of counsel.

All the authorities seem to hold that in a proceeding of this sort the burden of proof rests upon him who claims the sale to have been conditional rather than absolute. In other words, upon the transfer of personal property and the receipt of promissory notes in payment therefor, the presumption ordinarily would be that an absolute sale was intended and had been effectuated. The bankrupt in this case is a corporation, and the petitioner must have shown a contract as between himself and the corporation, if he would sustain his claimed reservation of title. The record, which consists merely of a summary of the evidence taken before the referee, obviously is very meager; but it does not, in my judgment, meet the burden imposed upon the petitioner. It fails to show that a contract was entered into between petitioner and the corporation. It does show that the petitioner had dealings with a Mr. Peavey, who was at said times the "president of the association," and was "at certain other times," but not necessarily at any times when sales of horses were being consummated, the "manager of the corporation," and that, in the sales which were made, verbal understandings were had that title to the respective horses was to be reserved by the petitioner until full payment of the purchase price. The mere fact that this arrangement was had with the president does not, in my judgment, under the authorities, serve to bind the corporation. Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580. There is no suggestion anywhere in the record that the corporation itself was at any time, through its board of directors or otherwise, apprised of the fact that a reservation of the title to the horses was a part of its contract. On the contrary, as shown by the record, the contract of the corporation, as evidenced by the resolution of its board of directors, was that of an absolute sale.

There is no showing as to the number of directors of the corporation, or as to the number who were informed even privately of the understanding had between the petitioner and the president, and no showing, therefore, that the board of directors, or even a majority of the board, were advised of the fact of the reservation of title, or at all consented to or acquiesced in the verbal agreement purporting to retain title to the horses in the petitioner until the full purchase price therefor had been paid. In this connection it must be remembered that the referee has denied the petition, and because of this fact all presumptions with respect to the want or sufficiency of evidence are in favor of the validity of his order, and the court must not assume that evidence with respect to any matter was given which would be inconsistent with the conclusion reached by the referee, unless such evidence is succinctly set forth in the record brought to this court.

It thus appears, as I view the case, that the petitioner attempted by verbal understanding had with the president of the corporation, who, in so far as the record shows, was unauthorized to bind the corporation, to retain the title to his horses until the entire purchase price had been paid. In this he was unsuccessful, in so far as the actual negotiation of a contract was concerned, in that the president was not authorized, apparently, to bind the corporation in this respect. The purchase price not having been paid, it would not be proper, however, to hold, as did the referee, that the petitioner now be deprived of the title to his horses. He consented to no such arrangement, entered into no such contract, and the court should not by its judgment decree that he did. It must be that as to the matter of the retention of the title to the animals there was no meeting of the minds sufficient to constitute a conditional sale contract, and the rights of the parties will have to be determined on some other basis.

[9] Though this feature of the case has not been argued by, or presented in the briefs of, counsel, it seems to me that under the circumstances the only fair and equitable thing to do is to hold that the petitioner is still the owner of the horses, and that the bankrupt corporation is entitled to a return of so much of the purchase price as has been paid thereon, less such a sum, not to exceed in any event the amount of the purchase price thus far paid, as will suffice to reimburse the petitioner for the reasonable value of the use of the horses during the time they were in the possession of the bankrupt and up to the date of the adjudication herein.

The order of the referee is therefore reversed, and the matter remanded for further hearing by him. Upon such further hearing he will take evidence and determine the reasonable value of the use of the horses during the period mentioned, and will make an order directing the trustee to return the horses to the petitioner, upon the repayment by the petitioner of all sums of money received by him as part of the purchase price of the said horses in excess of the amount which he may be entitled to retain as the reasonable value of such use. Petitioner will also be directed to deliver up for cancellation the promissory notes received by him as evidence of the purchase price to be paid.

REED et ux. v. ST. PAUL, M. & M. RY. CO. et al.

(District Court, W. D. Washington, N. D. November 23, 1915.)

No. 74.

1. PUBLIC LANDS ⚷103(4)—JURISDICTION OF COURTS—QUIETING TITLE.
The federal courts have no jurisdiction to quiet title and determine adverse claims to public land, title to which is in the United States, for the Land Department has exclusive jurisdiction over such matters.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. ⚷103(4).]

2. PUBLIC LANDS ⚷103(1)—TITLE TO—LAND DEPARTMENT.
The Land Department of the United States is a special tribunal with judicial functions, and has exclusive jurisdiction over issues affecting title to public lands until patent is issued.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 298; Dec. Dig. ⚷103(1).]

3. ADVERSE POSSESSION ⚷7(2)—TITLE TO—PERFECTION.
Adverse possession for 10 years under the limitation statutes of the state of Washington confers no right, where the legal title to the land is in the United States.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 40; Dec. Dig. ⚷7(2); Limitation of Actions, Cent. Dig. §§ 223, 224.]

4. HUSBAND AND WIFE ⚷252—COMMUNITY PROPERTY—RIGHT OF WIFE.
Rem. & Bal. Code Wash. §§ 5915–5918, relating to the property of the spouses, give the wife as a member of the community no interest which attaches to public land squatted upon by the husband and wife prior to homestead entry.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 895; Dec. Dig. ⚷252.]

In Equity. Bill by Charles W. Reed and Dora Reed, his wife, against the St. Paul, Minneapolis & Manitoba Railway Company, a corporation, and the Great Northern Railway Company, a corporation. The first-named company disclaimed, and the Great Northern Railway Company demurred. Demurrer sustained.

Carl E. Croson and E. H. Flick, both of Seattle, Wash., for plaintiffs.

F. V. Brown and F. G. Dorety, both of Seattle, Wash., for defendants.

NETERER, District Judge. The plaintiffs allege, in substance, that they are a marital community, and as such in good faith settled upon public lands upon homestead entry under the provisions of Act Cong. May 14, 1880, c. 89, 21 Stat. 140 (Comp. St. 1913, §§ 4536–4538), on November 24, 1906; that on February 6, 1907, Charles W. Reed made application for homestead entry; that during the summer of 1901, J. J. Tinckner, a qualified entryman under the act of Congress, supra, had settled upon the land, and during the years 1902 and 1903 he posted notices, giving a description of the land, advising the public that he claimed the land under the homestead laws of the United

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

States; that on April 1, 1902, he commenced to erect a cabin, and asserted rights to the land until August 21, 1906, at which time he conveyed his right in the land to W. M. Smithey, and "notices of claim under the scrip land laws of the United States, or otherwise, were never posted on said land up to said time last mentioned"; that W. M. Smithey was a qualified entryman during all the time he held such land, and on the 24th day of November, 1906, sold his claim to the land to the plaintiffs; that the land was not surveyed until July, 1905, and survey was not accepted by the Land Department until November 27, 1906. It is then alleged that plaintiffs have at all times mentioned claimed said land, and occupied and improved the same; that plaintiffs and their predecessors in interest have held said land more than 10 years openly and notoriously, "with adverse interest to the world at large," and then stated that the defendants claim some right to the land, but that the claim is junior to plaintiffs', and pray judgment quieting title in plaintiffs. It is alleged that the defendants are each a corporation organized under the laws of Minnesota.

A disclaimer has been filed by the St. Paul, Minneapolis & Manitoba Railway Company, and a demurrer is presented by the Great Northern Railway Company on the ground that the complaint does not state any matter of equity entitling plaintiffs to the relief prayed for, in this: That the complaint shows that the title to the land is in the United States, does not show that the plaintiffs were deprived of their alleged homestead right by any erroneous decision of the Land Department of the United States, and that Dora Reed, the wife, is living with her husband, and is not entitled to enter lands under the laws of the United States.

[1, 2] The demurrer must be sustained. The court has no jurisdiction to quiet title to public land, the title to which is in the United States. Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800. The Land Department of the United States is a special tribunal with judicial functions, and has exclusive jurisdiction of issues affecting title to the public lands until patent is issued. Bockfinger v. Foster, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. Ed. 975; Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286.

[3, 4] Adverse possession for 10 years under the limitation of actions of the state of Washington, confers no right, where the legal title is in the United States. Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534; Redfield v. Parks, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053. Nor do sections 5915–5918, R. & B. Codes of Washington, give the wife, as a member of the community, an interest which attaches to public land "squatted" upon by the husband and wife prior to homestead entry. McCune v. Essig, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237; Wadkins v. Producers' Oil Co., 227 U. S. 368, 33 Sup. Ct. 380, 57 L. Ed. 551.

WM. E. PECK & CO., Inc., v. LOWE, Collector.

(District Court, S. D. New York. June 1, 1916.)

COMMERCE ⊂⊃77—INCOME TAXES—EXPORTATION—"INCOME."

The Income Tax Law, in so far as it imposes taxes upon income resulting from exportation of goods and sale in foreign countries, is not invalid as imposing a tax on exports; the exportation being complete before the income, which presupposed a successfully completed transaction, arises for taxation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61–70; Dec. Dig. ⊂⊃77.

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

At Law. Action by William E. Peck & Co., Incorporated, against John Z. Lowe, Jr., Collector. On motion by both parties for directed verdict. Verdict directed for defendant.

John C. Spooner and Charles P. Spooner, both of New York City, for plaintiff.

Earl B. Barnes, Asst. U. S. Atty., of New York City, for defendant.

HOUGH, District Judge. Plaintiff is engaged in buying goods in the United States, and selling them largely to foreigners, making deliveries abroad. Having been taxed upon its corporate income from all sources, it sues to recover that proportion of the tax, compulsorily paid, which its foreign business bears to its whole trade, upon the ground that a tax on income derived from the profitable sale of exported articles is a tax on the articles so exported, and therefore unconstitutional.

It will be assumed (but not held) that the sixteenth amendment does not affect the matter, which is therefore to be decided in the light of a long line of cases of which Thames & Mersey, etc., Co. v. United States, 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087, is the latest. No elaborate review of decisions will be attempted. Such temptations, in constitutional matters, are to be resisted by trial courts, whose decisions thereon may interest the writers, but have no other importance.

Constitutional inquiries are political rather than legal. The fundamental law is not to be interpreted like a statute. The only decision worth having is that of the tribunal whose singular duty it is, under legal forms, either to finally withdraw some matter from political action, or precipitate constitutional amendment, according to the acceptance or popularity of the judgment, not among bar and bench, but with the men in the street. The only justifiable exception to this rule of reticence arises when is presented a glaring instance of invaded private right, demanding instant action to redress patent wrong. This is not such a case.

A recent commentator on the decisions most relied upon by plaintiff (Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45

L. Ed. 862, United States v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, and Thamas & Mersey, etc., Co. v. United States, supra) thus summarizes them:

"Any governmental burden which affects in any way the processes of exportation is unconstitutional and void."

This expresses my view of their result, and it is as far as the Supreme Court has definitely gone in identifying the substance exported with its accidents, attributes, and adjuncts. How far the process will go cannot be foreseen. I shall go further only under compulsion. At present it is held by still ruling cases, that taxation which anticipates exportation is not within the constitutional prohibition (e. g., Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504). Obviously general taxation on production may discourage exports, yet that gives no relief as to articles intended for foreign parts. By the same reasoning, profits or income from exports should be taxable, because subsequent to the act of export. Income or profit presupposes a successfully completed transport. It is no part of the act of exportation, though it may be said to be a result thereof. Similarly the fact that taxation of the fruits of exportation may discourage business quite as much as anticipatory taxation on the goods transported is immaterial.

Against all this are presented the numerous opinions holding that a tax on a salary is on the office producing it (Collector v. Day, 11 Wall. 113, 20 L. Ed. 122), that a tax on the receipts from interstate commerce is a tax on the commerce itself (Phila., etc., Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200), and the like. Such decisions usually describe themselves as busied in piercing through form to substance. They are even more logically viewed as seeking a definition of the subject of prohibition, and then laying down what in patent law is called its "range of equivalents."

Under the constitutional clause here to be considered, we must find equivalence between the articles exported and the processes or incidents of the act of exportation or transport. But protection begins with that act, and must end with its completion, because the act is the subject of the constitutional prohibition. After export, profits come, and taxation with them.

Verdict directed for defendant.

UNITED STATES v. UNITED SHOE MACHINERY CO. et al.

(District Court, E. D. Missouri. June 6, 1916.)

1. EQUITY ⚷153—PLEADING ⚷34(1)—LIBERAL CONSTRUCTION OF PLEADINGS.

In modern practice, pleadings in civil actions at law or in equity are not construed with the strictness formerly applied to criminal indictments, but are to be taken to mean what their language fairly imports.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386–389; Dec. Dig. ⚷153; Pleading, Cent. Dig. §§ 66, 67, 71; Dec. Dig. ⚷34(1).]

2. EQUITY ⚷362—PLEADING—SUFFICIENCY OF BILL.

In the federal courts of equity, indefiniteness of statement in a bill is not ground for a motion to dismiss, if, fairly construed, it states a cause of action; but the defendant has an adequate remedy under equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) by motion for more particular statement.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758–761; Dec. Dig. ⚷362.]

3. EQUITY ⚷141(1)—PLEADING—PLEADING WRITTEN INSTRUMENTS.

Instruments of writing need not be set out in extenso in a bill, unless the bill shows that it is essential to the proper construction of the particular clauses complained of, and which are set out.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323–330, 333; Dec. Dig. ⚷141(1).]

4. MONOPOLIES ⚷24(2)—SUIT UNDER CLAYTON ANTI-TRUST ACT—PARTIES.

To a suit by the United States to have leases of shoe machinery exacted by defendants from shoe manufacturers adjudged illegal, as in violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, because of provisions therein intended to prevent competition and to secure a monopoly by virtually compelling the lessees to purchase or lease other machines from defendants and preventing them from purchasing or using machines made by competitors of defendants, and to enjoin the further making or enforcement of leases containing such provisions, the lessees are not necessary parties; no relief being asked against them.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚷24(2).]

5. EQUITY ⚷94—JURISDICTION OF FEDERAL COURTS—PARTIES.

The failure to join one who is a proper, but neither a necessary nor an indispensable, party does not deprive a federal court of equity of jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. ⚷94.]

6. CORPORATIONS ⚷380—LIABILITY FOR CORPORATE ACTS—SUBSIDIARY CORPORATIONS.

Where one corporation owns all of the stock of another and controls its policy and business, it is responsible for the acts of the subsidiary corporation, which are considered in equity as its own acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1540; Dec. Dig. ⚷380.]

7. MONOPOLIES ⚷24(2)—CLAYTON ANTI-TRUST ACT—SUIT FOR VIOLATION—PARTIES.

All of the stock of one corporation was owned by a second, and 98½ per cent. of the stock of the second was owned by a third, and all three

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had for the most part the same officers and directors. *Held* that, in a suit by the United States for violation of Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730, by the first corporation, the other two corporations were properly joined as defendants.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚿24(2).]

8. CONSTITUTIONAL LAW ⚿48—STATUTES—DETERMINATION OF VALIDITY—PRESUMPTION IN FAVOR OF VALIDITY.

A federal statute will not be declared void by the courts, unless it appears beyond a reasonable doubt that it is not within the constitutional powers of Congress.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⚿48; Statutes, Cent. Dig. § 56.]

9. COMMERCE ⚿16—"INTERSTATE COMMERCE"—LEASING OF MACHINES.

The fact that every lease is not commerce is not conclusive that none may be, and where a large corporation, doing an interstate business amounting to millions of dollars annually in disposing of machinery which it manufactures, sees proper to lease instead of sell its machines, it is no less engaged in interstate commerce than it would be if it sold the machines, and its lease contracts are proper subjects of Congressional regulation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. ⚿16.

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

10. MONOPOLIES ⚿10—CLAYTON ANTI-TRUST ACT—CONSTITUTIONALITY.

Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, making it unlawful for any person engaged in commerce, in the course of such commerce, to lease or sell goods, machinery, etc., on any condition, agreement, or understanding that the lessee or purchaser shall not use or deal in goods or machinery of a competitor of the lessor or seller, where the effect may be to substantially lessen competition or tend to create a monopoly, as applied to leases made in the conduct of interstate business, is within the constitutional power of Congress.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. ⚿10.]

11. STATUTES ⚿216—CONSTRUCTION—EXTRINSIC AIDS.

It is only when an act of Congress is ambiguous that the debates when it was under consideration may be resorted to in aid of its construction; where the language is clear, it is controlling and conclusive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 292; Dec. Dig. ⚿216.]

12. MONOPOLIES ⚿24(2)—SUIT FOR VIOLATION OF CLAYTON ACT—SUFFICIENCY OF BILL.

A bill alleging that the corporation defendants made leases of shoe machinery to manufacturers for use throughout the United States which contained provisions prohibiting the lessees from purchasing or using machines of other makers under penalty of increased rental, or of the cancellation of leases under which indispensable machines not otherwise obtainable were in use, *held* to state a cause of action for violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, although it was not alleged that the lessees expressly bound themselves to observe such restrictions.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚿24(2).]

13. MONOPOLIES ⟹24(2)—SUIT FOR VIOLATION OF CLAYTON ACT—SUFFICIENCY OF BILL.

Such a bill, if it charges the doing of acts by the defendants which are in terms made unlawful by the act, and that such acts tend to substantially lessen competition and to create a monopoly, is not insufficient because it does not allege that they were "unduly and improperly exercised."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⟹24(2).]

14. CONSTITUTIONAL LAW ⟹27—OBLIGATION OF CONTRACTS—POWERS OF CONGRESS.

The constitutional provision prohibiting the states from passing laws impairing the obligations of contracts is not a limitation upon the powers of Congress, to which it has no application.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 31; Dec. Dig. ⟹27.]

In Equity. Suit by the United States against the United Shoe Machinery Company and others. On motion to dismiss. Denied.

See, also, 227 Fed. 507.

This is an action to enjoin the defendants, the United Shoe Machinery Company, a corporation existing under the laws of the state of Maine, the United Shoe Machinery Company, a corporation existing under the laws of the state of New Jersey, the United Shoe Machinery Corporation, also existing under the laws of the state of New Jersey, and certain individuals, alleged to be the directors and officers of these corporations, from enforcing, or attempting to enforce, certain provisions of leases alleged to be prohibited by section 3 of the act of Congress approved October 15, 1914, 38 Stat. 730, known as the "Clayton Act." For convenience the defendant United Shoe Machinery Company of Maine will be referred to in this opinion as the "Maine Company," the United Shoe Machinery Company of New Jersey as the "New Jersey Company," and the United Shoe Machinery Corporation as the "corporation."

The complaint is brief and concise, and will be practically set out in full. It charges: That the Maine Company is a corporation organized under the laws of the state of Maine, with an authorized capital stock of $3,000,000. Its original corporate name was "Goodyear Shoe Machinery Company." All of its capital stock, assets, and business were acquired in 1889 by the United Shoe Machinery Company of New Jersey, which now owns the same. That in 1902 the name of the "Goodyear Shoe Machinery Company" was changed to "United Shoe Machinery Company," and, while it continues its corporate existence, it is merely a selling and leasing department of the New Jersey Company. It is the only one of the defendants which does business in the Eastern district of Missouri. That the officers and directors of all three companies are in effect the same. That the New Jersey Company has a capital stock of $20,850,519, all of which is substantially owned by the defendant the United Shoe Machinery Corporation. That ever since its incorporation it has been engaged in manufacturing, selling, and leasing shoe machinery, and it is the operating company of the business followed by the defendants. Its chief manufacturing plant is at Beverly, Mass., and its officers and directors are, for the most part, the same as those of the other corporate defendants. That the corporation has an authorized capital stock of $50,000,000, and is empowered by its charter to engage in manufacturing, selling, and leasing shoe machinery, but its activities have been confined chiefly to those of a holding company. Shortly after its organization it acquired and now owns 98½ per cent. of the outstanding capital stock of the New Jersey Company and through this company dominates the other corporate defendants. In addition it controls the stock of certain other affiliated corporations, engaged in business related to the shoe machinery interest. That the defendant Sidney M. Winslow is president, director, and

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

managing officer of all these three corporations, and numerous other corporations owned and subsidiary corporate defendants, and the other individual defendants are officers and directors, some of all three corporations, and others of two of the defendant corporations. That the defendants have leased, sold, and are leasing and selling their machinery, supplies, and repairs, and in certain instances have fixed and are fixing the prices thereof, and discounts and rebates from such prices, on condition, agreement, and understanding that the lessee or purchaser shall not use the machinery, supplies, or other commodities of competitors of the lessors, which agreements tend to create a monopoly in that branch of interstate commerce which relates to the shoe machinery business.

The bill then alleges: That nearly all shoes now made in the United States are manufactured by machinery. Over 1,500 manufacturers are engaged in cities and towns of nearly every state in the Union in the production, annually, of more than 300,000,000 pairs of machine-made shoes. With all but a very few of these manufacturers the defendants have business relations. That the defendants devote themselves particularly to the production of machinery used in preparing and stitching soles to the uppers of shoes. They also manufacture machinery used in other shoe-making operations. That the defendants divide certain of their important machines into two classes, "principal" and "auxiliary." In a general way machines which perform operations of major importance are spoken of as "principal" while machines which execute operations necessary to the work of "principal" machines are called "auxiliary." The distinction, however, it is charged, is largely arbitrary, and results chiefly from the defendants' system of leasing. Many of the more important machines are put out by the defendants on leases. On some the lessees are required to pay royalties, and on others an annual rental. All machines on which royalties are exacted are designated as "principal," and all those on which an annual rental is paid "auxiliary."

The cutting of the soles, uppers, and lining, and the stitching of the uppers and lining, follow about the same course with respect to all kinds of shoes. It is when the sole comes to be attached to the upper of the shoe—"bottomed," as it is called in the trade—that the fundamental difference in construction arises. Here two chief categories appear: In the one the soles are fastened by thread; the other, by wire, nails, or wooden pegs. The first category is subdivided into three classes: (A) McKay sewed; (B) turned; (C) welt shoes. The second category is divided into two classes: (a) Metallic fastened; (b) pegged shoes. The McKay sewed shoe is so called because it is bottomed on a McKay sewing machine; the turned shoe takes its name from the fact that it is turned inside out during the process of attaching the sole, which is done on a welt and turn sewing machine; the welt shoe is so designated because a narrow strip of leather, called a welt, is sewed to the upper and insole, by a welt sewing machine, and the outsole is attached to the welt by an outsole stitching machine. Metallic fastened shoes have their soles attached to the insoles on a "loose nailer," or by wire screws on a "standard screw" machine; pegged soles are bottomed on a "pegging" machine. In connection with the working of these machines are certain accessory operations which are executed for the most part by "auxiliary" machines. The bill then describes how this work is done. It is then charged that "principal" machines cannot be operated profitably without the use of some, if not all, of the "auxiliary" machines. The "auxiliary" machines are of substantially no value, except as they are used in connection with the "principal" machines.

The illegal actions of which complaint is made are described as follows: The writings under which the defendants put out most of their machinery are variously designated "ordinary and temporary lease and agreement," "lease and agreement," "lease and license agreement," or "agreement," but are in the bill referred to as leases. Under these leases it is charged the defendants ship, and for many years have been shipping, in interstate and foreign commerce, the shoe machinery and supplies herein referred to, from Beverly, Mass., to points in other states and foreign countries. The leases generally run for a period of 17 years. Many of them were made before, and some since, the passage of the Clayton Act, but all are now being enforced by the defendants. The bill does not complain of the leases as a whole, but only parts thereof, which are described in the bill as "tying clauses" and "discounts and rebates." The bill charges that in each of the leases there are certain provisions denominated the "tying clauses," because they tie together the uses of several leased machines, and in effect, though not always in terms, prohibit the lessees from using machines of lessor's competitors. For example, the fastening machines may not be used on any shoe not welted, stitched, slugged, heeled, or seat-nailed on machinery leased from the defendants. In other words, machines are "tied" in a similar manner. The tying clauses provide in substance that the lessee: (1) Shall not use machinery in the manufacture or preparation of footwear which has not had certain essential operations performed upon it by other machines leased from the lessor. (2) Shall use the leased machinery to its full capacity. (3) Shall use exclusively the leased machinery for the class of work for which it is designed. (4) Shall obtain from the lessor exclusively, at such prices as it may establish, all duplicate parts, mechanisms, or repairs needed in operating the leased machines, and all supplies needed in connection with them. (5) Shall use patented insoles made on defendants' machinery only in connection with certain footwear manufactured by machinery leased from the lessor. (6) Shall lease from the lessor any additional machinery which he may need for work in the same department as that of the machine leased. (7) Shall permit the lessor to determine whether the lessee has in his factory more machinery adapted for doing the same work than he needs, and, if so, to remove such machines as, in the opinion of the lessor, are unnecessary. (8) Shall, at the election of the lessor, suffer a termination of all leases which he may have, and the removal of all machines leased by him from the defendants, in the event of any violation of any term of any one of the leases.

Copies of the clauses above referred to are attached to the bill as Exhibits 1, 2, 3, 4, 5, 6, 7, and 8.

Exhibit 1.

The leased machinery shall be used for no other purpose than for lasting boots, shoes, or other footwear made by or for the lessee. The leased machinery shall not, nor shall any part thereof, be used in the manufacture or preparation of any welted boots, shoes, or other footwear, or portions thereof, which have been or shall be welted in whole or in part, or the soles in whole or in part stitched, by the aid of any welt-sewing or sole-stitching machinery not held by the lessee under lease from the lessor, or in the manufacture or preparation of any turned boots, shoes, or other footwear or portions thereof the soles of which have been or shall be in whole or in part attached to their uppers by the aid of any turn-sewing machinery not held by the lessee under lease from the lessor, or in the manufacture of any boots, shoes, or other footwear which have or shall be in whole or in part pulled-over, slugged, heel seat-nailed, or otherwise partly made by the aid of any pulling-over or "metallic" machinery not held by the lessee under lease from the lessor.

Exhibit 2.

Subject to the foregoing limitations, the lessee shall use the leased machinery to its full capacity upon all boots, shoes, or other footwear, or portions thereof, made by or for the lessee in the manufacture or preparation of which such machinery is capable of being used.

Exhibit 3.

If at any time the lessee shall fail or cease to use exclusively lasting machinery held by him under lease from the lessor for lasting boots, shoes, and other footwear made by him or for him, which are lasted by the aid of machinery, or shall fail or cease to use exclusively tacking mechanisms and appliances held by him under lease from the lessor for doing all work in the manufacture of all boots, shoes, and other footwear made by or for him which is done by the aid of tacking mechanisms and appliances, the lessor, although it may have waived or ignored prior instances of such failure or cessation, may, at its option, terminate forthwith, by notice in writing, any or all leases or licenses of lasting machines, lasting machinery, lasting mechanisms, or lasting devices then existing between the lessor and the lessee, whether as the result of assignment to the lessor or otherwise; and the possession of and full right to and control of all lasting machines, lasting machinery, and lasting mechanisms shall thereupon revest in the lessor free from all claims and demands whatsoever.

Exhibit 4.

The lessee shall obtain from the lessor exclusively, and shall pay therefor at the regular prices from time to time established by the lessor, all the duplicate parts, extras, mechanisms, and devices of every kind needed or used in operating, repairing, or renewing the leased machinery, and the same shall form part of the leased machinery, and the lessee shall not otherwise make or allow to be made any addition, subtraction, or alteration to, from, or in the leased machinery without the consent in writing of the lessor, nor interfere with the proper operation of the same. The lessee shall also purchase from the lessor exclusively, at the prices from time to time established by the lessor, all supplies, including string nail, tack strips, and other fastening materials used in connection with the lasting machinery.

Exhibit 5.

The leased machinery shall be used only in the manufacture or preparation of reinforced insoles which embody the inventions patented in letters patent of the United States of America, No. 849,245, dated April 2, 1907, owned by the lessor, for use in welted boots, shoes, and other footwear known in the trade as "Goodyear welts," which have been or are to be welted wholly by Goodyear welt and turn shoe machines or Goodyear inseam sewing machines held by the lessee under lease from the lessor, and the soles of which have been or are to be attached to their welts wholly by Goodyear outsole rapid lockstitch machines held by the lessee under lease from the lessor, or for use as insoles or soles of turned boots, shoes, and other footwear known in the trade as "Goodyear turns," the soles of which have been or are to be attached to their uppers by Goodyear welt and turn shoe machines or Goodyear Universal inseam sewing machines held by the lessee under lease from the lessor, and in the manufacture or preparation of such patented insoles (or soles) the lessee shall use the principal machinery hereby leased to its full capacity so far as the lessee uses reinforced insoles (or soles) in the manufacture of such footwear. The auxiliary machinery hereby leased shall be used only in the manufacture or preparation of said patented insoles (or soles) which have been or are to be reinforced wholly by an Economy insole reinforcing machine hereby leased or held by the lessee under other leases and license from the lessor.

6. The lessee is hereby licensed under letters patent of the United States, No. 849,245, dated April 2, 1907, to manufacture by the use of the principal machinery hereby leased during the continuance in force of this lease and license the patented insoles covered by said letters patent and to use such patented insoles so made by the lessee in the manufacture of welted or turned boots, shoes, or other footwear which have been or are to be manufactured as provided in article 5 hereof.

Exhibit 6.

In case the lessee has more work of the kind which can be performed by any of the machines belonging to the metallic department of the lessor than the capacity of the metallic machinery which he has under lease from the lessor will permit, then the lessee shall either take from the lessor, under a like lease and agreement, sufficient and additional machinery to perform the work, or in case the lessee does not thus lease additional metallic machinery from the lessor, then the lessor may, if it so elects, cancel forthwith this lease and any other lease of metallic machinery then in force between the lessor and the lessee, whether as the result of assignment or otherwise.

Exhibit 7.

12. In case the lessee, at any time, shall have in his factory more machines adapted for doing the same work as any machine or machines hereby leased than in the opinion of the lessor are sufficient for performing the work which the lessee has in his factory, based upon the capacity of such machines and the number and kind of boots, shoes and other footwear made by the lessee for any period of twelve (12) consecutive months next preceding, the lessor may, at its option, upon thirty (30) days' notice in writing to the lessee, terminate the lease and license herein contained and in respect to such of the said machines as in the opinion of the lessor are unnecessary.

Exhibit 8.

This lease and license shall continue, unless sooner terminated by the lessor as herein provided for seventeen years from the date hereof. But if any breach or default shall be made in the observance of any one or more of the conditions contained herein or contained in any other lease or license agreement existing between the lessor and the lessee, whether as the result of assignment to the lessor or otherwise and expressed to be obligatory upon the lessee, the lessor shall have the right by notice in writing to the lessee to terminate forthwith any and all leases of or licenses to use machinery then in force between the lessor and the lessee, whether as the result of assignment to the lessor, or otherwise, and this notwithstanding that previous breaches or defaults may have been unnoticed, waived or condoned by or on behalf of the lessor.

The bill then charges that competitors of defendants have produced, sold, and leased, and are now producing, selling, and leasing, in interstate commerce, machines similar in function to many important machines put out by the defendants and affected by the "tying clauses" herein described. Exhibit 13 to the complaint is a list showing the different machines used in the manufacture of shoes showing, in one column, how many of these different machines are put out to shoe manufacturers in the United States by the defendants, and in another column by all other shoe machinery manufacturers in the United States.

Exhibit 13.

Machines Put Out to Shoe Manufacturers in the United States.

	By Defendants.	By All Others.
Clicking machine	3,655	None
Eyeletting machine	4,472	150
Pulling-over machine	(1)	(1)
Lasting machine	7,496	7
Standard screw machine	(1)	(1)
Pegging machine	(1)	(1)
Tacking machine	3,488	6
McKay sewing machine	898	8
Welt sewing machine	2,527	142
Outsole stitching machine	2,676	758
Loose-nailing machine	1,835	24
Heeling machine	2,019	17
Slugging machine	1,876	23

(1) No competition in the United States.

In nearly all cases where shoe manufacturers have used or are using any machines procured from competitors of the defendants, the latter have threatened and do now threaten to remove from the factories of the said manufacturers, all machines leased from them. In some cases the defendants have removed the machines, and in other instances have imposed heavy penalties upon manufacturers because of the use of such machines, secured from defendants' competitors in violation of said "tying clauses." That some of these competitors of the defendants are prepared to supply certain machines of the kinds referred to, as well as other machines adapted to the making of shoes, at prices much less and on terms more favorable than those exacted by the defendants for similar machines, and shoe manufacturers desire to procure them, but are deterred from doing so by the "tying clauses," and from fear of the severe financial consequences that would follow their violation. Besides, competitors of the defendants, other than those now in existence, would arise, and other shoe-making machines would be manufactured and put out by them, if the field of competition was free from the restraining effect of said "tying clauses."

Some indispensable machines can be obtained only from the defendants, for example, the stitch indenter and burnisher. In the lease under which the defendants put out these machines, they tie their use to other machines which they manufacture, and thereby compel the lessees to procure all such other machines from the defendants, the effect of which is practically to prohibit the shoe manufacturers from obtaining any such other machines from competitors of the defendants. That some leases put out by the defendants have clauses which provide for a discount or rebate on prices fixed for the use of the machines rented—in certain contingencies eliminating the price entirely—in consideration of the lessees using other machines of the defendants. Copies of these clauses are filed as Exhibits 9, 10, 11, and 12.

Exhibit 9.

6. The lessee shall pay to the lessor throughout the full term of this agreement the respective amounts set forth in the following schedule in respect to each pair of welted

boots, shoes, or other footwear, or portions thereof, manufactured or prepared by or for the lessees, which shall have been welted in whole or in part or the soles of which shall have been in whole or in part attached to welts by the use of any welting or stitching or sewing machinery, and in respect to each pair of "turned" boots, shoes, or other footwear, or portions thereof, manufactured or prepared by or for the lessee, the soles of which shall have been sewed or attached to their uppers, in whole or in part by the use of any sewing or stitching machinery, viz.:

Schedule of Payments per Pair.

	Sizes, Form Nos. ——.	Welts. Cents.	Turns. Cents.
Children's	1 to 10½ inclusive	3	1
Misses'	11 to 2 inclusive	4	1½
Women's	2½ and over	6	1½
Boys'	9 to 13 inclusive	4	1½
Youths'	1 to 5 inclusive	6	1½
Men's	5½ and over	8	1½

All payments and the guaranty in this agreement provided for are independent of and in addition to all payments and guaranties provided for in any other leases or licenses or agreements between the lessor and the lessee: Provided, however, that (excepting in so far as is required by the guaranty herein contained or contained in other lease and license agreements between the lessor and the lessee), in case under any other "Goodyear department" lease and license agreement between the lessor and the lessee covering one or more Goodyear welt and turn shoe machines, Goodyear Universal inseam sewing machines, or Goodyear outsole rapid lock-stitch machines, the lessees shall have paid to the lessor the amount set forth in the schedule of payments in such lease and license agreement contained in respect to any pair of boots, shoes, or other footwear, then the lessee shall be relieved from said payment hereunder in respect to that pair of boots, shoes, or other footwear.

Exhibit 10.

Order and Temporary Loan Agreement, No. 236 "A."

8. The licensee, until such time as he shall have redelivered all of said machinery to the United Company, as hereinafter provided, shall pay to the United Company the sum of one-half of one cent (½¢) in respect to each and every pair of boots, shoes or other footwear, or portions thereof, manufactured and prepared in said factory or in any factory to which any of the said machinery shall be removed which have been pulled over in any way, whether wholly or in part, by the aid of machinery, whether or not of the United Company; and the licensee shall also pay to the United Company in respect to each pair of boots, shoes, or other footwear, or portions thereof, in the manufacture or preparation of which any machine hereby leased is used, the sum of one-quarter of one cent (¼¢) for each machine so used: Provided, however, that the total of the payments required to be made under this article hereof or under the corresponding article of any other pulling-over department lease or license agreement or agreements heretofore executed between the lessee and the United Company shall not exceed such amount as shall make the total of such payments for such factory and of the payments for such factory required to be made under the corresponding article of any lease or license agreement or agreements between the licensee and the United Company covering lasting machines equal to a payment in respect to the total number of pairs of footwear made in whole or in part in such factory at the following rates, viz.:

In respect to all footwear lasted by machines held by the licensee under lease or license agreement from the United Company an amount for each pair three-fourths (¾) of one cent in excess of the amount required to be paid under the terms of the lease or license agreements covering such lasting machines.

In respect to all footwear not lasted by machines held by the licensee under lease or license agreement from the United Company one and three-fourths (1¾) cents for each pair of children's (sizes 1 to 10½ inclusive) or misses' (sizes 11 to 2 inclusive) footwear and two (2) cents for each pair of all other kinds, excepting alone that turned footwear in the manufacture of which no lasting machine shall be used shall in such computation be included at the rate of three-fourths (¾) of one cent per pair only.

Exhibit 11.

9. The licensee shall pay to the United Company, in accordance with the following "Schedule of Payments," in respect to each pair of footwear made in said factory or in any factory to which any of the said machinery shall be removed, in the manu-

facture of which any one or more of the operations which can be performed by the machines of the metallic department of the United Company or any of them is performed by machinery, whether performed by machinery of the United Company or by other machines, viz.:

Schedule of Payments.

	Per Pair.
For each pair of turned footwear in which no metallic fastening machine is used for attaching sole	½¢
For each pair of welted or slip soled or McKay sewed footwear in which no metallic fastening machine is used for attaching either a welt, slip sole, or outsole	1¢
For each pair of footwear the outsoles of which are attached by metallic fastenings	3¢
For each pair of footwear of all other kinds	2¢

—excepting, however, that in the case of each pair of footwear in which all such metallic operations as are performed by machinery in the manufacture thereof are performed by metallic department machinery of the United Company, held by the licensee under lease or license agreement from the United Company, and in which all of the metallic materials inserted by such machinery are obtained from the United Company at the prices from time to time established by the United Company (which prices include not only the price for the materials themselves but also an additional amount as royalty for the use of the machines by which the same are inserted), such payment in accordance with the foregoing "Schedule of Payments" shall not be required to be made.

[The words "United Company" appearing in the above exhibits refer to one of the corporate defendants.]

Exhibit 12.

Four. The lessee, as rent and royalty for the leased machinery, shall purchase exclusively of the lessor all the fastening material used by him in connection with the leased machinery, and shall pay the lessor in cash on delivery the regular and uniform prices therefor as established from time to time by the lessor, which shall not be more than ten (10) per cent. in excess of the prices to be established from time to time by the lessor for like fastening material to be used in its metallic department machinery by lessees who shall agree not to use the metallic department machinery leased to them in the manufacture of boots and shoes which are lasted on machines other than those leased from the lessor, or of welted boots, or shoes which are not welted and stitched on welt sewing and sole stitching machines leased from the lessor, or turned shoes the soles of which are not attached by turn sewing machines leased from the lessor.

Some of the machines are leased by the defendants on what they call an "unrestricted" form of lease. Under that form the lessee in certain cases is permitted to use with the machine leased from the defendants machinery obtained from the competitors of the defendants. These "unrestricted" leases involve the payment of certain "initial premiums" which have remained the same for many years. These "initial premiums" are in addition to the royalties and other charges, which are the same as under the "restricted" form of lease. The amounts of these "initial premiums" are so large as to practically prohibit the choice of the "unrestricted" form. It is charged that these premiums would amount to about $250,000 upon the machinery in a factory having an output of 25,000 to 30,000 pairs of shoes daily.

The bill then sets out how the defendants obtained control of the shoe machinery business, by charging that the New Jersey Company, soon after its organization, acquired and still owns the capital stock of the Goodyear Machinery Company, Goodyear Machinery Company of Canada, the International Goodyear Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, and Eppler Welt Machine Company, all of which companies were, at the time they were so acquired, engaged in the business of manufacturing, selling, and leasing, and otherwise dealing in shoe machinery; that these companies conveyed to the New Jersey Company all of their business, including letters patent of the United States and all other countries. Afterwards from time to time this corporation secured and still maintains control of 56 other concerns engaged in the manufacture, sale, and leasing of some form of shoe machinery, or supplies, thereby controlling a complete line of "principal" and "auxiliary" machinery used in the bottoming of shoes. Before then no one company could supply such a line, nor can any company do so now outside the defendants. By reason of this control the defendants make the unlawful lease clauses set out in the complaint, whereby shoe manufacturers are prohibited from using in the bottoming of shoes machinery or supplies of defendants' competitors, and to this cause is due the fact that the defendants control as they do 98½ per cent. of the shoe machinery business of the United States, as shown by Exhibit 13.

The prayer of the bill is that the clauses of the leases hereinbefore referred to, and all clauses of like tenor and effect, and the conditions, agreements, and understandings upon which the leases were made, as aforementioned, be declared illegal and void under the said Clayton Act, and that the defendants be enjoined from enforcing or attempting to enforce the same, and from making any similar clauses or leases upon like conditions, agreements, or understandings in the future.

The defendants have filed motions to dismiss the complaint, assigning 20 causes. As many of these are mere repetitions, and as the grounds relied on by the defendants will be referred to in the opinion, it is unnecessary to set them out in this statement of facts.

Constantine J. Smyth and H. La Rue Brown, Sp. Asst. Attys. Gen., for the United States.

Charles F. Choate, Jr., of Boston, Mass., Chester H. Krum, of St. Louis, Mo., Cordenio A. Severance, of St. Paul, Minn., and Frederick P. Fish, of Boston, Mass., for defendants.

TRIEBER, District Judge (after stating the facts as above). Section 3 of the Clayton Act, which was invoked as the basis for this action, is as follows:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We will first dispose of those grounds of the motion which affect the pleadings only.

[1] It is claimed that the allegations in the complaint are not specific enough to enable the court to determine whether the acts charged are within the meaning of the statute, nor sufficient to enable the defendants to prepare their defense.

Counsel in their arguments, as well as in their briefs, stated their position as follows:

"In any pleading, whether criminal, at law, or in equity, the thing charged should be stated with such precision and certainty that the defendant may know with what he is charged, that he may prepare his defense, and so that the court may be able to determine whether the offense charged is within the provisions of the statute."

While this rule is applied to indictments in criminal proceedings, the rule in civil actions, either at law or in equity, is much more liberal. Mr. Justice Holmes, delivering the opinion of the court in Swift

& Co. v. United States, 196 U. S. 375, 395, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), which was an action under the Sherman Anti-Trust Act, held:

"Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed 100 years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of the English speech."

Nor does the old rule, that "every intendment is against the pleader, and therefore the pleadings must be strictly construed against him," govern the courts at this day; but, on the contrary, the courts now recognize the fact that it is of more importance to determine issues than pleadings, provided, of course, the facts alleged in the complaint entitle the plaintiff to the relief sought.

[2] The new equity rules, which in effect are similar to the Code procedure prevailing in most of the states, are clearly intended to simplify pleadings and do away with many of the technicalities theretofore required. That under the Codes a demurrer upon mere technical grounds would not lie, but that the proper remedy is a motion to make the complaint more specific, is now well settled. 4 Standard Enc. of Procedure, 859; Bliss on Code Pleading (3d Ed.) § 425A; McAllister v. Kuhn, 96 U. S. 87, 24 L. Ed. 615; United States v. Parker, 120 U. S. 89, 94, 7 Sup. Ct. 454, 30 L. Ed. 601; Singers-Biggers v. Young, 166 Fed. 82, 91 C. C. A. 510; Locker v. American Tobacco Co. (D. C.) 194 Fed. 232; Phillips v. Jones, 79 Ark. 100, 104, 95 S. W. 164, 9 Ann. Cas. 131; Sanders v. Carpenter, 102 Ark. 187, 190, 143 S. W. 1091. Equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) offers the defendants an adequate remedy, if the allegations in the complaint are not specific enough to enable them to prepare their defense.

Even under the old rule general certainty only was required in pleadings in equity. St. Louis v. Knapp Co., 104 U. S. 658, 661, 26 L. Ed. 883. Only when the uncertainty in the pleadings is of such a nature that it does not state a cause of action will a demurrer, or, under the present equity rules, a motion to dismiss, lie. The complaint does not lack that certainty which is necessary to enable the court to determine whether it states a cause of action; nor can it be said that the allegations are too uncertain to enable the defendants to prepare their defense.

It sets out as fully as is necessary for a proper defense what the plaintiff expects to rely on, and therefore enables the defendants to prepare their defense. To a similar objection made in Swift & Co. v. United States, supra, which, as stated before, was an action under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209), Mr. Justice Holmes replied:

"This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it, notwithstanding these difficulties."

The complaint in this case is drawn in concise terms and, without repetitions and unnecessary verbiage, states the facts which the pleader claims show that the plaintiff is entitled to relief under the Clayton Act. The failure to set out the leases in full only tends to reduce the size of the record, as the complaint expressly alleges that only the parts set out in the exhibits are contrary to the statute, and only as to them is relief sought. If other provisions of the leases would show that these excerpts are misleading, that the lease as a whole would show a different state of facts than is alleged in the complaint, they may be set out in full in the answer, as counsel during the argument admitted that they had the original leases in their possession; or, if they believe that with the entire leases before the court it would appear that they are not subject to the construction put upon the clauses set forth in the complaint, and that they do not violate any statute of the United States, a motion under equity rule 20 would give them all the relief needed. This rule is a copy of the English chancery rule (Order XIX, rule 7), and as stated in Spedding v. Fitzpatrick, 38 C. D. 413:

"The bill of particulars is to enable the party asking for them to know what case he has to meet at the trial, and to save unnecessary expense and avoid allowing parties to be taken by surprise."

[3] In the opinion of the court instruments of writing need not be set out in extenso in the pleadings, unless the bill shows that it is essential to a proper construction of the particular clauses complained of. Such is not the case here.

[4] *Is the petition defective for failing to make the lessees defendants?*

The leading authority upon which the defense relies to sustain this ground of their motion is Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499. But the facts in that case differ so materially from those set out in the plaintiff's bill that it is wholly inapplicable to the instant case. In that case the state of Minnesota brought suit to enjoin the Northern Securities Company from exercising any control in the management or operation of two separate railways, existing under the laws of the state of Minnesota, which it was charged it attempted to do by reason of the ownership and control of the majority of the stock of the two railways and numerous other roads controlled by these railways, by virtue of stock ownership, and in violation of the laws of the state of Minnesota. Mr. Justice Shiras, delivering the opinion of the court, stated the object of the bill to be:

"The narrative of the bill unquestionably disclosed that the parties to be affected by the decision of the controversy are, directly, the state of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that state, and the Northern Securities Company, a corporation of the state of New Jersey, and, indirectly, the stockholders and bondholders of these corporations, and the numerous railway companies whose lines are alleged to be owned, managed, and controlled by the Great Northern and Northern Pacific Railway Companies. * * * But it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company."

Some of the relief prayed in the bill was that the Northern Securities Company, and its officers, be enjoined "from in any way aiding, advising, directing, interfering with, or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control, or operation of any of the lines of railway of either of said companies, * * * and from doing any and all acts and making any arrangements or combinations, by contract or otherwise, having for their object, effect, or result, the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties." No such relief is asked in this case, nor does the complaint seek the cancellation of any leases made by the defendants, but only to enjoin the enforcement of those clauses in the leases, which it is charged are prohibited by section 3 of the Clayton Act.

Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. Ed. 158, another case relied on by defendants, is wholly inapplicable to the facts in this case, as that was an action for the rescission of a compromise, and it was held that all the parties who, by the compromise sought to be rescinded, had been released of liability, were indispensable parties, as the object of the bill was to restore the plaintiff to his original rights as they existed before the compromise, and therefore would place upon these absent parties a liability of which they had been released by the compromise. It is hardly necessary to say, as it clearly appears from the language of the act, that the object of the statute invoked by the plaintiff was for the protection of the lessees and indirectly the public; Congress evidently presuming that the lessees accepted these leases under duress, and it is so charged in the complaint. It alleges:

"In the leases under which the defendants put out these machines they tie their use to other machines, which they manufacture, and thereby compel the lessees to procure all such other machines from the defendants, the effect of which is practically to prohibit the shoe manufacturers from obtaining any such other machines from competitors of the defendants."

And again:

"Competitors of the defendants have produced, sold, and leased, and are now producing, selling, and leasing, in interstate commerce machines similar in function to many of the important machines put out by the defendants and affected by the 'tying clauses' herein described. In nearly all cases where shoe manufacturers have used or are using lasting machines procured from competitors of the defendants, the latter have threatened, and do now threaten, to remove from the factories of said manufacturers, all machines leased from them. In some instances the defendants have removed such machines, and in other instances have imposed heavy penalties upon shoe manufacturers because of the use of such machines procured from the defendants' competitors in violation of said 'tying clauses.'"

[5] Aside from these allegations, it is expressly stated in the bill that no relief is sought against the lessees. What relief could the government ask against them? They are alleged to be bound hand and foot by these clauses in the leases, and must either submit to them, or do without those machines, which are under the absolute and sole control of the defendants, and if compelled to do without them, go out of business. Even if the lessees were proper parties, which is doubtful, the jurisdiction of the court would not be ousted for a failure to join them, as only indispensable parties, and in some instances necessary parties, must be joined. Cella v. Brown (C. C.) 136 Fed. 439; affirmed Id., 144 Fed. 742, 75 C. C. A. 608; O'Neil v. Wolcott Mining Co., 174 Fed. 527, 536, 98 C. C. A. 309, 318, 27 L. R. A. (N. S.) 200; Silver King, etc., Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 122 C. C. A. 402; Lion Tractor Co. v. Bull Tractor Co., 231 Fed. 156, —— C. C. A. ——, opinion filed February 12, 1916.

An indispensable party has been defined as:

"When he has such an interest in the subject-matter of the controversy that a final decree cannot be rendered in the suit without injuriously affecting the absent party, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380, and authorities there cited.

A necessary party is:

One who has "an interest in the controversy, and who ought to be made a party, in order that the court may act on that rule, which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." Shields v. Barrow, supra.

No title to nor possession of property is involved in this case. Still, if any of the lessees believe that their interests may be injuriously affected by this action, they can apply to the court to be made parties, and the court will then determine whether leave to do so should be granted. So far none of the lessees has asked to be made a party. United States v. Du Pont De Nemours & Co. (C. C.) 188 Fed. 127. In the court's opinion the lessees are not indispensable nor necessary parties to this action, as the relief prayed in the bill, if granted, can in no wise affect them or their rights, except that it may relieve them of an onerous, and, as the complaint alleges, illegal, burden. Vetterlein v. Barnes, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400.

[6, 7] *Are the New Jersey Company and the New Jersey Corporation improperly joined as defendants?*

It is urged that, as the Maine Company is the only defendant alleged to have made the leases complained of within the jurisdiction of this court, the other corporate defendants, each of whom has filed a separate motion to dismiss, are not proper parties. The allegations in the bill are that the entire capital stock of the Maine Company is owned by the New Jersey Company, and that the New Jersey Corporation owns 98½ per cent. of the capital stock of the New Jersey Company; that the officers and directors of the three corporations are practically the same, all of them serving as such officers and directors in at least two of the corporations, and some in all three. But it is claimed that as each corporation is an entity, and as there is no charge of conspiracy, the mere fact that they are the owners of the capital stock of the Maine Company, the only offender, does not justify their being made parties defendants.

Whatever may have been the views of the courts in the early days of corporate existence, when there were but few corporations, and they mostly confined to business of a quasi public nature, at this date courts, and especially courts of equity, will look behind the corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. In McCaskill v. United States, 216 U. S. 504, 514, 30 Sup. Ct. 386, 391 (54 L. Ed. 590), Mr. Justice McKenna, delivering the opinion of the court, said:

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, §§ 663, 664, 727. The principle was enforced in this court in Simmons Creek Coal Co. v. Doran, 142 U. S. 417 [12 Sup. Ct. 239, 35 L. Ed. 1063]."

The same rule was recognized in Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725. In Miller & Lux v. East Side Canal Co., 221 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, it was held that a plea that the plaintiff Miller & Lux, who instituted the action in a national court of the state of California, claiming to be a Nevada corporation, was organized under the laws of Nevada to act as the agent of Miller & Lux, a California corporation; that the California corporation owned all the capital stock of the Nevada corporation; that all the property of the Nevada corporation was held as agent for the California corporation, and that it had no other existence; that it was incorporated with the sole object to enable it to maintain suits in the national courts of California by reason of a diversity of citizenship; that it transacted no business except such as was necessary to carry out the performances of the California corporation; that therefore the Circuit Court should not retain jurisdiction of the cause, there being, in fact, no diversity of citizenship, both parties being citizens of the state of California—was rightly sustained by the Circuit Court, and its judgment affirmed by the Supreme Court. In Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, Mr. Justice Harlan said:

"Necessarily by their combination or arrangement (referring to the Securities Company as holder of a majority of the shares of the constituent companies), the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines, for the exclusive benefit of its stockholders."

In the same case, when pending in the Circuit Court (120 Fed. 721, 725, 726), Judge Thayer, delivering the opinion of the court, in which Circuit Judges Caldwell and Sanborn concurred, said:

"It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of a majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. * * * The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in Pearsall v. Great Northern Railway, 161 U. S. 646, 671 [16 Sup. Ct. 705, 40 L. Ed. 838]," and numerous other cases cited in the opinion.

Referring to Pullman Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, another case relied on by counsel for defendants, the same learned judge distinguished it by saying:

"In that case the meaning of the word 'controlled,' as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the Anti-Trust Act, when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership."

In Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 Fed. 41, — C. C. A. —, opinion filed April 27, 1916, Judge Adams, speaking for the Circuit Court of Appeals of this circuit, said:

"It is true that, apart from the question of ultra vires, not presently involved, when one corporation owns and controls the entire property of another, and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations," citing a number of authorities.

In Re Rieger (D. C.) 157 Fed. 609, the court said:

"The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it and preserve the rights of innocent parties or to circumvent fraud."

In United States v. Milwaukee Refrigerator Transit Co. (C. C.) 142 Fed. 247, it was charged that the defendant was a dummy corporation, organized, owned, and operated by the stockholders of a brewing company, as a device to cover rebates on interstate shipments of beer, and the court held:

"A corporation, from one point of view, may be considered an entity, without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its consistent parts. The word 'corporation' is but a collective name for the members who compose the association [citing authorities]. If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears;

but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Of the many other cases to the same effect, see State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; First National Bank v. F. C. Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

From the allegations in the complaint it is beyond question that the Maine Company is merely a subsidiary of the New Jersey Company, and that both are under the absolute control, by reason of its stock ownership, of the New Jersey Corporation. The acts of one are the acts of all these corporations; in fact, it may truthfully be said that they are the acts of the United Shoe Machinery Corporation. This being the case, they are properly joined as defendants.

[8-10] *Is section 3 of the Clayton Act, so far as it applies to leases, unconstitutional?*

Counsel for defendants challenge the constitutionality of so much of section 3 of the Clayton Act as applies to leases. It has been earnestly and ably argued that a lease is no more commerce than insurance or manufacturing, and it is claimed, if not commerce, it cannot be interstate commerce. The diligence of the able counsel has not been rewarded by finding any authority which has determined that question, nor has the court been able to find any. In the argument many extreme illustrations were made. It is a well-settled rule that courts are slow to declare the acts of co-ordinate departments of the government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it. As stated by Mr. Justice Holmes in Interstate, etc., Railway Co. v. Massachusetts, 207 U. S. 79, 128 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555:

"It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of a real doubt a law must be sustained."

This principle of law was settled at an early date by Chief Justice Marshall in Fletcher v. Peck, 10 U. S. (6 Cranch) 87, 3 L. Ed. 162. The fact that the question has never been before the courts, or that the power has never been exercised by Congress, is no proof that the Constitution does not authorize it. As stated by Mr. Justice Brewer in Re Debs, 158 U. S. 564, 591, 15 Sup. Ct. 900, 909 (39 L. Ed. 1092):

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

It may be conceded that every lease is not commerce, but that is not conclusive that none may be. Each case must be determined from the peculiar facts shown to exist in that case. When a corporation with millions of capital, doing an annual business amounting to millions of dollars, sees proper to conduct its business by only leasing its chattels, instead of selling them, why is it not as much engaged in commerce as if it sold them outright? But, aside from that, cannot a person be engaged in interstate commerce, although, if its business is confined exclusively to its own state, it would not be engaged in commerce?

The act of Congress of June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1913, §§ 8812–8819), commonly known as the "White Slave Act," makes it an offense to transport, or cause to be transported, in interstate or foreign commerce, any woman or girl, for the purpose of prostitution, or for other immoral purposes. In 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, arising under that Act, it was contended that the immoralities of their citizens can only be controlled by the states, and as women are not articles of commerce, there can be no reason for holding that, by reason of transporting them from one state to another, or furnishing means for such transportation, the acts can become interstate commerce. But the court unanimously held that, while it is true that women are not articles of commerce, if transportation is employed as a facility for their wrongs, Congress has the power to regulate or prohibit such acts under the commerce clause.

Acquiring an education would not ordinarily be commerce, but in International Text-Book Co. v. Pigg, 217 U. S. 91, 106, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, it was held that, as contracts between the company and its patrons involved the transportation from one state to another of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, the company was engaged in interstate commerce.

In Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1 to 17, 84 C. C. A. 167, 183, the issue involved was whether a contract of factorage, under which the Rubber Company consigned to the Shoe Company goods from an Eastern state to Colorado, to be sold by the Shoe Company as a factor. Judge Sanborn, after a very thorough review of the authorities bearing on that subject, held:

> "Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

From this it appears that every negotiation or dealing between citizens of different states which causes such importation is a transaction of interstate commerce. In Marienelli v. United Booking Offices (D. C.) 227 Fed. 165, it was held that booking performers for a theatrical circuit, which requires them to pass from state to state, taking with them paraphernalia and stage properties, constitutes interstate commerce.

It is not necessary to cite the many authorities found in the books sustaining this conclusion, as they will be found collated in the opinions hereinbefore cited. It is sufficient to say that as new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce; and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.

The bill charges that the machinery manufactured by the defendants is leased for the purpose of enabling the lessees to manufacture shoes; that they deal with over 1,500 shoe manufacturers in all parts of the United States, and, when the leases are made, the machinery is shipped by the defendants from the state of Massachusetts, the place of manufacture, to other states of the Union and to foreign countries. Upon these facts there can be no other conclusion than that the defendants are engaged in interstate commerce, and subject to be regulated by Congress. Whether it applies to leases made and sold in the same state, and not transported to another state, it is unnecessary to determine, on this motion, as the bill charges shipments to other states. By reference to the act under consideration, it will be noticed that, while section 1 defines the word "commerce" as used in the act, section 3 prohibits any person engaged in such commerce from doing the acts prescribed and enumerates them. The act is not limited to leases, and sales in interstate commerce, as is the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665); but the language employed is like that used in the amendment of March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1913, §§ 8613–8615), to the Safety Appliances Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 8605–8612]). This amendment had, prior to the enactment of the Clayton Act, been held to embrace all locomotives, cars, and vehicles used on a railway that is engaged in interstate commerce, and is not confined exclusively to vehicles engaged in interstate commerce. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, reaffirmed at the present term of the Supreme Court in Texas & Pacific R. Co. v. Rigsby; 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. But whether this act should be so construed, and held to apply to the intrastate business as well as the interstate business of the defendants, in view of the fact that the defendants are charged to be engaged in interstate commerce, need not be determined now, as the question may never arise. Reference is made to it only for the reason that during the oral argument counsel for defendants stated that a very large part of the defendants' business is intrastate.

[11] *Do the allegations in the complaint show a violation of section 3 of the Clayton Act?*

The act declares unlawful any lease, etc., where the price is fixed, or a discount or rebate upon such price is granted, under the condition, agreement, or understanding that the lessee or purchaser thereof is not to use or deal in the goods, etc., of a competitor of the lessor, or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding, may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. For the purpose of aiding in the construction of the act, counsel in their argument have read copious extracts from the reports and debates in Congress, while the act was under consideration. They have also furnished the court with copies of these reports and debates, and they have been carefully read; but so far as the construction of the act is concerned the court does not feel justified to consider them. It is only when the language of a statute is ambiguous that these sources can be referred to. If the language is clear and free from ambiguity, there is nothing for the courts to construe. United States v. Union Pacific Railroad, 91 U. S. 72, 23 L. Ed. 224; United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Dunlap v. United States, 173 U. S. 65, 19 Sup. Ct. 319, 43 L. Ed. 616; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; Dewey v. United States, 178 U. S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170; MacKenzie v. Hare, 239 U. S. 299, 307, 36 Sup. Ct. 106, 60 L. Ed. 297.

Aside from this, the record of the proceedings of the two Houses of Congress shows that section 3 of the Clayton Act, as finally enacted, differs materially from the section as passed by each House. The words "where the effect of such lease, sale, contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition, or tend to create a monopoly in any line of commerce," are not found in either of the acts as passed by the House of Representatives or the Senate. Nor does the act as finally passed make the violation of that section a penal offense, although each of the houses had made such a provision. The act as finally passed was the result of the conference committees appointed by the two houses. What induced the conferees to make the changes, and Congress to adopt them in the final enactment of the statute, is unknown. Whether the speeches made, while the bill was pending, influenced the conference committees, and, if so, to what extent, is merely speculative, and for the courts to consider them in construing the act, as finally passed, might be misleading.

[12] A careful reading of this section of the act leaves no room for doubt as to what Congress intended. The language is plain, and the court is unable to find any ambiguity in it, which would make it necessary to resort, for aid in its construction, to any source outside the act itself. In plain and concise language it declares that it shall be unlawful for any person engaged in interstate commerce to lease, sell, or contract for sale of any commodity, whether patented or not, for use, consumption, or resale, and fix a price for, a discount from or rebate up-

on such price, on the condition, agreement, or understanding, that the lessees shall not purchase such articles from the competitors of the lessor or the seller, and then is added:

"If the effect of such an agreement, or understanding, may be to lessen competition, or tend to create a monopoly."

That the leases made by the defendants, as shown by the extracts attached to the complaint as exhibits, provide for rebates on condition that the lessee shall only use the machines and materials manufactured and dealt in by the defendants, and forbids the use of machines purchased from other manufacturers, under penalty of having the leases canceled and machines taken from them by defendants, is beyond question. But it is claimed that there is nothing in the leases whereby the lessees covenant or bind themselves not to use any machines manufactured by other parties, or purchase materials which are dealt in by the defendants, from others. This is true, but as the lessors retained the right, in case any other machines are used in the manufacture of shoes than those manufactured by the defendants, of canceling the leases and removing the leased machines, and further provide for a rebate to those who comply with these terms, which those using other machines or material do not receive, there is an implied promise on the part of the lessees not to violate these conditions of the leases, or suffer the penalties set out in the leases. It is charged in the bill:

"In nearly all cases, however, they [lessees] are deterred from doing so by the said 'tying clauses,' and by fear of the serious financial consequences that would follow their violation. * * * Some indispensable machines can be obtained only from the defendants; for example, the stitch indenter and burnisher."

Exhibit 5 shows that the machine therein mentioned is protected by letters patent of the United States and provides that:

"The lessee is hereby licensed under letters patent of the United States No. 849,245, dated April 2, 1907, to manufacture by the use of the principal machinery hereby leased, during the continuance in force of this lease and license, the patented insoles covered by said letters patent, and to use such patented insoles so made by the lessee in the manufacture of welted or turned boots, shoes, or other footwear, which have been or are being manufactured as provided in article 5 hereof."

The acceptance of a deed poll containing a provision that the grantee assumes payment of a certain mortgage or lien on the premises conveyed binds the grantee to the performance of the terms, and an action, in some states at law, while in others in equity, will lie on the implied promise. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Willard v. Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Johnson v. Muzzy, 45 Vt. 419, 12 Am. Rep. 214; Patton v. Adkins, 42 Ark. 197; Dismukes v. Halpern, 47 Ark. 317, 1 S. W. 554; Hand v. Kennedy, 83 N. Y. 149; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Finley v. Simpson, 22 N. J. Law, 311, 53 Am. Dec. 252; Crowell v. St. Barnabas Hospital, 27 N. J. Eq. 650; Maule v. Weaver, 7 Pa. 329. The right to impose a heavy penalty for doing certain things is just as effective to prevent them as a covenant not to do them.

It is therefore unnecessary that the lessees should bind themselves to these conditions or agreements by covenants. It is sufficient if the natural and inevitable effect of the leases, accepted by them, leads to the same result as if they had in express terms bound themselves not to use any other machines or materials than those manufactured or dealt in by the defendants. But, to remove any doubt upon the subject, Congress, out of abundant caution, added the words "or understanding" after the words "contracts or agreements." The word "understanding," as defined by lexicographers, includes mental discernment, comprehension, clear knowledge. Professor March, in his valuable Thesaurus Dictionary, defines it as equivalent to "comprehension."

Counsel contend that "understanding" is equivalent to "agreement," except that it imports that it is oral. The court cannot adopt this definition. In its opinion it means something more. It means an implied agreement, resulting from the expressed terms, of the agreement, whether written or oral, or where the law from certain acts of the parties implies an agreement to do a certain act. A right to recover on a quantum meruit is based upon an understanding or implied agreement to pay for services rendered for one's benefit, although there is no express agreement to pay therefor.

Can there be any doubt that these clauses in the leases are understood by the lessees to mean that by using no other machines than those of the defendants they are relieved of certain royalties, otherwise exacted for the use of the defendants' machines? See Exhibits 9, 10, 11, and 12. And can there be any doubt but that, if the lessees use the defendants' lasting machines for shoes welted on machines made by other manufacturers, or fail to use exclusively defendants' machines for lasting shoes, or fail to purchase from the defendants exclusively all duplicate parts, extras, and devices of every kind, needed or used in operating, repairing, or renewing the lasting machinery, or fail to use exclusively the auxiliary machinery of the lessor in the manufacture or preparation of insoles licensed under letters patent No. 849,-245, or fail to buy any additional machines needed in their shoe factory, which can be leased from the lessor, that under the terms of the leases set out in the Exhibits 1, 3, 4, 5, and 6, all of the leases can be canceled and the lessees be deprived of the use of them and be compelled to pay certain royalties, which otherwise they would not have to pay? Exhibit 9 expressly authorizes the lessor to terminate all leases for these breaches, although the lessee is bound by them for 17 years from the date of the lease, whether the patents, if there be any, have expired or are still in force.

Can it be doubted that these provisions are not only within the spirit but the letter of the statute? What is the natural, direct, and necessary effect of these conditions? There can be but one answer to this: To compel the lessees to use defendants' machinery and material, regardless of whether the terms granted by the defendants are as favorable as can be obtained from other manufacturers of some of the machines or dealers in some of the materials.

In addition, it is charged that by reason of these leases there is no market for any one inclined to manufacture these or some of these machines, and therefore all are deterred from engaging in their manufacture, as, there being no market for them, financial failure is bound to result from the attempt. Such a condition of affairs clearly tends to substantially lessen competition, and create, in favor of the defendants, a monopoly in that line of commerce.

In addition, it is charged in the bill that the New Jersey Company acquired and still owns the capital stock of 56 other concerns, at one time engaged in the manufacture and selling and leasing of some form of shoe machinery or supplies. The bill alleges:

"Thus the control of a complete line of 'principal' and 'auxiliary' machinery used in the bottoming of shoes became vested in one establishment. Before this no one company could supply such a line, nor can any company do so now outside the defendants."

The reason other manufacturers do not engage in making all the machines as the defendants do are not stated as specifically as they might be. Whether it is due to the fact that many of these machines, or some of them, are protected by letters patent, or what other reason there may be, might well be stated more explicitly, in order that the court may determine whether they are sufficient to sustain the conclusions of the pleader, who during the argument stated that some of these machines leased by the defendants are protected by letters patent and for that reason cannot be made by others. The only reference to patented machines is in Exhibit 5, and refers to the Goodyear insole machines. But under the present liberal practice this is not sufficient to sustain a motion to dismiss, although it would be better pleading to set out more fully the reasons why other parties cannot manufacture all these machines. The effect is shown by Exhibit 13.

[13] *Is the complaint defective because it does not charge that the acts of the defendants were unduly and improperly exercised?*

It is claimed that in view of the construction of the Sherman Act in the Standard Oil and Tobacco Cases, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it is not sufficient to charge acts which may result in creating a monopoly, unless further shown that the actions of the parties were "unduly and improperly exercised." There can be no doubt that upon well-established principles of law the courts presume that Congress, when legislating upon a subject included in previous statutes, uses the same language found in the previous statute and if it had prior to the enactment of the later act been construed by the courts, especially the Supreme Court, it intended to adopt that construction as a part of the new act.

But is the language used in the Clayton Act, even if not identical, so similar to that used in the Sherman Act, construed in those cases, as to make that rule applicable? By referring to sections 1 and 2 of the Sherman Act (Comp. St. 1913, §§ 8820, 8821), it will be seen that Congress used merely generic words, without defining what specific acts shall constitute restraint of trade or commerce, or a monopoly. The Chief Justice, in delivering the opinion of the court, said:

"The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of 'restraint of trade' as used in the statute leaves room for but one conclusion, which is that it was expressly designed not to unduly limit the application of the act by precise definitions, but while clearly fixing a standard; that is, by defining ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute."

On the other hand, the act now under consideration, instead of using the generic words of the Sherman Act, in plain and unequivocable language states what acts shall be unlawful, if they "substantially lessen competition or tend to create a monopoly." This being the case, the presumption is, not that Congress intended that the construction of the Sherman Act should control, but, on the contrary, that it should not control. Had Congress intended that the construction placed upon the Sherman Anti-Trust Act in those cases should apply to the Clayton Act, it would have used the same or like generic words, instead of defining what acts shall be unlawful, if the natural result of such acts tends to substantially lessen competition or create a monopoly in any line of commerce.

It will be noticed that in this act there is nothing said of combinations or conspiracies, nor that the parties complained of are monopolizing or attempting to monopolize any part of the commerce among the several states, as was required in the Sherman Act. This applies to the many cases cited by counsel for defendants on this point, all of which arose under the Sherman Act. Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do those acts, which may put it in his power to do so.

For these reasons, in the opinion of the court, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a monopoly in interstate commerce.

So far as the wisdom of the act is concerned the courts cannot question it. Congress alone can determine that. Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482; United States v. Union Pacific R. Co., 91 U. S. 72, 23 L. Ed. 224; Angle v. Chicago, etc., R. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151. As stated in the Employers' Liability Cases, 207 U. S. 463, 492 (28 Sup. Ct. 141, 143, 52 L. Ed. 297):

"In testing constitutionality of an act of Congress this court confines itself to the power of Congress to pass the act, and may not consider any real or imaginary evils arising from its execution."

In Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 33 Sup. Ct. 9, 15 (57 L. Ed. 107), Mr. Justice McKenna, speaking for the court said:

"The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be, of some good results."

Or as has been so tersely expressed by Judge Dyer, when this case was before him ([D. C.] 227 Fed. 507, 511):

"If the course adopted by the defendants has the effect to stifle competition and create a monopoly within the law, then the law should be enforced, even if it resulted in going back to the awl and wooden peg."

Are the provisions in the leases requiring lessees to use lasting wachinery to its full capacity, and in case the lessee shall have more machines adapted for doing the same work than is necessary, for a period of 12 consecutive months, the lessor can remove the machines not necessary, unreasonable?

These provisions are found in Exhibits 2 and 7. The court is unable to see anything unreasonable in these provisions. The only compensation for the use of the machines provided in the leases is the royalty upon the shoes manufactured on them. To permit the lessees to retain more machines than are necessary for the manufacture of his product would result in the lessors receiving no compensation therefor, consequently no return on the investment. As these provisions are only to be enforced, if the machines are not used to their capacity for the period of 12 consecutive months, the court is unable to say that they are in violation of any provisions of the Clayton Act. or can in any way tend to substantially lessen competition or create a monopoly.

Is the act retroactive or retrospective, so as to apply as to leases entered into before the enactment of the act?

That question was fully discussed by counsel, but in the opinion of the court it is unnecessary to determine it on this motion, as on the final hearing there may be no such leases in force. If there should be, it will be time enough to determine that question then.

Is the act unconstitutional in attempting to apply it to patents previously granted?

Neither in the oral argument, nor in the elaborate briefs filed by counsel, was this ground of the motion urged. It may therefore be assumed that it has been abandoned by the defendants. But in any event the court can conceive of no reason why Congress cannot restrict the rights of patentees, if in its opinion they are used in a manner resulting in oppressing the public. A patent is merely a privilege granted to inventors by Congress, and whenever that privilege is abused or is found to be exercised in a manner contrary to the public policy of the government, Congress certainly has the power to enact laws which will prevent such an abuse. Whether it can deprive a patentee of all the privileges granted by the patent before its expiration is a question which cannot arise under this act.

[14] Something was said in the oral argument about an impairment of contracts, but there is nothing in the Constitution of the United States which prohibits Congress from enacting legislation impairing the obligations of contracts. Article 1, § 10, applies to the states only,

and is not a limitation of the powers of Congress. Legal Tender Cases, 79 U. S. (12 Wall.) 457, 547, 20 L. Ed. 287, et seq.; Mitchell v. Clark, 110 U. S. 633, 643, 4 Sup. Ct. 170, 312, 28 L. Ed. 279; Evans-Snider-Buel Co. v. McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900, affirmed McFaddin v. Evans-Snider-Buel Co., 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012.

This disposes of all the issues raised by the motion to dismiss, which is overruled.

LANDON et al. v. PUBLIC UTILITIES COMMISSION OF KANSAS et al.

(District Court, D. Kansas, First Division. May 26 and June 3, 1916.)

No. 136-N.

1. COURTS ⚷497—JURISDICTION OF NATIONAL COURTS—CONFLICT—RECEIVERSHIP—CONFISCATORY RATES.

A national court, which has jurisdiction of a suit in it to foreclose a mortgage upon the property of a public service corporation which is operating in three states under a receiver of its property in one of the states appointed by a state court, and under the same person appointed a receiver of its property in the two other states by the national court, and directed by that court to operate the business and property of the corporation in the three states as a unit, under the direction of the state court until further orders of the national court, has jurisdiction, on the petition of the receiver, to prevent the public utilities commissions of the states from destroying or irreparably injuring the business or property of the receiver and the corporation by making or enforcing unreasonably low and confiscatory rates for the sale of their product (in this case natural gas) to the purchasers from them in those states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. ⚷497.]

2. GAS ⚷14(1)—NATURAL GAS COMPANY—RATES FIXED BY STATE—CONSTITUTIONALITY.

Rates for gas fixed by a state commission to be charged by a natural gas company, which purchased, piped, and distributed gas to a large number of cities and towns, *held* confiscatory and unconstitutional, on the ground that the commission failed to take into consideration in fixing the rates the diminishing supply of gas and the consequent constantly increasing price, and the necessity for the company to extend its pipe lines into new fields, or the probable short life of the company, due to the same facts; also *held* that, taking into account the nature of its business, the company was entitled to earn 8 per cent. on its capital invested, instead of 6 per cent., which was the basis of the rates fixed by the commission.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10; Dec. Dig. ⚷14(1).]

3. GAS ⚷14(1)—NATURAL GAS COMPANY—OPERATION BY RECEIVER.

Where the creditors of the gas company, which was being operated by a receiver, consented to its expenditure of certain sums from its annual earnings for extensions and betterments, on condition that the property be operated at compensatory rates, the customers of the company are entitled to have such expenditures made to the extent necessary to supply them with gas at reasonable rates, before payments are made on the principal of the company's debts.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10; Dec. Dig. ⚷14(1).]

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

4. COURTS ⇐371(1)—FEDERAL COURTS—ENFORCING REMEDIES GIVEN BY STATE STATUTES.

Rights created by the statutes of the states, to be pursued in the state courts, may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 972; Dec. Dig. ⇐371(1).]

5. COMMERCE ⇐57—"INTERSTATE COMMERCE"—TRANSPORTATION AND SALE OF NATURAL GAS.

Natural gas, procured by a company or its receiver in one state and piped into and sold in another state, is an article of interstate commerce, and does not lose that character because it is mixed in the pipes with a small quantity of gas procured in the state in which it is sold. The company, or its receiver, conducting such business, is engaged in "interstate commerce," and the enforcement by the state in which the sales are made of any law or regulation which substantially burdens the business, or renders it impossible to conduct it at a fair profit, is an undue interference with interstate commerce, in violation of the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–76, 88, 90, 92–102; Dec. Dig. ⇐57.

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

6. JUDGMENT ⇐740—MATTERS CONCLUDED—NONESSENTIAL HOLDINGS.

Reasons given by courts in their opinions for conclusions they reach, which are not necessary to, and are not embodied in or, made parts of, the adjudications which follow, do not work the estoppel of res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1268; Dec. Dig. ⇐740.]

7. EQUITY ⇐195—CROSS-BILL—NATURE AND OFFICE.

A cross-bill may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446–449; Dec. Dig. ⇐195.]

In Equity. Suit by John M. Landon, as receiver of the Kansas Natural Gas Company, and others, against the Public Utilities Commission of the State of Kansas and others. On motion for interlocutory injunction. Granted as to certain of the defendants.

John H. Atwood, of Kansas City, Mo., Robert Stone, of Topeka, Kan., Chester I. Long, of Wichita, Kan., and T. S. Salathiel, of Independence, Kan., for complainant receiver.

H. O. Caster and Fred S. Jackson, both of Topeka, Kan., for defendant Public Utilities Commission of Kansas.

William G. Busby, of Carrollton, Mo., and Alex Z. Patterson, of Jefferson City, Mo. (James D. Lindsay, of Jefferson City, Mo., on the brief), for defendants Public Service Commission and Attorney General of Missouri.

J. A. Harzfield and A. F. Evans, both of Kansas City, Mo., for defendant Kansas City, Mo.

William E. Stringfellow, of St. Joseph, Mo. (Olin, Butler, Stebbins

& Stroud, of Madison, Wis., and Culver & Phillip, of St. Joseph, Mo., on the brief), for intervener St. Joseph Gas Co.

J. W. Dana and C. E. Small, both of Kansas City, Mo., for Kansas City Gas Co. and Wyandotte County Gas Co.

T. F. Doran, of Topeka, Kan., for Consumers' Light, Heat & Power Co.

Charles A. Loomis, of Kansas City, Mo., for Ottawa Gas & Electric Co. and other distributing companies.

Charles L. Faust, of St. Joseph, Mo., for city of St. Joseph, Mo.

Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co.

A. M. Baird, of Carterville, Mo., for city of Oronogo, Mo.

E. F. Cameron, of Joplin, Mo., for city of Joplin, Mo.

Before SANBORN, Circuit Judge, and CAMPBELL and BOOTH, District Judges.

On Challenge of the Jurisdiction of the Court.

SANBORN, Circuit Judge. The receiver of this court and of the district court of Montgomery county, Kan., brings a dependent bill in this court in the original suits brought by a creditor and the trustee for mortgage bondholders to take possession of the property of the Kansas Natural Gas Company and that of some other defendants, to appoint receivers of that property, administer the property, foreclose the mortgage, dispose of the property, and distribute its proceeds, first to the lienholders; second, to the unsecured creditors; third, to the stockholders. This receiver claims that, while he is operating the property for the benefit of the beneficiaries, the commissions of Missouri and Kansas are fixing rates which are and threaten to be unreasonable, noncompensatory, confiscatory, and to interfere with the interstate commerce in natural gas which he is conducting. The bill is challenged, and his right to an injunction from this court to prevent these alleged wrongful acts is objected to, on the ground that this court has no jurisdiction to issue an injunction to prevent these alleged wrongful doings.

[1] On February 14, 1913, this court had jurisdiction and complete control of all this property in the original suit to which reference has been made. The power is conferred and the duty is imposed upon every court in equity, which takes into its possession for administration and disposition the property of owners and lienholders, to exercise any power it has to protect that property from depreciation by the wrongful act of any person or party. Hence it was that, when this court originally took jurisdiction of this property in the original suits, it issued its injunction against all persons, requiring that they interfere not with any of this property. Hence it is that under the law, when a court of equity has taken possession of property for such purposes, a circle of segregation is drawn around it and the ordinary processes of the law cease to reach it. Neither attachment nor execution may seize one iota of the property, but all controversies concerning it, all claims to it, must be adjudicated upon application to the court which holds the dominion of the property for the beneficiaries. Such was the condition of this cause in this court on February 14, 1913. This court

subsequently learned that the officials of the state of Kansas had brought a suit in the district court of Montgomery county, Kan., for the purpose of seizing the property of the Kansas Natural Gas Company, winding up that corporation, selling or disposing of or operating its property as the court should see fit, because it was alleged to have violated the anti-trust law of Kansas. When that fact was discovered, because the court in Kansas had the primary right to discharge its duty regarding this property, first, because the suit in that court was brought before the suit in this court, this court turned over to the receiver appointed by the Kansas court the possession, management, and control of that property until such time as it should renounce possession, and until it should have discharged its duty to the state of Kansas and to the owners of this property under the anti-trust law.

The fact then developed that the property in Kansas, the property in Missouri, and the property in Oklahoma constituted a unit, and that it should not be divided into its three parts and separately operated, without that very spoliation and destruction that is alleged may come from noncompensatory rates, without a depreciation of the value of the property and an impracticability of wise and beneficial operation. At this time the properties in Oklahoma and Missouri were still within the jurisdiction and complete control of this court, and the court in Kansas had not then and never has had any inherent power, nor could the state of Kansas give it any power, to take, manage, or control the property in Oklahoma or Missouri. It was in the power of this court at that time to order its receiver, Mr. Sharritt, to operate the property in Missouri and Oklahoma in harmony with the receiver in Kansas. It was in its power to appoint a master, and to direct that he should see that the receiver of this court should operate in that way. It was in its power to appoint the same man receiver that had been appointed by the Kansas court, and to direct him to operate in harmony with himself; and upon consideration of the facts and circumstances the court came to the conclusion that the wise method of operation was to appoint the same man whom the Kansas court had appointed receiver of the Kansas property its receiver of the Missouri and Oklahoma property, ancillary to the receivership in this court. The Kansas property was delivered over, because the Kansas receiver, the receiver appointed by the Kansas court, had the primary right to take it, to enable that court to discharge its duty, leaving the reversion of the property and the control of it, subject to that temporary operation of the Kansas court, still within the jurisdicuon of this court. This court, therefore, appointed the same man who was the receiver of the Kansas court the receiver of this court of the Oklahoma and Missouri property. I say the Kansas receiver, because, although two receivers, I know, were appointed, one of them has deceased. It is more convenient to treat this matter as though there was only one receiver in Kansas then, as there is only one now.

Now, whenever it appears to the receiver of this court, or of any court, which has control or management of property of this character, that there is danger of its destruction or depreciation by the wrongful act of any one, it is the duty of that receiver to apply to the court, whose hand he is, to protect that property from such destruction or interference. And pursuant to that duty this receiver, whose only power over the Oklahoma and Missouri property is derived from this court, has applied to this court by this dependent bill to exercise its power to prevent the depreciation of the property in his possession.

It is the opinion of the court that under these circumstances, however desirous the court might be to renounce or avoid the exercise of power or jurisdiction, it cannot lawfully do so, and that, if the allegations of this bill are true (a question that of course must be hereafter determined), this court has jurisdiction to exercise all the power that it had in the beginning over the property in Missouri and Oklahoma, and over the reversion of the property in Kansas, to prevent the depreciation of any of that property by the wrongful acts of any one.

The court is also of the opinion that under section 21, chapter 238, of the Session Laws of 1911 of Kansas, in accordance with the opinion of the Supreme Court of Kansas, this is a competent court to which the receiver may apply for the purpose of determining whether or not the rates established by the commission in Kansas are compensatory, reasonable, or confiscatory, and that for this reason there is jurisdiction in this court to hear and determine the question suggested in the dependent bill.

It is urged that the receiver is estopped from applying to this court, because it is decided by the Supreme Court of Kansas, as it is claimed, that he is not engaged in interstate commerce in that state, but in intrastate commerce. It is not necessary to determine the question of res adjudicata in order to determine the question of the jurisdiction of this court, because, if he is not engaged in interstate commerce, still if these rates are noncompensatory, unreasonable under the Kansas statute, or if they are confiscatory, thus in violation of the Constitution of the United States, the jurisdiction still inheres. It is said that in the Kansas case the receiver claimed that he was doing an intrastate business, while he now claims that he is doing an interstate business; but it is not inconsistent with the fact that he is doing an interstate business that he is also doing an intrastate business; and it is not thought, though he may have urged that he was doing an intrastate business there, that that fact is inconsistent with or can estop him from urging here, if it be material, that he is doing an interstate business in Kansas.

It is said that the receiver had a remedy at law in the mandamus case in Kansas, in the state court, and that consequently there is no jurisdiction of this court in equity, because one may not apply to a court of chancery where he has a plain and adequate remedy at law. The answer is: First. The remedy at law, which will prevent the appeal to a national court of equity, must be a remedy at law in a national court. A remedy at law in a state court will not ordinarily have that effect. And, second, in order to bar the remedy in equity, the remedy at law must be as prompt, complete, efficient, and adequate as the remedy in equity which the court of equity may grant. The remedy at law which might have been obtained in the mandamus case is neither of these, and for that reason it does not bar the remedy in equity in this court, if there be facts to sustain the application.

It is insisted that the fact that the receiver put in force the 28-cent rate fixed by the Kansas commission is a bar to its application to this court to consider whether or not the rate is compensatory, or confiscatory, or violative of or an interference with interstate commerce, and that for that reason he may not apply to this court. But it has frequently been the practice of the courts, when one came to it to ask such equitable relief as is here sought, to require as a condition to listening to the application that the rates fixed by the commission should be first tested, and then the matter should be determined as to whether or not they were confiscatory. And it cannot be that a course that has become so common with the courts, and an act which they have frequently required a litigant to do before he should be heard in his appeal to them, can deprive a litigant of the right thus to appeal for relief.

The Missouri defendants claim that they are not within the jurisdiction of this court, because the process of this court was served on them within the state of Missouri, and not within the state of Kansas. The court is of the opinion that this is one of those cases referred to in section 56 of the Judicial Code, that the original jurisdiction which this court obtained by the filing of the original bills and the appointment of the receivers in the original suits still inheres in this court, subject, as has already been said, to the operation of the property in Kansas temporarily until that court shall have discharged its duty in the anti-trust case, and that the power which was invested in this court by the filing of those bills and the orders thereon, copies of which were filed in the federal courts in Oklahoma and Missouri, gave to this court the power to issue its process in any suit brought in aid of the original suits, for the purpose of the protection and administration of the property, to any of the jurisdictions which were ancillary to the original jurisdiction in those suits, and consequently to the defendants in the state of Missouri. This statute says:

"In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district."

Missouri is within this circuit, and the court is of the opinion that the process was properly issued and served. The court is of the opinion that it has jurisdiction of this dependent suit, brought in aid of the original suits, and that it has the power, and that the duty is imposed upon it, to consider whether or not the charges made in the dependent bill are true, and whether or not it ought, when the facts have been presented to it, to issue its orders to protect the property in its control.

On Motion for Preliminary Injunction.

After the delivery of the foregoing opinion voluminous evidence was introduced, counsel presented briefs and arguments on the merits of the motion, and after consideration the court delivered the following opinion:

PER CURIAM. John M. Landon is the receiver of the property of the Natural Gas Company, a corporation of the state of Delaware, by appointment of the district court of Montgomery county, Kan., and of the United States District Court of the District of Kansas, and he is operating the business and property of that company under the direction of the former court. That company is directly and indirectly the owner of the pipe line extending from gas fields in the state of Oklahoma to 37 cities in Kansas and 8 cities in Missouri, and by means of the receiver is conducting natural gas from Oklahoma to these cities and their inhabitants, where it is distributed under contracts between the natural gas company and other corporations that for convenience are termed distributing companies. The receiver obtains about 92½ per cent. of his gas from fields in Oklahoma and about 7½ from fields in Kansas. He purchases the gas he obtains from Oklahoma, and produces from leaseholds of the company most of that obtained from fields in Kansas. He supplies about 46 per cent. of his gas to the Kansas cities and towns, and about 54 per cent. of it to cities and towns in Missouri. On December 10, 1915, the Public Utilities Commission of the state of Kansas made an order to the effect, among other things, that the net rates for the sale of natural gas by the receiver to the public in the state of Kansas should be:

"For domestic gas in Montgomery county, 23 cents per thousand cubic feet except at Elk city, where the present rate of 25 cents is to remain; boiler gas in said county 10 cents per thousand cubic feet. In all other counties except those supplied by the Gunn pipe line 28 cents per thousand cubic feet; in the counties supplied by the Gunn pipe line, the present rate of 30 cents per thousand cubic feet; and on all boiler gas, except Montgomery county, 12½ cents per thousand cubic feet."

As the rate of 28 cents named in this order applies to much the larger part of the gas affected by the order, the rates so fixed have been and will be termed the 28-cent rate. The receiver has brought this suit against the members of the Public Utilities Commission of the state of Kansas and the Attorney General of that state to prevent by the injunction of this court the enforcement of the order fixing this 28-cent rate, on the ground that it is unreasonably low, confiscatory of the property and destructive of the business of the natural gas company, and violative of the Constitution of the United States. He has made the distributing companies through which, and the cities to which, he furnishes gas parties defendant. He has also made the members of the Public Service Commission of the state of Missouri parties defendant, and has set forth a complaint and prayed an injunction somewhat similar against them. After the commencement of the suit an application for an interlocutory injunction against the enforcement of the rates fixed by the orders of the commissions was made and has been heard in accordance with the provisions of section 266 of the Judicial Code as amended (Act March 4, 1913, c. 160, 37 Stat. 1013 [1 U. S. Comp. Stat. § 1243, p. 519]).

[2] The crucial question for decision upon this application for an injunction by the court constituted under section 266 is whether or not the 28-cent rate is confiscatory or unreasonably low. Ten days have been devoted to the reception of evidence and the hearing of arguments. Time has been taken for examination of evidence and briefs and for deliberation and consultation. Many issues of fact and of law have been presented that were proper for consideration, but that are not controlling of the decision of the question at issue. The act of Congress requires that the hearing on this application "shall be given precedence and shall be in every way expedited," and the situation of

the property in the hands of the receivers and of the parties to this litigation is such that delay may be as fatal to the interests of all concerned as an adverse decision. For these reasons the court pretermits reference to matters that are not indispensable to the determination of the crucial question in hand, as well as discussion of those that are indispensable to such a question, and confines itself to a statement of the conclusions which the law and the evidence in its opinion compel.

One of the bases of the conclusion and order of the commission is the following table, which is copied from its opinion:

Table No. 5—Kansas Natural Gas Company.

Statement of Estimated Revenue and Requirements for the Ensuing Year, Based on 1914 Figures, Revised as Previously Explained, for the State of Kansas.

Requirements.		Transportation.	Kansas.
25,671,445 M. cubic feet gas at 4c		$1,026,857.80	$ 514,045.01
Operating expenses and taxes assigned to transportation		510,536.14	223,245.11
Receivership expenses		32,228.00	14,093.30
Uncollectible gas accounts		12,555.07	6,359.14
Taxes, Kansas City pipe line		32,288.27	16,860.51
Taxes, Marnet mining company		10,497.35	5,316.91
Maintaining organization, Marnet Mining Company		690.20	349.59
Total		$1,626,652.83	$ 780,269.57
[1] Present value of transportation property, $7,083,605.64; depreciation on basis of twelve years		590,300.00	268,468.44
Requirements exclusive of a return on property investment		$2,216,952.83	$1,048,738.01
[1]Return on present value	$7,083,605.64		
Add for working capital	200,000.00		
Total	$7,283,605.64		
	at 6%	437,016.35	198,755.00
		$2,653,969.18	$1,247,493.01

Estimated Revenue.

Gas sales, 1914	$1,192,089.82
[2] Gas used in compressor station (on basis of use)	31,737.70
Total	$1,223,827.52
Estimated revenue from proposed increased rates	171,513.63
Total estimated revenue from Kansas	$1,395,341.15
Deduct requirements as above	1,048,738.01
Estimated net revenue	$ 346,503.14
Which is equal to a return of 10.46 per cent. on the present value $3,312,583.83, which is 45.48 per cent. to Kansas of the total of $7,283,605.64 or	
Total estimated revenue for Kansas	$1,395,341.15
Less requirements including a 6 per cent. return	1,247,493.01
Surplus	147,848.14

[1] The division of these items between Kansas and Missouri has been made on the basis of the use of the property as shown in Table 1.

[2] This item is placed here to balance an equal sum included in the expenditures. It is a bookkeeping entry solely.

The commission found the reproduction value of the property of the gas company, less depreciation for age and use, to be $7,083,605.64, the probable life of the going concern to be 12 years, amortized the $7,083,605.64 by the allowance of one-twelfth thereof, $590,300, as a yearly requirement for its operation, and allocated all the requirements between Kansas and Missouri on the basis of 45.48 per cent. to Kansas and 54.52 per cent. to Missouri. The evidence before the commission, a great volume of evidence which was not before the commission, including a disclosure of the actual results of the operation of the property during the first four months of the year 1915 under the 25-cent rate, which existed before the commission established a 28-cent rate, and the results of its operation during the first four months of the year 1916 under the 28-cent rate, evidence of the exhaustion of gas fields, of the increase of the cost of gas, of the value of the property of the company, and of every other conceivable issue relative to the general question has been presented to this court. Upon nearly every issue this evidence is conflicting and the determination of some of these issues is difficult. "And yet," as the Supreme Court said in Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 172, 20 Sup. Ct. 336, 338 (44 L. Ed. 417) "this difficulty affords no excuse for a failure to examine and solve the questions involved." Bearing this caution in mind, and conceding the present value of the property of the company to be $7,083,605.64, as the commission found it, a deliberate consideration of the entire case has forced our minds to these findings and conclusions, which in our view are determinative of the real question to be decided.

A supply of gas adequate to the reasonable needs of the customers of the natural gas company for domestic lighting, cooking, and heating is the real desideratum in this case. Without it no rate will be compensatory. The company now has no such supply. It cannot get such a supply without adequate extensions to its pipe lines. It can make such extensions by the expenditure of a reasonable amount of money. It cannot make such extensions without such money, and it cannot get the money to make them without compensatory rates for the gas it procures and sells. Any rate which will not compensate it for making the necessary extensions to secure such a supply, for paying its other necessary expenses of operation and a reasonable income on the value of its property, is unavoidably confiscatory, because without these extensions it must lose its customers, cease its operation, and the value of its property must greatly decrease.

In the earlier years of its operation the natural gas company produced most of its gas from its leaseholds in Kansas, but the fields so leased have been gradually exhausted until it is able to produce therefrom only about 7½ per cent. of the gas it transports and sells. In order to get gas it has already extended its pipes far into the state of Oklahoma, where it purchases and whence it transports to the cities of Kansas and Missouri 92½ per cent. of its gas. It is conceded that the business of the company is temporary, that the exhaustion of the fields which it can reach with permissible extensions must eventually come, and that the time when it can no longer reach fields from which it can obtain gas cannot be delayed many years. The creditors' agreement of December, 1914, which provided for the payment of the bonded debts of the company within 6 years and for the expenditure of $1,500,000 for extensions and additional gas supply, indicates that they estimated the life of the company as a going concern at 6 years from that date. The first opinion of the Kansas commission, which was based upon this creditors' agreement, provided for the payment of the bonded debts of the company, except the principal of the second mortgage bonds, within the 6 years, 1915, 1916, 1917, 1918, 1919, and 1920, and for the expenditure by the receiver for extensions and additional gas supplies of $1,500,000. The life of the company as a going concern is necessarily unknown and unknowable, a matter of opinion, and yet the court must determine what it probably is, and a consideration of the evidence, of the history of the gas fields in Kansas and Oklahoma, of the testimony of witnesses familiar with that history, with the fields, and with the production, purchase, transportation, and sale of gas, has brought the minds of all the members of the court to the conclusion that the probable life of the natural gas company as a going concern is approximately 6 years from this date, June 3, 1916.

The creditors by their agreement provided for an expenditure of $1,500,000 within 6 years from December, 1914, for the extensions of the pipes of the company and an additional supply of gas. The Kansas Commission in its opinion, founded upon that creditors' agreement, made a like allowance. The extensions contemplated have not been made, and the exhaustion of the available gas fields has proceeded for 17 months since the creditors' agreement and for about 11 months since the opinion and finding of the commission founded upon it. In order to procure and maintain a reasonably adequate supply of gas for the coming winter it is necessary for the receiver to extend the pipe lines 50 or 60 miles, and to construct compressors at an aggregate expense of at least $750,000 to $900,000 during the first year after the filing of this opinion. And it is the opinion of the court that, in order to procure and maintain such a supply of gas during the 6 years of the probable life of the company as a going concern, it will be necessary for the receiver to expend for extensions and compressors at least $750,000 the first year and $200,000 in each of the 5 years thereafter, amounting in all to $1,750,000. As the life of the company as a going concern is 6 years, the salvage value of the pipes and other materials at the end of the 6 years, when they will be no longer useful in their places in the ground, is estimated to be $262,500, and deducting this from the $1,750,000 leaves $1,487,500 which must be returned within the 6 years. The commission in its finding and estimates made no allowance for these extensions.

The commission allowed $1,026,857.80 yearly for the purchase of 25,671,445 M cubic feet of gas at 4 cents per cubic foot. Gas is constantly becoming more difficult to procure, the cost of it in the fields has increased and is increasing as the fields one after another are exhausted, and the evidence that has been produced before this court has convinced us that the gas requisite reasonably to supply the customers of the natural gas company will cost at least 6 cents per M cubic foot, and that on this account there should be allowed as a part of the requirements of the receiver and the company 2 cents more per M cubic foot yearly than the amount which was allowed by the commission; that is to say, $513,428.90.

The commission allowed for interest 6 per cent. annually on $7,283,-605.64, or $437,016.64. The business of and the investment in the property of this gas company is of the most precarious and hazardous nature. Seven per cent. per annum is deemed a just and reasonable allowance on investments in railroads, and in the property of water, artificial gas, and lighting companies of a permanent nature, and at least 8 per cent. per annum should be allowed in this case, or an increase of the amount allowed by the commission of 2 per cent. on $7,-283,605.64, or $145,672.10.

The commission allowed $590,300, which is one-twelfth of $7,083,-605.64, for future depreciation of the property of the company, on the basis that the life of the company as a going concern would be 12 years. As the evidence has convinced that its life will not exceed 6 years, there should have been allowed $590,300 more each year during the 6 years than was allowed by the commission.

Turning now to the table of the commission quoted above, the result is that, laying aside other considerations and conceding the substantial correctness of the commission's other findings for the purpose of the decision of this application for injunction, its estimates of the requirements of the company and of the receiver for the first and the succeeding 5 years of the life of the gas company as a going concern were too low by the following amounts:

On account of estimating 12 years, instead of 6 years, as the life of the going concern by	$ 590,300.00
On account of lack of allowance for extensions by	247,916.00
On account of estimate of cost of gas at 4 cents per M cubic foot instead of 6 cents per M cubic foot by	513,428.90
On account of allowance of 6 per cent. instead of 8 per cent. interest	145,672.10
Total	$1,497,317.00

The commission assigned to the Kansas property 45.48 per cent. of its estimated revenue and requirements; and 45.48 per cent. of $1,-497,317 is $680,979. The commission estimated that upon the basis stated in its table a surplus of $147,848.14 would be produced. Deducting this estimated surplus from the $680,979, it appears that its estimated revenue falls short by $533,131.10 of producing an amount sufficient to pay the necessary expenses of the maintenance and operation of the property and business of the natural gas company and a reasonable interest upon the present value of its property.

The experience of the future may, and it is hoped that it will, teach that the necessary requirements of the receiver and the company will be less than those which the evidence convinces the court will be indispensable to provide and maintain an adequate supply of gas for its customers, to operate the business of the company, and to return a fair income upon the value of its property. The opinion of the court can rest only on the evidence before it, and upon that evidence it is its opinion that a less rate than 32 cents per M cubic foot will be found insufficient to accomplish this result. But even if there are errors in some of the conclusions to which the court has arrived, and even if they are so great as to reduce the necessary increase of the requirements fixed by the commission by one-half, still moneys must be provided for the extensions of the pipes of the company, for which the commission allowed nothing. The amount it allowed for the cost of gas and the interest rate which it fixed were largely too low, 12 years was too high an estimate for the life of the plant, and in the opinion of the court there is no escape from the conclusions that the 28-cent rate is not and will not be compensatory, that, on the other hand, it is unreasonably low, confiscatory, and violative of the Constitution of the United States, and that the complainant is entitled to the interlocutory injunction of this court to prevent its enforcement pending the hearing of this cause upon its merits.

[3] The creditors by their agreement consented that there should be reserved during the year 1915 $500,000 out of the annual earnings for that year and $200,000 annually thereafter for extensions, betterments, and additional gas supply, upon condition that the properties were being operated on a compensatory rate. Those amounts have not been so reserved and applied, and yet $1,000,000 has been paid on the principal of the creditors' debts during these years. Under these circumstances the rights of the public—that is to say, of the customers of the gas company—to a reasonably adequate supply of gas from the receiver and the company, at a rate that is not unreasonably high, are superior to the rights of the creditors to the payment of their debts, and the making of necessary extensions of the pipes and the construction of the requisite compressors to procure and furnish to these customers that reasonably adequate supply must be made primary in the administration of this estate, and the payments upon the principals of debts of the creditors secondary. To this end the issue of the injunction herein will be conditioned upon the giving by the receiver, or by some one on his behalf, of a bond or undertaking in the sum of $750,000, with adequate security, that he will pay no more upon the principals of the debts of the creditors who were parties to their agreement of December, 1914, or to the Fidelity Title & Trust Company, until $750,000 has been invested in the necessary extensions and compressors, and that he will proceed speedily to make them, and will invest therein at least $500,000 within six months after the issue of the injunction herein.

Elaborate arguments have been made and extensive briefs have been submitted on the questions whether the gas which the receiver is buying, carrying, and selling is an article of interstate or of intrastate commerce, whether he is engaged in interstate or intrastate commerce, and, if in the former, whether the rate fixed by the commission directly or indirectly burdens or interferes with interstate commerce. These questions have received examination and consideration. Their decision, however, is not indispensable to the determination of the question before this court, for, if the gas is not an article of interstate commerce, and if the business of the receiver in dealing with it is not interstate commerce, nevertheless this court has plenary jurisdiction to adjudge the issue whether or not the 28-cent rate is unreasonably low, or is confiscatory, and to enforce its adjudication by injunction under the Public Utilities Act of Kansas (Laws of 1911, c. 238, § 21). State v. Flannelly, 96 Kan. 833, 154 Pac. 235, 237.

[4] Rights created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." Davis v. Gray, 16 Wall. 203, 221, 21 L. Ed. 447; Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 14, 23 C. C. A. 609, 616, and cases there cited; Broderick's Will, 21 Wall. 503, 520, 22 L. Ed. 599; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263.

[5] Discussion of these questions is therefore omitted, but the members of the court are unanimously of the opinion: (1) That the gas purchased or procured in Oklahoma, transported from Oklahoma, and sold or delivered by the receiver or by the gas company to parties in Kansas or Missouri, is an article of interstate commerce, as is the gas procured in Kansas and sold or delivered by them, or either of them, to parties in Missouri; (2) that this gas, which is probably at least 95 per cent. of all the gas the receiver or the company handles, does not lose its interstate character by the fact that a small portion, probably not exceeding 4 per cent., of the gas they handle is procured and delivered in Kansas, is an article of intrastate commerce, and is inseparably mingled in the pipes with the interstate gas; (3) that the purchase or procuring of interstate gas in Oklahoma, its transportation, sale, and delivery by the receiver, or the gas company, to parties in Kansas and Missouri, is interstate commerce, and the receiver and the company are engaged in interstate commerce; (4) that the enforcement by a state through its officers of any legislative act preventing interstate commerce in this article of interstate commerce, either by a direct prohibition of such commerce in this article by state law, or by an inhibition of a sale of the article in the state at any price whatever, or at any price above a price so low that the laws of trade make it impossible to purchase or procure it in another state and to sell and deliver it in the prohibiting state at that price with profit, substantially burdens and unduly interferes with interstate commerce in violation of the commerce clause of the Constitution of the United States.

[6] Counsel for the Public Utilities Commission of Kansas argue that the issues relative to the interstate or intrastate character of the business and gas of the receiver are rendered res adjudicata between him and the commission by the judgments of the Supreme Court of Kansas in State ex rel. Caster v. Flannelly, 96 Kan. 372, 152 Pac. 22, and State ex rel. Caster v. Flannelly, 96 Kan. 833, 154 Pac. 235, to which the receiver and the commission were parties, and in which

that court in its opinions expressed the view that this business and this gas was not of an interstate character. But reasons given by courts in their opinions for conclusions they reach, which are not necessary to and are not embodied in or made parts of the adjudications which they render, do not work the estoppel of res adjudicata. One of the judgments of the Supreme Court in the case mentioned was founded on its decision that Judge Flannelly had no jurisdiction of the case before him, for the sole reasons that the summons against the commission and its members, and the service thereof, were unauthorized and void. The other judgments were the denial of the petition of the receivers for an injunction against the commission to prevent it from putting the 28-cent rate in force, and this was founded on the ground that the receiver had already voluntarily put it in force and no longer pressed in that court for relief against it, and the other was the dismissal of the mandamus proceeding because there was no longer any function for it to perform. The opinion and conclusion that the business and the gas of the receiver were not of an interstate character was unnecessary and immaterial to any of these judgments, and for that reason the court is of the opinion that the questions in relation to the interstate or intrastate character of the business or gas of the receiver and of the natural gas company were not rendered res adjudicata by the adjudications of the Supreme Court of Kansas in the cases to which reference has been made.

Now as to the Missouri defendants: First, have the receivers established their right to the preliminary injunction prayed against the Missouri Public Service Commission? In paragraph 2 of the bill it is alleged that on September 27, 1915, the Public Service Commission of Missouri held a conference with the Public Service Commission of Kansas, after which John M. Atkinson, as chairman of the Missouri Commission, and for the commission, announced that the Missouri Commission would not permit a higher rate to be charged in the cities of Missouri than was charged in the border cities of Kansas. In support of this allegation affidavits were introduced, from which it appears that about September 28, 1915, the three members of the Kansas Commission and two members of the Missouri Commission, held a private conference in the Baltimore Hotel at Kansas City, Mo., after which one of the members of the Missouri Commission stated that:

"If application is ever made to the Missouri Commission for an increase of natural gas rates in these Missouri cities which are supplied with gas by distributing companies buying from the Kansas Natural, no action will be taken until all the cities have been given a hearing. Neither will the commission, if called upon to take action, agree to a higher rate in Missouri cities—all of which are upon the border—than in cities of Kansas similarly situated. This applies with particular force to Kansas City, Mo., and Kansas City, Kan., which the commission regards as practically one city."

Certainly this statement of a single member of the commission, made under these circumstances, outlining what he believed would be the action of the commission in the future in case the question of these rates should be brought before it, furnishes no ground in itself for the granting of the injunctive relief prayed.

It is further alleged that on September 13, 1915, the local distributing companies of Oronogo and Carl Junction, Mo., filed with the Missouri Commission schedules prescribing a rate of 30 cents for each of those towns, which the commission suspended, and has ever since refused to permit said rates to be put into effect. Under the law of that state the commission may, upon the filing of a proposed schedule of rates, suspend its operation pending a hearing. It does not appear that a hearing as to these last-mentioned rates has ever been had, so that it cannot be said what will be the action of the commission as to such rate, and it further appears that the applications for the allowance of such schedules have been since withdrawn.

So far as concerns the case of the plaintiff, the receiver, against the Missouri Commission, as to the order of the Missouri Commission in relation to the St. Joseph rates, it will be noted that the order of the Missouri Commission complained of was entered at a proceeding to which neither the receiver nor the Kansas Natural Gas Company was a party. The order entered in that proceeding was directed only against the St. Joseph Company. In the course of its opinion the commission said:

"The company [St. Joseph Company] has been paying the Kansas Company 26⅔ cents per thousand cubic feet, while other distributing companies are paying 16⅔ cents, except the local company in Kansas City, Mo., which pays 16.87 cents. The Kansas Company is not before us, and we have no jurisdiction over the contract between that company and the defendant, under which the latter receives its gas from the former. However, it is well recognized that in rate-making cases only reasonable charges, as operating expenses, will be allowed against the public. * * *"

The increase from 40 to 60 cents, prayed by the St. Joseph Company, was denied. There is nothing in the order of the Missouri Commission to prevent the receiver continuing to collect from the St. Joseph Gas Company his proportion of the rate as provided by the contract. So long as the St. Joseph Company continues to collect the 40-cent rate the receiver may under his contract collect as his proportion the 26⅔ cents. A consideration of all the evidence does not convince us that 26⅔ as the proportion of the St. Joseph rate received by the receiver is unreasonably low, noncompensatory, unremunerative, or confiscatory. Therefore no ground is shown in reference to the Missouri Public Service Commission's order regarding St. Joseph rates that entitles the receiver to the preliminary injunction prayed.

[7] So far as concerns the application of the St. Joseph Gas Company for an interlocutory injunction as against the Attorney General of the state of Missouri and the officers of the Public Service Commission of that state as prayed in what it terms its intervening bill of complaint in this case, it appears that to the original bill of the receiver, plaintiff, both the St. Joseph Gas Company and the Attorney General and Public Service Commission of Missouri were made parties defendant. By its answer filed in this case on January 28, 1916, the St. Joseph Gas Company states that it has no knowledge, save as is alleged in said bill, as to the several allegations thereof, and leaves the complainant, receivers, to make such proof thereof as they may be advised is material, and further states that it has no interest in the result of the receiver's suit or in the matters to be litigated herein, and

specifically disclaims any such interest, and prays to be dismissed, with its costs. At the hearing upon the application of the receiver in Kansas City, the St. Joseph Gas Company, through counsel, asked and was granted leave within a certain time thereafter to file an intervening bill.

It has now filed what it styles its intervening bill of complaint, and upon the allegations therein contained it bases its application for the interlocutory order above referred to. The Attorney General of Missouri and the Public Service Commission of that state challenge the jurisdiction of this court in this cause to grant such relief to the St. Joseph Gas Company. In view of the fact that that company and the aforementioned Missouri defendants were all made parties to the original bill, what the St. Joseph Gas Company terms its intervening bill is in reality a cross-action or cross-bill against its codefendants, the Attorney General and the Public Service Commission of Missouri.

In Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618, the Circuit Court of Appeals for this circuit said:

"A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill, and must be dismissed, because there cannot be two original bills in the same case. Story, Eq. Pl. § 3890; Cross v. De Valle, 1 Wall. 1, 140 [17 L. Ed. 515]; Ayres v. Carver, 17 How. 591 [15 L. Ed. 179]; Rubber Co. v. Goodyear, 9 Wall. 807, 809 [19 L. Ed. 587]; Stonemetz Printer's Mach. Co. v. Brown Folding Mach. Co. [C. C.] 46 Fed. 851; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. [C. C.] 53 Fed. 850, 852; McMullen v. Ritchie [C. C.] 57 Fed. 104."

In Gilmore v. Bort (C. C.) 134 Fed. 658, it is said:

"The purpose of a cross-bill is either (1) to obtain a discovery in aid of a defense to the original bill, or (2) to obtain full relief to all the parties touching the matters of the original bill. Story's Eq. Pl. par. 389. And it must be made to appear that a settlement of the controversy presented by the cross-bill is fairly necessary in order to enable the court to fully dispose of the matter of the original bill. It is auxiliary to the original suit, and a dependency upon it, and should not introduce any new or distinct matter not embraced in the original bill. Neither may it introduce new controversies between the codefendants to the original bill, the decision of which is in no way necessary to a complete determination of the controversy between the complainant and the defendants over the subject-matter of the original bill. If it does, it is not a cross-bill, but an original bill, and should be dismissed. Cross v. De Valle, 1 Wall. 5 [17 L. Ed. 515]; Rubber Co. v. Goodyear, 9 Wall. 807 [19 L. Ed. 587]; Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618."

The relief sought as set forth in the prayer of what is termed the intervening bill is that, should the court find and decree that the matter of the division of the proceeds received from the consumers for gas sold in St. Joseph or the amount paid by the St. Joseph Gas Company to the Kansas Natural Gas Company, or its receiver, for gas is a matter within the jurisdiction and control of the Public Service Commission of Missouri, that the court should further find and decree that 17 cents per thousand cubic feet, the amount fixed by the Missouri Public Service Commission as the maximum operating charge which it will allow against the public as the cost of gas, is an insufficient and unreasonably small operating charge, the enforcement of which results in the confiscation of intervener's property as set forth in the bill, and that the court find and determine whether 26⅔ cents per M cubic foot is a fair, reasonable, and proper sum to be paid by the intervener to the Kansas Natural Gas Company, or its receiver, for gas, and a fair and reasonable operating charge against the public as the cost of gas, and that the aforementioned Missouri defendants be temporarily and permanently enjoined and restrained from attempting to enforce the provisions of the order and decisions of the Missouri Commission, or authorizing or directing the institution of any suit or action against the intervener, or its officers, agents, or employés, for the recovery of any penalties because of its failure to observe such order.

A careful consideration of the allegations of this intervening bill, which we treat as a cross-bill, convinces us that it neither serves to aid in the defense of the original suit nor to obtain a complete determination of the controversies between the original complainant and the several defendants to the original bill. In our judgment it interposes new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant receiver and the several defendants to the original bill over the subject-matter of that bill. It is in the nature of an original controversy between the St. Joseph Gas Company and the several Missouri defendants, and the fact that in the determination of this controversy it may and probably will become necessary to consider questions very similar to those involved in this case as between the receiver and the several defendants to the original case, makes it none the less a new and distinct controversy, of which, in the present state of the record, we conclude we have not jurisdiction to grant the relief prayed by the St. Joseph Gas Company, and its application for an interlocutory injunction will therefore be denied.

It has not been and is not necessary for this court as at present constituted to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, the contracts between the distributing companies and the Natural Gas Company and the duties and obligations of the receiver under them, in order to adjudicate the issues it was constituted to decide, and for that reason no opinion is expressed or adjudication made concerning them.

In re DOZIER WHOLESALE GROCERY CO.

(District Court, S. D. Alabama, N. D. March 25, 1916.)

No. 1688.

BANKRUPTCY ⚷381—COMPOSITION—OBJECTIONS TO CONFIRMATION.

Evidence considered, and held not to sustain objections to the confirmation of a composition offered by a bankrupt on statutory grounds, and to show that the composition would yield a larger dividend to general creditors than could probably be realized from the administration of the estate, and was for their best interest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⚷381.]

In Bankruptcy. In the matter of the Dozier Wholesale Grocery Company, bankrupt. On report of W. K. Campbell, referee and special master, on objections to confirmation of composition. Objections overruled, and composition confirmed.

The following is the report of W. K. Campbell, Special Master:

The evidence offered by objecting creditors assumed a very wide range, and obviously much of it is immaterial to any of the issues tendered by the specifications. Counsel for objecting creditors filed a brief from which it appears that the propositions relied upon by them may be briefly summarized as follows: (1) That the letter of Mr. E. Lamar and that of Mr. A. W. Stewart, the bankrupt's attorney, "were calculated to mislead the creditors" as to the financial status of the bankrupt. (2) That the claim of C. H. Dozier, Sr., president of bankrupt, should not have been allowed. (3) That the true condition of bankrupt's financial condition was concealed. (4) That the subscription of C. H. Dozier for $12,000 of stock on or about January 14, 1914, has not been paid at all, or has not been fully paid. (5) That the real value of the warehouse, belonging to bankrupt's estate, was concealed from the creditors. (6) That large sums of money were paid out by bankrupt to some of its creditors for debts due them within four months preceding bankruptcy, thereby constituting preferences which are recoverable by bankrupt estate. As these are the only propositions pointed out by objecting creditors in brief, upon which they rely to sustain their specifications of objection, the summary of the evidence will be limited to that having some probative relations to said propositions.

The first and third propositions appear to be based on the letters of Lamar and Stewart to the creditors. Both of these appear to be printed in typewriter type, that of Mr. Lamar being dated January "41," 1916 (evidently intended for 14). Briefly summarizing its contents, it is to the following effect: That some days ago the Selma creditors of bankrupt had a conference, and with such facts as were before them, it appeared that bankrupt's president and its principal business factor had become incapacitated by disease from giving any attention to the business; that he had been in confinement in a hospital for three months; that the business was in the hands of his young son, of but little experience; that it was obvious that it was to the interest of all creditors to place the concern in bankruptcy; that Reese & Reese, attorneys at Selma, Alabama, had been authorized and employed to file a petition in involuntary bankruptcy for the benefit of all the creditors; that an adjudication had been obtained; that Mr. Blalock of Selma had been appointed receiver, and was in charge of the effects, having an inventory made; that according to the judgment of said (petitioning) creditors "it would seem that the best interests of the creditors would be best protected by being consolidated or centralized in the hands of one firm of attorneys, those already employed by said creditors" (the names of the petitioning creditors are here stated); that the writer is a member of the firm of L. & E. Lamar, who in-

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

forms the creditors of the foregoing facts and invites their co-operation. Suggestion is made that, "if you desire to co-operate with us in handling this estate, * * * you can sign up and mail your claim to them (Reese & Reese) if you so determine it to be to your best interest to co-operate with us; otherwise, of course, you can handle your claim in any way you think best. In either event, we will be glad to keep you informed as to progress." The testimony shows that this letter was mailed to some of the creditors, but fails to show how many. The manuscript from which this letter was printed was delivered to printer by Mr. Reese.

The letter of Mr. Stewart is dated January 27, 1916. The pertinent parts are: That the failure of bankrupt is largely due to ill health of C. H. Dozier for last two years, during which time he has mostly been confined in hospitals, including the State Insane Hospital; that "the assets of the company, as shown by the inventory of the receiver, are as follows: [Here follows the inventory value and the appraised value of the assets as shown by said receiver's inventory, and the figures correspond in each particular with the respective figures in inventory filed in my office.]" It further states that the writer has arranged to provide money to make a 25 per cent. composition, and concludes as follows: "I have arranged to provide money to carry out this offer, which I think is to the interest of the creditors. Without in any way attempting to influence your action, I have for your convenience attached hereto a perforated slip, with the suggestion that, if you deem it to your interest, you sign and send to your attorney, or Hon. Wm. King Campbell, referee, Selma, Ala., prior to first meeting of creditors. If a sufficient number indicate acceptance the money will be immediately paid into court on the day of said meeting and promptly paid to the creditors, or you can mail to me direct your acceptance."

The evidence shows that Mr. Stewart sent or brought the original from which said letter was printed to Mr. Reese at Selma, and asked him as a "courtesy" to deliver it to the printer. After it was printed, Mr. Stewart mailed it out from Marion to the creditors, and mailed some of them to Reese & Reese, who represented a majority of the creditors who had filed their claims, who mailed them to some of the creditors whom they represented, writing a letter therewith as follows: "We inclose herewith a circular letter from Mr. A. W. Stewart, of Marion, Ala., bankrupt's attorney, which we have compared with the official inventory and schedules on file in the referee's office, and find the figures taken therefrom correct. We hardly think at this season and under the prevailing depressed conditions that the assets will sell for more than $5,000. Book accounts remaining unpaid at this season in this section are generally of little value; when sold in block rarely bring more than 10 per cent. In order to pay the expense, fees, and costs of bankruptcy, and the claims entitled to payment in full, and leave sufficient amount for a dividend of 25 per cent., it would be necessary for the trustee to realize about $8,500 from the sale of the assets. This we think very improbable, if not impossible. Kindly instruct your wishes in the matter." At the time of mailing the letters by Stewart, he had Mr. Reese to file one of the letters in my office.

As it seems a contention of objecting creditors that the warehouse is the basis of the alleged concealment of the value of the assets, a summary of the evidence relating thereto is substantially as follows:

Said warehouse is a brick structure with a cement floor. It is located on the right of way or lands of the Southern Railway Company, under a license from said railway. The written contract evidencing said license is in evidence. In said contract the bankrupt is styled the "licensee." It provides a payment of $57 per annum to the railway company, and contains among others, the following provisions:

"(3) That this license is a personal privilege to the licensee hereunder, and is not transferable or assignable, and any attempt to transfer or assign same shall operate as a forfeiture of this license.

"(4) That the licensee will post, and at all times thereafter and during the life of this agreement maintain, in a conspicuous place upon said warehouse, a notice reading as follows: '*No goods, wares, merchandise, or other prop-*

erty, except that of Dozier Wholesale Grocery Company, shall be stored or placed in this warehouse, without the consent, in writing, of Southern Railway Company.'"

"(6) That it [licensee] will indemnify and save harmless the railway company against any and all loss of or damage to the property of the railway company, and against all claims, demands, suits, judgments, or sums of money accruing to licensee or to any other party, against the railway company, for loss or injury, caused by fire or otherwise, however resulting, either to person or estate, and arising by reason of or in connection with the occupation and use by licensee of said premises of the railway company, and the presence of the warehouse of the licensee thereupon."

"(8) That in the event that the licensee shall be in default for 30 days in the payment of any rental payment, payable to the railway company hereunder, then forthwith upon such default or violation, and at all events upon 30 days' notice in writing so to do, served upon it by the company, the licensee will remove said warehouse from the premises of thé railway company, and vacate said premises, and restore the same to their condition existing prior to the occupation and use thereof by the licensee and the erection of said warehouse thereupon, or in default thereof the railway company may itself re-enter upon said premises, remove said warehouse, and restore the said condition of said premises, but at the expense of the licensee. And it is understood and agreed that the right of the railway company to revoke this license and require the licensee to remove said warehouse and vacate said premises by notice, as aforesaid, shall always obtain, notwithstanding payment of rental in advance and full compliance by the licensee with all of its covenants in this agreement contained."

On the schedule as filed by bankrupt at the end of Schedule B, appears the following note: "Note. In addition to the above property, bankrupt erected a warehouse on the property of the Southern Railroad, and under his [its] contract, it has the right to remove the material therein. It is impossible to estimate its value."

It appears from the evidence that the cost of construction of this warehouse was $3,220, of which the labor constituted about $1,024; that the flooring is of concrete, and constitutes about one-third of the total cost of the building; that the walls are of brick, cemented with a mortar of cement, lime, and sand, which makes a harder substance than the brick. Stewart also testified (same page) that the wooden structure on the lot would not be worth $50 if torn down and used. J. C. Foster, the attorney for objecting creditors, testified that the value of the brick warehouse in his opinion was $2,000; that of the wooden building being $500. This witness stated that he had only lived in Marion since the middle of last April; that he had never been in the real estate business, nor bought or sold real estate there. This witness also swore that the property referred to in the petition as being worth $3,000 was this warehouse; witness being asked in reference to said warehouse the following question: "Q. You swear in here [in specification] that the warehouse is worth at least $3,000? A. I swore that was my belief. Q. You don't know what it is worth? A. No, sir; I was swearing to what I believed it was worth."

Mr. T. D. Kemp, of Marion, testified that he was a civil engineer and architect; had had much experience in construction work of various kinds; that he was familiar with the plans and specifications of said warehouse; that the mortar therein, from its degree of hardness, contained a large percentage of cement; that in tearing down a building containing such cement the salvage would be less than in case of ordinary mortar; that the flooring was of concrete, and constituted from one-fourth to one-third of entire cost of building; that in removing the building he would not consider it of any value; that "it would only be fit for rubbish, for filling holes"; that it would have no market value; that the wooden building was built of "merchantable rough stuff, what we call log run lumber"; that the material salved from taking down the buildings, under the terms of the contract, would hardly be sufficient to put the ground in its original condition.

J. A. Wood, a witness for objectors, was asked: "Can you say that you know the market value of that property, the warehouse of the Dozier Wholesale Grocery Company?" to which he answered, "I couldn't say that I do, but I could give an idea of what I think the value is." Subsequently, in answer to question as to market value of said warehouse, he said: "I would say $2,000," and as to the wooden structure said, "$500, I would say." This witness was asked as to the value of the material in said building if torn down, but objection to said question was sustained on the ground that witness was not shown to know the market value thereof. His answer, however, was taken down—respectively, $400 for brick building and $100 for wood building. He further testified that he did not know what would be the cost of tearing down the brick building, and that he thought it would cost $25 to tear down the wood building; that with a higher per cent. of cement in mortar there is a greater loss in brick in tearing down; that he never examined the mortar in said building.

F. V. Woodfin, on behalf of objectors, testified that prior to the building of the brick warehouse he had a license from the railway company for the ground now occupied by said building— that is, the brick warehouse; that said wooden structure was then on said ground; that the railroad was willing for him to continue said occupation under said license; that the Dozier Wholesale Grocery Company wanted said place, and paid witness $900 for his privileges, including the buildings on said ground; that after said transaction said wooden building was moved off the space on which brick building stands.

W. C. Dozier, for bankrupt, testified that the bankrupt had tried to sell the wooden building to Mr. Ed. Curb, and asked him to make a bid for it; that he offered nothing for it, but was willing to move it off for the salvage. Witness further testified that when the brick building was erected the contractor was required to tear down said wood building or move it, and he moved it, instead of tearing it down; that it was cheaper for said contractor to move said building than to tear it down; that at time of said transaction with Woodfin he had a line of business which bankrupt desired to handle, and it desired to get him out of business, said line being brick, lime, and cement.

There is no evidence before me having any tendency to show any collusion or conspiracy between Lamar, Stewart, Reese & Reese, and the receiver, or between any of them, in connection with said letters.

In relation to the claim of C. H. Dozier, filed and allowed in this case, a brief summary of the evidence is: Said claim is in due form required by law, and sworn to, and was allowed, as admitted in the specification of objection directed against it. Its basis is five notes made by the bankrupt, two of which are payable to C. H. Dozier, respectively, for $2,000 and $3,030.66, due respectively one day after date and on demand; the dates of said notes being March 16, 1915, and May 1, 1915. The other three notes are payable to Marion Central Bank, dated March 15, 1915, April 1, 1915, and May 8, 1915, respectively, for $1,057.78, $1,057.78 and $1,052.44. Each of them are duly transferred and indorsed by the cashier of said bank to said C. H. Dozier; the date of said transfer being November 13, 1915. From the testimony of C. H. Dozier, testifying with the books before him, it appears from said books of account that the consideration of the $3,030.66 note was notes to the amount of $3,000 owing from the bankrupt to the People's Bank and the $30.66 being the interest thereon. This witness also proved the signature of the cashier to the transfers of the three notes from the Marion Central Bank.

Counsel for objecting creditors assume in their brief, on the sixth page thereof, that the witness Dozier testified that the amounts embraced in the three notes (transferred by Marion Central Bank to C. H. Dozier) is the same as the amount embraced in the note to C. H. Dozier for $3,030.66. I did not understand the witness to so testify, and as a matter of fact he explained that he did not so mean to testify. The three notes referred to were payable to Marion Central Bank, and according to the books, and testimony of said witness, C. H. Dozier, Jr., the consideration of the $3,030.66 was cash paid by C. H. Dozier to the People's Bank to take up $3,000 worth of notes of bankrupt due said bank, and that the $30.66 was interest thereon. The aggregate amount of said three notes to Marion Central Bank is $3,168.10, while that of the note to Dozier is $3,030.66. This witness fully explains that he did not mean to so testify. Furthermore, one of said three notes is subsequent in date to the $3,030.66 note. As to the question of whether said latter note is dated "March 1, 1915," or "May 1, 1915," I cannot conceive of any reason, beneficial to Dozier, for such alteration; and if any alteration has been made it seems to me that it could have easily been explained by said cashier and the books of the bank. Witness further testified from the books that none of the notes attached to said proof of claim appear as credits on the personal account of C. H. Dozier with the bankrupt. There is no evidence before me tending to show any defense against said notes. A transcript of said C. H. Dozier account is attached to testimony of C. H. Dozier, Jr.

As to the payment of the capital stock, the evidence shows from the books of account, as explained by said witness C. H. Dozier, Jr., that the first $18,000 was paid on dates from December 24, 1912, to February 27, 1913, as follows: December 24, 1912, $1,500; January 1, 1913, $1,000; January 6, 1913, $6,000; December 27, 1912, $3,479; January 6, 1913, $120; January 23, 1913, $1,540; January 29, 1913, $1,500; February 24, 1913, $2,000; February 27, 1913, $861—making $18,000 in all. The item of $1,540 was charged to the individual or personal account of C. H. Dozier. The last $1,500 was cash, and the other payments were by check, and the books, as well as the passbooks of the People's Bank and the Marion Central Bank, show that said cash item and all of said checks were deposited in one or the other of said banks to the credit of the bankrupt firm; the items of deposit in said passbooks being identified in the stenographer's minutes by a red cross mark. On the individual account of C. H. Dozier with the bankrupt he is, on January 14, 1914, charged with treasury stock $12,000. On the date said charge was made against said Dozier on his account, said account showed a credit balance in favor of him of $13,193.63. It also showed a credit balance in his favor at time of bankruptcy of $765.56, exclusive of any of the items embraced in the claims of said Dozier filed in this bankruptcy.

No evidence was offered before me having any tendency to show nonpayment of any of the stock subscribed for, nor any showing that said Dozier owed the bankrupt anything, which was proper to set off against said claim of Dozier, or against the said payments on account of said stock.

In this case objecting creditors, without objection, offered in evidence all the books of bankrupt, and all the proceedings in the creditors' meeting; it being stated that I would consider same so far as I could remember same. The books are exceedingly numerous and bulky, and no particular portions of them have been called to my attention, except as shown by the stenographic minutes. Collier on Bankruptcy, p. 33, declares this practice is loose and should not be followed; that the better method, where a stipulation is possible, is to call out those portions that are pertinent and read them in. However, I am unable to say that the books show any such preferential payments as would be recoverable by the trustee; it not being even suggested by any evidence as to whom the payments were made, and there being no evidence before me, as to the knowledge or intent of such creditors, such as would make them recoverable, if any may have received such payments within said four months.

The purpose of specifications of objection is to give the bankrupt notice of particular conduct of his which is challenged (Collier, 322; In re Hirsch [D. C.] 2 Am. Bankr. Rep. 715, 96 Fed. 468), and they should contain allegations sufficient to show all essential facts existing bringing the opposition within the grounds specified by the statute (Collier, 324). They must be clear and unequivocal, and contain specific averments of facts. They should be pleaded with greater particularity than complaints in civil actions. Collier, 324. Specifications and proof in support must be clear, positive, and direct. The opposing creditor must distinctly allege and prove one or more of the statutory grounds. In re Griffin Bros. (D. C., Toulmin, Judge) 19 Am. Bankr. Rep. 78, 154 Fed. 537. See, also, In re McGurn (D. C.) 4 Am. Bankr. Rep. 459, 102 Fed. 743; In re Thomas (D. C.) 1 Am. Bankr Rep. 515, 92 Fed. 912; In re Holman (D. C.) 1 Am. Bankr. Rep. 600, 92 Fed. 512; In re Hixon (D. C.)

1 Am. Bankr. Rep. 610, 93 Fed. 440; In re Kaiser (D. C.) 99 Fed. 689; In re Hirsch, supra; In re Peacock (D. C.) 4 Am. Bankr. Rep. 136, 101 Fed. 560; In re Quackenbush (D. C.) 4 Am. Bankr. Rep. 274, 102 Fed. 282; In re Gross, 5 Am. Bankr. Rep. 271; In re Wolfensohn, 5 Am. Bankr. Rep. 60; In re Wetmore (D. C.) 99 Fed. 703; In re Idzall (D. C.) 2 Am. Bankr. Rep. 741, 96 Fed. 314; In re Main (D. C.) 30 Am. Bankr. Rep. 547, 205 Fed. 421.

The allegations must be specific and of such a character that their sufficiency may be met by demurrer, or by exceptions analogous to those allowed in equity. Mere general averments are not sufficient. If they fail to allege any fact which by construction would be deemed ground for denial, they may be disregarded, though not excepted to. Collier, pp. 325, 326; In re Troeder, 17 Am. Bankr. Rep. 723, 150 Fed. 710, 80 C. C. A. 376; In re Steed (D. C.) 6 Am. Bankr. Rep. 73, 107 Fed. 682; In re Peck (D. C.) 9 Am. Bankr. Rep. 747, 120 Fed. 972; In re Parish (D. C.) 10 Am. Bankr. Rep. 548, 122 Fed. 553; In re Chandler, 14 Am. Bankr. Rep. 512, 138 Fed. 637, 71 C. C. A. 87. It is held in Re Mintzer (D. C.) 197 Fed. 647, 28 Am. Bankr. Rep. 743, that specifications in general terms following the language of the statute are insufficient. The grounds specified must be one of those enumerated in the statutes. In re Griffin Bros., supra. This case, decided by the judge of this district, is one of the clearest and most lucid discussions of the necessary allegations and proof required in specifications.

In my opinion, the first specification is insufficient. It does not allege any of the grounds enumerated in the statute, no evidence was offered in support of it, and, further, it is a fact that I mailed notice of the first meeting of creditors to all of the creditors scheduled, including the creditor mentioned in said specification. The envelope containing each of said notices had my official return address thereon, and has never been returned to me. I therefore find that said specification is not sustained by the evidence.

The second specification, so far as its meaning can be gathered by reading it, and the evidence offered relating thereto, is predicated on the fact that certain property—the warehouse—is scheduled as valueless, which is worth at least $3,000, and that the offer of composition is less than would be realized on sale of the assets of the bankrupt. The allegation that it "is scheduled as valueless," seemingly the conclusion of the pleader, is not borne out by the evidence, as the official schedule shows that this warehouse was listed with the explanatory note relating thereto, which note is set out heretofore in this report, and from which note it appears that the bankrupt was 'unable to estimate its value as an asset; and from said note I am unable to derive any suggestion even intimating that same was valueless. The explanation is plainly that bankrupt is unable—did not know how—to fix or estimate its value as an asset; and for reasons hereinafter set out I think such conclusion was fully justified.

No evidence was offered in support of the allegation that more would be realized to the creditors by a sale of the assets than is offered by the composition; on the contrary, Mr. Monk, president of the Central Alabama Dry Goods Company, shown to have large experience in bankrupt sales, testified that in his opinion the assets would not likely sell for over $5,000, and that is the conclusion I reach, and I do not think that more could be realized to creditors by sale than is offered by the composition, and this would still be my conclusion, even though it were shown that several hundred dollars could be realized by sale of the warehouse.

Section 70, subd. "a," of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), specifies and determines what property passes to the trustee and becomes assets in his hands. The only part of said subdivision "a" which could by a possibility relate to this warehouse is the following part of the clause numbered (5): "(5) Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. * * *"

Under the terms of the contract with the Southern Railway Company, referred to heretofore in this report, it is my opinion as a matter of law, and I so hold, that, except as to the privilege of removing the material from the railroad, the bankrupt had no property rights arising out of said contract, which he could by any means have transferred or which might have been levied upon and sold under judicial process against him and I further hold that the only property right which could pass to the trustee as an asset was the right to remove and sell said material according to the terms of the contract. As to the value of such material one witness, Wood, testified that the material in the brick warehouse he thought would be worth $400, and that in the wood building $100; that the cost of tearing down the wood building would be about $25. He failed to testify as to what would be the cost of tearing down the brick warehouse, or restoring the ground to the condition required by the contract. The questions which elicited these answers as to the value of said materials were objected to, and such objections were sustained, because said witness was not shown to know the values inquired about. The witness Kemp, a very intelligent man of many years' experience in such matters, testified that the material salved from the taking down of the buildings would hardly be sufficient to pay expenses thereof and of putting the ground in its original condition according to the terms of said contract. There is therefore before me no evidence from which I can conclude, as a matter of fact, that this right to remove this material is of any value as an asset of the estate; but, if so, its value at least is problematical and uncertain.

The approval of a majority of the creditors is evidence, prima facie, that the composition is for the best interests of the creditors, and the burden is on those who attack it to show the contrary. Collier, p. 297; In re Waynesboro Co. (D. C.) 19 Am. Bankr. Rep. 487, 157 Fed. 101; In re Hoxie (D. C.) 25 Am. Bankr. Rep. 32, 180 Fed. 508; In re Barde & Levitt (D. C.) 31 Am. Bankr. Rep. 736, 207 Fed. 654; City Bank v. Doolittle, 5 Am. Bankr. Rep. 736, 107 Fed. 236, 46 C. C. A. 258. There must be a positive showing to rebut this presumption that the action of the majority is for the interest of all. Collier, p. 297; In re Weber Co., Fed. Cas. No. 17,330; Id., 17,331; In re Greenebaum, Fed. Cas. No. 5769.

My report of this composition shows its acceptance by 42 creditors, whose claims aggregate $13,115.79. The objecting creditors are Van Camp Products Company and Hancock Bros. & Co., whose claims amount, respectively, to $316.80 and $37.82. It is my conclusion, based on all the evidence, that the creditors would realize more under the composition than by a sale of the assets. Without passing on the pleadings, I find upon the evidence that the second specification is not sustained.

In my opinion, the third specification does not allege any of the grounds enumerated by the statutes; but I do not deem it necessary to pass on the exceptions to it. There is no evidence before me showing a concealment, nor an attempted concealment, nor any false statement sent out by the bankrupt, or any of the other persons mentioned therein. This specification, which is very vague, according to the evidence is based on the fact that the warehouse was an asset of great value, and Mr. Stewart in his letter failed to mention it as an asset, and that Reese & Reese failed to call it to the attention of their clients that it was a valuable asset. As already stated, in my opinion it is an asset of but small and problematic value. I find that this third specification is not sustained by the evidence.

The fourth is also based, so far as its meaning can be gathered, on the value of the warehouse, it avers it to be worth $5,000; that the bankrupt "colluded with the petitioning creditors, the attorneys representing a majority of the creditors and the receiver to "conceal and deceive creditors" as to the condition of bankrupt estate; that bankrupt sent out a statement to the creditors "in which it failed to list" the warehouse; and that attorneys representing a majority of the creditors wrote their clients that they had receiver's inventory, and that bankrupt's statement as to what it showed was correct. The evidence is without dispute that bankrupt sent out no statement, and that allegation probably refers to the letter written by Mr. W. A. Sewart, its attorney. The figures given in that letter, upon comparison, are identical with those shown by the said inventory filed in my office by said receiver. There is no evidence before me having any tendency to show any conspiracy to deceive any of the creditors. It is unnecessary for me to again state my conclusion as to the value of the warehouse as assets. I find that the fourth specification is not sustained by the evidence.

No evidence was offered in support of the fifth specification, and I therefore find that it is not sustained by the evidence.

The sixth specification is to the effect that C. H. Dozier, who was president of the bankrupt, "did file a claim with the referee, * * * which was allowed, and which is not a bona fide (?) claim or charge against the estate of said bankrupt." Pretermitting any discussion as to the extent of the effect or limitation affected by the use of the words "bona fide," and without passing on the sufficiency of said specification, it will be observed that said specification admits that said claim has been allowed. The bankrupt's counsel strongly contended that the allowance of said claim was a judgment in favor of said C. H. Dozier; that it could not be attacked collaterally on this reference; that said judgment was in the nature of res adjudicata; that said claim could only be attacked on petition of the trustee to re-examine and disallow or reduce said claim (a trustee has been duly appointed and qualified in this cause)—citing in support of said proposition the case of In re Lewensohn, 9 Am. Bankr. Rep. 368, 121 Fed. 538, 57 C. C. A. 600. In my view of the evidence relating to this claim, a decision of the above question of evidence is unnecessary. As already stated in this report, said claim is properly proven according to the statute and in the form provided therefor. No evidence in rebuttal thereof, or from which a contrary inference is raised, has been presented. I therefore find that the evidence does not sustain the sixth specification.

I am of the opinion that the composition should be confirmed, and I do therefore recommend that it be confirmed. Considerable costs and expenses have been incurred in the execution of this reference, an itemized statement of which is handed up with this report, and which should be taxed against the objecting creditors.

Reese & Reese, of Selma, Ala., for petitioning creditors.

A. W. Stewart, of Marion, Ala., for bankrupt.

J. C. Foster, of Marion, Ala., and Brown & Ward, of Tuscaloosa, Ala., for objecting creditors.

HENRY D. CLAYTON, District Judge. This cause, coming on to be heard, is submitted for order and decree upon the motion of the bankrupt and certain of his creditors to dismiss or strike from the file the additional specifications of objection to the confirmation of the composition, and also for decree upon objections of certain creditors to the composition, and for decree in the matter of such composition reported and recommended by the special master in his report dated March 25, 1916.

The report and the testimony in the case have been carefully considered by me, and I have heard and considered the argument of the attorneys in opposition to the confirmation of the composition, as well as that of the attorneys in behalf of the confirmation. After careful examination and reflection, I have reached the conclusion that the real question to be decided in this case is whether or not the composition is for the best interest of the creditors of the estate. If this view be correct, and the whole controversy is reduced to that one question, it is unnecessary for me to pass upon several minor or incidental questions discussed during the oral argument. It is my opinion that the confirmation of the composition, as recommended by the special master, is to the best interest of all the creditors.

1. The letter of E. Lamar and that of A. W. Stewart to certain of

the creditors in connection with the composition were fully and satisfactorily explained, and are far from persuasive that they were instruments of deception or were even instrumental in deceiving or misleading the creditors who accepted the composition. Further, no injury was worked to any of the creditors by these letters.

2. The contention that the claim of C. H. Dozier, Sr., president of the bankrupt, should not have been allowed, perhaps, ought not now to be considered by the court. But, it having been considered, I find from all the evidence in the case that it was just and proper.

3. The alleged concealment of the "true condition of the bankrupt's financial condition" cannot here furnish a reason for disapproving the composition recommended. An examination of all the evidence in the case convinces me that there was no real, or at any rate no fraudulent, concealment of the assets of the bankrupt.

4 and 13. The objection that the subscription of C. H. Dozier, Sr., for $12,000 stock of the bankrupt corporation has not been paid is not well founded. The evidence satisfies me that such subscription has been paid.

5. The conditional leasehold interest in the warehouse, or conditional license to use the same, in accordance with the limitations of the contract between the bankrupt and the railroad company, was not such a part of the bankrupt's assets as that a failure to schedule the same can be held to be a concealment of assets. But, even if this be an asset at all, then it does not furnish any reason why the composition should not be allowed.

The liabilities of the bankrupt to unsecured creditors total $14,945.09. The claims of creditors who have admitted preferential liens amount to $3,288.02. Omitting the contract lease or license of the warehouse property, the assets of the bankrupt were appraised at $6,935.50. It is not to be doubted that this appraisement was fair, and that the reasonable value of the assets of the estate is not more than $5,000. So it is a matter of simple mathematics to show that, although the leasehold or license interest in the warehouse, if treated as a part of the available assets of the bankrupt and as worth $2,000, the maximum amount of value which the objecting creditors can fairly claim it has, this would not furnish any reason why the composition should not be approved as being in the best interest of all the creditors.

Treating the warehouse interest as an asset worth $2,000, and assuming that it could be sold for that amount, and that the other assets (as shown by the evidence) sell for more than $5,000, this would produce an aggregate amount of $7,000; from which, deducting the $3,288.02, amount of preferred claims, there would be left a balance of only $3,711.98. From this amount, of course, there must be further deductions for the costs of administration, including receiver's and trustee's fees and expenses, insurance, and fees of the various attorneys and officers. It is not necessary to hazard an estimate of the aggregate amount of these deductions, as it is already entirely obvious that the above amount of $3,711.98 is of itself insufficient to pay a dividend of 25 per cent. on $14,945.09, which dividend of 25 per cent. is what the creditors will receive under the composition.

However, assuming—as the court does—that the license in the warehouse property is not such property as passes to the trustee, the above figures would be reduced $2,000, and would be only $1,711.98, from which the costs of administration must be paid before being divided among the creditors; and it would be very doubtful even if as much as 5 per cent. could be realized to the general creditors.

6 and 10. It does not seem necessary to now consider the claim that large sums of money were paid out by the bankrupt to some of his creditors for debts due them within four months preceding bankruptcy. But, it being considered, I find that the evidence does not sustain these grounds of objection. The findings of fact and the conclusions of law applicable to the question raised by these objections are correctly stated by the special master in his report.

7. The seventh ground of objection to the report is not well taken. There was no collusion between the attorney representing the creditors and the attorney representing the bankrupt, whereby any fraud was perpetrated upon or done to the creditors of the bankrupt. The whole matter raised by this objection is fully and satisfactorily explained by the evidence.

And I find that the other objections, numbered 8, 9, 11, 12, 14, and 15, of a like tenor, are not well founded.

8. As to objection 16, it is no more than a general objection, predicated upon the second, third, fourth, fifth, and sixth specifications, which I have dealt with, and, in dealing with them as I have, necessarily the effect is to hold that objection 16 is without any worth.

9. As to objection 17, which is a general exception to that part of the report in which the special master finds that there was not sufficient evidence to support either of the objections to the said confirmation of said composition, it is sufficient to say that this is a general objection, which, if necessary to deal with at all, has been dealt with in my consideration of the several specific objections.

I am convinced that there is not sufficient merit in any of the 17 objections to the composition, or in all of them considered together, to warrant the court in disallowing the proposed composition.

Accordingly decree will be entered, approving the report of the special master and authorizing the composition recommended by him.

UNITED STATES v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(District Court, N. D. Illinois, E. D. August 16, 1915.)

CARRIERS ⊂⊃38—CARRIAGE OF GOODS—REBATING—INDICTMENT—SUFFICIENCY.

An indictment, charging three carriers with rebating, averred that two of them were engaged in carrying coal over their respective routes; that a third corporation, which was the owner of the majority of the stock of the other two and controlled and managed their affairs, did unlawfully and knowingly give to a shipper of coal a sum of money as a rebate of the freight rates and charges collected, which were the regular fixed rates. Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (Comp. St.

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

1913, § 8569), declares that no carrier shall refund or remit, in any manner or by any device, any portion of rates, fares, or charges, except such as are specified in the tariffs, while section 10 (section 8574) provides that if the carrier be a corporation, penalties for violation may be visited upon any director, or officer thereof, or any receiver, trustee, licensee, agent, or person employed by such corporation. The Elkins Law (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [Comp. St. 1913, § 8597]) provides that anything done or omitted to be done by a corporate common carrier subject to the act to regulate commerce, which, if done or omitted to be done by any director or officer, agent, or employé, would constitute a misdemeanor, shall be held a misdemeanor committed by the corporation, that it shall be unlawful for any person or corporation to offer, grant, accept, or receive any rebate, and that in construing the provisions of the section, the act, omission, or failure of any officer or other person acting for or employed by any common carrier or shipper acting within the scope of his employment shall be deemed the act of the common carrier. *Held*, that while the mere fact that the third corporation owned the majority of the stock of the other two carriers did not constitute it their agent or give it the management of their affairs, yet the indictment was sufficient to charge an offense, averring that the rebate was made by such third corporation as their agent, and clearly indicating that such procedure was a device to avoid the penalties of the acts, therefore the averments of ownership of stock cannot be taken as controlling the allegations of agency.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. ⟹38.]

At Law. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and others were charged with rebating. On demurrer to the indictment. Demurrer overruled.

The case is before the court on demurrer of the three defendants to an indictment charging rebating. The allegations of fact essential to a consideration of the questions presented, and which are common to the three counts of the indictment, are:

The defendant the Cleveland, Cincinnati, Chicago & St. Louis Railway Company—commonly known as the Big Four Company—is an Ohio corporation, and, for seven years prior to the presentation of the indictment (November, 1912), engaged in carrying coal from Harrisburg to Danville; the defendant Chicago, Indiana & Southern Railroad Company, an Illinois corporation, was engaged in carrying coal from Danville to Gibson, Ind. Both companies have been carrying such coal over their respective routes for delivery at Gibson, Ind., to the Indiana Harbor Belt Railroad, for carriage by the latter to connections with other carriers for further transportation. Some of it has been transported from Harrisburg under common arrangement between such two defendants and such other carriers for continuous shipment, some under joint tariffs. The Big Four Company, during the period specified, filed its separate established rate, also its concurrences in joint schedules.

Most of the coal carried from Harrisburg was delivered by the O'Gara Coal Company, a New York corporation; and "in respect to all such transportation of such property for said O'Gara Coal Company, in such interstate commerce over the routes of said (defendants, Big Four Company, and Chicago, Indiana & Southern Railroad Company) during such period of time, the full, lawful freight rates and charges earned by both of said last-mentioned railway companies have been paid to them by said O'Gara Coal Company."

The giving of a rebate by the two defendants above referred to, and the connection of the third defendant, Lake Shore & Michigan Southern Railway Company, therewith, is then charged: "And the grand jurors aforesaid, upon their oath aforesaid, do further present that said Cleveland, Cincinnati, Chicago & St. Louis Railway Company and said Chicago, Indiana and Southern Railroad Company, during said period of time, to wit, on the 24th day of November, in the year 1909, at Chicago aforesaid, in said Eastern Division of said Northern District of Illinois, through the Lake Shore & Michigan Southern Railway Company, a corporation theretofore organized and then existing under and by virtue of the laws of the state of Illinois (said the Lake Shore & Michigan Southern Railway Company then and there acting as the agent of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and said Chicago, Indiana & Southern Railroad Company in that behalf, and this by reason of the fact that it was then the owner of the majority of the capital stock of both of said companies, and controlled and managed their affairs), unlawfully did knowingly give to said O'Gara Coal Company a sum of money, to wit, the sum of $10,000, as a rebate of the freight rates and charges so as aforesaid before that time paid by said O'Gara Coal Company to said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and said Chicago, Indiana & Southern Railroad Company in respect to the transportation in interstate commerce of said property of said O'Gara Coal Company as aforesaid; by which giving of said rebate the said property was by said several common carriers transported in interstate commerce at less rates than the rates so named therefor in said tariffs and schedules as said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, said Chicago, Indiana & Southern Railroad Company and said the Lake Shore & Michigan Southern Railway Company, when so as aforesaid giving the same, well knew."

The formal charge is thereupon incorporated into each count that the three defendant carriers did unlawfully and knowingly give a rebate in respect to the transportation of property in interstate commerce.

Each of the three counts is challenged as insufficient in its charge of the commission of an offense by any of the defendants, because:

"First. A legal conclusion is set out as the basis of the agency.

"Second. The count alleges that the agency existed solely by reason of the fact that the Lake Shore & Michigan Southern Railway Company was the owner of a majority of the capital stock of the defendants, and controlled and managed their affairs. It therefore fails to aver facts of agency within the limitations of the Elkins Act.

"Third. The facts set forth show affirmatively that the Lake Shore & Michigan Southern Railway Company was without authority to act as the agent of the two other companies.

"Fourth. The indictment fails to aver, in accordance with the language of the Elkins Act, that the agent acted for or was employed by the alleged principals while acting within the scope of his employment.

"Fifth. The count fails to set forth any specific rates, fares, and charges specified in the tariffs, which were received by either defendant in respect of which it is alleged to have given a rebate.

"Sixth. The count fails to specify the shipments for which either defendant received freight rates and charges as compensation for the carrying of the same and in respect of which such defendant is alleged to have given a rebate.

"Seventh. The count fails to set forth any freight rates or charges separately due each of the defendants which were received by it as consideration for services rendered, and further fails to specify the sum alleged to have been separately given by each defendant as a rebate of the freight rates and charges separately received or accounted for to it.

"Eighth. Each count fails to show any specific violations of the statute, in that it declares only that the defendants gave divers sums of money as rebates to a certain party who for seven years previous thereto had been engaged in shipping coal over the defendant railroads to points beyond."

Charles F. Clyne, U. S. Atty., of Chicago, Ill.

Glennon, Cary, Walker & Howe, of Chicago, Ill., for defendants.

GEIGER, District Judge (after stating the facts as above). The allegations of the indictment may be thus summarized: Two railroads are carrying interstate shipments of coal for a shipper who pays the full lawful freight tariffs. Such coal is forwarded by them to a belt line, which in turn receives it for transportation to connections with other carriers by whom it goes to points of ultimate destination. A sum of money, charged to be a rebate, is paid to the shipper, in the following manner: The two carriers give it *through* a *third corporation carrier,* who, the indictment says, parenthetically, *was then and there acting as the agent* (of the two carriers) *in that behalf, and this by reason of the fact that it was then the owner of the majority of the capital stock of both of said companies and managed and controlled their affairs.* This alleged rebate operated to carry the property at less than the published rate, as the three carriers, when giving the same, well knew. The three companies are charged with *knowingly* paying a rebate to the shipper. Do these facts justify the inference that the offense defined in the following sections of the Interstate and Elkins Acts has been committed?

"Sec. 6. Nor shall any carrier refund or remit in any manner or by any device, any portion of rates, fares or charges so specified, 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.

Under section 10 of the original act, although the prohibition under section 6 comprehended all carriers, the penalties for violation could be visited, if the carrier was a corporation, upon—

"any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation." Comp. St. 1913, § 8574.

But the Elkins Law declared:

"That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, licensee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation. * * *"

And further:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

Also:

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier [or shipper] *acting within the scope of his employment* shall in every case be also deemed to be the act, omission, or failure of such common carrier or shipper as well as that of the person." Comp. St. 1913, § 8597.

Considering the first four grounds assigned on the demurrer, the argument in support thereof is, in substance, that the indictment fails to show any relation between the Lake Shore Company and the other two carriers, save that growing out of the ownership of a majority of their capital shares; that it must be construed as showing that company possessed of only such control and management of their affairs as resides in a majority ownership of stock; hence it not only fails to show a relation of agency, but, in the absence of other disclosure of such relation, its legal existence is really negatived. It is therefore insisted that, even if the Lake Shore Company did make a payment which, if made by either of the other carriers, would be a rebate, the indictment shows it to have been made by one, or in a manner, not yet comprehended within the prohibitive terms of the statute. In other words, it was made by a stranger; the payment was not made by the corporation which bore the relation of *carrier* to the shipper, nor: (1) By an agent; or (2) person acting for, or (3) (a person) *employed by, such corporation;* and in no event could the *act* of the Lake Shore corporation, as a distinct legal entity, be deemed to be the act of either or both of the other two corporations, as: (1) Their agent; or (2) person acting for; or (3) employed by (them) any common carrier acting *within the scope of his employment.*

It may be assumed that the ownership of a majority of the capital shares in a corporation by an individual or by another corporation constitutes neither agency nor managerial control, as those terms are usually used in implying a contractual relation of principal and agent, master and servant, or the like. And, if this were all that could be spelled out of the indictment before us, it might be said that not sufficient has been alleged to show the existence of a relation between the Lake Shore Company and the other companies to justify the inference required by the statute; that is to say, if we start with the assertion that the statute refers to agency, a delegated authority to act for the principal, or that, as to a person *acting for* or *employed by* another, there be the contractual element, the conclusion that an owner of a majority of the shares of a corporation is neither, is as evident as it is necessary.

But, granting that an indictment which predicates an agency *solely* upon the ownership by the agent corporation, of the majority of the stock of the alleged principal corporations may be infirm, it is important to recognize the probable relations intended to be reached by the law as it now stands; and this may be done, conceding to the utmost the proposition that a rebate, to be such as is condemned by the law, must come from and be *paid* by or on *behalf* of the corporation which is in the relation of carrier to the shipper. It may be conceded that a payment by a *stranger*—if it be thought that a stranger ever does such things—is permissible. These elementary concessions do not aid us; they bring us back to the fundamental question, who, other than *strangers,* are comprehended; or, to put it in another way, when does a third person or corporation cease to be a stranger legally, and what is a sufficient allegation, in an indictment, of complicity in the commission of the alleged offense? And, in my judgment, the law, in its intention to reach not only the particular corporation which sustains the relation of carrier to the shipper, but also its agents and persons *acting for it,* comprehends either individuals or corporate entities who contribute, knowingly and understandingly, to a refund or remission "in any manner or by any device," and it is wholly immaterial that, in other respects, the latter may bear no relation to the carrier which may be the foundation of a legal relation of agency or employment having ascertainable scope. To put it more particularly, when the payment is made to a shipper, when it is charged to have been intended to operate, and did operate, as a rebate, when two corporations are charged to have given it *through* a third, does not the indictment sufficiently charge a *device?* When it further charges, though only formally, *knowledge* by each of the participants of the character and intended operation of the payment, does it not sufficiently charge that the refund or rebate was made by one *acting for* the real carriers?

Grant that the ownership of the majority of capital stock did not constitute the Lake Shore Company the agent, nor in any sense a legal delegate which could bind the other two companies in ordinary transactions. The statute is not limited to that sort of relation. It comprehends a matter of conduct in respect of making rebates; it aims to reach those on whose behalf the rebate is paid and those who have complicity, with knowledge, therein. If the individual or corporation guilty of complicity in fact is to be relieved because he or it had no other duly constituted relation with the principal offender, then, as in the present case, the law can easily be frustrated. The latter goes acquit because *he* did not pay; the former because he or it was a volunteer. Plainly, the statute, considering its purpose to reach any *device,* intends to reach precisely those situations where the one making *the payment in fact* may be shown to have acted for that purpose alone, though possibly in all other respects a legal stranger. Therefore, granting that the ownership of the stock does not in and of itself show agency, as that term is ordinarily to be understood, it does show a *basic relation* of *interest* sufficient to justify the inference that the shipper was really the beneficiary of a *device.* Granted that the two carriers hauled coal for the O'Gara Company; that the latter paid the full freight; that the Lake Shore Company, the holder of the stock control in the carrier companies, paid to the shipper knowingly sums which are charged to be rebates (that is, refunds on freights), is it reasonable to interpret this *state of facts* as giving the Lake Shore Company the status of a stranger? Or is it reasonable—even as against the necessity of giving an innocent rather than a culpable color—to say that these facts alone justify the inference that *such company acted for* the other companies; that they all acted understandingly and knowingly to accomplish in a devious way that which the two carriers were forbidden to do directly? I am satisfied that good sense requires an affirmative answer to this latter question; that these facts of themselves justify the inference that the Lake Shore Company sustained the relations toward the other companies which are necessary to establish the commission of the offense. This does not mean that they establish the fact conclusively or irrebuttably, but they *justify* its inference. Therefore the parenthetical clause of the indictment may be rejected except in so far as it charges the fact of majority stock ownership. The allegation that this was the *reason* of the agency may be omitted, and we may still draw the inference from the combined state of facts charged that there was, perhaps not a contractual *agency* or *employment,* but their equivalent in the criminal law, an abetting or complicity or confederation. That, after all, ought to suffice, unless the statute be construed to indicate the most palpable of devices for its own evasion. That is to say, if a majority owner of the stock in a carrier can pay what he is charged to have known and intended to be a refund, and still not be subject to the inference that he and the carrier *agreed* that he should do so, if further allegation or proof must be adduced before he must answer, or must furnish countervailing proof, then the law has left free to be practiced the most palpable device to commit that which, in most sweeping terms, it aimed to stop.

It may be a theme for reflection whether, where a corporation, not itself the carrier, but the owner of a majority of stock in the carrying corporation, knowingly pays to a shipper of the latter what is in effect a rebate, it should not be conclusively held to have "acted for the other" corporation, whether the latter was a formal party to it or not. It may be that, when once it appears that the latter did not have actual knowledge, or that under the circumstances it could not be said to have knowledge presumptively, there is a want of that relation necessary to a finding of complicity. But the idea is certainly suggested that where the intercorporate stockholding situations exist, the law can easily be frustrated where the interrelationship itself furnishes the basis upon which the one corporation may "act for" the other; where the relationship is one of interest which may dispense with the necessity of formal delegation of authority or request to do the prohibited act. It is not necessary, however, to determine the case on so narrow a basis of fact.

It may be true, as suggested by counsel during oral argument, that when one speaks of another as having management or control of a railway, it ordinarily means such managerial control as an individual, a general or traffic manager, exercises. But it is not true that, when a statute denounces an act done by a carrier or any one "acting for it" the latter, of necessity, must have acted only upon the promptings of direct *delegated* authorization. As a penal statute, it must be construed reasonably to give it the greatest efficacy to accomplish its object. Therefore, when this indictment charges that the O'Gara Coal Company, as a shipper, received these refunds; that the two companies were the actual carriers; that the Lake Shore Company had a majority of their stock; that it paid the refunds which the O'Gara Company received; that the three companies *knowingly* paid them *as rebates*—there is a sufficient statement of *facts* upon which to found a charge, to be answered by each of the carriers, of a violation of the statute. In other words, when it charges that the three companies knowingly paid or suffered to be paid what is charged to have been a rebate, each and all are charged with complicity therein, even though the company which did the actual paying may, in all other respects, have been and be, a legal stranger to the other two. When once the latter is charged with having knowingly paid the rebate, that it was the medium *through* which the other companies paid it, justification for the payment on other grounds is, it seems to me, sufficiently negatived; and the parenthetical effort to give the ownership of a majority holding of stock as a basis of legal *agency* to bring the situation within the terms of the statute need only to be considered as supportive of the necessary allegation that the three companies knowingly and understandingly co-operated, each for the other, in doing the prohibited act. If the statute were to be limited only to relations, agencies, or employment or of delegated authority between carriers and others, individual or corporate, which have a formal or express contractual basis, the allegations of the indictment here might be infirm; but if the language, *agent, or person acting for or employed by such corporation,* be considered in the light of settled principles respecting joint wrongdoers, under which each is the representative of *all* others, no difficulty is apprehended in treating the facts averred as a sufficient basis for inferring, even though it be circumstantial, the ultimate fact of violation.

Nor is this conclusion forbidden by the language of the Elkins Act which directs that in construing and enforcing its provisions, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, *acting within the scope of his employment,* shall be deemed to be the act of such common carrier as well as that of the person. This may have the effect of defining the limitations of *imputed* responsibility. That is to say, the law does not contemplate that such responsibility arises always from the *mere fact* of *any* agency, no mattter what its scope may be. For example, if a locomotive engineer or conductor should pay to a shipper a refund in respect of a shipment, the law might not impute his act to the corporation, as it would if the payment were made by a traffic manager or freight solicitor. But, under the law, are not averment and proof permissible to show that he *in fact* acted for his carrier principal? Plainly so. And therefore the question, as upon the present indictment, is, What is a sufficient allegation of fact to justify the inference? To put it concretely, suppose an indictment charged that A. B. shipped coal over the C. D. Railway and paid the full freight; that the C. D. Railway Company paid him a rebate *through* E. F. (said E. F. then and there acting as the agent of the C. D. Railway Company, and this by reason of the fact he was one of its locomotive engineers). Granting that a locomotive engineer's act in paying a sum of money to a shipper is not to be imputed to his principal as the paying of a rebate, because he is not acting within the *scope of his employment* as an engineer, do the allegations that the *carrier paid through* him; that the payment was in fact a rebate; that the carrier and the engineer *knowingly* paid it as a rebate—still require that the allegation of *agency by reason* of the relationship as *engineer* be accepted as controlling and in conclusive negation of the construction of a device, and in negation of his "acting for" the carrier in respect of the particular transaction? This seems to me not open to serious doubt. It is clear that certain agents or employés of a carrier have duties within whose scope the payment of rebates, if lawful, would naturally fall. The section intends that the acts of such agents, when done, shall, as matter of law, be deemed to be the act of the carrier, and to dispense with further proof. But certainly it does not, and cannot, intend that instances where the relation was constituted for no other purpose and with no wider scope than the commission of the particular act complained of should be beyond reach. In such cases, naturally, the indictment must contain either the appropriate general averment, or facts from which the inference may be drawn.

Therefore when, as in the present case, the indictment charges the payment of a refund which is a rebate on freights, and it appears that the payment was made to the shipper by a corporation which holds a majority of the stock of the two carriers, there is herein—when coupled with the further allegation that such payment was *knowingly* made by these carriers as a rebate—a sufficient allegation of rebating by a *device;* and such allegation involves and necessarily tenders, among others, the question of fact whether the corporation making the payment was *acting for* the two carriers. In other words, the relationship and mode of operation described in the indictment is a sufficient allegation of a *device* which, if proven, and until counter proof be forthcoming, is sufficient basis for the necessary inference that the paying corporation acted for the others, and the averment of agency *by reason of* stock control cannot negative or limit such inference.

Counsel for defendant has stated the theory of the indictment thus:

"That if one railroad company own a majority of the stock of another railroad company, the former can *thrust* responsibility upon the latter under the provisions of the Elkins Act by paying a sum of money as a rebate to a shipper of freight over the railroad of the latter company."

It is but repetition of what has been said to suggest that, if the indictment alleged: (1) The carriage of freight by two carriers for the O'Gara Company; (2) the payment of full freight rates; (3) the ownership of a majority of their stock by the Lake Shore Company; (4) the payment of sums of money by it to the O'Gara Company—it might well be urged to be infirm because of its failure to allege: (1) The relationship which must exist; and (2) the fact that the payment charged to have been made effected a rebate or deviation from the tariffs. But, when there are added the two circumstances that the payment was made *knowingly*—to the knowledge of the three companies—and that it did to their knowledge *effect a rebate,* the larger theory embodying the element of complicity, of *acting for* each other, of refunding freights, is disclosed. Without these, the required conclusion, under the statute, might be reached by conjecture only. With them, every ingredient of fact necessary to constitute the offense is expressly averred, excepting that respecting the relationship between the Lake Shore and the other two companies. In my judgment the fact of such relationship may justifiably be inferred to be that of "acting for" the carrying corporations. It is then no longer reasonable to adopt—to the exclusion of such view—the notion that such corporation was a stranger to the other two, and, being such, acted as a volunteer.

The other grounds assigned in support of the demurrer do not, in my judgment, require notice. The criticisms respecting insufficient detail of rates, fares, shipments, payment of rebates, and the like may be entitled to consideration upon a demand for a bill of particulars, but do not vitiate the indictment.

An order may be entered overruling the demurrer.

FIELD et al. v. HAFNIA S. S. CO.

HAFNIA S. S. CO. v. FIELD et al.

(District Court, E. D. Pennsylvania. May 24, 1916.)

No. 27.

1. SHIPPING ⚷49(3)—CHARTERS—INTERRUPTION OF SERVICE—LIABILITY OF OWNER.

The master of a steamship under charter *held* not chargeable with negligence because of a fire which started in an extra coal bunker, on evidence showing that the coal was stored and cared for in the usual and customary manner, and the owner *held* not liable for the resulting damage to the charterer under an exception of fire in the charter party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 194–196; Dec. Dig. ⚷49(3).]

2. SHIPPING ⚷40—CHARTER—TERMINATION BY FIRE—RIGHT OF CHARTERER TO PAYMENT FOR COAL.

By a time charter of a steamship the charterers were to leave 500 tons of coal in the bunkers on redelivery, for which they were to be paid a stipulated price. The vessel was damaged and rendered inefficient by fire, and withdrawn from the charter by the owner, having then in her bunkers coal in excess of 500 tons. *Held*, that the charterers were entitled to pay for 500 tons at the charter price, and for the remainder at the market price at the place where the charter was terminated.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⚷40.]

3. SHIPPING ⚷49(3)—TIME CHARTER—HIRE—DISABILITY OF VESSEL.

Where a fire disabled a steamship from further performing a time charter, and under its provisions terminated the contract, the owner is not entitled to recover hire after such time.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 194–196; Dec. Dig. ⚷49(3).]

In Admiralty. Suit by John W. Field and others, trading as William Haskins & Son, against the Hafnia Steamship Company, with cross-libel. Decree for libelants.

Howard M. Long, of Philadelphia, Pa., for libelants.

H. Alan Dawson, of Philadelphia, Pa., and Burlingham, Montgomery & Beecher, of New York City, for cross-libelant.

DICKINSON, District Judge. The above are cross-actions. The respective claims arise out of a charter party. The proceedings are in personam. The causes of action set up are, in the inverse order of the institution of the proceedings, in substance as follows:

The steamship claims for the agreed hire stipulated in the charter party, less an admitted deduction for hire from October 8 to October 15, 1911, amounting to $1,623.23. The charterers deducted hire to October 24th, increasing the amount deducted to $3,652.27. The difference, or $2,029.04, measures the amount of the claim. The libel in the one proceeding is by stipulation to be taken as the answer to this claim. The claim in the first case is by the charterers. It is for loss of the use of the ship through the act of the owners in withdrawing its service, and for time lost at two ports at which the ship touched, for

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

overpayment of the charter hire, and for coal of the charterers on board the steamship when withdrawn from their services. The aggregate of these claims approximates $50,000.

The defense to these counterclaims can be most succinctly stated in connection with the facts. The amount due for hire is undisputed, except that a larger deduction is claimed than the owners allow. The charter party contract was entered into June 24, 1911. The hire was £1,250, British sterling, per calendar month, and ratably for a part of the month. The hiring was for six calendar months from time of delivery; the place of delivery "a port in the U. S. Gulf," other than the ports excluded. Redelivery to the owners was to be made at "a port in the River Plate at charterers' option." Charterers were to pay for all coal in the steamer's bunkers at the current market price prevailing at the port of delivery, and were to leave 500 tons in the bunkers when the ship was redelivered, for which they were to be paid a stipulated price per ton. The charter party was of the usual printed form type, embodying the conditions and covenants ordinarily inserted. The special facts and the applicable provisions of the charter party are these:

The vessel was delivered to the charterers, and her charter hire began to run, August 4, 1911, with the vessel at Gulfport, Miss. She was there loaded, and proceeded thence on a voyage to Buenos Ayres, Argentine. On the way some crew trouble arose, and the vessel put in at St. Thomas, Danish West Indies. The trouble with the crew was there submitted to the authorities. As a consequence, some of the crew were left at St. Thomas. The vessel left that port September 13th, and proceeded on her voyage to Buenos Ayres, arriving in the outer harbor October 6, 1911. The captain went ashore to make arrangements for discharging the cargo. During his absence, the vessel took fire. The time of the fire is fixed as between 7 and 8 o'clock in the morning of October 8th. It started in an extra bunker just aft of the part of the cargo stowed through cargo hatch No. 2. It became necessary to flood the ship in order to control the fire. This, in turn, of course, necessitated the ship being pumped dry. The result was the ship did not reach the inner harbor until October 15th. Arrangement (interrupted by the fire) had been made to begin discharging October 9th. The result was that a discharging wharf was not secured until October 27th, and the work of discharging was not begun until October 30th. It was not completed until December 4th. Surveys were had and temporary repairs made to enable the vessel to get to a port at which she could be finally put in condition. She left Buenos Ayres December 16, 1911, stopping at Montevideo and Los Palmos for a renewal of her coal supply, and reached Wallsend January 20, 1912. Repairs were made there, and the vessel made ready to be again put in commission, March 6, 1912.

We observe in passing that the time limit of her hiring expired February 4, 1912. During the time the vessel was at Buenos Ayres, the charterers and owners conferred through telegrams, correspondence, and agents upon the subject of the disposition of the vessel. The view pressed by the owners then, as now, is that the charter was practically at an end. The charterers insist now, as then, that the vessel should have been refitted for her charter purposes. As there were no facilities for making the needed repairs in Buenos Ayres, the vessel should have been taken to the most convenient port in the United States and put in condition to have taken on fresh cargoes. The claim of the charterers is that they had profitable use for the ship, of which they were deprived by the sending of her to the British Isles for repairs. One of their contentions is that the fire was due to the negligence of the ship; another, that she might have been repaired in the United States and some of her charter time saved to the charterers. An alternative claim is that, in any event, the allowance for deduction from hire should have been extended to include October 27th, and, under paragraph 16 of the charter party, a further allowance for deduction of about two days should be made for the detention of the vessel in going to St. Thomas. Still further deductions are asked because of the condition of the vessel after the fire, because of which she was delayed in discharging at Buenos Ayres. Claim is likewise made for 689 tons of coal, of an averred value of $7,118.75, which was appropriated by the owners. The loss sustained by the charterers was swelled by the fact that the charterers were compelled to secure the services of another vessel at an enhanced price. The reply of the owners to these counterclaims of the charterers is indicated with sufficient clearness in this statement of facts out of which the claims arise, except with respect to the claim for coal which will be considered by itself.

[1] 1. A convenient starting point in a discussion of the matters in controversy between the parties is in the consideration of the averments of negligence. These involve two assertions: One is that the coal was negligently stowed. The other is that the condition of the coal was not properly watched. The first finding of negligence asked relates to the coal in what is called the extra coal bunkers. More coal was taken aboard than the regular bunkers would hold. In consequence, a temporary bunker was improvised by partitioning off a portion of the cargo hold space for the extra coal. These partitions were of wood, so that no obstacle to the spread of the flames was provided. The second finding of negligence, if made, must rest upon the failure of the master to have the temperature of the coal taken from time to time. We are unable to find negligence. No discussion of the evidence is called for beyond the statement of its negative effect upon the mind. The principles of law involved are admittedly the familiar ones that the coal was required to be so stowed and cared for as that no greater risk of damage was created than is ordinarily and in reasonable expectation present when what is done is done in accordance with the usages, customs, and ordinary requirements of the conditions with which the managers of the vessel were confronted, and the evidence of what precautions, either in construction or management, might have been taken to minimize the danger, is fully met by the fact that the construction and management employed was the usual and ordinary construction and management known and adopted as adequate to meet the conditions of danger instant and prospective.

There was some evidence in the case which would have justified a finding that a safer construction might have been introduced to lessen the danger of fire, and added oversight given to have prevented its spread by anticipating its breaking out. The finding would not be justified, however, that the precautions taken were not the usual and ordinary ones, and such as the usages, customs, and ordinary requirements of the business in hand demanded. This is aside from the further thought that fire was excepted from the charter party, and this included fire caused by negligence.

2. The second main point involved is whether the owner breached the covenants of his charter party in taking the vessel to Wallsend on Tyne. The hiring was for full six calendar months. For this length of time the vessel was at the disposal of the charterers. Had she become unfitted for use and repaired within the term, the charterers could use her when made efficient up to the end of the term, or under paragraph 5 of the charter party up to the end of her then uncompleted voyage.

It is admitted that, under paragraph 17, fire suspended the obligations of the contract, or annulled them, according to the fact of whether the efficiency of the vessel was restored within the time of the running of the contract. The fact of fire rendering the ship inefficient is asserted by both parties. The fact that repairs could not be made in Buenos Ayres is not disputed. The vessel was taken to Wallsend on Tyne, and not restored to efficiency until after the charter party had expired. There is no complaint of delay in what was done. The complaint is limited to the assertion that she might have been taken to a port of the United States and there sooner repaired. Unless, however, she could have been repaired in the United States before the expiration of the six months time limit, taking her to England did not affect the rights of the charterer. The whole question presented by this feature of the case turns on the fact, and the fact is found with the owner and against the charterer.

[2] This brings us to the claim for coal. The only defense urged is that it is not one of which admiralty will take cognizance, not being within the charter party, nor of the claims of the libel, or if, to be considered, the charterer is limited to the agreed price fixed by the charter party. To sustain the former position would require the drawing of overfine lines of distinction. The complaint is that the owners, in defiance of the charter party, resumed possession of the vessel, and along with her confiscated the coal of the charterers. The provisions of the charter party as to the effect of fire and as to the bunker coal relieve the owners from liability only for the time the effects of the fire lasted, and limited the coal price only up to the stipulated quantity. The charterers are entitled to recover for their coal 500 tons at $4.86 per ton, the agreed price, and 189 tons at $10.33, its undenied value, or $1,952.37, with interest from December 16, 1911.

[3] This brings us to the claim of the owners for hire. Recurring again to the charter party, the fact of fire suspended or annulled all the obligations of the contract. This relief is accorded to each of the parties. The fire took place October 8th. Its relief effect was in operation on October 24th as fully as on October 15th. The cross-libel is therefore dismissed. This is meant to dispose of the charterers' claim

for further allowances for the St. Thomas incident and the fire incident. We have spoken of the former as if the stop at St. Thomas was caused by the difficulty with the crew, or to have them reduced to subordination by the authorities there. The inadvertence is scarcely worth correction, but it is corrected by the finding that the trouble arose during the ship's stay in the port, and did not interfere with her navigation or affect the charterers. The allowance of deductions on fire account was made by the charterers, and the hire paid by them a voluntary payment made under circumstances which do not entitle them to recover back what they thus paid.

Formal decrees embodying these findings may be submitted.

UNION SULPHUR CO. v. FREEPORT TEXAS CO. et al.

(District Court, D. Delaware. November 15, 1915.)

No. 336.

EQUITY ⟹371—PRACTICE—SEPARATE HEARING—RIGHT TO.

Complainant's bill charged that defendant and a second corporation controlled by defendant, which was named a defendant, but not served, conspired together to infringe complainant's patent. The bill of particulars specified infringements as the result of a conspiracy, and declared that complainant did not waive the right to rely on infringements by the corporations or either of them. Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) declares demurrers to pleas are abolished, but every defense heretofore presentable by plea in bar or abatement shall be made in the answer, and in the discretion of the court disposed of before trial of the principal case. *Held*, that as, in a suit to enjoin infringement of letters patent and recover profits and damages, the interlocutory decree enjoining infringement marks the divisional line between the introduction of evidence of infringement for the purpose of obtaining such decree and of evidence showing profits, no separate trial on the defense that the defendant served did not conspire with the second corporation to infringe the patent and did not control it can be had, for that would be calculated to result in confusion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 782; Dec. Dig. ⟹371.]

In Equity. Bill by the Union Sulphur Company against the Freeport Texas Company and the Freeport Sulphur Company, which latter defendant was not served. On motion for separate hearing of the defense of nonliability of the Freeport Texas Company for the acts of the Freeport Sulphur Company. Motion denied.

Alan N. Mann and Fish, Richardson, Herrick & Neave, all of New York City, for complainant.

Thomas F. Bayard, of Wilmington, Del., and L. F. H. Betts and James R. Sheffield, both of New York City, for defendants.

BRADFORD, District Judge. The bill was filed by the Union Sulphur Company against the Freeport Texas Company, a corporation of Delaware, and the Freeport Sulphur Company, a corporation of Texas; but the last named company is not before the court, not having been served with process and not having appeared. The seventh paragraph of the bill states:

"That the said Freeport Texas Company at the time of the commission of the acts hereinafter complained of was controlling and is now controlling all of the acts and all of the property of the Freeport Sulphur Company and was and is now operating and conducting or directing and controlling the operation and conduct of its plant and business."

The ninth paragraph states that the Freeport Texas Company and the Freeport Sulphur Company conspired and contrived together to commit the acts of infringement complained of. The tenth paragraph states that the Freeport Texas Company and the Freeport Sulphur Company "conspiring together, and acting in concert" have been guilty of infringement. The twelfth paragraph states:

"That the Freeport Texas Company has itself committed such acts of infringement in that it has authorized, directed and controlled, and is now authorizing, directing and controlling the acts of the Freeport Sulphur Company, herein alleged to be infringements of said letters patent."

The eighth paragraph of the answer alleges:

"That said defendant, Freeport Texas Company, never owned, controlled, operated, directed or conducted, and does not now own, control, operate, direct or conduct the property, plant or business of the Freeport Sulphur Company."

The ninth paragraph denies:

"That at any time the defendant Freeport Texas Company was controlling or is now controlling the acts, or all of the acts, or the property, or all of the property, of the said Freeport Sulphur Company, or was at any time or is now operating, conducting, directing or controlling the operation or conduct of the plant or business of said Freeport Sulphur Company, * * * or that the defendant Freeport Texas Company has itself committed any acts of infringement or has authorized, directed or controlled, or is now authorizing, directing or controlling * * * any acts of said Freeport Sulphur Company alleged in said bill to be infringements of any of the several letters patent in suit."

The tenth paragraph alleges:

"That it [the defendant] is not in any way liable or responsible for any of the alleged acts of said Freeport Sulphur Company alleged in said bill to be infringements of said several letters patent."

The twelfth paragraph denies that the defendant and the Freeport Sulphur Company conspired or contrived together to infringe. The thirteenth paragraph denies that the defendant and the Freeport Sulphur Company have conspired together or acted in concert to infringe.

Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), prescribed by the Supreme Court, provides:

"Demurrers and pleas are abolished. * * * Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court."

The parties on both sides have applied through their counsel "for a separate hearing, under equity rule 29, of the special defense and issue raised in paragraphs, 8, 9, 10, 12 and 13 of the answer of the defendant Freeport Texas Company, that it is not liable for the infringement charged in the complaint, either through control of or as a so-called conspirator with the Freeport Sulphur Company." And it is argued that the paragraphs in the answer above referred to raise "a single special issue as a defense to the whole bill, viz., the non-liability of the defendant for the alleged acts and operations charged to be infringements of the patents in suit, either through control of or acting in conspiracy with the Freeport Sulphur Company." Aside from the bill of particulars, the bill nowhere specifies particular acts of infringement or the particular times when committed, but charges that the Freeport Texas Company and the Freeport Sulphur Company conspiring together and acting in conjunction have within six years next before the filing of the bill infringed the letters patent therein referred to. In the bill of particulars it is alleged that the character of the infringing apparatus and devices "is exemplified by mines and appurtenances such as defendants' wells 143 and 146 and their appurtenances, situated on Bryan Heights at Freeport, Texas," and that of the alleged infringing processes by those "used in the operation of such mines as defendants' wells 143 and 146, aforesaid." The bill of particulars further alleges that the dates of the infringing acts "include all times at which wells such as those described were constructed and operated" as alleged in the bill; "for example, during the year 1914." The alleged acts of infringement are not particularly enumerated or assigned to particular dates. The concluding paragraph of the bill of particulars is as follows:

"These particulars are given without waiving the plaintiff's right to rely, in this or other suits, upon any infringing acts of these defendants or either of them, or upon any other patents or claims which it may subsequently learn have been infringed by these defendants or either of them."

The counsel in their brief in support of the plaintiff's interrogatories say:

"The defendant tried to make it appear that the plaintiff claimed recovery only for infringement during the year 1914. However, in the bill of particulars, it is definitely stated that the particulars are given without waiving the right of the plaintiff to recovery for any other infringement which it might discover."

The granting of the present motion would not, I think, be an exercise of sound discretion. No case tending to show its propriety has been brought to my attention. Reference was made to Alexander v. Fidelity Trust Co. (D. C.) 214 Fed. 495, and 215 Fed. 791, and to St. Louis Union Trust Co. v. Studebaker Corporation (unreported),[1] recently decided by the district court of the United States for New Jersey. In the former case the issue raised was laches, and in the latter res adjudicata. Either defense could, I think, prior to the adoption of equity rule 29, have been presented by a plea in bar, and consequently the issue could properly "be separately heard and disposed of before the trial of the principal case."

But wholly aside from the question whether an issue of infringement under conspiracy together with an issue of infringement pur-

[1] Since reported in 226 Fed. 797, under the title of Sanitary Street Flushing Mach. Co. v. Studebaker Corporation.

suant to control, authority or direction, formerly could properly form the subject-matter of a plea, or can now, under rule 29, be heard and disposed of "before the trial of the principal case," it is obvious that considerations different from those usually applicable to other cases apply to suits in equity to recover profits and damages for infringement of letters patent. In such a suit the granting of the interlocutory decree, if there be one, marks the divisional line between the introduction of evidence touching infringement for the purpose of obtaining or preventing the granting of such decree, and the introduction of evidence as to infringement before the master to establish the amount of profits or damages. It does not follow that because one act of infringement was the result of conspiracy or of control, authority or direction, on the part of the defendant, that all others were. If upon a separate hearing before the granting of an interlocutory decree it should be determined that a single act of infringement was committed—which so far as infringement is concerned is all that is required to support such a decree—under conspiracy or pursuant to control, authority or direction, manifestly that determination should not control the action of the master in dealing with evidence of acts of infringement committed under circumstances different from those found to exist by the court on the separate and preliminary hearing and justifying an interlocutory decree. To require all evidence touching infringement to be introduced before the time for the entry of the interlocutory decree would be to uproot the settled practice in patent suits in equity. On the other hand, if the master is not bound with respect to infringement by the action of the court in the first instance, save so far as the court has specifically found acts of infringement, the question of conspiracy, or control, authority and direction touching other acts of infringement is left open for determination on the circumstances surrounding and explanatory of such other acts, and "the examination must be at large." It is a matter of regret that the hearing and decision of this case should be attended with what at first sight might seem unnecessary delay and expense; but for the reasons above given the court is compelled to hold that in the exercise of a sound discretion the motion must be denied.

UNION SULPHUR CO. v. FREEPORT TEXAS CO. et al.

(District Court, D. Delaware. May 12, 1916.)

No. 336.

1. COURTS ⚷351—INTERROGATORIES—DISCRETION OF COURT.

Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), authorizing the parties to file interrogatories for discovery from the opposite party of facts and documents material to the support or defense of the action, and declaring that, if either party be a public or private corporation, the opposite party may apply to the court for an order allowing him to file interrogatories to be answered by any officer of the corporation, and

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

that an order may be made for examination of such officer as may appear to be proper and upon such interrogatories as the court shall think fit, is not intended to deprive the parties, or either of them, of the right to introduce at the trial evidence of facts and documents material to the support or defense of the cause, but to enable the parties to obtain evidence prior to trial, and therefore, in allowing the propounding of interrogatories to corporate officers, the court should exercise its discretion, so as to avoid necessarily vexatious results.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⚷351.]

2. COURTS ⚷351—INTERROGATORIES—RIGHT TO PROPOUND.

In an action against two corporations for conspiring to infringe and infringing letters patent, the president of the corporation, which was served, in answer to interrogatories concerning the infringement, stated that his company was only a holding company, that he was the financial and executive officer, and lacked the knowledge to state what infringements, if any, had been had, and that no other officer of such corporation was conversant with the infringement. Complainant sought to compel further answers, demanding that the president of such corporation ascertain from the agents of the second company the nature of the infringements. It appeared that the officers of the two corporations were practically identical. *Held* that, under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), authorizing the propounding of interrogatories to corporate officers in the discretion of the court, such additional interrogatories should not be allowed, for it would either result in binding the corporation by hearsay statements of its inferior agents, or the answers, if not treated as admissions, would be unavailing, being mere hearsay.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⚷351.]

In Equity. Bill by the Union Sulphur Company against the Freeport Texas Company and the Freeport Sulphur Company, which was not served. On motion for further answers to complainant's interrogatories. Denied.

Alan N. Mann and Fish, Richardson, Herrick & Neave, all of New York City, for complainant.

Thomas F. Bayard, of Wilmington, Del., and L. F. H. Betts and James R. Sheffield, both of New York City, for defendants.

BRADFORD, District Judge. The Union Sulphur Company, a corporation of New Jersey, brought its bill in this case against the Freeport Texas Company, a corporation of Delaware, and the Freeport Sulphur Company, a corporation of Texas, hereinafter referred to as the Texas corporation. No service of process having been made upon the Texas corporation and it not voluntarily appearing, the only defendant in court is the Delaware corporation. The plaintiff has filed under rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), of the equity rules promulgated by the Supreme Court interrogatories to be answered by Eric P. Swenson, who is the defendant's president, or by such other officer of the defendant as has knowledge of the facts inquired about; one class of interrogatories being directed to the question of such control by the defendant over the Texas corporation, or such combination or co-operation between the two, as to render the defendant liable for the acts of the Texas corporation, and the other class of inter-

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

rogatories to the question of infringement of certain patents held and owned by the plaintiff. The interrogatories relating to the question of control, combination or co-operation were specifically answered by Swenson, and no exception has been taken to his answers in that regard. Exception, however, has been taken by the plaintiff to his answers to the interrogatories touching the question of infringement. Swenson in reply to such interrogatories says:

"Referring to the interrogatories directed to the issue of infringement, I say as follows:

"I am a banker, and my connection with these matters has been that of a financier and executive officer. I have had no technical training. I have no knowledge or information, either personally, or as president of the defendant corporation, which will enable me to answer the said interrogatories, and I am not competent or qualified to answer the same. Furthermore, I have made an investigation to ascertain whether the facts inquired about in these interrogatories are known to any officer, or to any employé, of the defendant Freeport Texas Company, which is a holding company and not an operating company, and to the best of my knowledge, information and belief, there is no officer or employé or any one under the control of said company who is competent or qualified to answer any of these interrogatories, and there is no writing, record or drawing in the file of the said defendant company giving information on which the said interrogatories might be answered. The defendant company, its officers and employés, are, therefore, unable to answer any of the said interrogatories."

The plaintiff, not being content with the above statement, has moved that Swenson be ordered to file—

"further full and fair answers to each and all of the interrogatories directed to the issue of infringement, and further, that if he have not sufficient personal knowledge or information to give such full and fair answers, that he be directed, before answering, to make such further inquiry concerning the facts inquired about as to the court shall appear just and proper under the circumstances."

As it appears from Swenson's statement that he has not sufficient personal knowledge or information to give such full and fair answers, and, further, that such knowledge or information is not possessed by any other officer or employé of the defendant, the question is presented whether Swenson should be directed, with a view to making further answer, to make inquiry of persons other than officers or employés of the defendant, touching the facts inquired about. It is urged by counsel for the plaintiff that for the purpose of the present application it must be assumed that the Texas corporation is under the control of the defendant, and should be treated as its agent, and that Swenson, therefore, is under an obligation to ascertain the facts bearing upon the alleged infringement from the officers or employés of the Texas corporation. On the above assumption of control and agency, however, of whom shall Swenson make inquiry? Certainly this court has no means of indicating the person or persons capable of imparting to him the desired information. The officers of the defendant and of the Texas corporation, namely, the president, vice president, treasurer and secretary, are and for a number of years have been the same; and knowledge or lack of knowledge on the part of such officers of the defendant would equally be knowledge or lack of knowledge on the part of such officers of the Texas corporation. The apparatus employed in conducting the alleged infringing process is used by the Texas corporation in carrying on its mining operations in that state, and there is a violent, if not conclusive, presumption that knowledge of the facts inquired about in the interrogatories relative to infringement is possessed by those or some of those of the employés of that corporation who handle or inspect such apparatus; and it is strongly urged in effect that Swenson is under an obligation or should be directed by the court to identify the employé or employés of the Texas corporation having such knowledge and gain sufficient information to enable him to make satisfactory answers to the interrogatories touching infringement.

[1, 2] For various reasons this position does not commend itself to the approval of the court. The practical enforcement of rule 58 in the case of corporations is often beset with perplexity and embarrassment; and the granting of the application in hand would be calculated aptly to illustrate the confusion, uncertainty, vexation and injustice which may or must result from the construction of the rule contended for. The filing of interrogatories in the case of corporations is not a matter of course or of strict right. On the contrary, the rule expressly provides that:

"Any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit."

The purpose of the rule is not to deprive the parties or either of them of the right at the trial to adduce evidence of "facts and documents material to the support or defense of the cause," but to enable the parties or either of them in proper cases to obtain evidence, prior to the trial, of such facts and documents, and thus render unnecessary the production of such evidence at the trial. The rule is intended to facilitate the proper disposition of the cause, and not to needlessly harass and vex parties or those representing them, or either of them. Hence, as heretofore held by this court in this case, the application of the rule involves the exercise of sound discretion by the court, which, while not withholding from the party filing the interrogatories the benefit of the disclosure to which he is entitled, should observe proper care that the party interrogated shall not be unduly and unnecessarily burdened, oppressed or harassed. And equally, the party or person interrogated should not be required in order to make answer to incur great and unreasonable expense and trouble, which could be obviated by the taking of evidence by deposition or by the production of proof at the trial.

The course of judicial decision up to the present time touching the scope and effect of the rule has not been such as to throw much light upon the subject. The reported cases, both under rule 58 and under order XXXI of the English rules, leave much to be desired in the way of consistency and perspicuity. While rule 58 contemplates "discovery" of material facts and documents that term evidently is not employed in its technical sense. The effect of an answer to interrogatories filed under the rule is, under the language of the decisions, by no means clear. Is the answer to be treated as an admission by or on behalf of the corporation and as such conclusive upon it? Or should it be regarded as having only such probative force against the corporation as would be possessed by an ordinary deposition containing the same matter, its weight to be largely determined by its inherent probability or improbability and the circumstances of personal knowledge or its lack on the part of the person answering? An acceptance of either hypothesis involves difficulty. On behalf of the plaintiff it is contended that "it is perfectly apparent that the theory upon which answers to interrogatories are admissible as evidence is that they constitute admissions." It is Swenson and not unsworn operatives of the Texas corporation handling the apparatus employed in the alleged infringing process who is required to make answer to the interrogatories; and I fail to perceive any justification, reason or excuse for an order requiring him to seek information from such operatives, unnamed and unsworn, who, whether honestly or dishonestly, may vary in the information they may impart to him touching the multifarious details covered by the interrogatories, and upon the basis of this mere hearsay make answer operating as an admission binding upon the defendant. If, on the other hand, the answer under rule 58 should be treated, not as an admission, but as having only such force as would be accorded to the same matter appearing by deposition, it would, as wholly based upon hearsay, have no force whatsoever in this case. It is unnecessary to review the decisions in this opinion. I find no case, well considered or otherwise, lending support to the present application. The plaintiff could have brought suit in Texas and probably have obviated all difficulty. Not having sued there, it has ample opportunity to take by deposition the necessary testimony in Texas and have it returned here for use at the trial. In view of the situation of the parties and the circumstances of the case, the granting of the present motion would, in my opinion, be a gross abuse of discretion, and it consequently must be denied.

In re TONAWANDA IRON & STEEL CO.

(District Court, W. D. New York. February 29, 1916.)

No. 998.

1. SEAMEN ⚿29(2)—INJURY—LIABILITY OF VESSEL.
Liability of a vessel for injury to a seaman depends either upon the unseaworthiness of the ship or her failure to supply and keep in order proper appliances.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188; Dec. Dig. ⚿29(2); Master and Servant, Cent. Dig. § 211.]

2. SEAMEN ⚿29(2)—LIABILITY OF VESSEL FOR INJURY—UNSEAWORTHINESS.
Vessel owners are not bound to provide the best, safest, and most convenient appliances, and a failure to do so does not render the vessel unseaworthy.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188; Dec. Dig. ⚿29(2); Master and Servant, Cent. Dig. § 211.]

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

3. SEAMEN ⟹29(3)—LIABILITY FOR INJURY—NEGLIGENCE OF FELLOW SERVANTS.

That the insufficient lighting of the part of the deck where a seaman was required to work caused or contributed to his injury does not render the ship liable, where proper lanterns and lamps were supplied, and the failure to have them lighted and in place was due to negligence of some member of the crew, who was a fellow servant of the seaman injured.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188; Dec. Dig. ⟹29(3); Master and Servant, Cent. Dig. § 492.]

4. SEAMEN ⟹4—SUIT FOR INJURIES—CONSTRUCTION OF STATUTE.

The provision of Seamen's Act March 4, 1915, c. 153, § 20, 38 Stat. 1185, that, "in any suit" to recover for injury to a seaman, "seamen having command shall not be held to be fellow servants with those under their authority," is not retroactive, and does not apply to suits commenced before it went into effect.

[Ed. Note.—For other cases, see Seamen, Dec. Dig. ⟹4.]

In Admiralty. Petition of the Tonawanda Iron & Steel Company, as owner of the steamer Oceanica, for limitation of liability. On claim of John Moran for injury as seaman. Claim disallowed.

Dempsey, Tuttle & Rice, of Niagara Falls, N. Y. (S. Wallace Dempsey, of Lockport, N.Y., of counsel), for claimant.

Brown, Ely & Richards, of Buffalo, N. Y., for petitioner.

HAZEL, District Judge. On the night of November 2, 1913, in St. Mary's river, while the steamer Oceanica, with tow, was bound from Duluth to North Tonawanda, the claimant, John Moran, a deckhand, stood by the tow chock in the stern of the vessel preparatory to handling the tow line for tying the steamer up to the dock for the night. When the steamer was checked down the barge came ahead on the tow line, causing it to slack and slide to the right of the tow chock. The tow line running from the barge through the tow chock was fastened to timber heads on the steamer after passing over a sliding block positioned in the tow chock, which was about 7 feet wide and 18 inches high. Moran testified that he was ordered to take in the slack of the line and trice it along the rail; that while complying with such order he looked down on the deck to avoid stepping on ropes thrown there, when a sudden pull on the tow line caused it to come against one of the uprights of the chock, catching and crushing his hand, making necessary the amputation of three fingers.

In this proceeding for limitation of liability it is claimed that the steamer Oceanica should be held responsible for the accident, on the ground that as the place where the accident occurred, and where it was necessary for claimant to stand, was insufficiently lighted and littered with ropes, there was a complete failure on the part of the vessel to furnish a reasonably safe place in which to work.

[1] It is unnecessary to examine the many authorities cited in the briefs, for I conceive that the law of the case is clearly and definitely set forth by the Supreme Court of the United States in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, where it is expressly held that liability of a vessel for injuries received by a seaman depends ei-

ther upon the unseaworthiness of the ship or upon her failure to supply and "keep in order the proper appliances appurtenant" thereto; that the crew, except perhaps the master, are as between themselves fellow servants; that seamen receiving injuries because of the negligence of a fellow servant can recover only for maintenance and cure; and that indemnity for the negligence of the master and crew is not allowable. No claim is made in this case for maintenance and cure.

[2] 1. There is no evidence to support the view that the vessel was unseaworthy, though it was contended that the tow chock at the stern was faultily constructed, in that the tow line was permitted to have undue play, and that the injuries were partially attributable thereto; but I think the construction of the tow chock and the manner of rigging the tow line were proper and seaworthy. Tow chocks of the kind on the Oceanica were common in ships of her class and construction, and indeed towing chocks allowing good play of line were regarded as convenient and proper appliances; but, even if such were not the case, no negligence for failure to provide more modern appliances is attributable to the vessel, as it has often been decided that owners are not obliged to provide the best, safest, and most convenient appliances. The Santa Clara (D. C.) 206 Fed. 179.

[3] 2. It is claimed that there was but a single oil lantern aft, which hung from the center of the ceiling and gave insufficient light; that on each corner of the cabin there was a place for a lamp, but that there were no lamps at such places at the time of the accident, and claimant could not see the tow chock or the sliding movements of the tow line. Even assuming that all the lamps were not in place, and that the deck was dimly lighted (although the second mate testified that both lanterns at the corners of the cabin were lighted and in place, in addition to the lantern suspended from the ceiling, and that the lighting was sufficient), liability on the part of the vessel is not proven, in view of the fact that the lamp room aboard the ship contained lanterns and lamps for adequate lighting which were supplied by the owner for use. The owner discharged its full duty to the crew when it supplied proper and suitable equipment for doing the work with reasonable safety, and as lamps had been supplied they should have been lighted and used when required. Madigan v. Oceanic Steam Nav. Co., Ltd., 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495; The Osceola, supra. Assuming, therefore, that the proximate cause of the injuries sustained by claimant was the insufficient lighting of the stern deck of the vessel, it must then be held on this record that the mishap was due to the negligence of fellow servants or a fellow servant, either the master or mate, for which the ship was not responsible. The City of Alexandria (D. C.) 17 Fed. 390; Cornell Steamboat Co. v. Fallon, 179 Fed. 293, 102 C. C. A. 345; Benson v. Goodwin, 147 Mass. 238, 17 N. E. 517.

3. So, also, as to littering the deck with rope. The owners of the vessel having furnished the rope necessary for purposes of navigation, it was, of course, the duty of the officers to keep it in a proper place, and not to allow it to litter the deck and render it unsafe for work, to the injury of seamen there employed; but their failure to perform their duty in this respect does not constitute negligence which is attributable to the ship or her owner.

[4] The maritime law at the time of the accident was in its application essentially different from the common and statutory law dealing with injuries to servants arising from the negligence of the master or of fellow servants, and the adjudications already cited herein point out such differences with clearness and understanding. But it is contended that section 20 of the Seamen's Act, so called, passed by Congress on March 4, 1915 (38 Stat. 1185, c. 153), radically changed the existing maritime law as to the liability of the ship to seamen, in that it abolished the fellow servant doctrine by expressly providing:

"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

Was such act retroactive? By section 18 it is provided that the act shall take effect as to all vessels of the United States eight months after its passage; i. e., on November 4, 1915. The injuries in question were sustained November 2, 1913, and this proceeding was begun in January, 1915. Proctor for claimant urges that the language of section 20, referring to "any suit" and "any injury sustained," is broad enough to include the claim for injuries under discussion. But with this I do not agree. Had it been the intention of Congress that section 20 should be effective prior to other provisions of the act, or that it should apply to actions pending or to causes of action already in existence, explicit words would have no doubt been used to express such intention. Upon reading sections 18 and 20 together, it seems to me that they are clearly of a prospective character. The ordinary presumption is that legislation provides for the future and that there is no retrospective intention, and both federal and state courts are slow to incorporate words into a statute which will permit such an interpretation. White v. U. S., 191 U. S. 545, 24 Sup. Ct. 171, 48 L. Ed. 295.

In Winfree v. Northern Pacific Railway Co., 227 U. S. 296, 33 Sup. Ct. 273, 57 L. Ed. 518, the Supreme Court had before it the Employers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), which it was argued was retroactive. That act substantially declared that in all actions subsequently brought against any common carrier contributory negligence should not be a bar, etc. While the reference to future actions was perhaps somewhat more definite than in section 20 of the Seamen's Act, standing alone, I nevertheless think the principle enunciated in that case is applicable to the present situation. It was there contended, as it is here, that the statute was merely remedial, and should be construed to apply to all suits, whether already begun or not; but the Supreme Court said:

"While there are exceptions, especially in the case of remedial statutes, the general rule is that statutes are addressed to the future and not to the past; and, in the absence of explicit words to that effect statutes are not retroactive in their application. The Employers' Liability Act of 1908 introduced a new policy, and radically changed existing law, and will not be construed as a remedial statute having retrospective effect."

So, also, in the case at bar the Seamen's Act made a substantive change in the maritime law of the land creating a new liability—not simply changing methods of procedure or rules of evidence or affecting the statute of limitation—and making the ship or her owner answerable for the negligence of the officers charged with the responsibility of her navigation, as a result of which a seaman sustains injuries. Such change in an existing law does not concern the remedy merely, but, as said in the Winfree Case, supra:

"It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action."

For the foregoing reasons I am constrained to hold that Congress did not declare in the Seamen's Act an intention that the act should operate retrospectively, that the claimant is without right of action against the steamer Oceanica, and, further, that his claim not being for maintenance or cure must be disallowed.

UNITED STATES v. ALBRIGHT et al.

(District Court, D. Montana. July 1, 1916.)

1. STATUTES ⇐225¾—CONSTRUCTION—ADOPTION.
The Legislature, in adopting a statute, is presumed to have acted with knowledge of previous construction of similar statutes, and to have intended such construction, unless it otherwise indicated.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. ⇐225¾.]

2. LIMITATION OF ACTIONS ⇐100(3)—RUNNING OF STATUTE—FRAUD.
The six-year limitation prescribed by Act March 3, 1891, c. 561, § 8, 26 Stat. 1099, in which suit to cancel patents must be commenced, does not, as to a patent secured through fraud, in that the patentee was acting for speculative purposes and under an agreement to convey when he should receive his patent, begin to run until those facts are discovered, for a limitation statute, in so far as it applies to actions based on fraud, does not, where the fraud is concealed, begin to run until discovery.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 482, 483; Dec. Dig. ⇐100(3).]

3. PUBLIC LANDS ⇐131—PATENTS—ISSUANCE.
Under Rev. St. §§ 2290, 2291 (Comp. St. 1913, §§ 4531, 4532), requiring an applicant for a patent to public lands to make oath his purpose is not speculation, but to secure a home, and that he has not made and will not make any agreement by which the title shall inure to any other's benefit, and on final proof to make oath that he has not alienated the land, the fact that an entryman who filed for speculative purposes recognized the possibility of a future alienation, and that he asked one who purchased a considerable time after the issuance of a patent if he would buy the land when the patent was secured, does not show that the purchaser knew the entry was speculative, or deprive the purchaser, who was bona fide, of the benefit of his good faith.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 347; Dec. Dig. ⇐131.]

4. PUBLIC LANDS ⇐135(2)—PATENTS—SPECULATIVE PURPOSES.
Where an entryman on public lands, who secured a patent, was not actuated by speculative purpose at the time of his entry, he may, despite Rev. St. §§ 2290, 2291 (Comp. St. 1913, §§ 4531, 4532), declaring that a pat-

ent shall not be issued to one entering for speculative purpose, dispose of the land after acquiring his patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 353, 354; Dec. Dig. ⟹135(2).]

5. PUBLIC LANDS ⟹120—PATENT.

Unless proof that a patent to public land was secured through fraud is clear and convincing, the patent should not be overthrown.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⟹120.]

6. PUBLIC LANDS ⟹120—EVIDENCE—SUFFICIENCY.

In a suit to cancel a patent to public lands, evidence *held* insufficient to show that defendant, to whom it was subsequently conveyed, had a contract for the purchase of the land when it was patented.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⟹120.]

7. PUBLIC LANDS ⟹120—EVIDENCE—SUFFICIENCY.

In a suit to cancel a patent to public lands, on the ground that the patentee was acting under a contract to subsequently convey to defendant, evidence *held* insufficient to establish any such agreement, or that the patentee's entry was not in good faith.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⟹120.]

In Equity. Suits by the United States against William H. Albright and others. Decree for defendants.

B. K. Wheeler, U. S. Atty., and Frank Woody, Asst. U. S. Atty., both of Butte, Mont., and H. G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Cooper, Stephenson & Hoover, of Great Falls, Mont., for defendants W. H. and V. C. Albright.

BOURQUIN, District Judge. April 22, 1901, a homestead patent issued to Whitaker, and August 18, 1902, one issued to Carter. These suits to cancel the patents, against the patentees and their transferees, were commenced September 11, 1915, and have been tried as one.

The complaints, in brief, are that the patentees made application for the lands, inspired by speculative purposes, and not for homes, under agreements to convey the lands, after final proof, to defendant Albright; that they did not comply with law in the matter of residence, improvement, and cultivation of the lands; that their final proofs, showing the contrary to all the foregoing, were false and to the knowledge of Albright; that the lands were so conveyed that title is now vested in Albright's wife for his benefit; that all the facts aforesaid were concealed from and not discovered by plaintiff until 1911. Carter was not served, Whitaker defaulted, and the Albrights denied, and pleaded bona fide purchase and limitations.

[1, 2] The statute (26 Stat. 1099) provides suits to vacate patents "shall only be brought within six years after the date of issuance of such patents." Long before it, the construction of like statutes, in courts of equity, was that they commenced to run only from discovery of fraud that is concealed or self-concealing. And this rule has been applied to this statute. See Linn, etc., Co. v. U. S., 203 Fed. 394, 121

C. C. A. 498, and cases cited; s. c., 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725, affirmed on other grounds.

Congress knew this construction, and intended it, when enacting said statute, or it would have indicated otherwise by appropriate language. This, too, is a settled rule of interpretation. The fraud alleged in the matter of residence, improvements, and cultivation was open to observation prior to and at final proof, and as cause of action is barred by the statute. That alleged to consist in speculative purpose and agreement to convey is concealed and self-concealing fraud, hidden until some participant discloses it, which was only done herein in 1911, and so is not barred.

[3-6] That the patentees conveyed to Albright, and the deeds were recorded, some six and nine months subsequent to patent, neither disclosed the fraud nor put on notice; for on their face they appeared honest transactions. From Whitaker's testimony, as a witness for plaintiff, it appears he needed money to apply on his home in Michigan. To procure it he made original entry of the land involved, intending to sell it to the best advantage. Having so entered it, he asked Albright if the latter would buy it after final proof; Albright with some demur saying he would, if able. After final proof a tentative agreement was made, and one year later, and six months subsequent to patent, Albright did buy the land, paying $750 therefor, and received and recorded a deed.

In this is perceived nothing warranting cancellation of the patent. The Homestead Law (R. S. §§ 2290, 2291 [Comp. St. §§ 4531, 4532]) requires the applicant to make oath his purpose is not speculation, but to secure a home, and that he has not made and will not make any agreement by which the title to the land "should inure" to any other's benefit, and at final proof requires him to make oath that he has not alienated any of the land. Whitaker's purpose was speculative, but nothing appears that would warrant a finding that it was known to Albright. True, after original entry Whitaker inquired if Albright would buy the land when final proof was made; but this was not notice that Whitaker was inspired by speculation rather than desire for a home, when he made his original entry or at all. It was but oral utterance of the thought necessarily in every entryman's mind—the possibility of a sometime sale—and in no wise inconsistent with his good faith. Furthermore, if it was, to deprive Albright of his status as a bona fide purchaser it would be necessary to find (and the court does not) he kept and had the fact in mind when he purchased some 29 months later. See U. S. v. Clark, 200 U. S. 608, 26 Sup. Ct. 340, 50 L. Ed. 613.

After original entry made, Whitaker could lawfully entertain a purpose to sell the land, rather than to retain it as a home; for the law stipulates his freedom from speculative purpose, and possession of intent to secure a home, shall exist at original entry only, recognizing circumstances may effect change therein in any honest entryman. The Land Department so construes the law, and see the analogous case of Williamson, 207 U. S. 461, 28 Sup. Ct. 163, 52 L. Ed. 278. And from the inquiry Whitaker made of Albright, the latter, if required to infer anything, could infer Whitaker's contemplation of possible sale arose subsequent to original entry. After testifying as aforesaid, in response to leading and double questions, and questions assuming his testimony was otherwise than the fact, put by plaintiff's counsel, Whitaker testified he made the inquiry of Albright before original entry. Although no objections were made, under the circumstances, the witness only in theory adverse and not in fact, such testimony and so extracted deserves little consideration and weight. Furthermore, the conflict is not explained, and nothing persuades that the witness' last statement is more to be relied on than his first. At best, there is conflict, which must be resolved against the party tendering the witness. If the witness does not know, the court cannot know. It is obvious there is no evidence of the agreement to convey, alleged to have been made before final proof. Albright testifies to purchase in good faith. Circumstances from which suspicion might arise, in itself amounting to nothing, all taken together and with all else, are consistent with bona fide purchase by Albright.

A grant of lands by the United States, over its seal, upon every consideration must stand, unless overthrown by clear and convincing evidence of the fraud charged, in quality and quantity that inspires confidence and produces conviction. U. S. v. Budd, 144 U. S. 161, 12 Sup. Ct. 575, 36 L. Ed. 384. None such appears here. The doubtful, ambiguous, and conflicting recollection, 15 years subsequent to events, of those acknowledging themselves particeps criminis if the law was violated, does not satisfy the measure of evidence exacted; and less would make of patents mere scraps of paper, disturb titles, impair confidence, and destroy values.

[7] From Carter's testimony, as a witness for plaintiff, the situation appears much the same as in Whitaker's case, save that a like speculative intent seems absent. When he had testified that "along about the time of filing, or after," he had told Albright, "if I got title, why I would sell it to him," that he sold to Albright after final proof, on an agreement made after patent, that he (Carter) paid all costs, mortgaging the land to a bank to secure money to pay the purchase price of the land, he was asked by counsel for plaintiff that, if he had testified in a former case, as recited in narrative by counsel in considerable detail, amongst other things, that prior to filing he had talked with Albright in substance that, if Carter did not want the land, Albright "was to take it off my hands," that he "had this agreement to transfer the property to Mr. Albright prior to the time I filed, we talked it over in that way," "Would that be correct, was your recollection better then?" and he answered, "Well, I don't know; I expect it would be." He was then asked, "Do you recall having testified that way?" and answered, "Why, yes, something like that"; and the like were put, terminating in a leading and double question, in substance if there was not an understanding and agreement that, if Carter "didn't want to keep this land," he would sell it to Albright, and for a price of $640 agreed on before original entry, to which Carter answered, "Yes; I guess that is right." After testifying to an innocent situation, the witness is challengingly asked if he did not testify to an assumed evil one when his memory was better; and the impression created was that the witness, embarrassed by suggested earlier conflicting testi-

mony of his, weakly snatched at the way out pointed out by counsel in suggested better recollection (and perhaps to fall in with what he would infer was counsel's desire), and assented to the latter, if not to the truth of the former.

On cross-examination, Carter testified he would think his recollection was best when he made final proof, and the proof more nearly true—nearer the fact than any subsequent testimony, that he had no particular understanding with Albright, and that he took the land for his own benefit. Whitaker testified he had heard "talk since, more than before," "general opinion I would hear," that Carter "had taken up some land" for Albright.

Peterson's testimony that she knew Carter "had a homestead for Mr. Albright" is not supported by any facts known to and stated by her. She also testified she made a homestead entry at Albright's suggestion; she to "get the same as the rest," $640. Gustafson testified, "Carter told me he had a homestead for Albright"; that he (Gustafson) had an agreement with Albright, when Gustafson took up a homestead, "Give me the same show as the rest of the boys, * * * same price." If these scant conclusions of Peterson and Gustafson would suffice to prove that at some indefinite time they and Albright entered into prohibited agreements like those herein alleged, they are not evidence these alleged agreements were made. For the proof herein fails in respect to substance—the time and the terms of these alleged agreements at bar—and not merely in respect to intent and scienter; and other like offenses go only to determine the true character of the latter, when otherwise equivocal, and not at all to establish time and terms of otherwise, in these particulars, innocent, or even ambiguous, agreements.

Albright denied any agreement with Carter, and testified he paid Carter all the land was worth. It appears Albright operated a quarry where he employed some 80 men, and Carter worked for him as master mechanic, having a room in a bunk house and boarding at Albright's house; that some 18 of his men made homestead entries, a few of which he bought; that he also bought railroad land and entered lands with scrip. There is evidence from which it can be fairly inferred that Carter (and also Whitaker) availed himself of an opportunity to secure land at the same time he was in employment, and without interruption of his employment; his employer, Albright, favoring him therein. Such favor is to be commended, not condemned. But, as said of Whitaker's case, the indefinite, ambiguous, equivocal, conflicting testimony of assumed particeps criminis, taken in connection with all the circumstances and the indefinable impressions created during the trial (a trial of loose methods by both parties), does not serve to overcome the presumptions attaching to the patent, to measure up to the quantum of evidence necessary, and to satisfy the court the fraud alleged is proven.

Carter's testimony, even in view of the doubtful method of his examination and the more doubtful applicability of his responses to multiple questions, establishes no more than in Whitaker's case—a suggestion after original entry that, if Carter secured the land, Albright would buy it, if Carter did not want it—far short of the prohibited agreement alleged. So would it be if made before original entry. The law forbids agreements by which the land "should inure" to any other's benefit; not those by which it only may so inure if the entryman after proof concludes to sell it. If a mere mask for the prohibited agreement, it would not avail to escape the consequences of the latter. But the fact that Carter mortgaged the land to secure purchase money, and did not sell to Albright until two years after proof and nine months after patent, in connection with all else, forbids belief that the alleged agreement was made.

The finding is the fraud alleged is not proven, save that Whitaker made entry with speculative purpose; that Albright purchased and paid value without notice. And since nothing is urged but cancellation of the patents, decree will go for defendants.

REED et ux. v. ST. PAUL, M. & M. RY. CO. et al.

(District Court, W. D. Washington, N. D. December 3, 1915.)

No. 74.

1. Public Lands ⚿120—Patents—Suits to Set Aside—Jurisdiction of Court.

A patent to public lands will not be set aside by a court of equity, unless it appears that through error in the construction of the law the patent was issued to the wrong party, or that through fraud or gross mistake patent was issued to the wrong party. Therefore a bill to set aside a patent to public lands, which contained no averments of fraud, mistake, or erroneous construction of law, is demurrable.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⚿120.]

2. Public Lands ⚿120—Patents—Bill to Set Aside.

A bill to set aside a patent to public lands, which averred settlement upon, improvement, and failure to post notices of claim, and also averred plaintiff's adverse possession for 10 years, and the subsequent issuance of a patent to defendant, is insufficient to state a cause of action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⚿120.]

3. Public Lands ⚿120—Patents—Bill to Set Aside.

A bill to set aside a patent to public lands, averring that defendants claim some title, estate, and interest in the land by reason of a patent, is insufficient to give jurisdiction to a court of equity.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⚿120.]

In Equity. Bill by Charles W. Reed and wife against the St. Paul, Minneapolis & Manitoba Railway Company, a corporation, and another. On demurrer to amended bill. Demurrer sustained.

Carl E. Croson and E. H. Flick, both of Seattle, Wash., for plaintiffs.

F. V. Brown and F. G. Dorety, both of Seattle, Wash., for defendants.

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

NETERER, District Judge. A demurrer to the bill in equity in this case was sustained. Reed v. Railway Co., 234 Fed. 123. By permission, the bill has been amended by interlining paragraph IX of the bill so that it reads:

"That said defendants claim some right, title, estate, and interest in and to the foregoing described lands, more particularly to the S. W. ¼ N. W. ¼ of section 3 thereof, *by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company*, but that said claim is junior and inferior to the claim and right of these plaintiffs." (The amendment is underscored.)

A demurrer has been interposed to the bill as amended. The additional facts pursuant to this discussion appear in Reed v. Railway Co., supra.

[1] It is apparent that no statement appears of any fact of a fraudulent nature, or of any act done or performed by corrupt motives or corrupt means by the defendant, or any of the land officers who have had to deal with this land (Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800), and a court of equity cannot, under any untraversable allegations of error in general, be invoked (U. S. v. Trockmorton, 98 U. S. 61, 25 L. Ed. 93). A bill in equity to set aside a patent or declare the patentee a trustee must set out the facts conceded or established, upon which it is charged the officers, through error in the construction of the law, issued the patent to the wrong party, or that through fraud or gross mistake they misapprehended the facts, with the same result, and if mistake of fact is the ground of attack, the bill must allege the mistake in the finding, and also state the evidence before the department from which the mistake resulted, as well as the particular mistake and the manner in which it occurred, and the fraud, if any, which induced it. U. S. v. Atherton, 102 U. S. 372, 26 L. Ed. 213; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476. If fraud, error, mistake, or wrong has been done, courts of justice present the only remedy. Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848. But to maintain a bill in equity it must be averred and proved that the Land Department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices (Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 548), and the facts upon which these various conclusions are predicated must be stated.

[2, 3] The statement of settlement upon and improvement of the land, and the failure to post "notices of claim under the script land laws of the United States or otherwise," does not bring plaintiff within the rule; nor does the allegation of adverse possession for 10 years constitute a sufficient equity in plaintiff's favor to control the title subsequently conveyed to the defendants by the United States. Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534. The allegation "that said defendants claim some right, title, estate, and interest * * * in the * * * land * * * by reason of government patent No. 29 issued April 13, 1908, to the Great Northern Railway Company," is not sufficient, with the other allegations, to invoke the powers of a court of equity.

The demurrer is sustained.

TOWN OF NEWBERN et al. v. NATIONAL BANK OF BARNESVILLE, OHIO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No. 2707.

1. COURTS ⚷372(7)—PRECEDENCE—FEDERAL COURTS.

Where the validity of municipal bonds depended upon the construction to be given Acts Tenn. 1897, c. 13, and Acts Tenn. 1901, c. 450, incorporating the municipality, and the contract had been entered into before an interpretation of the statutes by the Tennessee court, the federal courts are not bound by a decision of the Tennessee court holding the bond issue invalid, and, having obtained jurisdiction of a suit involving the validity of some of the bonds, they may exercise an independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. ⚷372(7).]

2. COURTS ⚷372(7)—PRECEDENCE—FEDERAL COURTS.

Upon questions of general law decisions of the state courts are not binding on the federal courts sitting within their borders; therefore a decision of the state court that a municipality was not estopped from denying the validity of its bonds, which had passed into the hands of a bona fide purchaser for value without notice, is not binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. ⚷372(7).]

3. MUNICIPAL CORPORATIONS ⚷927—BONDS—VALIDITY.

Where municipal bonds bore admittedly official signatures of municipal officers and the city seal, such signatures and seal prima facie established the validity of the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. ⚷927.]

4. MUNICIPAL CORPORATIONS ⚷948(4)—BONDS—BONA FIDE PURCHASER—ESTOPPEL.

Acts Tenn. 1897, c. 13, declares that, to secure pure elections, boards of commissioners shall be appointed in the several counties. Acts Tenn. 1901, c. 450, incorporating the town of Newbern, provides in section 6 for the holding of an election by the sheriff for the selection of mayor, aldermen, recorder, and marshal. By Act of March 13, 1907 (Acts 1907, c. 117), the mayor and aldermen of the town of Newbern were authorized to issue bonds to erect school buildings, to improve and extend the water and light system, and to improve streets. The bonds contained a recital that at an election duly and legally held by order of the mayor and aldermen of the town, in accordance with an ordinance duly passed, the issuance of the bonds was ratified by a majority of the voters. The bonds were signed by the mayor and countersigned by the clerk of the board of aldermen, instead of being signed both by the mayor and aldermen. The ordinance referred to in the bond recited that an election, ordered by the mayor and aldermen to ascertain the will of the qualified voters as to whether the mayor and aldermen should issue the bonds, as provided for, was held, and resulted in showing that a majority favored the issuance of the bonds; the result of the election having been duly and regularly certified by the sheriff under whose supervision the election was held. *Held* that, as against a bona fide purchaser of the bonds for value and without notice, the city was estopped to deny the validity of the bonds on the ground that the election, having been held by the sheriff, instead of commissioners, was invalid, for a purchaser could not be charged with notice of the fact that the election was held by the sheriff, on the ground that the bonds were signed by the mayor and clerk, instead of the mayor and

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

aldermen; these signatures being accompanied by a corporate seal importing authority.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1985; Dec. Dig. ⊂=948(4).]

5. MUNICIPAL CORPORATIONS ⊂=931—BONDS—VALIDITY—ALTERATIONS.

Municipal bonds are not invalid, on the ground that they did not follow the form prescribed by the ordinance, because of the insertion of provision for payment in a particular bank in the city, where payment was provided for, or by declarations that the total debt of the town, including the bonds, did not exceed any limit of indebtedness prescribed by the laws of the state, and that provision for the levy of an annual tax sufficient to pay the principal and interest of the bonds had been made and would be duly levied upon all taxable property, for the first provision operated to the convenience of the municipality, and the latter did not change the obligation of the municipality, which pledged its full faith, credit, and revenues.

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

6. MUNICIPAL CORPORATIONS ⊂=948(5)—BONDS—VALIDITY—DEFENSES.

Where coupon bonds issued by a municipality to erect a school building were sold, and the purchaser disposed of them to bona fide purchasers, but never paid the purchase price to the municipality, the bonds are, in the hands of bona fide purchasers, valid, being negotiable instruments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1986, 1987; Dec. Dig. ⊂=948(5).]

7. MUNICIPAL CORPORATIONS ⊂=948(1)—BONDS—DELIVERY—PRESUMPTIONS.

Under Negotiable Instruments Act (Acts Tenn. 1899, c. 94) § 16, providing that, where a negotiable instrument is in the hands of a holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is conclusively presumed, the validity of municipal school bonds in the hands of a bona fide purchaser cannot be questioned by a municipality on the ground that there was no valid delivery to the one through whom the purchaser traced his title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1982, 1990; Dec. Dig. ⊂=948(1).]

8. APPEAL AND ERROR ⊂=1078(1)—REVIEW—WAIVER OF ERRORS.

Failure to argue assignments of error operates as a waiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ⊂=1078(1).]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by the National Bank of Barnesville, Ohio, against the Town of Newbern and the Mayor and Aldermen of Newbern, Dyer County, Tennessee. There was a judgment for plaintiff, and defendants bring error. Affirmed.

The suit below was to recover judgment for interest alleged to have accrued on certain bonds of the town of Newbern, a municipal corporation located in Dyer county, Tenn. The town was empowered in 1907 to issue $50,000 of coupon bonds for municipal improvements, as follows: $25,000 par value to erect and furnish school buildings, $10,000 to improve and extend water and light system, and $15,000 to improve streets. The bonds are all outstanding, and the town received the money arising from the sale of the water and light and street bonds, though it has received no money for the school bonds. The town pays the interest as it accrues on the water, light, and street bonds, but it declines to pay anything on account of school bonds. The interest now sought to be recovered is represented by 131 past-due coupons, for $30 each, which have been cut from certain of the school bonds. The declaratión sets out the statute investing the town with power to issue the bonds, alleges the steps taken, including the adoption of certain ordinances, by the town, and also the vote of a majority of the qualified voters of the town, authorizing the issue and sale of the bonds, plaintiff's possession as bona fide owner and holder for value of the coupons sued on, which are specifically described by their numbers and by the numbers of the bonds from which they were detached, and prays judgment upon such coupons with interest from their respective dates of maturity. To this declaration the defendants interpose three pleas: (1) That they did not "promise, undertake or agree in the manner and form as the plaintiff in its declaration has complained"; (2) that they do not "owe the said sums of money demanded, or any part thereof, in manner and form as the plaintiff in its declaration has complained"; (3) that the coupons and writings obligatory mentioned in the declaration are not defendants' "act or deed * * * and were not executed for or in their behalf by any person authorized to bind them or either of them in the premises," and that they demand a jury to try the issues joined. Upon these pleas plaintiff joined issue. At the close of all the evidence the parties each moved for a peremptory instruction in its favor. The court treated such joint submission as a withdrawal of the case from the jury and, upon consideration, found all the issues in favor of the plaintiff, distinctly finding that plaintiff is the owner of the coupons "for value in due course," and judgment was accordingly entered for plaintiff. Defendants prosecute error upon 12 assignments, and these assignments are considered in the opinion as far as necessary.

Elias Gates, of Memphis, Tenn., for plaintiffs in error.
Wm. R. Collins, of Cincinnati, Ohio, for defendant in error.

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

WARRINGTON, Circuit Judge (after stating the facts as above). We are called upon to determine which of two innocent parties shall suffer a material loss, and their rights must depend upon the application of principles which in effect may engender more serious losses than are presently involved; the performance of such a duty is, to say the least, perplexing; and this is emphasized by the fact that our conclusion is not in harmony with that reached by the Supreme Court of Tennessee concerning interest coupons similar to those in issue here. Weil v. Newbern, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915A, 1009, Ann. Cas. 1913E, 25.

What considerations must enter into the question whether the coupons in suit are binding obligations of the town of Newbern? It is manifest that the binding effect of the bonds to which the coupons in dispute belong must be considered, although the bonds themselves are not in suit. Concededly, the statutes incorporating the town in question under the name of "Mayor and Aldermen of Newbern," and enabling the corporation to issue these bonds, are constitutionally valid enactments; and, apart from a question made upon the election at which the electors of Newbern voted upon the issuing of such bonds, the ordinances relating to the issue and sale of the bonds are admittedly valid. The facts that the bonds comprised in the entire authorized issue ($50,000 par value) are outstanding, that the interest accruing on one-half of such issue (though not including the school bonds) is regularly paid by the town, that all the bonds (13 in number) with the coupons in suit attached thereto were acquired by the plaintiff bank and others through loans and purchases made before maturity of any of such coupons, in good faith and for value, without notice of any defect in respect either of issue or delivery thereof, and that plaintiff subsequently obtained the rights of these former holders in such of these coupons as it had not previously acquired, are not under the evidence open to substantial denial. The school bonds mentioned severally bear date September 1, 1907, and contain a promise—

"to pay to bearer the sum of one thousand dollars * * * on the first day of September, A. D. 1927, together with interest on said sum from the date hereof, until paid, at the rate of six per centum per annum, payable semiannually on the first days of March and September in each year, upon presentation and surrender of the interest coupons hereto attached, as they severally become due. Both principal and interest are payable at the Hanover National Bank, in the city of New York * * * and for the prompt payment of this bond * * * the full faith, credit and revenues of said town are hereby irrevocably pledged."

And each bond also contains recitals which state that it—

"is one of a series of 25 bonds, of like date and tenor, aggregating $25,000 issued by the mayor and aldermen of Newbern for the purpose of erecting and furnishing a school building in and for the town of Newbern, pursuant to and in full compliance with the provisions of an act of the General Assembly of the state of Tennessee," giving its title and date, "and as ordered by a vote of a majority of all the qualified voters of the town of Newbern, at an election duly and legally held by order of the board of mayor and aldermen of said town," on a date named, "and under and in accordance with an ordinance duly passed" by that board "at a meeting thereof, duly and regularly called and held" on a named date.

It is also certified and recited:

"That all acts, conditions and things required to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form as required by law."

Each bond is signed by the mayor, countersigned by the clerk, and attested by the seal of the town of Newbern, and such execution purports to have been directed by the board of mayor and aldermen.

[1, 2] It is practically admitted that if the bonds had been signed by the mayor and aldermen the recitals mentioned would have estopped the town of Newbern from denying the validity of either the bonds or coupons. It is insisted, however, that since only the mayor and the clerk signed the bonds, while the mayor and aldermen were the officers authorized to issue them, every purchaser was bound at his peril to examine into the authority of the mayor and clerk to execute the bonds; and that this would have led to the discovery of an infirmity which justifies the pleas of non assumpsit, nil debet and non est factum, relied on. The mayor and clerk appear to have been empowered by two different ordinances to execute the bonds. The first one was passed April 19, 1907, "to provide for the issuance of $50,000 in coupon bonds." The third paragraph of the ordinance provides that "the bonds so to be issued shall be signed by the mayor and clerk of said board of mayor and aldermen." The second ordinance was passed August 17, 1907, to fix "the form and date of the $25,000 school bonds, $15,000 street bonds, and $10,000 water and light bonds." The form

of the school bonds and that of the school coupons are set out, and the testatum clause of the former is as follows:

"In testimony whereof, the said mayor and aldermen of Newbern have caused this bond to be signed by the mayor and countersigned by the clerk of said board of mayor and aldermen, with the corporate seal attached, this third day of September, A. D. 1907."

And the name and official title of the mayor, and similarly of the clerk as countersigning, are printed immediately under the testatum clause and also at the end of the form of coupon. The first of these ordinances, however, is the one containing the provision which it is claimed would inform an intending purchaser, not alone of the authority of the mayor and clerk to execute the bonds, but also of the facts relied on to invalidate the bonds. It is stated in the preamble of that ordinance:

"The election heretofore ordered by the mayor and aldermen of Newbern to be held to ascertain the will of the qualified voters of the town of Newbern * * * as to whether or not the mayor and aldermen should issue the fifty thousand dollar (s) in coupon bonds as provided for in the acts of the General Assembly * * * passed March 13, 1907 * * * was held on the 16th day of April, and resulted in showing that a majority of all qualified voters in said town favored the issuance of bonds as provided for in said acts of the General Assembly, the result of said election having been duly and regularly certified by the sheriff of Dyer county * * * under whose supervision the said election was held. * * *"

It is claimed that the sheriff was not the authorized official to supervise and certify to the result of this election, and that the presence of the names of the mayor and clerk on the bonds put intending purchasers upon inquiry as to the validity alike of the election and the bonds. This view is sustained in Weil v. Newbern, supra, 126 Tenn, at pages 257, 265, 148 S. W. 680, L. R. A. 1915A, 1009, Ann. Cas. 1913E, 25; and indeed it was there held that the statement contained in the ordinance that the election was held by the sheriff "gave plenary information that it was a void election, and that the board of mayor and aldermen of Newbern had no power to issue the bonds. There could, therefore, be no innocent purchaser or holder of such bonds." This was the result of the court's construction of certain statutes of Tennessee which appear in the record. One was passed February 10, 1897 (Acts Tenn. 1897, p. 131), and its purpose is indicated by its title:

"An act to secure pure elections by creating boards of commissioners of election in counties having a population less than 50,000 inhabitants, computed by the federal census of 1890, and any subsequent federal census, and defining the duties and powers thereof."

While the operation of this statute was limited to a particular class of counties, it is clear that it was applicable to all counties of the state, regardless of the number, falling within the class specified, and so was in that sense a general rather than a special law. Commissioners were to be appointed by the governor, for every county, and were to comprise in each county "a board of three persons to be known as the commissioners of election." The commissioners of each county were required "within sixty days prior to every election to be held in their county, and in due time therefor, to appoint three judges for each and every voting place in their county, to superintend the election at the precinct or voting place for which said judges shall be appointed," and also within such time to appoint two clerks of election for each of such voting places. The commissioners were further authorized to appoint "the officer or officers of election at each voting place to the exclusion of the sheriff" theretofore "possessing said power of appointment." Further, "the county courts, mayors, boards of mayor and aldermen and sheriffs of and in the said counties within the provisions of this act" were "divested of the authority to appoint judges or inspectors and clerks of elections," and all statutes vesting such officials with such power of appointment, which were inconsistent with this provision, were repealed. The officer holding an election was required to deliver the returns to the commissioners, who were to compile the returns at the courthouse, and certify the result and also "to deliver to each person elected a certificate of his election." It is agreed that the census population of Dyer county was at the time now in question less than 50,000.

Now, conceding that this statute, considered alone, would in terms embrace an election, not merely for the selection of local officers, but, also, for ascertaining the will of the electors concerning any question arising in a political subdivision of any county of the class erected by this statute, still (in view of the Newbern charter subsequently enacted), the concession is not determinative of the question whether the statute was exclusively applicable, or even applicable at all, to the election here in dispute. It was more than four years after that statute was enacted that the town of Newbern was incorporated. The charter was granted on April 11, 1901, and was entitled "A bill to incorporate the town of Newbern, in Dyer county, and to define its powers and provide for the election of officers" (Acts Tenn. 1901, p. 1076), the corporate name being, as we have seen the "Mayor and Aldermen of Newbern." The act describes the boundaries of the corporation, provides for succession, and invests the corporate body with the usual attributes and powers of a municipality. Section 6 of the act is in material part as follows (Id. 1081):

"Sec. 6. Be it further enacted, that the sheriff of Dyer county, after giving ten days' notice, shall by himself or one of his deputies hold an election in the town of Newbern on the third Tuesday of November, 1901, and said election shall be held for the purpose of electing mayor, aldermen, recorder, marshal, and the mayor, aldermen, recorder, and marshal elected at said time shall serve for two years. And thereafter, on the third Tuesday of November, there shall be an election held for the purpose of electing a mayor, aldermen, recorder, and marshal for said town to serve for the ensuing two years, it being the intention of this act to provide for the election of a mayor, aldermen, recorder, and marshal of said town one in every two years. The polls shall be open at 10 o'clock a. m., and closed at 4 o'clock p. m., of that day. The board of mayor and aldermen may, by ordinance, make any additional provisions that may be found necessary to prepare for and conduct said election, if the sheriff fail to hold said election at the time herein mentioned. It shall be his duty to hold it as soon thereafter as possible, giving the required notice. If there be no sheriff, or if no notice has been posted by him on the tenth day before the regular election, or if notices have been posted by him but he is not present himself or deputy on the day of said election; then in either of said events, the coroner, or some person who may be appointed by the board of mayor and aldermen shall perform all the duties in and about said election required of the sheriff, * * * and the officers holding said election shall make out and deliver, within three days, to each a certificate of their election; and the judges and clerks, after being sworn as provided by the election laws of this state, shall perform similar duties of judges and clerks in state and county elections. And after the votes are counted and the results ascertained, the officers holding said election shall file poll lists and other papers showing the results of said election, properly certified, with the recorder, who shall preserve them."

Claim was made in Weil v. Newbern, supra, that this section conferred upon the sheriff of Dyer county the power to conduct all corporate elections; but it was held (126 Tenn. 250, 148 S. W. 680, L. R. A. 1915A, 1009, Ann. Cas. 1913E, 25) that while the section does purport to confer such power, it does so "only in a special and limited way; that is, for the purpose of electing a 'mayor, aldermen, recorder and marshal.' " It would seem that the result of this is to place all elections in which the town of Newbern is alone interested under the control of the sheriff, except such as call for an expression of the town electors upon questions involving their own indebtedness and ultimate taxation, like the issue of municipal bonds, to defray the cost of purely local improvements.

It is insisted both that this construction, and that the conclusion drawn from it that the bonds are void in the hands of bona fide purchasers, are binding upon the federal courts. It is to be observed that the infirmity thus claimed to inhere in the bonds as a result of such a construction of the statute does not show that the electors did not in truth vote, and favorably, upon the question of issuing the bonds; nor does it show that the election in fact held was not officially supervised and reported under apparent color of law; indeed, the contention is reducible to a claim of mistake made in officials, that is, in having the sheriff instead of the commissioners of election, to supervise the election and report its result. We say the claim is simply one of mistake, because there is not a suggestion of fraud or even unfairness in so obtaining the expression, and the "order," of the voters respecting the issue and use of the bonds. Acts Tenn. 1907, p. 343, § 3.

How far then are the federal courts bound by the decision in Weil v. Newbern? It is observable that the decision in that case was not rendered until after the presently contested bonds with their coupons had passed into the hands of bona fide holders for value, without notice of the defect in the election now asserted; and this court has held with reference to an analogous situation, that "the courts of the United States exercise an independent judgment." Rondot v. Rogers Tp., 99 Fed. 202, 210, 211, 39 C. C. A. 462, 470. This was an apparent recognition of one of the settled exceptions to the general rule that the federal courts accept the interpretation of a state statute by the highest court of the state as settling the validity and meaning of the statute. It is manifest that the exception in that instance proceeded upon the principle that where a contract has been entered into in virtue of a state statute, a federal court obtaining jurisdiction of a question concerning the validity, effect, or obligation of the contract, will exercise an independent judgment, although "leaning to an agreement with the state court," where it appears that the decision of the state court was rendered after the rights involved in the controversy originated. Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 301, 22 C. C. A. 334 (C. C. A. 6). The present case need not, however, be rested alone upon those decisions or the class they represent, for a question of general commercial law arises here which of itself calls for the independent judgment of the federal courts. It is of course thoroughly settled and understood that upon questions of general law the decisions of the state courts are not controlling. Swift v. Tyson, 16 Pet. 1, 17, 10 L. Ed. 865; B. & O. R. R. v. Baugh, 149 U. S. 368, 370, 13 Sup. Ct. 914, 37 L. Ed. 772, et seq.; Burgess v. Seligman, 107 U. S. 20, 33, 34, 2 Sup. Ct. 10, 27 L. Ed. 359. As Mr. Justice Harlan said in Presidio Co. v. Noel-Young Bond Co., 212 U. S. 58, at page 73, 29 Sup. Ct. 237, at page 242, 53 L. Ed. 402:

"In respect of the doctrines of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment, and in respect to such doctrines will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, 'will lean to an agreement of views with the state courts.'"

It might therefore be conceded for present purposes that the federal courts must, regardless of their own opinions, yield to the ruling of the learned Supreme Court of Tennessee in Weil v. Newbern that the commissioners of election, and not the sheriff of the county, were the proper officials to conduct and report upon the election in question; but this concession would not require us to adopt the conclusion drawn from the ruling that the bonds are void in the hands of bona fide holders. Such a question as this was directly involved and decided in Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424. It was there claimed that the township bonds in dispute had been sanctioned at an election conducted by a moderator chosen by the electors present, when it should have been presided over and the returns made by the supervisor, assessor, and collector of the township (107 U. S. 539, 2 Sup. Ct. 704, 27 L. Ed. 424); and it appears that the Supreme Court of Illinois had held that this defect in the proceeding rendered the bonds absolutely void. In the course of the opinion in the Pana Case it was said (107 U. S. 540, 2 Sup. Ct. 714, 27 L. Ed. 424):

"It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a state constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."

See, also, Supervisors v. Schenck, 72 U. S. (5 Wall.) 772, 774, 784, 18 L. Ed. 556; Oregon v. Jennings, 119 U. S. 74, 94, 7 Sup. Ct. 124, 30 L Ed. 323.

[3, 4] It results that the federal courts must exercise an independent judgment upon the question whether the town of Newbern is estopped to deny, as against the plaintiff, that these bonds were issued conformably, in all respects, with the recitals therein contained. It is admitted, and is to be borne in mind, that the town of Newbern was clothed with power to issue just such bonds as these upon the approval of a majority of its electors; that the town, through steps in fact taken by its board of mayor and aldermen and its electors, sought to exercise the power and to issue the bonds; and that the plaintiff is an innocent holder of the securities sued on, for value and without actual notice of any defect in the proceedings in virtue of which the bonds were put into circulation. We are therefore not concerned with a question that might arise in a case, such as has in substance been suggested for illustrative purposes, where, either in the presence or in the absence of power to issue bonds no steps are in fact taken by the appropriate municipal agencies to exercise such a power, the executive officers fraudulently, though formally, execute bonds and dispose of them in the name and under the pretended promise and recitals of the municipality. In the present case it is admitted, as we have seen, that estoppel could not be escaped if the bonds had been signed by the mayor and aldermen of Newbern; this admission was rightly made. Presidio County v. Noel-Young Bond Co., supra, 212 U. S. at pages 64, 65, 67, 29 Sup. Ct. 237, 53 L. Ed. 402. The efforts made here to avoid estoppel are bottomed upon the fact that the authority of the mayor and clerk to execute the bonds does not appear in the statutes but only in the ordinances, and, consequently, that intending purchasers were bound at their peril to examine these ordinances. This does not question the genuineness of the signature of either of these officials; nor does it question the genuineness of the corporate seal which appears on the face of the bonds; indeed, it is not claimed that the bonds were not in truth signed and sealed by these officials; and, further, the record contains an admission "that the lithograph signatures on the coupons are lithographic facsimiles of the signatures" of the mayor and clerk. The natural inference arising from the presence of these virtually admitted official signatures and seal is that the officers acted with due authority; moreover, this is the prima facie effect in an evidential sense; and in such cases the uniform course of decision in the Supreme Court of the United States has been to treat the signatures of the executive officers and the seal of a municipal corporation as importing authority so to execute the bonds, and this, too, where the authority of the signatory officers has not appeared in the statutes. Thus, in Von Hostrup v. Madison City, 68 U. S. (1 Wall.) 291, 297, 17 L. Ed. 538, Mr. Justice Nelson said:

"Another objection taken is, that the proviso requiring a petition of two-thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court."

In Hackett v. Ottawa, 99 U. S. 86, 95, 25 L. Ed. 363, it appears that the bonds in question contained recitals of their issue in virtue of the charter and certain specified ordinances of the city, but that the bonds had been executed by the mayor and the clerk and authenticated by the corporate seal; and in the course of the opinion Mr. Justice Harlan said:

"Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. * * * It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representation, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued."

The ruling in that decision was followed, in respect of bonds similarly signed, in Evansville v. Dennett, 161 U. S. 434, 435, 444, 16 Sup. Ct. 613, 40 L. Ed. 760; and this is likewise true of the ruling made in Waite v. Santa Cruz, 184 U. S. 302, 304, 315 to 319, 22 Sup. Ct. 327, 46 L. Ed. 552. See, also, Myer v. City of Muscatine, 68 U. S. (1 Wall.) 384, 388, 17 L. Ed. 564; City of Lexington v. Butler, 81 U. S. (14 Wall.) 282, 295, 20 L. Ed. 809; Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355, 358, 373, 21 L. Ed. 170; Commissioners, etc., v. Thayer, 94 U. S. 631, 632, 642, 24 L. Ed. 133 et seq.

Furthermore, Fairfield v. Royal Independent School Dist., 116 Fed. 838, 54 C. C. A. 342 (C. C. A. 8), reviews and reverses the decision below, which is reported in (C. C.) 111 Fed. 453, 455, and where it appears that the president and secretary of the board of directors of the school district were authorized by resolution of the board to issue and deliver the bonds in dispute, and we do not discover that such authority otherwise existed. Judge Sanborn, in announcing the opinion of the Circuit Court of Appeals, stated the question thus (116 Fed. 840, 54 C. C. A. 344):

"Is a bona fide purchaser of municipal bonds, which recite that they were issued in pursuance of a statute authorizing the municipality to issue them for a lawful purpose, and in conformity with an ordinance or a resolution of a specified date, which discloses the fact that they were issued for an unlawful purpose, charged with notice of the terms and contents of the ordinance or resolution?"

After stating that the question was not new, and commenting upon decisions there cited, the learned judge said (116 Fed. 843, 54 C. C. A. 347):

"These decisions and opinions of the Supreme Court conclusively answer the question presented in this case, and render any independent discussion of it unnecessary and useless. They demonstrate the fact that, so far at least as the federal courts are concerned, it is now the settled law of this country that a bona fide purchaser of municipal bonds, which recite that they were issued in pursuance of a statute which authorized the municipality to send them forth for a lawful purpose, and which also recite that they were issued in conformity with an ordinance or resolution whose date or title is specified in the recital, which, if read, would disclose the fact that they were issued for an unlawful purpose, is not charged with notice of the terms or contents of the ordinance or resolution, and the municipality cannot avail itself of the facts there disclosed to defeat its bonds."

It must be said that these decisions do not distinctly discuss the question whether the presence of the official signatures of corporate executive officers, accompanied by the corporate seal, puts purchasers on inquiry as to the authority of those officers; but if the decisions mean what they say, it is certain that an intending purchaser of the bonds now in dispute might safely have relied upon the bonds themselves both as to the verity of their recitals and the authority of the executing officers. To be specific, the intending purchaser was not required to look into the ordinance which is referred to in the recitals of the bonds in order to gain protection under a good faith purchase, without actual notice of the infirmity claimed in respect of the election. This, it may be remarked, would undoubtedly be true as to purchases of bonds of a private corporation, bearing the guaranty of a railway company whose president and secretary, under its seal, had executed the guaranty (Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 574, 575, 19 Sup. Ct. 817, 43 L. Ed. 1081); though it is to be noted that while considering the rule applicable to private corporations and the decision in Royal British Bank v. Turquand (1856) 6 El. & Bl. 327, Mr. Justice Gray, apparently relying upon such familiar cases as Knox County v. Aspinwall, 21 How. 539, 545, 16 L. Ed. 208, said:

"And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated Royal British Bank v. Turquand as well decided upon its facts."

It is true that this would indicate that the learned justices had not always been in harmony as respects the application of the principle to municipal bonds; yet we do not find anything to modify the Supreme Court decisions before cited in that behalf.

We are not unmindful of what was said by this court in Rondot v. Rogers Tp., supra, 99 Fed. 212, 39 C. C. A. 462, to the effect that a purchaser accepting a township bond signed by the supervisor and treasurer of the township "ran the risk of the actual existence" of authority in such officers to execute the bonds; but it does not seem to have been claimed by the defendant in that case that an intending purchaser was required to examine any of the proceedings of the board for the purpose of ascertaining the existence or not of authority in the signing officers; on the contrary, evidence was offered on the question of whether a resolution vesting such authority was ever adopted. The precise question then with which we are now concerned does not seem to have arisen in that case; indeed, in view of the decisions of the Supreme Court above cited, we cannot think that it was intended in the Rondot Case to decide that if a resolution vesting authority had existed, it was necessary that it should have been examined prior to the purchase of a bond. It cannot be forgotten that one of the peculiar features of the instant case is that the defendant in effect admits the existence of authority in the mayor and clerk to execute the bonds, since it insists that if a purchaser had examined the ordinance he would have discovered this authority, as well as the fact that the vote was supervised by an officer subsequently held to have been without authority. Surely the federal rule of decision pointed out, shows that such a defense as this is not sufficient to discredit the present bonds.

[5] It is claimed that the bonds are invalid because of certain changes that were made in the form fixed by ordinance. The form so fixed made the bonds payable in New York City, and before the bonds were executed the place of payment was made definite by the insertion of the name of the Hanover National Bank of that city. The other alteration complained of is an addition that was made at the end of the recitals before execution of the bonds, to the effect that the total debt of the town including the bonds in question did not exceed any limit of indebtedness prescribed by the laws of the state, and that provision for the levy of an annual tax sufficient to pay the principal and interest upon the bonds as they fall due, had been made and would be duly levied upon all the taxable property in the town. We are not impressed with the contention that these changes amount to material alterations; neither could affect the identity of the contract or otherwise operate to the prejudice of the town. The first operated to the benefit and convenience of the maker of the bonds; and the other in no way changed the nature or the amount of the maker's obligation, and, moreover, the bond in its original form otherwise distinctly pledges "the full faith, credit and revenues" of the town. These matters seem to us too plain to require citation of decisions, though we call attention to the following: As to the first insertion, Major v. Hansen, 16 Fed. Cas. No. 8,982 by Judge Drummond; Shuler v. Gillette, 12 Hun (N. Y.) 278, 281; as to the second, Commonwealth v. Emigrant Industrial Savings Bank, 98 Mass. 16, 17, 93 Am. Dec. 126; Crawford v. Dexter, 5 Sawy. 201, 204, Fed. Cas. No. 3,368.

[6, 7] It is contended that the board of mayor and aldermen never authorized the mayor and clerk, or any one else, to deliver the bonds. It is fairly to be deduced from the evidence concerning the disposition made of the entire issue of bonds ($50,000), that they were sold and delivered through proper representatives of the town to Hays & Sons of Cleveland, Ohio; that Hays & Sons paid for 11 of the street, light and water bonds, and returned to the town the remaining 14 bonds of that issue which were then sold to others, but that the school bonds were neither paid for nor returned. It is plain enough that the representatives of the town dealt with Hays & Sons on the theory that they were solvent; this was the mistake and the misfortune alike. So far as the record discloses, there is no suggestion of fraud in the transactions save only through charges made against Hays & Sons after discovery of the fact of their insolvency. The decisive point,

however, is that the validity of the plaintiff's title to the securities here involved does not depend upon the transactions with Hays & Sons. We think the finding made by Judge McCall, to the effect that the plaintiff became the owner of the coupons in suit for value and in due course, is sustained by the evidence; every coupon sued on passed from the hands of Hays & Sons to bona fide holders, before maturity and for value, in transactions conducted in due course and without notice on the part of such holders of any of the defects now claimed and relied on respecting the issue and sale of the bonds. This alone brings the case well within the rule laid down in Cromwell v. County of Sac, 96 U. S. 51, 52, 57, 59, 24 L. Ed. 681; and it is to be observed that the bonds there in controversy were issued for the erection of a courthouse and were delivered to the contractor, but that "a courthouse was never constructed by the contractor or any other person pursuant to the contract." Further, the uniform Negotiable Instruments Act existed as a law of Tennessee when these bonds were authorized and issued (Acts Tenn. 1899, p. 140), and section 16, p. 144, provides that where a negotiable instrument "is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." Buzzell v. Tobin, 201 Mass. 1, 2, 86 N. E. 923; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 163, 164, 72 N. E. 959; Madden v. Gaston, 137 App. Div. 294, 296, 121 N. Y. Supp. 951; 1 Daniel on Neg. Inst. (6th Ed.) § 838.

[8] We do not understand, in view of the motions made respectively by plaintiff and defendants for a directed verdict, that the action of the trial judge in treating the case as withdrawn from the jury and submitted to the court on both the facts and law is questioned; but if any of the assignments of error were so intended, they have not been argued and so must be regarded as waived.

Upon all these considerations, and with great deference to the learned Supreme Court of Tennessee, we hold that the defendant is estopped to deny the recitals contained in the bonds from which the coupons in issue were detached. An order will therefore be entered affirming the judgment, with costs.

ERBER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 2, 1916.)

No. 262.

1. CRIMINAL LAW ⟹510—EVIDENCE—ACCOMPLICE'S TESTIMONY.
In the federal courts a conviction may be had on the testimony of an accomplice without corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. ⟹510.]

2. CRIMINAL LAW ⊂⊃1056(1)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where no exception is taken, the propriety of instructions cannot be reviewed.

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

3. CONSPIRACY ⊂⊃45—PROSECUTION—EVIDENCE—ADMISSIBILITY.

It was charged that defendant, with others, entered into a conspiracy to purchase goods on credit through a fictitious company, dispose of them, and retain the proceeds, without making any payment, and that to effect their scheme defendant and his co-conspirators gave themselves and corporations in which they were interested as references for the fictitious purchaser, answered the references, recommending credit, acquired the goods, and disposed of them without payment. The mails were shown to have been used in carrying on these frauds. Defendant was conducting a business under the name of the Photo Play Coupon Corporation, and in connection with that business purchased goods from dealers who sold to the fictitious company. One of the conspirators testified that letters to their dupes were sent out every week, and that defendant was a party thereto. *Held*, that correspondence between defendant and those from whom he and the fictitious company purchased was admissible to show that he knew of their existence, but it was improper in such case to show that defendant had not paid for goods which he purchased for himself.

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

4. CRIMINAL LAW ⊂⊃424(1)—EVIDENCE—ADMISSIBILITY—CONSPIRATORS.

In a prosecution for conspiracy, in which the mails were used in connection with the scheme to defraud, declarations made by one of the conspirators, implicating defendant at a time when the conspiracy had ended, two of the conspirators being in jail and declarant being under subpœna to appear before the grand jury, were inadmissible as against defendant, and letters identified by such declarant should not be received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002, 1006, 1008, 1010; Dec. Dig. ⊂⊃424(1).]

Hough, District Judge, dissenting.

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

Emil Erber was convicted under Criminal Code (Act March 4, 1909, c. 321) §§ 37, 215, 35 Stat. 1096, 1130 (Comp. St. 1913, §§ 10201, 10385), of conspiracy, and of using the mails in connection with a scheme to defraud, and he brings error. Reversed and remanded.

This cause comes here on a writ of error to review a judgment convicting plaintiff in error (hereafter called Erber or defendant) on four counts of an indictment; three charging violation of section 215, and one charging violation of section 37, of the United States Criminal Code.

C. H. Griffiths, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and F. M. Roosa, Asst. U. S. Atty., both of New York City.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

MAYER, District Judge. Defendant was tried on an indictment containing five counts; four of which charged a violation of section 215, and one of section 37 of the Criminal Code of the United States. Defendant was indicted jointly with seven other persons, viz., Zipper, Stavsky, Starr, Mandelbaum, Nadelman (alias Nadel), Shapiro, and Wetstein. Starr and Shapiro were never apprehended. Mandelbaum, Nadelman, and Wetstein pleaded guilty the day the trial began, and were witnesses for the United States, and as to them sentence was suspended. Erber, Zipper, and Stavsky were tried. The first count was taken from the jury, and on the remaining four counts the jury found Zipper and Stavsky not guilty, and Erber guilty, and thereafter the court sentenced Erber to serve a term of imprisonment.

The first four counts of the indictment are the same, except that a different letter is alleged to have been mailed or received in each of the separate counts. These counts charge, in brief, that the defendants formed a scheme to defraud and for obtaining merchandise, by means of false and fraudulent pretenses, representations, and promises, from various concerns by organizing a business to be known as the Manhattan Merchandise Company, and in the name of that company to secure merchandise on credit. It is alleged as part of this plan that various persons and companies were given as references who would give satisfactory references regarding their prior transactions with the Manhattan Merchandise Company, even though they had no such transactions; and it is further alleged that the defendants did not intend to pay for the goods received, but intended to sell them and convert the moneys received therefor to their own use and benefit. The fifth count of the indictment charges that each of the defendants entered into a conspiracy to devise the scheme described in the other counts of the indictment.

The testimony offered by the United States showed that the idea of starting a company was first talked over between Starr, Shapiro, Nadelman, and Wetstein. Starr, Shapiro, and Nadelman previously had been associated together in a scheme to start and carry on a business known as the Pan-American Supply Company. Nadelman had filed the certificate required under the New York statute to conduct a business under the designation of a "company." A false financial statement was to be made to the commercial agencies to procure credit and such a statement was made by Nadelman, but the scheme was not successful, and Wetstein, a friend of Nadelman's, went into this business, and Nadelman, as he says, "got out." Wetstein took the name of Excelsior Manufacturing Company.

Nadelman testified that, a few days before he met Erber, he had a talk with Starr and Shapiro about starting another business, and Wetstein also testified to a conversation at the Excelsior Company office with Starr and Nadelman, at which Shapiro was present. From this conversation it appeared that Nadelman was to open a store and pay the first month's rent, that one Kohler, who knew "how to run such a business," and "a party up in Forty-Second street" were to pay further expenses, that fifty per cent. of the profits were to go to Nadelman, Starr, Shapiro, and Wetstein, and 50 per cent. to "Forty-Second Street."

Kohler, who, according to the evidence, was the deviser of the scheme, or, in any event, an important participator, was not indicted, and was not called as a witness, although during the trial he was presumably in the jurisdiction, and, as the prosecuting attorney swore on cross-examination "available at any time," and at large on a suspended sentence after conviction of some previous offense in the District Court for the Southern District of New York.

Erber was conducting a business of his own at the Long Acre Building on Broadway near Forty-Second street, known as the Photo Play Coupon Corporation and the United Coupon Corporation. This business consisted in selling trading stamps and coupons to merchants who gave these tokens to their customers to induce the public to trade at certain stores. So far as the record discloses this business of Erber was a lawful enterprise and some months before the transactions here referred to, Erber had sued Kohler in the State Court (presumably the New York Supreme Court), and had obtained an injunction against Kohler or his company, which was conducting a rival business. What the controversy was does not clearly appear, and in any event is here immaterial.

In this way (according to Erber), and later through a broker, who brought Kohler to Erber on a proposition to take over Kohler's coupon business, Erber became acquainted with Kohler, with the result that Kohler ultimately took desk room in Erber's office. After Erber became acquainted with Kohler, Mandelbaum, who was Kohler's nephew, worked for Erber getting orders for the Photo Play Company. He had known Starr for several years. There is no testimony that Erber ever saw Zipper or Stavsky.

Without setting forth at length the details of their testimony and its indefinite character in some respects, the three accomplices, Nadelman, Wetstein, and Mandelbaum, testified in effect that Kohler, Wetstein, Nadelman, Starr, Shapiro, and Erber, at Erber's office, devised the scheme whereby Nadelman, under the name of Nadel, was to file a certificate in the New York county clerk's office under the name of Manhattan Merchandise Company, and order goods for which they would not pay, giving as credit references Wetstein's Excelsior Manufacturing Company, Zipper Bros. of which concern defendant Zipper was a member, and New York Credit House, of which Stavsky was proprietor. Wetstein, Zipper, and Stavsky were to answer these references favorably, to the effect that they had dealt with Manhattan Merchandise Company and that the company had good credit up to certain amounts. The profits were to be divided half and half, as stated supra, the "Forty-Second street" group being Kohler, Mandelbaum, and Erber.

Nadelman filed the certificate, opened a store, goods were ordered, and references given and answered as per scheme. The goods were not paid for, but were sold at sacrifice prices and the proceeds appropriated. Nadelman testified that he signed letters which were drawn up by Erber at night, and the two other accomplices testified, though unable to give specific instances, that Erber had answered references and written letters. The nearest approach to any proof that Erber mailed any letters was Mandelbaum's statement referring to letters generally, "They were mailed out. I also mailed some. Two or three times a week I guess they were mailed." There was no evidence that Erber ever received any money and Mandelbaum said:

"I never gave Mr. Erber any money. I never saw any one give Mr. Erber any money."

[1] Nowhere in the record is there a scintilla of evidence corroborating the testimony of the three accomplices against Erber, except, possibly, in regard to the Pocket Umbrella Company, hereinafter mentioned. Such corroboration is not necessary in the United States courts, although frequently required by state statutes; but the absence of corroboration gives emphasis to the errors which we think compel a reversal of the judgment of conviction in a case where the attitude of the accomplices is vividly portrayed by Nadelman's answer on cross-examination, "I am trying now to save myself from further imprisonment."

Erber took the stand, and denied every essential element of the testimony adduced by the government, admitting, however, that some 17 years prior to his trial, when a youth of 17 or 18, he had pleaded guilty to some charge of embezzlement in connection with his employment as a post office clerk and consequently had served a sentence in a reformatory.

With this sharp conflict as to the facts and this uncorroborated testimony, the case—and properly so—went to the jury. After retiring, "the jury," as the record states, "returned into court and stated that they were unable to agree; that they stood six to six. They asked for further instructions." We are not enlightened as to what the request of the jury was, but from the additional instructions of the trial court, it is apparent that further light was sought as to the weight to be accorded to the testimony of accomplices.

[2] As no exception was taken to the additional instructions, they cannot be reviewed, but the incident is mentioned because affirmance is urged by the government on the ground that the error infra largely relied on by defendant was "merely a fact to be considered with the other evidence in the case," and that "it is not believed that there can be a question of a doubt as to Erber's guilt."

Of the numerous amended assignments of error, we think that consideration of the group relating to the Photo Play Company and of the admission of the letters referred to in assignment No. 16 will be sufficient.

[3] 1. One of the firms from which Manhattan Merchandise Company had ordered and not paid for goods was the Pocket Umbrella Company of Findley, Ohio. After the witness Hyan, manager of the Pocket Umbrella Company factory, had testified as to transactions with the Manhattan Merchandise Company, the following occurred:

"Q. I show you Government's Exhibits 37, 38, 39, and 40. Can you tell me what those exhibits are?

"Mr. Jordan: I object. They state for themselves, if your honor please.

"The Court: He may answer, if he can identify them, whether he ever saw them before; what they are.

"Mr. Jordan: Exception.

"A. This is correspondence or letters received by the Pocket Umbrella Company from the Photoplay Coupon Company of New York, an order for umbrellas, and the answer.

"Mr. Jordan: I move that * * * all the answer be stricken out as incompetent, irrelevant, and immaterial, not embraced within the issues in this case.

"The Court: Who is this communication to?

"Mr. Roosa: From the Photoplay Coupon Company, where Nadelman testifies that these letters were written. I offer them in evidence to show that Erber himself was communicating with these people at the same time he was communicating under the name of the Manhattan Merchandise Company, and that he got goods, and did not pay for them.

"Mr. Jordan: * * * I submit that it can have no bearing upon the issues involved in this case.

"The Court: Doesn't it lead up to or introduce any correspondence between them and the Manhattan Merchandise Company?

"Mr. Jordan: Not the slightest. Here was a corporation doing business, and the corporation is doing business now.

"The Court: What is the purpose of this.

"Mr. Roosa: I want to show Erber's knowledge of these particular companies the Manhattan Merchandise Company was doing business with. Here are some letters written to the Pocket Umbrella Company. Nadelman testifies that Erber wrote the letters and signed them. Now here we have the Photoplay Coupon Company, letter signed by Erber, corresponding with this same company, and getting goods on credit, for which he does not pay.

"The Court: Are you going to show any connection? These are entirely different transactions. I don't know any reason why Erber should not do business with them.

"Mr. Roosa: I simply want this correspondence identified.

"The Court: If that is all, I will overrule the objection.

"Mr. Jordan: I object to his getting this before the jury. I respectfully except.

"This Government's Exhibit 39 was a letter we received from the Photoplay Coupon Company, and this is a copy of our reply and Government's Exhibit 37 is a copy of the letter received, 38 a copy of our reply; in other words the correspondence that passed between us.

"The Court: These are merely introduced for identification.

"Mr. Roosa: For identification at the present time.

"Q. Did you ship any goods to the Photoplay Coupon Corporation?

"Mr. Jordan: That I object to as incompetent, irrelevant and immaterial.

"The Court: I will overrule the objection, and you may have your exception. I assume that counsel will connect it.

"Mr. Jordan: He cannot connect it.

"The Court: That remains to be seen. If he does not you may move to strike it out. This is a conspiracy case, and conspiracies may be shown by circumstances and detached instances which, if taken all together, point beyond a reasonable doubt to the corpus delicti; why, it is competent testimony, the court can never anticipate what effect an isolated fact or circumstances might have, when considered with all the other evidence in the case.

"Mr. Jordan: I except to the ruling.

"The Court: Very well.

"Q. (Last question read) A. Yes, sir. Q. What was the value of the goods?

"Mr. Jordan: Objected to as before.

"The Court: I will overrule the objection.

"Mr. Jordan: Exception.

"A. I think about $250 worth.

"Q. Did you get paid for those? A. No, sir.

"Mr. Jordan: Objected to upon the same ground. Overruled. Exception.

"Q. You say no, sir. A. No, sir."

Later the witness Taylor, after testifying to transactions of the Economy Manufacturing Company of Philadelphia with the Manhattan Merchandise Company, stated in answer to a question of the prosecuting attorney:

"Exhibits 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65 is correspondence from the Photoplay Coupon Corporation and carbon copies of our replies to them."

Thereupon the record continues:

"Q. Did you ship them any goods?

"Mr. Jordan: That I object to as immaterial, irrelevant, and incompetent.

"The Court: Do you purpose to connect it up with any one to make it relevant to this issue?

"Mr. Roosa: It is the same thing we had before in regard to the Pocket Umbrella Company, to show that Erber was communicating at just about the same time with the same companies the Manhattan Merchandise Company was communicating with and in the same office.

"By the Court: Q. Was that correspondence conducted in the same way? And the letters sent by mail? A. Yes sir; I personally attended to the receipt of the correspondence and know it came through the mail.

"The Court: I will overrule the objection.

"Mr. Jordan: I respectfully except.

"By Mr. Roosa: Q. Did you ship any goods to them? A. Just a line of samples. They ordered other goods."

The exhibits referred to were not offered nor received in evidence, although in the presence of the jury the statement supra was made, "Now, here we have the Photo Play Coupon Company letter signed by Erber, corresponding with this same company, and getting goods on credit for which he does not pay." At the conclusion of the government's case, counsel duly moved to strike out all this testimony of Hyan and Taylor, which motion was denied, and exception taken.

"In so far as the testimony showed that Erber knew of the existence of the Pocket Umbrella Company and the Economy Manufacturing Company, as evidenced by the fact that he had corresponded with them, it was admissible for the reason that such testimony was some evidence to corroborate the testimony of Nadelman as to the writing of letters to the same concerns with which Manhattan Merchandise Company had dealt. But the testimony as to nonpayment to the Pocket Umbrella Company and the shipment by the Economy Manufacturing Company was entirely irrelevant. In the one case the fact that the goods were not paid for was plain, and in the other the purpose and effect were clearly to create a like inference. As the trial court truly said:

"We are not suing on an open account. We are not trying to establish a debt."

The result of the testimony was to produce an atmosphere unfavorable to defendant because he had not paid his debts, and its admission was error within the principle referred to in the Baron transaction in Scheinberg v. United States, 213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258. On the evidence there was a complete failure to show any unlawful scheme devised by Erber in connection with his Photo Play Coupon Company, and so the prosecution in its brief admits when, referring to Marshall v. United States, 197 Fed. 513, 117 C. C. A. 65, it states:

"In the Marshall Case evidence of a separate contemporaneous fraudulent scheme was introduced; in this case only one isolated fact which would possibly be objected to was introduced, namely, that the goods received by the Photo Play Coupon Company from the Pocket Umbrella Company had not been paid for; not a separate scheme, and not even a criminal offense, but merely a fact to be considered in connection with the other evidence in the case."

Whatever may be the view of the courts as to the occasion when and the extent to which testimony as to similar transactions are admissible (and this court has expressed its views as to this statute in the Marshall Case, supra), the transaction must always be similar or substantially so. Mayer v. People, 80 N. Y. 364; People v. Shulman, 80 N. Y. 373, note; United States v. Budd, 144 U. S. at page 164, 12 Sup. Ct. 575, 36 L. Ed. 384; People v. Thompson, 212 N. Y. at page 251, 106 N. E. 78, L. R. A. 1915D, 236, Ann. Cas. 1915D, 162; Fish v. United States, 215 Fed. at page 551, 132 C. C. A. 132, L. R. A. 1915A, 809; People v. Marrin, 205 N. Y. 281, 98 N. E. 474, 43 L. R. A. (N. S.) 754; Boyd v. United States, 142 U. S. at page 457, 12 Sup. Ct. 292, 35 L. Ed. 1077.

[4] 2. At the conclusion of the cross-examination of Zipper, the government offered in evidence seven letters written by merchants to the New York Credit House, asking for information as to the credit of Manhattan Merchandise Company, and containing answers to these inquiries, signed New York Credit House, but not satisfactorily proved. The court excluded these letters. Thereupon the prosecuting attorney took the stand and testified to a conversation with Stavsky. Stavsky had testified that he had refused to answer these letters in response to Starr's insistence. In the conversation with the prosecuting attorney there was no statement by Stavsky that he signed these letters.

"I asked him" testified the prosecuting attorney, "concerning the references, and he made no denial that he had assigned these references. * * * I will not say he said he did not or did receive them, and the reason was that I took it for granted."

The contention of the government is somewhat novel. This speculation is indulged in:

"Since the request for references were in fact answered, as shown by the testimony of the witnesses receiving them, it is plain to be seen what probably happened, if Stavsky's testimony is true—namely, that upon Stavsky's refusal to answer the request for references, they were answered by Starr or Erber, in the same manner as Wetstein testified was done in the case of requests received by his company."

At the time when this conversation took place, Nadelman and Wetstein had been arrested and were in the City Prison, and a grand jury subpœna had been sent to Stavsky who, being ill, had not responded and then the prosecuting attorney, with a post office inspector, visited Stavsky's home and held the conversation above referred to. The alleged conspiracy manifestly was at an end, and admissions or confessions by Stavsky then under subpœna to appear before the grand jury, were clearly not admissible against his alleged co-conspirators.[1]

[1] NOTE.—The recent case of Stager v. U. S., 233 Fed. 510, —— C. C. A. ——, while not in point as to the facts, is a useful reference as to declarations of conspirators.

Nevertheless, at the urgent solicitation of the government and over objection, the seven letters were admitted against Erber and exception was taken.

We are of opinion that the admission of these letters was error, and, as we cannot say upon this record that this evidence and that relating to the Photo Play Coupon Company was not prejudicial, the judgment is reversed.

HOUGH, District Judge, dissents.

WESTERN EXTRACTING CO. v. SMIETANKA, Internal Revenue Collector.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied May 25, 1916.)

No. 2272.

1. INTERNAL REVENUE ⚷28—TAX—INJUNCTION—BILL—SUFFICIENCY.
Allegations that nontax-paid liquor absorbed by whisky barrels in bonded warehouse evaporated, and was replaced in six months after leaving the warehouse by tax-paid liquor, with which they were refilled, and that complainant extracted liquor only from refilled barrels, which had been out of the warehouse an average of six months. was insufficient to show that all the extracted liquor was tax-exempt, for the tax liability on barrels under the six-months average was not canceled because other barrels were out over six months before being treated.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⚷28.]

2. INTERNAL REVENUE ⚷28—INJUNCTION—BILL—SUFFICIENCY.
An allegation that a barrel is "single-stamped," indicating refilling since leaving the warehouse, does not establish that it has been out longer than "double-stamped" barrels containing the original warehouse liquor, where it is also alleged that retailers receive and empty both kinds of barrels indiscriminately.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⚷28.]

3. INTERNAL REVENUE ⚷28—INJUNCTION—BILL—SUFFICIENCY.
Where a bill alleges that handling, transportation, and temperature variations accelerate the evaporation and absorption in whisky barrel staves, and experience suggests other influential factors, it may be concluded that the time required for the process varies with conditions.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⚷28.]

4. EQUITY ⚷144—PLEADING—BILLS—REPUGNANCY BETWEEN CONCLUSIONS AND FACTS.
Complainant's statement of conclusion that it treated only "single-stamped" barrels is not supported by its allegations of fact that those supplying it with barrels have both single and double stamped barrels, and that all distinguishing marks have been obliterated before complainant secures them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 338; Dec. Dig. ⚷144.]

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

5. INTERNAL REVENUE ⇐12—TAXES—LIABILITY OF MIXTURE TO TAX.
Where it is impossible to ascertain the proportions of tax-paid and nontax-paid liquor in whisky barrel staves, one who extracts and markets the mixture is taxable upon the entire amount.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 30–32; Dec. Dig. ⇐12.]

6. INTERNAL REVENUE ⇐12—ENFORCEMENT OF TAX—REGULATIONS—REASONABLENESS.
There is nothing unreasonable in the purpose of internal revenue orders requiring proof of certain facts to determine whether liquor extracted from empty whisky barrels was tax-paid.

[Ed. Note.—For other cases. see Internal Revenue. Cent. Dig. §§ 30–32; Dec. Dig. ⇐12.]

7. INTERNAL REVENUE ⇐28—ENFORCEMENT OF TAX—REGULATION—WHO MAY QUESTION.
Where complainant does not itself know. and cannot prove, what proportion of the liquor it extracts from empty whisky barrels is tax-paid, it has no interest in the method of proof required before the extract is stamped tax-paid.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⇐28.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the Western Extracting Company against Julius F. Smietanka, Collector of Internal Revenue at Chicago, Ill., and others. From a decree dismissing the bill on motion of the named defendant, complainant appeals. Affirmed.

Appellant brought a suit in equity against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue at Chicago to enjoin the enforcement of certain orders of the Bureau of Internal Revenue of May 18, 1910. The Collector alone appeared, and moved to dismiss the bill for want of equity appearing on its face. The court decreed dismissal accordingly, and from such decree this appeal is prosecuted.

The bill charges: That since 1894, and up to July 1, 1910, when the orders complained of went into effect, appellant was in the business of buying from retail liquor dealers and others, whisky barrels which they had emptied, shipping them to its plant at Chicago, where they were treated by some process whereby the spirits which had been absorbed into and were held in the pores of the wood of the barrels (commonly called "soakage") was recovered therefrom, converted into commercial grain alcohol, and sold without payment by appellant of the statutory tax of $1.10 per gallon on distilled spirits. That for doing such business the Bureau of Internal Revenue issued yearly to appellant a rectifier's license for the recovery, and a wholesale liquor dealer's license for the sale of the product. The bill charges that appellant thus treated, and proposes in the future to treat, only barrels known as "single-stamp" barrels, which had theretofore been "double-stamp" barrels, the distinction between which will appear from the provisions of the revenue law relating to tax on distilled spirits, and the significance thereof from the further statement of the facts.

Section 3247, Rev. Stat. U. S. (Comp. St. 1913, § 5981), defines a distiller, and section 3248 (section 5982) defines distilled spirits. Section 3251 (section 5985) provides for a tax of $1.10 per gallon to be paid the government on distilled spirits. Elaborate and detailed provisions are made for governmental supervision of distilleries and the storage and handling of the product, to insure the payment of the tax. Section 3271 (section 6009) makes provision for bonded warehouses wherein the product of distilleries must be stored under control of the Collector. Section 3287 (section 6028) provides that on receiving the barrel in the warehouse it shall be gauged and a stamp affixed thereon showing the quantity, date of receipt, name of distiller, and serial number of cask, and that on the cask shall be cut the name and quantity of the contents. It is provided (3251) that the spirits may be kept in the warehouse not exceeding eight years, and that the tax must be paid on the quantity in the barrel shown on regauging at the time of removal from warehouse, and sections 3294 and 3295 (sections 6036, 6037) make provision for regauging for withdrawal, and payment of the tax, and then affixing another stamp on the barrel showing the quantity then contained in it on which the tax has been paid, name of person paying the tax, and person to whom and place where it is to be delivered on withdrawal. The barrel must then be taken from the warehouse (section 3288 [section 6029]). At the time it is taken from the distiller's warehouse the barrel has on it the two stamps described, and is then what the bill terms a "double-stamp" barrel. The bill charges that the double-stamp barrel on leaving the warehouse would go to one of the three classes provided by law—the rectifier, who combines, mixes, or otherwise changes the product, the wholesale liquor dealer, who disposes of it in quantities of more than five gallons, and the retail liquor dealer, who sells it in quantities less than five gallons.

Section 3318 (section 6100) provides that, before a rectifier or wholesaler draws off or adds to or alters any part of the contents of the barrel, he must enter in a book of the form provided by the Bureau the information afforded by the stamps, marks, and brands then on the barrel, and must return monthly to the Collector a transcript of such entries. On emptying the barrel he must, under heavy penalty, efface and obliterate all the marks, brands and stamps then on the barrel. Section 3324 (section 6105). Sections 3320, 3322, and 3323 (sections 6102–6104) provide for gauging barrels filled by rectifiers, and for affixing stamps to barrels sent out by them or by wholesalers which contain spirits theretofore received from the distiller's warehouse. After the barrel thus received from the distiller is emptied, and all stamps and brands thereon effaced and obliterated, the barrel may again be used by the rectifier or wholesaler for containing distilled spirits, the same as an entirely new barrel; but when so used, like any other barrel so filled by the rectifier or wholesaler, it must have a stamp affixed thereon to indicate that the spirits contained therein have been tax-paid. When such a barrel is so stamped the bill denominates it a "single-stamp" barrel. When the retail liquor dealer or other person gets the barrel from the rectifier or wholesaler, he must on emptying the barrel likewise efface and obliterate all marks, brands, and stamps thereon, and the bill states it is thereafter that the empty barrels are purchased by appellant.

The bill states that appellant will buy only single-stamp barrels which had theretofore been double-stamped, that an average of six months elapses after such barrels leave the distiller's warehouse before they reach appellant for treatment, and that in less than six months the soakage contained in the pores of the wood when the barrel leaves the warehouse will have evaporated from the outside of the barrel, and have been wholly replaced by soakage from the tax-paid contents afterwards put in it by the rectifier or wholesaler, and that therefore the soakage which appellant proposes to recover, has in fact paid the tax.

It is stated that in 1898 Commissioner of Internal Revenue Scott issued an order in the form of a letter wherein it was provided that persons proposing to recover soakage from such barrels must have a rectifier's license and must make application to the Collector on prescribed forms that they propose to recover the soakage from a given number of barrels, and expect to recover a given quantity of spirits therefrom; that thereupon a gauger was to be sent to inspect the barrels, and such as he considered proper for treatment might be treated accordingly, and when the contents were recovered they were to be barreled, gauged, stamped and marketed without payment of any tax, and that ever since appellant was in this business up to July 1, 1910, such was the practice; that on May 18, 1910, Commissioner Cabell issued orders discontinuing this practice, and providing that after July 1, 1910, no one may extract soakage from empty spirit barrels unless he first supply to the Collector affirmative proof as to each barrel that all the spirits contained in its staves have been properly tax-paid, and requiring also that rectifiers, such as appellant, must thereafter make the same returns as ordinary rectifiers are required to make as to the history of the spirits rectified as shown by the stamps and brands on the barrel.

The bill charges that, owing to the required effacement of all the marks and brands on the barrel, it is impossible to make this return, or to supply the requested information as to each barrel; that appellant's business was built up under the prior practice, and that in reliance upon its continuance appellant has invested in its said business $100,000, and others in like business an amount approximating $1,000,000, and that, if such orders of May 18th are upheld, the business cannot be carried on, and the investment therein will be practically lost; and that in fact since July 1, 1910, when the orders went into effect, appellant's business has been wholly suspended. It is claimed in the bill that the long uniform practice of the Bureau in dealing with this business is such a construction or recognition by the government as will entitle appellant to remedy by injunction to prevent the enforcement of the orders of May 18th.

D. S. Wegg, of Chicago, Ill., for appellant.

Charles F. Clyne and Joseph B. Fleming, both of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). That soakage recovered from the staves of empty whisky barrels must before entering into commerce bear the government tax on spirits of $1.10 per gallon was decided by this court in Hunter v. Corning & Co., 86 Fed. 913, 30 C. C. A. 483. There Corning received from the distiller's bonded warehouse for rectification the barrels of whisky, emptied them, and recovered the soakage from the barrels. It was assumed that the spirits there recovered were a part of such as had entered into the pores of the barrel staves while in the bonded warehouse, and that therefore no tax had in fact been paid on such soakage, since under the law the tax actually paid was on the free, pourable contents of the barrel as gauged at time of removal from the warehouse. As to this it is frankly stated in the brief for appellant:

"We admit in this bill that, at the time a double-stamped barrel leaves a distiller's bonded warehouse, the liquid then contained in the pores of the wood of such barrel is the original distilled spirits, and that the general tax of $1.10 per gallon has not been paid thereon by the distiller. We further admit that under Hunter v. Corning, 86 Fed. 913, 30 C. C. A. 483. it is the law of this circuit, while such decision stands, that if such double-stamped barrel be practically treated at once by the extractor, he should pay the general tax upon the spirits which he obtains from the pores of the wood of such double-stamped barrel."

The relief sought by the bill herein is bottomed on the foundational allegation that the soakage proposed to be extracted by appellant is in fact tax-paid, and should not, on being recovered for commerce, again be taxed.

[1] The allegations of fact, from which the conclusion of tax payment is claimed to follow, are that appellant, in its sole business of recovering the soakage from the barrels, buys of retail liquor dealers and others only single-stamp barrels (as above defined), and that such single-stamp barrels, when coming to appellant for treatment, have been out of the warehouse an average of six months or more, and that during such six months all the nontax-paid spirits in the staves at time

of withdrawal from the warehouse will have evaporated from the outside of the barrel, and have been wholly replaced by absorption from the tax-paid contents of the barrel.

Conceding the process of evaporation and absorption to be as stated in the bill, the conclusion that the tax has been paid on the soakage in the barrels when they come to appellant, under the bill, depends in large measure on the time the barrels have been away from the warehouse. As to this all the bill charges is that "the average time for such period is not less than six months," and in appellant's brief it is stated "an average of six months' time elapses as to every double-stamped barrel which has been changed into a single-stamped barrel from the date it leaves the distiller's warehouse and is purchased by us."

But what has the average to do with the case? The fact that six months is the average would imply that in some cases the time is longer, and in others shorter, than six months. Indeed, for anything that appears in the bill to the contrary, barrels may leave the distiller's warehouse, come into the hands of the wholesaler or rectifier, be emptied, replaced by tax-paid liquor and single-stamped, and the barrel finally be emptied and sold to appellant, all within a period of a very few weeks, or even days, and in such case the tax on the soakage would clearly be unpaid.

Suppose a consignment of just such barrels were treated by appellant, and 1,000 gallons of nontax-paid spirits recovered from them. Should this under any circumstances be permitted to enter commerce without paying the tax? Then suppose another such consignment comes for treatment, where the intervening time is a year, and a like amount recovered which may be considered tax-paid because of the evaporation and loss of all the original nontax-paid soakage and replacement by the tax-paid contents. It is true that as to the two lots the average of time intervening between their leaving the warehouse and reaching appellant would be six months; but how would this affect the right of the government to have its tax on the first lot? The loss to the owner through absorption of the tax-paid liquor, does not give rise to any claim for a refund of the tax which has been paid on what has been so lost, whereby it might with show of reason be claimed that the tax due the government on the first lot might be balanced against the counterclaim arising on the second. Under such circumstances the very most that could be claimed is that the first lot, not having paid the tax, should pay it, and the second, having once paid the tax, ought not again to be required to pay. So if the soakage in one lot or barrel is tax-paid, this fact would not in any way relieve from the liability to pay the tax on the soakage from any lot or barrel on which the tax has not been paid.

[2] Furthermore, from the allegations of the bill, the fact that a barrel is single-stamped does not of necessity require the conclusion that it has been materially longer out of the warehouse than the double-stamp barrel. The bill states that the barrel becomes single-stamped when the distiller's double-stamp package is emptied by the wholesaler or rectifier, refilled with tax-paid spirits, and stamped as tax-paid—the two stamps theretofore thereon being effaced. But it states

also that distiller's double-stamp packages are also sold directly to the retail dealer, and to others, who may finally empty them, and who may have on hand, and may empty indiscriminately, double and single stamped barrels, without rule or probability as to which was first emptied. So the allegation that appellant uses only single-stamp barrels does not, under the facts charged in the bill, necessarily distinguish, as between single and double stamp barrels, which was longest out of the bonded warehouse.

[3] But the bill states yet other elements than that of time as bearing on the rapidity of evaporation, in the words following:

"That such single-stamped barrels are held by such rectifiers and the said wholesale liquor dealers until sold, and such barrels are carried or transported by steam cars, wagons, trucks, or other vehicles, and sometimes by all of them, to divers points and distances, and they are handled and rehandled divers times, and become exposed to varying degrees of temperature, each and all of which largely increase and accelerate the aforesaid process of evaporation and absorption, before any of such barrels become empty in the hands of the qualified retail liquor dealers or other persons, who have poured out, used, or consumed the contents thereof."

Ordinary experience would suggest yet other materially influential conditions, such as the kind and quality of the material of the barrel, as bearing on the porousness of the wood, and the nature of the place where the barrels are kept after removal from the warehouse—whether in a closed, dark, damp place, which would retard, or in a place open, light, and airy, which would facilitate, evaporation. And so from the bill itself it may be concluded that under some conditions the evaporation may be considerable in a short time, and under others may be slight during a much longer period.

[4] While the bill alleges that appellant treats or proposes to treat single-stamp barrels only, and that single-stamp can be readily distinguished from double-stamp barrels, such statements of conclusions are dependent on the allegations of fact upon which they are predicated. In the bill it is stated:

"That it is impossible to ascertain or state the exact period of time which elapses as to each barrel from the date of its removal from the distillery bonded warehouse to the date your orator removes from the pores of the wood thereof the liquid contained therein."

The reason for such impossibility is well stated in appellant's brief as follows:

"It is true that, as all marks, brands, and stamps have been effaced from each barrel we buy before its purchase by us, as provided by section 3324, Rev. St. [Comp. St. 1913, § 6105], it is impossible for us to trace each barrel and show the exact length of time which has elapsed since it left the distiller's hands."

There is nothing distinctive about the barrels themselves, as between single and double stamp barrels. Both kinds come into the hands of those who sell to appellant. If the stamps and brands remained thereon, the information would be readily available to determine, not only when and from what distillery the barrels were taken, but also whether the barrels were single or double stamped, though in such case the now single stamp would probably be denominated triple stamp. But the obliteration of all stamps and brands makes all barrels then look alike, and the same conditions which make it impossible to know when the barrels left the warehouse make it alike impossible for appellant to know which of the empty barrels were single and which double stamped; and it is not apparent from the bill how a gauger, who inspects the barrels when they come into appellant's possession to determine whether they may be treated tax-free, can know any more about it than appellant.

But appellant urges that, as a necessary result of the continuous process of evaporation and absorption after the barrels leave the warehouse, to use the language of its brief:

"There is no way of ascertaining from time to time by the day, week, or month just how much, if any, of the distilled spirits which formed the original soakage remain in the pores of the wood of each barrel. Hence it is very clear that the tax which should be paid by the extractor, if any, must vary from time to time, or constantly shift as the length of time increases from the date the barrel leaves the warehouse, and also as such evaporation may be enhanced by modifications in heat, changes in position, through handlings by different persons, transportation, and the like. Certainly a question would arise in each barrel as to what quantity of the original spirits which had not paid the tax remained in the pores of the wood thereof."

This admitted uncertainty as to each barrel is necessarily reflected in any accumulation of barrels, and surely does not warrant the alleged conclusion that the soakage in any number of barrels is tax-paid.

[5] What is the rule governing such a condition of uncertainty? In appellant's brief it is stated to be:

"Any doubt as to such quantity must be solved, under the authorities, in favor of the extractor. There is no way in which such quantity could be ascertained, and any attempt to collect a tax thereon would be void."

We find no authorities which support such a doctrine. If under the statute it were doubtful whether or not spirits or any other article should be taxed at all, such doubt would inure to the benefit of the one sought to be taxed. But there is no doubt of the statute requiring all spirits included in its provisions to pay the tax. The question here is not one of statutory construction, but of proof whether or not the tax has been paid; and we are of the opinion that one asking the government to stamp, as tax-paid, spirits to be marketed in competition with tax-paid goods, must present to the authorities affirmative proof that the tax has been paid; and such requirement is not satisfied by showing a state of facts under which it is unknown or unknowable whether all or any part is paid.

If, when the barrels leave the warehouse carrying in the staves spirits on which no tax has been paid, and are so handled that at a given time thereafter it cannot be known how much, if any, of the soakage in the staves has paid the tax, the owner is very much in the situation of one who willfully and indistinguishably mixes and confuses his own goods with those of another. The mixer must bear any resultant loss—often to the extent of losing his own goods. If, as applied to circumstances like those here presented, the rule were otherwise, one who would mix some tax-paid alcohol with a quantity on which no tax has been paid would be entitled to have the whole mass treated as tax-paid, unless the government could affirmatively show the exact proportions of each.

It is our view that, when tax-paid spirits are mixed or suffered to be mixed with nontax-paid spirits, so that the proportion of each cannot be ascertained, one undertaking to market the mixture must pay tax on the whole. In an early case it was held:

"That the payment of the tax on all the spirits not having been proven, there being a mixture of fraudulent spirits with spirits that had paid the tax, the whole lot was legally forfeited to the use of the government." United States v. Fifty-Four Barrels of Distilled Spirits, 25 Fed. Cas. 1074.

[6, 7] The bill alleges that on the faith of the Scott letter and others, and the long practice thereunder of permitting such soakage to be recovered and marketed without requiring payment of any further tax thereon, there has been a long acquiesced in practical construction of the statutes and rules governing such a situation by those charged with supervision over and collection of the internal revenue, and that it would now be highly inequitable to permit this practice to be changed as against appellant, which has, in reliance thereon, invested $100,000 in its plant which would become practically valueless. Many cases are cited in appellant's brief to the general effect that, where a statute is of doubtful meaning, long and uniform construction and practice thereunder by the department or officers of the government charged with its enforcement is entitled to great weight, and will ordinarily be accepted and followed by the courts. But is there such a question or principle here involved?

The statute plainly prescribes the records to be kept and returns to be made by rectifiers in order to afford proof to the officers charged with carrying out the law that the rectifier handles only tax-paid spirits. In the practice relied upon, the statute was departed from in dealing with appellant, notwithstanding he operated under a rectifier's license. In its case proof other than that indicated by the statute was accepted as evidence that the spirits it dealt with were tax-paid. Assuming that the plain provisions of the statute might be departed from in favor of one holding a rectifier's license, who is handling spirits on which the tax has unquestionably and provably been paid, but who cannot make proof in the particular form and manner which the statute prescribes for ordinary rectifiers, yet the question here presented is not one of statutory construction or interpretation, but of proof as to whether or not the tax has in fact been paid on the soakage which appellant would recover. If appellant cannot comply with the statute, it surely can have no vested right or interest in the kind, degree, or character of proof that may properly be required to establish the fact of payment before the government shall stamp the recovered product as tax-paid. If experience has convinced the Bureau that under the long-existing practice sufficient proof was not afforded that the tax had been paid on spirits which appellant would market as tax-paid, no reason is apparent why it may not amend and change the practice, so that the government may be amply secured in its revenues. That such was the experience claimed by the Commissioner to be the reason for the change in the practice abundantly appears from one of the orders of May 18, and a letter of the Commissioner of March 31, 1910, referred to in the bill. A different question might be presented if it were now undertaken to unsettle and impeach completed transactions under the old practice. But the orders complained of have reference only to the future.

It is urged that the May 18th orders are unreasonable, because their enforcement would in effect prevent appellant from carrying on its business, since, owing to the required effacement of all stamps, marks, and brands on the empty barrels before appellant buys them, it cannot supply the information demanded. But according to the bill the presence or nonpresence in the staves of nontax-paid alcohol depends mainly on the time which has elapsed between withdrawal from the warehouse and treatment by appellant. The orders require proof of the facts from which this may be determined. Surely there is nothing unreasonable or improper as to the purpose of the orders; and if the prescribed method cannot be complied with, the bill suggests none other, except the untenable assumption of "average of time." The effect of the orders on appellant's business is not an exclusive test of their reasonableness. In a letter, referred to in the bill, of July 28, 1905, of Commissioner Yerkes, it is said:

"It is, of course, evident that all spirits in the staves of a new single-stamped barrel which has been filled with tax-paid spirits must consist of spirits on which the tax has been paid; and consequently no further tax can be collected on such spirits when recovered from the staves."

If it were proposed to treat such new barrels which could clearly and certainly be proved to be such, a different question might arise. But here the bill expressly disclaims that appellant treats new barrels into which the rectifier or wholesaler has put tax-paid spirits, but, on the contrary, alleges that the barrels it proposes to treat are those which, before being refilled by the rectifier or wholesaler, and sent out as single-stamp barrels, were in the bonded warehouse, on leaving which the soakage contained in the staves was not tax-paid. And since from the bill itself it is apparent that appellant does not and cannot know, and therefore cannot prove, whether the soakage in such barrels at the time of extraction is tax-paid, it is quite immaterial to appellant what rule on the subject the Bureau may promulgate. So far as appellant is concerned it could not in any event, under the facts of the bill, affirmatively show that the soakage it proposes to extract and market is tax-paid, and it is therefore not affected by the precise form, kind, or degree of proof which the government may require to show that the tax is paid. Even if the orders might be said to be unreasonable as to barrels which never held nontax-paid spirits, that is clearly not the case as to barrels within the purview of the bill.

Holding as we do that the government has in any event the right to require satisfactory proof that the tax on the soakage in any and all barrels has been paid before same may be extracted, stamped, and marketed as tax-paid, and finding from the bill that appellant in its business as described does not and cannot and will not know whether or not the tax has been paid on the soakage it proposes to extract, we conclude that the bill was properly dismissed for want of equity, and the decree of the District Court is accordingly affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES & MEXICAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 16, 1916.)

No. 4482.

(Syllabus by the Court.)

1. MORTGAGES ⚷151(1)—LIENS—PRIORITY—EQUITABLE CLAIM.

Sureties on supersedeas bonds given at the request of the mortgagor to stay the collection of judgments on unsecured claims, who, by affirmance of the judgments, are compelled to pay, or become liable to pay, the claims, do not thereby secure any preference in equity over bondholders secured by a prior recorded mortgage on the property and income of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 316; Dec. Dig. ⚷151(1).]

2. MORTGAGES ⚷151(1)—LIENS—PRIORITY—ENHANCING SECURITY.

The fact that liabilities or guaranties incurred, work done, or money or materials furnished at the request of the mortgagor preserve the mortgaged property, enhance the security of the mortgagees and keep the property operating, is no ground for displacing the prior lien of the mortgagees, because the record of the mortgage is full notice to all that such acts will ordinarily and naturally have that effect and will subject the enhanced value to the superior lien of the recorded mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 316; Dec. Dig. ⚷151(1).]

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

Bill by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railroad Company and others to foreclose a mortgage, in which the United States Fidelity & Guaranty Company intervenes. From a decree of foreclosure, allowing the claim of the intervener as a general demand, but denying it as an equitable preference over the holders of bonds secured by the mortgage, the intervener appeals. Affirmed.

Jean Madalene, of Wichita, Kan. (S. B. Amidon, of Wichita, Kan., on the brief), for appellant.

Samuel W. Moore, of Kansas City, Mo. (Samuel Untermyer, of New York City, on the brief), for appellees.

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

SANBORN, Circuit Judge. This is an appeal by the United States Fidelity & Guaranty Company, surety on a supersedeas bond of the Kansas City, Mexico & Orient Railroad Company, from a decree of the District Court allowing its claim in proceedings to foreclose the prior mortgage on the property of the Railroad Company as a general demand, but denying it an equitable preference over the holders of the bonds secured by the mortgage. The mortgage securing the bonds covered the property, the after-acquired property, and the in-

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

come of the Railroad Company. It was made and recorded about February 1, 1901. On December 6, 1912, in the suit to foreclose the mortgage, a prior receivership of the property of the Railroad Company was extended over the foreclosure suit. A decree of foreclosure was rendered on February 2, 1914, in which the court adjudged that the mortgage was a first lien upon the property and income of the Railroad Company to secure the payment of bonds issued thereunder to the amount of $24,538,000, and that the property be sold, and it was subsequently sold under the decree for $6,001,000 in this foreclosure suit. The Fidelity Company intervened, and prayed that the court would order its claim to be paid out of the proceeds of the sale of the property in preference to the claims of the bondholders secured by the mortgage.

Its claim arose in this way: One Madison, on June 19, 1911, recovered a judgment in one of the district courts of Kansas against the Railway Company, on account of a personal injury caused by the negligence of servants of the company, for $9,000 and costs, from which the Railway Company appealed. At the request of the Railway Company the Fidelity Company made and filed a supersedeas bond to stay the collection of the judgment, the judgment was subsequently affirmed, and the Fidelity Company paid the penalty of the bond, $10,247.05.

[1] The first reason presented to this court for the reversal of the decree below is that the court failed to investigate, fix, and enforce the liability of the stockholders of the Railway Company to pay for their stock and to apply the payments that should thus be collected to a liquidation of the mortgage bonds. But the Fidelity Company presents this ground for relief for the first time in this court without pleading it in its intervening petition, or introducing any evidence below to sustain it, and without giving the trustee of the bondholders any notice of such a claim, or any opportunity to challenge it, or to produce evidence to defeat it in the court below. It is clearly too late to urge this contention for the first time now, and the consideration or maintenance of it by this court under these circumstances would be unjust and inequitable.

The second argument is that the judgment in Madison's personal injury suit was rendered on June 19, 1911; that at that time and when the supersedeas bond was given the Railway Company was in default in the payment of its interest on its bonds, and was insolvent; that the Fidelity Company had no knowledge of these facts; that if it had known them it would not have signed the bond, but that the holders of the bonds and coupons neither foreclosed their mortgage nor gave any notice of the financial conditions of the Railway Company to the Fidelity Company before it made its bond; and that in view of these facts they are estopped from maintaining the superior lien of their prior mortgage. The proof, however, leaves no doubt that there had been no default in the payment of the interest on the bonds when the supersedeas bond was given. All the coupons which were due, and which had been presented at their respective places of payment, had been paid. A small percentage of the bondholders had not yet presented their overdue coupons, and those were still unpaid. Nor would the facts, if they had existed, that the Railway Company was insolvent, that the bondholders knew of this insolvency and the Fidelity Company did not, that the bondholders did not inform that company of the insolvency, and that the Fidelity Company would not have made the bond if it had been aware of the insolvency, have estopped the bondholders from enforcing the superiority of their mortgage lien. If their lien had been a secret one, there might have been some basis for a claim of an estoppel; but their mortgage was of record, and had been of record for about 10 years, and that record, under the law which made it a public record, was a flaming signal of danger that charged the Fidelity Company and all others dealing with the Railway Company with full knowledge of the terms and legal effect of the mortgage and of the bonds it secured. After the bondholders had recorded their mortgage no duty rested upon them to notify the Fidelity Company, or any other party dealing with the Railway Company, of any default in the payment of their bonds or coupons, or of any insolvency or solvency of the Railway Company. They had secured themselves against the risk of the insolvency of the Company by their mortgage, and by its record they had given all men legal notice of that fact, and of the further fact that every party who thereafter dealt with the company took its own risk of the insolvency of that company and of its inability to pay any debt or discharge any obligation it contracted in the face of the record notice of the prior and superior lien of the mortgage. The bondholders were not estopped from enforcing their superior lien by the facts or the alleged facts of this case.

[2] It is next insisted that the Fidelity Company is entitled in equity to a preference over the holders of the bonds, because its bond preserved and enhanced the value of the property to the bondholders secured by the mortgage. But the fact that liabilities or guaranties incurred, money or materials furnished, or work done at the request of the mortgagor preserve the mortgaged property and enhance the security of the mortgagees, is no ground for displacing the prior lien of the mortgagees for the reason that the record of the mortgage is plenary notice that such acts will ordinarily and naturally have that effect, and will subject the enhanced value to the superior lien of the recorded mortgage. Dunham v. Railway Company, 1 Wall. 254, 267, 17 L. Ed. 584; Railroad Co. v. Cowdrey, 11 Wall. 459, 464, 481, 482, 20 L. Ed. 199; Railway Co. v. Hamilton, 134 U. S. 296, 301, 10 Sup. Ct. 546, 33 L. Ed. 905; Porter v. Pittsburgh Bessemer Steel Co., 120 U. S. 649, 671, 7 Sup. Ct. 1206, 30 L. Ed. 830; Thompson v. Valley R. R. Co., 132 U. S. 68, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256; Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 195, 11 Sup. Ct. 61, 34 L. Ed. 625; Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 259, 296, 20 Sup. Ct. 347, 44 L. Ed. 458; Lackawanna, etc., Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 316, 20 Sup. Ct. 363, 40 L. Ed. 475; Illinois Trust & Sav. Bank v. Doud, 105 Fed. 123, 124, 136, 44 C. C. A. 389, 390, 402, 52 L. R. A. 481; International Trust Co. v. T. B. Townsend, etc., Co., 95 Fed. 850, 863

37 C. C. A. 396, 409. The dominant rule that runs through and controls this case, and all other cases upon this subject, is thus stated by the Supreme Court in Dunham v. Railway Company, 1 Wall. 254, 267, 17 L. Ed. 584:

"Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance; but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders. Acting, as he did, with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight."

Finally counsel argue that the fact that the Fidelity Company gave a supersedeas bond and thereby prevented Madison from levying an execution on the property of the Railway Company, and thereby interrupting the running of the railroad, entitles it to an equitable preference over the bondholders secured by the prior mortgage, and in support of this position a consideration of these authorities is invoked. Union Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825; Farmers' Loan & Trust Co. v. Northern Pacific R. Co. (C. C.) 71 Fed. 245; Jones v. Central Trust Co., 73 Fed. 568, 571, 19 C. C. A. 569; City Trust Co. v. Sedalia Light & Traction Co. (D. C.) 195 Fed. 845, 849. An examination of these cases discloses little support for the position of the appellant. The opinion and decision in City Trust Co. v. Sedalia Light & Traction Co. (D. C.) 195 Fed. 845, 849, sustains that position. But that opinion and decision was rendered by Judge Pollock, the same judge whose decision in the case in hand that the surety on this supersedeas bond is not entitled to an equitable preference over the bondholders secured by the mortgage is now in issue, and his opinion in the case in 195 Fed. 845, was contrary to the opinion of Judge Brewer, afterwards Mr. Justice Brewer of the Supreme Court, in Blair, Trustee, v. St. Louis, H. & K. R. Co. (C. C.) 23 Fed. 523, which was rendered in 1885 and has been the prevailing rule in this circuit from that time to the present. As Judge Pollock has come to a different conclusion in the case before us, his decision in 195 Fed. 845, is entitled to no farther consideration. All the other authorities quoted above were rendered before that long and notable line of decisions of the Supreme Court commencing with Kneeland v. American Loan Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379, and including Morgan's L. & T. R. Co. v. Texas Central Ry. Co., 137 U. S. 171, 196, 198, 11 Sup. Ct. 61, 34 L. Ed. 625, Thompson v. Valley R. Co., 132 U. S. 68, 71, 73, 10 Sup. Ct. 29, 33 L. Ed. 256, Thomas v. Western Car Co., 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663, Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458, Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 40 L. Ed. 475, and later cases of the same nature, narrowed and limited the class of cases entitled to an equitable preference over prior mortgages to those incurred for the necessary current expenses of the operation of the mortgaged property in the ordinary course of business within a limited time anterior to the impounding of the property by the receiver for the benefit of the mortgagees. The influence and authority of these earlier decisions is far less than those of the modern opinions which conform to the rule established by the later authorities from the Supreme Court.

The opinion and decision in Union Trust Company v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825, when carefully read, fails, as was demonstrated by Judge Lurton, afterwards Mr. Justice Lurton of the Supreme Court, in Whiteley v. Central Trust Co., 76 Fed. 74, 77, 22 C. C. A. 67, 34 L. R. A. 303, to sustain the proposition that a surety who, at the request of the mortgagor, signs a supersedeas or other bond in reliance upon the solvency of the mortgagor, and in the belief and expectation that it will pay any loss the surety sustains out of its income or property, is entitled to any preference in equity over the bonds secured by the prior mortgage. It was not based upon that proposition but was founded on special equities which do not exist in this case, or in any ordinary case involving an alleged preferential equity of a surety upon a supersedeas bond.

Nor does the decision and opinion of the court in Jones v. Central Trust Company, 73 Fed. 568, 19 C. C. A. 569, sustain the contention of the surety. In that case an attachment had been levied upon some mortgaged property. Thereupon the trustee in the mortgages caused the property to be replevied, and brought the sureties to sign the replevin bonds. Because the trustee induced and caused the sureties to make the bonds, the court held that the sureties were entitled to an equitable preference over the trustee and over the bondholders he represented in payment out of the mortgaged property. The case rests upon the fact that the trustee for the bondholders induced the sureties to sign. 73 Fed. 571, 573, 19 C. C. A. 569. Neither the trustee nor any of the bondholders solicited or caused the Fidelity Company to sign the bond in the case at bar.

Of the cases cited by counsel for the surety there remains Farmers' Loan & Trust Co. v. Northern Pacific R. Co. (C. C.) 71 Fed. 245. In that case Griggs and Foster had signed a supersedeas bond to stay the execution of a judgment against the Northern Pacific Railroad Company for a personal injury. The appeal was dismissed, and the judgment became final, after receivers of the property of the Railroad Company had been appointed. At that time there was a rivalry between the judge of the Eastern district of Wisconsin, the court of original jurisdiction, and the judge of the district of Washington, one of the courts of ancillary jurisdiction, over the administration of the property of this railroad. Judge Caldwell had delivered his opinion in Farmers' Loan & Trust Co. v. Kansas City, W. N. W. Ry. Co. (C. C.) 53 Fed. 182, in which he had in effect held that any meritorious claims of unsecured creditors might, in the discretion of the judge administering the property, be given a preference in payment out of the income, or out of the proceeds, of mortgaged property over the claims of bondholders secured by a prior mortgage. The Supreme Court, not without knowledge of that opinion, had expressly held, and rather sternly insisted upon, the established contrary rule in Kneeland v. American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 953 (34 L. Ed. 379), and had said:

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In this state of the decisions the receivers applied to Judge Jenkins in the Wisconsin district for authority to pay the claim against the sureties on the supersedeas bond out of the income of the property in their hands in preference to the claims of the mortgage bondholders. Judge Jenkins reviewed the decision of Judge Caldwell and that of the Supreme Court in Kneeland v. Loan Co., 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, held that the decision of Judge Caldwell was "in direct antagonism to the rulings of the Supreme Court," that he could not follow it, and denied the petition of the receivers. Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 68 Fed. 36, 39. Thereupon the sureties, Griggs and Foster, applied to the District Court of Washington in the same foreclosure suit, for preferential payment of the same claim, and Judge Hanford, although he was aware of Judge Jenkins' decision to the contrary (71 Fed. 246), referred to Judge Caldwell's opinion in 53 Fed. 182, 196, said:

"It is my opinion that Judge Caldwell's opinion in that case is sound, and that the principles therein enunciated must prevail as the law of this country, and I have no hesitation in following that case in this instance." Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 71 Fed. 245, 246, 248.

On the authority of Judge Caldwell's decision he gave the claim of the sureties a preference in payment over the claims of the mortgage bondholders, notwithstanding the decisions of the Supreme Court.

This decision of Judge Hanford is the only decision cited by counsel for the Fidelity Company which is in point upon the issue in the case in hand. It lacks the support of reason and of authority, and the argument in it is not persuasive.

There is no equity in the claim of this surety to be preferred in payment out of the mortgaged property to the holders of the bonds. The mortgage was made and recorded a decade before the surety signed its bond. That mortgage was made and recorded for the express purpose of giving to the bondholders secured thereby a first lien upon the mortgaged property and a preference in payment out of the income and out of the proceeds of the property mortgaged. Such a preference was secured by the express terms of the contract made between the mortgagor, the trustee and the bondholders. Probably some of the bonds had been repeatedly sold between the time when they were issued and the date when the supersedeas bond was given. The purchasers bought them in reliance upon the first lien upon the property of the railway company evidenced by the recorded mortgage. They had no notice or knowledge that the Fidelity Company was acquiring or seeking to acquire a lien superior to their own. The Fidelity Company gave them no notice of its attempt so to do, and no opportunity to protect or defend themselves against it until, if its preferential lien exists at all, it has become perfect. On the other hand, the Fidelity Company, before and at the time it assumed its liability, had full knowledge by the record of the mortgage, first, that the bondholders had a first lien upon the mortgaged property; second, that the only parties that could waive that lien, or make a lawful contract to give another superior to it, were the trustee and the bondholders, and that the mortgagor was powerless to do so. Notwithstanding this knowledge the Fidelity Company neither sought nor secured any contract from the trustee or the bondholders. In the face of all this knowledge, it voluntarily signed the supersedeas bond and assumed its liability in reliance upon and at the risk of the ability of the mortgagor to protect and indemnify it, and it cannot now successfully appeal to a court of equity to throw that risk and the burden thereof upon the mortgage bondholders. Its equity is far inferior to theirs.

The contention that by means of the bond property was preserved, and the assets that came to the hands of the bondholders were increased by the amount of the judgment which the bond prevented the judgment creditor from collecting, is fallacious. The judgment was inferior in lien to the mortgage, and nothing which was subject to the mortgage could have been taken from the bondholders by a levy and sale under the judgment. If the execution would have been levied upon property upon which the bondholders had no lien, the taking of that property would not have diminished their security, and if it would have been levied upon property subject to their lien, their mortgage would have held that property. And even if it were true that the surety, by its bond to pay the judgment, preserved security or property which subsequently came to the bondholders, and which they otherwise would have lost, that fact would not give the surety a preferential equity over the bondholders. If it would, then every unsecured creditor, whose moneys, labor, material, or guaranty aided to preserve or enhance the value of the mortgaged property, might, by delaying collection of the mortgagor's debts, secure an equitable lien superior to that of the mortgage, and every creditor, whose claim, like that of Madison here, neither preserved nor enhanced the value of the mortgaged property, could give that claim a preferential lien by hiring some surety company for a small percentage of his claim to guarantee its payment. If the argument of counsel for the Fidelity Company could be sustained, its practical effect would be to strike down the security of every railroad mortgage, and to give to unsecured creditors liens superior to those of the creditors who by mortgage bonds, in reliance upon recorded mortgages, secure their payment. The law and equity, the written contract evidenced by the mortgage and its record, and the relative equities of the parties, cry out alike against the payment out of the income or the proceeds of the mortgaged property of the claim of a surety on a bond of a mortgagor in preference to the claims of bondholders secured by a prior mortgage. A mortgagor and his sureties cannot, by making a contract or bond with an unsecured creditor to pay the mortgagor's debt to him, transform his unsecured claim into a claim secured by a lien superior to that of bondholders secured by a prior recorded lien, and so are the authorities. Blair v. St. Louis, etc., Ry. Co. (C. C.) 23 Fed. 523; Farmers' Loan & Trust Co. v. Northern Pacific R. Co., (C. C.) 68 Fed. 36, 39; Whiteley v. Central Trust Co., 76 Fed. 74, 77, 78, 22 C. C. A. 67, 34 L. R. A. 303; Central Trust Co. v. Third Ave. Ry. Co., 180 Fed. 710, 711, 103 C. C. A. 492; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C.) 165 Fed. 485; Gay v. Hudson River Elec. Power Co. (C. C.) 182 Fed. 904, 909.

The decree below is affirmed.

CHICAGO RYS. CO. v. KRAMER.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2230.

1. CARRIERS ⚷306(2)—RELATION OF "PASSENGER"—OPERATING OVER ANOTHER'S ROAD.

One who is a passenger of a street railroad company operating its through cars over the tracks of another such company with its consent, as evidenced by its acceptance of an ordinance, is in law also a "passenger" of the other company, and entitled to the exercise by each of the same degree of care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1249; Dec. Dig. ⚷306(2).

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

2. CARRIERS ⚷316(4)—INJURY TO PASSENGER—RES IPSA LOQUITUR.

Regarding negligence of defendant, owner of a street railroad, which ran its car into the car of another street railroad company standing on defendant's track, over which it was being operated with defendant's

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

consent, injuring a passenger on the standing car, the principle of res ipsa loquitur is applicable to a count charging general negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1287; Dec. Dig. 🔑316(4).]

3. NEGLIGENCE 🔑136(6)—DIRECTING VERDICT—RES IPSA LOQUITUR.

Where the principle of res ipsa loquitur is applicable, on a count charging general negligence, an instruction to find for plaintiff would be proper, in the absence of testimony tending to explain the occurrence on any theory other than that of defendant's negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 285; Dec. Dig. 🔑136(6).]

4. APPEAL AND ERROR 🔑1062(1)—HARMLESS ERROR—TAKING COUNT FROM JURY.

The measure of damages on all the counts in a personal injury action being the same, any error in overruling motion to take one of them from the jury was harmless, where the jury might properly have been instructed to find for plaintiff on one of the others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. 🔑1062(1).]

5. EVIDENCE 🔑477(4)—APPEARANCE OF PERSON.

Evidence that a few minutes after plaintiff's injury, while her foot was being bathed, she was screaming, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2240; Dec. Dig. 🔑477(4).]

6. WITNESSES 🔑248(2)—RESPONSIVENESS OF ANSWER.

The answer, "She was screaming with pain in her side," in the absence of specific objection that it was not responsive to the question as to how she appeared, will be deemed to mean, not that her screams were in fact due to pain in the side, but that they appeared to witness to be caused thereby.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 862; Dec. Dig. 🔑248(2).]

7. EVIDENCE 🔑268—STATEMENT TO PHYSICIAN.

Unless it clearly appears that plaintiff's description to a physician to whom she had gone of her subjective symptoms was made solely to aid an expert to give evidence on the trial in an action for her injury, and not in good faith to assist him in diagnosing her case for purpose of treatment, it is admissible, though the weight to be given it by the jury may be slight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1061, 1062; Dec. Dig. 🔑268.]

8. EVIDENCE 🔑554—EXPERT TESTIMONY—CAUSE AND EFFECT.

There being no conflict as to the manner of an injury, a physician may testify that the accident did cause, and not merely that it might have caused, the injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2375; Dec. Dig. 🔑554.]

9. EVIDENCE 🔑547—EXPERTS—SPECULATIVE TESTIMONY.

Testimony of a physician, after he had described the conditions found during a period of treatment of plaintiff, a profuse discoloration of the abdominal region, jaundice, blocking of the bowels, retention of the water, high pulse, etc., and had stated that he gave her treatment of the stomach, bowels, and liver, that it was his opinion that there had been an injury to the stomach and liver, was not speculative.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. 🔑547.]

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

10. APPEAL AND ERROR ⚷1047(3)—HARMLESS ERROR—RULINGS ON EVIDENCE.
There being uncontradicted testimony as to the injuries received by plaintiff, their permanent character, and the sufferings endured by her, any error in refusing to strike out as speculative the answer of a physician, asked if he formed an opinion as to the trouble with her abdomen and hip, that his diagnosis and conclusions were that there were possible adhesions there, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4149; Dec. Dig. ⚷1047(3).]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by Marie Kramer against the Chicago Railways Company and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Charles Le Roy Brown, of Chicago, Ill., for plaintiff in error.

C. Helmer Johnson and Arthur H. Chetlain, both of Chicago, Ill., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Writ of error to reverse a judgment for $3,350 against the plaintiff in error in an action against it and the Chicago City Railway Company. Diversity of citizenship is the ground of federal jurisdiction. At the conclusion of the plaintiff's case, the defendant the Chicago Railway Company moved for a directed verdict. The motion was overruled, and it rested its case. Thereupon the defendant Chicago City Railway Company offered evidence tending to establish its freedom from negligence. At the conclusion of the entire case each defendant moved for a directed verdict on each count of the declaration separately. All motions were overruled, the cause was submitted to the jury, and a verdict was rendered in favor of the Chicago City Railway Company and against the Chicago Railways Company.

Plaintiff's injuries were received under the following circumstances: She had just stepped upon the rear platform of a south-bound street car standing at the north side of the intersection of Western avenue and Twelfth street in Chicago and owned and operated by the Chicago City Railway Company, when another south-bound car, owned and operated by the Chicago Railways Company, came into collision with the rear platform of the Chicago City Railway Company's car, breaking it and bending the front end of the other car. Plaintiff introduced no evidence as to the condition of the brakes or stopping apparatus. The track on Western avenue was owned, operated, and under the control of the Chicago Railways Company, and was used by the Chicago City Railway Company for the operation of through route cars under an ordinance of the city of Chicago passed in February, 1907.

The section of the ordinance relating to the Chicago City Railway Company introduced in evidence provides as follows:

"The company will co-operate with any corporation or corporations operating such of the street railway lines now operated by the receivers of the Chicago Union Traction Company as may be parts of the through routes in this ordinance or in 'Exhibit C' referred to, in establishing and maintaining through lines of cars over the street railway lines of the company and the street railway lines of the Union Traction System entering the South Division of the said city, north of Twelfth street, which shall carry passengers from the South Division of the said city to the other two divisions of the said city, or in the reverse directions, through the portion of the South Division of said city north of Twelfth street, for a single fare."

That relating to the Chicago Railways Company reads:

"The company will co-operate with any corporation or corporations operating such of the street railway lines now operated by the Chicago City Railway Company as may be parts of the through routes in this ordinance or in 'Exhibit C' referred to, in establishing and maintaining through lines of cars over the street railway lines of the company and the street railway line of the Chicago City Railway system entering the South Division of the said city north of Twelfth street, which shall carry passengers from the North and West Divisions of the said city to the South Division of the said city, or in the reverse directions, through the portion of the South Division of said city north of Twelfth street, for a single fare."

Exhibit C therein referred to provides as follows:

"Route No. 10: 'Beginning at Seventy-First street and Western avenue; north on Western avenue to Belmont avenue, returning by the same route.'"

It was stipulated that, in accordance with the provisions of the ordinances and the acceptance thereof by each of the defendant companies, the operation of the through route cars by the one company over tracks belonging to the other was under the direction and supervision of a board of supervising engineers appointed by the city of Chicago, and under the directions of this board each company was required to permit the other to operate cars over its various lines and to give and receive transfers therefor.

Errors in the charge and in denying the Chicago Railways Company's motions are based on its contentions made in the trial court and renewed in this court that the plaintiff was a passenger of the Chicago City Railway Company alone; that the Chicago Railways Company was a stranger to her, and owed her the duty, not of the highest degree of care, but only of ordinary care; that the collision alone under the circumstances narrated did not justify the application of the principle of res ipsa loquitur at least as against it, the stranger company; and that in any event the total failure of affirmative proof of the specific negligence charged against it in at least one of the counts, namely, a negligent failure to keep the equipment of its car in proper order, makes the refusal of the court to grant this defendant's motion for an instruction in its favor on this count reversible error.

[1] 1. In Illinois, the liability of a lessor public service company for the acts and omissions of its lessee, is well established. As declared in Anderson v. West Chicago Street Railway Company, 200 Ill. 329, 333, 65 N. E. 717:

"The relation * * * is not that of landlord and tenant, but that of principal and agent, or master and servant."

While in some of the lower federal courts it has been said that in the determination of the relation between lessor and lessee company and the liability of the former for the latter's acts, the federal courts will not deem themselves bound by the state court's views in the absence of a controlling statute, we are of the opinion that under N. C. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, and I. C. R. R. Co. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208, the local law, as interpreted by the state court, controls. While each of these cases originated in the state court, it is to be noted that in the Zachary Case the question involved was the interpretation of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), and that, while the state Supreme Court held this inapplicable to an intrastate lessor corporation not itself actually engaged in interstate commerce, the federal Supreme Court held it to be a necessary result of the local law, constituting the lessee the lessor's substitute or agent, and making the latter responsible for the former's acts and omissions, whether in interstate or in intrastate commerce, that "the lessor is a common carrier by railroad engaging in commerce between the states," and that an employé of the lessee is employed by such lessor in interstate commerce, within the meaning of the federal act.

The statement in the Sheegog Case, "Now whether we agree with it or not, the doctrine is familiar that in the absence of statute a railroad company cannot get rid of its liability attached to the exercise of its franchise by making a lease," was not intended, in our judgment, to cast any doubt upon the views expressed in Railroad Company v. Barron, 5 Wall. 90, 18 L. Ed. 591. There the action was begun in the federal court. The defendant was the owner of the road and the actual carrier of the passenger. It was held liable for the negligence of another company operating by consent, on its road. The court said that the liability had "been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable."

We are unable to see any real distinction between the lessor and lessee cases and the present case. The Chicago Railways Company was the owner of the track and furnished the motive power. It had the right and the duty to operate its own cars thereon. The privilege granted to the Chicago City Railway Company to operate its through cars over the Chicago Railways Company's tracks was necessarily with the consent and permission of the latter company, a consent evidenced by its acceptance of the ordinance. The Chicago City Railway Company while operating its cars over the tracks and under the electric power furnished by the Chicago Railways Company was performing the public duty of the latter company as its agent or substitute in the same measure as a lessee company to which similar privileges had been granted. It follows that, while the plaintiff was a passenger of the Chicago City Railway Company, she was also as a matter of law a passenger of the Chicago Railways Company and entitled to the exercise by each of them of the same degree of care.

[2, 3] 2. Plaintiff's rights, therefore, are the same as would have arisen if her injuries had been caused, under similar circumstances, by a collision of two cars, both belonging to the defendant Chicago Railways Company. In such a case, concededly res ipsa loquitur would apply. For there, as here, the uncertainty as to whether the injury was due to the negligence of the employés of the first car or of the second car or of both would support a charge of general negligence against the defendant Chicago Railways Company.

While res ipsa loquitur does not shift the ultimate burden of proof, and at times only calls for without necessarily requiring explanation or rebuttal (Sweeney v. Erving, 228 U. S. 233, 240, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905), in the instant case, in view of the passenger carrier relation, the prima facie case made for her through proof of the circumstances of the collision and the exercise of due care for her own safety would not merely have justified the submission of the question of the defendant's negligence to the jury, but, in the absence of any testimony offered by the defendant and of any matters in the testimony offered on behalf of the plaintiff tending to explain the occurrence on any theory other than that of the defendant's negligence, an instruction to find for the plaintiff on the count charging general negligence would have been proper. North Chicago Street Railway Company v. Cotton, 140 Ill. 486, 29 N. E. 899; Central Vermont Ry. Co. v. Cauble, 228 Fed. 876, 878, — C. C. A. —.

[4] In Wilmington Mining Company v. Fulton, 205 U. S. 77, 27 Sup. Ct. 412, 51 L. Ed. 708, the failure of the court to grant a motion to take from the jury a count unsupported by the evidence was held to be reversible error, even though there was evidence justifying the submission of another count to the jury, inasmuch as it would be impossible to say that the verdict was not based on the former count. Subsequently, in Scott v. Parlin & Orendorf, 245 Ill. 460, 92 N. E. 318, the Supreme Court of Illinois laid down a contrary rule, basing its decision, not on any statutory provision, but on the analogy of section 78 of the Illinois Practice Act (Laws 1907, p. 459).

Assuming that the practice thus sanctioned by the state court is not controlling in the federal courts, yet inasmuch as the trial court, in this case, unlike the Wilmington Mining Company Case, might properly have instructed the jury to find for the plaintiff on at least one of the counts, and as the measure of damages was necessarily the same on all of the counts, the error, if any, in overruling the defendant's motion, could not be prejudicial or furnish a ground for reversal.

[5, 6] 3. Error is also assigned on the admission of certain testimony, all bearing solely upon the matter of the injuries and the amount of the damages.

(a) Plaintiff lived and worked on Western avenue just north of Twelfth street. A few minutes after the accident, she came home. Her employer assisted her to her room, got a basin of water, and was bathing her foot when a neighbor entered. Asked for a description as to how plaintiff appeared to her at that time, the neighbor testified through an interpreter, "She was screaming with pain in her side."

A motion to strike out this answer was properly overruled; that she was screaming, irrespective of the cause, was clearly admissible.

Moreover, in the absence of a specific objection that it was not responsive, the answer must be deemed to mean, not that the screams were in fact due to the pain in the side, but that they appeared to the witness to be caused thereby. Plaintiff's actions and gestures, her appearance at the time, might well be so described.

[7] (b) The accident occurred in June, 1913; the trial in November, 1914. In February, 1914, the month in which this action was brought, her original physician and another doctor examined her in Chicago. The first physician testified, in answer to the court's question whether she came at that time as a patient, "Yes; for treatment and also for examination." He further stated that she was in his office twice and that he treated her; that she was to have come again, but that she went home; that he supposed she went to her family physician. In partial answer to questions as to the examination made and complaints of pain at the time, he testified that he found tenderness over the abdomen and back, a swelling of the left leg, and that she complained of weakness and inability to stand any length of time. Objections to the question and motion to strike out the answers, on the ground that they called for and gave subjective symptoms displayed at an examination pending litigation, and "after plaintiff testified that she did not go to the doctor at that time for treatment," were overruled.

If plaintiff had in fact so testified, there would be more force in the objections, as her complaints at an examination sought by her solely for litigation purposes are usually held inadmissible (but see 5 Wigmore, Evidence [2d Ed.] § 688, note 2, commenting on C. & O. Ry. v. Wiley, 134 Ky. 461, 121 S. W. 402), even though the physician does not know the purpose of her visit. Her testimony on cross-examination was as follows:

"Dr. MacFarland examined me about six months ago. Q. Has he examined you at any time since then? A. No; he didn't exactly examine since then. He examined me thoroughly six months ago. Q. That was when you were starting to get ready for your lawsuit? A. Yes, sir. Q. Is that what he examined you for? A. Yes, sir. Dr. Burns and Dr. MacFarland examined me together about six months ago at Dr. MacFarland's office. * * * I have been at home in Burlington, and have seen Dr. Proudy from time to time, but he has not treated me since last spring."

If "that," in the question, "Is that what he examined you for?" means the lawsuit, the answer does not in any manner indicate that she did not go to her physician also and primarily for treatment. That she required treatment at the time is clearly shown by the physician's testimony that he did in fact treat her and her testimony that on her return home the local physician continued to treat her.

We cannot agree with Kath v. Wisconsin Ry. Co., 121 Wis. 503, 99 N. W. 217, that such testimony must be excluded unless made during examination before suit and solely for the purpose of treatment. As is said in N. P. R. R. v. Urlin, 158 U. S. 271, 274, 15 Sup. Ct. 840, 39 L. Ed. 977:

"As one of the principal questions in the case was whether the injuries of the defendant were of a permanent or a temporary character, it was certainly competent to prove that, during the two years which had elapsed between the happening of the accident and the trial, there were several medical examinations into the condition of the plaintiff. Every one knows that, when injuries are internal and not obvious to visual inspection, the surgeon has to largely depend on the responses and exclamations of the patient when subjected to examination."

The court cites with approval Fleming v. Springfield, 154 Mass. 520, 522, 28 N. E. 910, 26 Am. St. Rep. 268, that:

"It may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during, the trial, it does not appear that such is not the case."

Unless it be clear that the patient's description of her subjective symptoms was made solely for the purpose of aiding an expert to give evidence on the trial, and not in good faith, to assist the physician in diagnosing the case for the purpose of treatment, it is not to be deemed inadmissible, though the weight to be given it by the jury, varying according to the circumstances, may be but slight. C., C., C. & I. R. R. Co. v. Newell, 104 Ind. 264, 270, 3 N. E. 836, 54 Am. Rep. 312.

[8] (c) This case falls within the principle of City of Chicago v. Didier, 227 Ill. 571, 81 N. E. 698, and not within that of Schlauder v. C. & S. T. Co., 253 Ill. 154, 97 N. E. 233. Here, as in the Didier Case, there was no conflict as to the manner of the injury. It was, therefore, not improper to permit the physician to state that the accident did cause, and not merely that it might have caused, the injuries. 5 Wigmore, Evid. § 1976.

[9] (d) As a result of the accident, plaintiff, a hardworking healthy woman 24 years old, earning $5 per week and board and lodging, was confined to her bed nearly three weeks, and then for over two months got about on crutches. The left foot was cut about 3½ inches on the inner border of the heel. It required 14 stitches. Deep abrasions of the skin were formed over the right hip. A physician attended her daily for four or five weeks before she left the city for her home in Wisconsin. After he had described the conditions found during this period of treatment,—a profuse discoloration of the abdominal region, jaundice, blocking of the bowels, retention of the water, high pulse, etc.—and had stated that he gave her treatment and medicine for the stomach, bowels, and liver, he was asked, "Was it your opinion that there had been an injury to the stomach and liver?" An objection that this was speculative, and did not call for a physical condition which he found, was overruled, and he answered affirmatively.

The ruling of the court was entirely proper. The diagnosis was not, as in Lyons v. Chicago City Railway Co., 258 Ill. 75, 101 N. E. 211, speculative; that is, that there might have been such an injury, but clear and positive that there was such an injury.

[10] (e) Answering the question, "Did you form an opinion as to the trouble with her abdomen and hip at that time?" he answered, "Why, my diagnosis and conclusions were that there were possible adhesions there, from such a crushing injury, adhesions of the intestines." "Possible adhesions" is speculative; it would have been

proper to grant the motion to strike it out on that ground. In view, however, of the uncontradicted testimony as to the injuries received, their permanent character, and the sufferings endured by the plaintiff, we are of the opinion that, even if the failure to strike it out should be held error (but see 5 Wigmore, § 1976, commenting on the Lyons Case, supra), the error cannot be deemed to have been so prejudicial as to justify a reversal.

Judgment affirmed.

HIGGINBOTHAM v. BOGGS et al.

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

No. 1405.

1. TRUSTS ⚷72—RESULTING TRUSTS—CREATION.
When one person pays for land and has title made to another, a trust results in favor of the purchaser.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. ⚷72.]

2. TRUSTS ⚷43(1), 88—RESULTING TRUSTS—ESTABLISHMENT.
Where land is paid for by one, though title is taken in the name of another, either the payment, raising a resulting trust, or an express agreement by the holder of the title to hold in trust for the real purchaser, may be established by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62, 130–133; Dec. Dig. ⚷43(1), 88.]

3. TRUSTS ⚷86—RESULTING TRUSTS—PRESUMPTIONS.
Where a husband or father, on purchasing land, takes title in the name of his wife or his child, no presumption of resulting trust arises, as in case of strangers or relatives under no obligation to support.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. ⚷86.]

4. TRUSTS ⚷86—RESULTING TRUSTS—PRESUMPTION.
The presumption of a resulting trust may be rebutted by evidence of the circumstances or declarations by the real purchaser, who took title in the name of another, that a gift was intended to the grantee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. ⚷86.]

5. TRUSTS ⚷81(1)—RESULTING TRUSTS—EVIDENCE.
In determining whether a resulting trust arises, where one purchasing land has title taken in the name of another, the close relationship of the grantee to the purchaser and the purchaser's moral obligation to support may be considered.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 115; Dec. Dig. ⚷81(1).]

6. TRUSTS ⚷362—RESULTING TRUSTS—DECLARATION.
A resulting trust will not be declared in favor of a purchaser, who had the legal title made to another for the purpose of defrauding his creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 560–562; Dec. Dig. ⚷362.]

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

7. TRUSTS ⚷72—RESULTING TRUSTS—CREATION.
A resulting trust, if it arises at all, must arise at the time the legal title is taken in the name of one who does not pay a consideration for the conveyance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. ⚷72.]

8. TRUSTS ⚷89(5)—RESULTING TRUSTS—ESTABLISHMENT.
Parol evidence, to establish a resulting trust, must be clear, unquestionable, and certain.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 137; Dec. Dig. ⚷89(5).]

9. TRUSTS ⚷372(3)—RESULTING TRUSTS—EVIDENCE—ESTABLISHMENT.
In a suit to establish a resulting trust in land, evidence *held* to show that the purchaser, who paid the consideration, had title taken in the name of an ostensible grantee for the purpose of defeating a judgment creditor, and so no resulting trust arose.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603; Dec. Dig. ⚷372(3).]

10. TRUSTS ⚷362—RESULTING TRUSTS—CREATION.
Where purchaser of land took title in the name of another for the purpose of defeating the collection of a judgment against him held by the state, a subsequent release of the judgment will not give rise to resulting trust, as such trust, if it arises, must do so when title vests.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 560–562; Dec. Dig. ⚷362.]

11. TRUSTS ⚷89(1)—RESULTING TRUSTS—EVIDENCE.
In suit to establish a resulting trust in land, title to which was transferred from the original grantee to the purchaser's sister, evidence *held* to establish that, though the purchaser was the equitable owner, he intended his sister to take the fee of the land.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 134; Dec. Dig. ⚷89(1).]

12. TRUSTS ⚷365(4)—RESULTING TRUSTS—RIGHT TO ASSERT—LACHES.
Where for over 22 years a purchaser of land acquiesced in the title remaining in his sister, to whom it was transferred from the original grantee, and his will affirmed such title, the heirs of the purchaser cannot thereafter assert a resulting trust in the land; it being barred by laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 572; Dec. Dig. ⚷365(4).]

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

Suit by Jessie Boggs and others against Fannie W. Higginbotham, substituted in the place of Nancy J. Bright. From a decree for complainants (222 Fed. 714), defendant appeals. Reversed.

William W. Crump and Charles V. Meredith, both of Richmond, Va. (Conway R. Sands and Meredith & Cocke, all of Richmond, Va., on the brief), for appellant.

Marshall M. Gilliam and A. L. Holladay, both of Richmond, Va., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The issue in this case is whether the appellant, Fannie W. Higginbotham, holds the legal title to a tract of land of 335 acres in Henrico county, Va., as her own property, or as trustee of a resulting trust in favor of the heirs of William M. McGruder. The decision of the District Court was in favor of the complainants, claiming one-eighth interest as grandchildren of a deceased sister of McGruder. The bearing of the documentary evidence will be made clearer by setting it out in chronological order.

In 1867 the commonwealth of Virginia recovered judgments aggregating about $20,000 against Wm. M. McGruder as surety on the bond of R. H. Huff, county sheriff. On June 29, 1869, Susan C. Fisher and others conveyed a tract of 283 acres of land to Fannie Wrenn, a niece of McGruder, for the consideration of $1,800, and on September 13, 1872, another tract of 335 acres for the consideration of $1,600. The tract of 335 acres is the land in dispute.

On August 25, 1880, Fannie Wrenn executed to Wm. M. McGruder a power of attorney authorizing him to convey both tracts of land, in all 618 acres giving full discretion as to the consideration. The next day under his power of attorney McGruder executed in Fannie Wrenn's name a conveyance of the land to John T. Jones for the consideration expressed in the deed of $9,580. At the same time Jones executed a deed of trust to Henry A. Atkinson, Jr., trustee, to secure $6,333.34, the alleged balance of the purchase money. On June 11, 1881, Atkinson as trustee and McGruder as the agent of Fannie Wrenn acknowledged full payment of the balance of the purchase money and released all claim under the deed of trust. On March 3, 1884, Jones conveyed the land to Nancy J. Bright for the consideration expressed in the deed of $8,580. On March 7, 1884, the General Assembly of Virginia passed an act that no proceedings should be taken to enforce judgments like that against McGruder after the 1st of January, 1885; and on the 20th of December, 1886, McGruder compromised the judgment against him by making a small payment and was released from all liability thereon. On May 1, 1906, Nancy J. Bright conveyed a portion of the land to T. P. Davie and Jesse A. Davie, who executed a trust deed to secure $9,000 of the purchase money and interest thereon. The bonds and the notes representing this purchase money were indorsed and assigned by Nancy J. Bright to Wm. M. McGruder. In November, 1908, McGruder died, leaving his will, dated November 26, 1906, by which he undertook to bequeath the bonds and notes to certain persons and for certain purposes. The will however, contains this recital:

"Whereas, Mrs. Nancy J. Bright, recently sold a portion of her landed estate to Mr. T. Percy Davie, and held his bond for the payment of the same, dated May 1, 1906, for nine thousand ($9,000) dollars, payable in five years after date, payable to Mrs. Nancy J. Bright, and indorsed by her, and assigned to me."

The will contains no devise of the land in dispute and no intimation that McGruder regarded it as his property. After McGruder's death Mrs. Bright instituted a suit in the circuit court of Henrico county against the executors of McGruder and others interested in the bonds and notes, which resulted in a decree to the effect:

"That the assignments appearing on the back of each of the bonds and signed by Mrs. Nancy J. Bright were not made with the intention of transferring the ownership of said bonds to Wm. M. McGruder, and that therefore the legal title which passed by such assignments should be revested in the said Nancy J. Bright."

The court, however, exonerated McGruder from any fraudulent purpose in securing the assignment.

On October 7, 1909, the complainants, as the heirs of a sister of Wm. M. McGruder, brought this suit against Nancy J. Bright, alleging that when Susan C. Fisher and others conveyed to Fannie Wrenn, in 1872, McGruder paid the purchase price for the land, that all of the subsequent transfers were made at his instance, and that the grantees held the legal title in trust for him and after his death for his heirs. Nancy J. Bright died October 2, 1913, after her answer was filed, and Fannie W. Higginbotham, to whom Mrs. Bright devised the land, was made a party defendant and filed her answer.

[1, 2] When one person purchases land with his own money and has the title made to another a trust results in favor of the former. Bank v. Carrington, 7 Leigh (Va.) 566. And either the payment of the purchase money imposing a resulting trust on the holder of the legal title, or an express trust by agreement of the grantee to hold in trust for the real purchasers may be proved by parol. Young v. Holland, 117 Va. 433, 84 S. E. 637.

[3, 4] Between strangers a resulting trust is presumed against the grantee in favor of the person paying the purchase money. But if the purchaser takes the title in the name of a wife or child or other person for whom he is under some natural or legal obligation to provide, the presumption is against a resulting trust and in favor of a gift or advancement to the person named in the deed. 1 Perry on Trusts, 143; Young v. Holland, supra; Jackson v. Jackson, 91 U. S. 122, 23 L. Ed. 258. In general there is no legal or moral obligation on one brother or sister to support another, and therefore in these relations the nominal grantee will be presumed to hold under a resulting trust for the real purchaser. Madison v. Andrew, 1 Vesey, 57; 1 Perry on Trusts, 144; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182; 39 Cyc. 136. But the presumption of a resulting trust is one of fact, which may be rebutted by evidence of the circumstances or of the declaration of the purchaser that he intended a gift to the nominal grantee. Warren v. Steer, 112 Pa. 634, 5 Atl. 4; Higdon v. Higdon, 57 Miss. 264; Jackson v. Jackson, supra.

[5] Manifestly the relation of close affection or kinship, though not amounting to moral or legal obligation, is a fact to be weighed along with other evidence tending to rebut the presumption of a trust and support the inference of a gift.

[6] A resulting trust will not be declared in favor of a purchaser who had the legal title made to another for the purpose of defrauding his creditors. Almond v. Wilson, 75 Va. 613; Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007; Sell v. West, 125 Mo. 621, 28 S. W. 969, 46 Am. St. Rep. 508, and note; Neill v. Keese, 5 Tex. 23, 51 Am. Dec. 754, and note; 1 Perry on Trusts, 165.

[7] A resulting trust, if it arises at all, must arise at the time the legal title is taken. Beecher v. Wilson, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883; Miller v. Blose, 30 Grat. (Va.) 744.

[8] Parol evidence to establish a resulting trust must be clear, unquestionable, and certain. Donaghe v. Tams, 81 Va. 132; Woodward v. Sibert, 82 Va. 441. But when the payment of the purchase money by one for a conveyance made to another is established, the charge that the legal title was made to another to defeat the creditors of the purchaser must also be established by clear proof.

[9] There was a feeble effort to show that Mrs. Bright paid the purchase money when the Fishers conveyed the land to Fannie Wrenn in 1872; but the testimony proves beyond doubt that McGruder paid it. The deeds from Fannie Wrenn to Jones and from Jones to Mrs. Bright were made without valuable consideration. Mrs. Bright and McGruder lived together on the land as brother and sister, and Fannie Wrenn, their niece, was a member of the family until her marriage. McGruder cultivated the land and used it in all respects as his own, Mrs. Bright no doubt performing the household duties incident to her relation with her brother. McGruder also directed the changes of the title from Fannie Wrenn to Jones, and from Jones to Mrs. Bright, and all concerned acquiesced in full recognition of his control. His reason for getting the title out of Fannie Wrenn and into Jones, his confidential friend, was the expected marriage of Fannie Wrenn, and for getting the title out of Jones into Mrs. Bright, was the anticipated financial embarrassment of Jones. McGruder spoke of the land to his neighbors sometimes as his property and sometimes as the property of Mrs. Bright, his expressions on this subject no doubt varying as he had in mind his own control and dominion or the legal title of Mrs. Bright.

If this were all, there could be little doubt that all of the successive grantees of the land—Fannie Wrenn, Jones, and Mrs. Bright—took and held the legal title with a resulting trust in favor of McGruder, and enforceable after his death by his heirs. But inquiry into the motive of McGruder for keeping the title out of himself and in another is fatal to the claim of the complainants. An active and aggressive man in all his pursuits, it is evident that there must have been a reason cogent to him for the course he pursued. The record suggests no reason except that of preventing the collection of the large judgment in favor of the state against him; and the affirmative evidence of that motive is convincing. The mere fact of the existence of the judgment and the keeping of the title to the property for which he had paid and which was his chief asset in the names of others for so many years unexplained is strong evidence (Hickman v. Trout, 83 Va. 478, 3 S. E. 131, 20 Cyc. 449); for the judgment and the land were the two largest factors in McGruder's business life. Still stronger evidence is the fiction resorted to in the conveyance from Fannie Wrenn to John T. Jones. The arrangement was that Jones was to give his check for the cash portion to McGruder as attorney in fact for Fannie Wrenn, and McGruder was to return the check or the money collected on it. This was done to make that which was a mere fictitious consideration appear to be a real one. Mr. Atkinson, the attorney who drew the papers and who was the trustee under the mortgage deed purporting to secure a portion of the purchase money, testified that as he understood the transaction nothing was to be paid, and that the purpose of McGruder in not having the title in himself was to prevent the collection of the judgment. Objection was made to this testimony of Atkinson as to the fraudulent intent, on the ground that it came out on a cross-examination which extended beyond the subject of the direct testimony. The objection is not well founded, since the cross-examination related to the explanation of the transaction referred to as fictitious in the direct examination. It is true that the witness intimated that he had no positive knowledge of the fraudulent intent, but he was a party to the transaction and his understanding that the trust deed made to him was a mere pretense is not without weight.

The conclusion that McGruder had the title made to another for the purpose of defrauding his creditors carries with it the finding that equity would have given no relief to him, and will give none to his heirs.

[10] The claim that the release of the judgment by the state related back to the date of all of the transactions intended to prevent the collection of the judgment and purged them of this intrinsic vice is clearly untenable. Under the authorities above cited the relations of the parties were fixed when the deeds were made. Because of the fraudulent purpose to defeat a creditor the resulting trust failed to come into existence when the purchase money was paid by McGruder. The subsequent payment or release of the judgment could not create it. If it could a debtor by fictitious transfers could conceal property, secure a settlement of his debts by means of his fraud, and then demand the restoration of his property from the holder of the legal title at the hands of a court of equity.

[11] There is another view which is just as conclusive against the complainants if we lay to one side the vice of fraud. The evidence shows plainly that, while McGruder worked and intended to control and use the land as long as he lived, he had no intention of ever claiming the fee—of asserting the legal title and ownership. He took the utmost pains to escape owning it up to the time of the conveyance of Jones to Mrs. Bright. After that and after the satisfaction of the judgment against him, when there was no business motive for him to keep the legal title in his sister, he allowed her to retain it from January, 1885, when the judgment was satisfied, until his death in 1907—a period of 22 years. There is no evidence that in all this time he ever asked for a conveyance, or in any way indicated that he desired it. More significant still, in his will he solemnly asserts the land to be the property of Mrs. Bright, and the proceeds of the sale of a portion of it to have been transferred to him by her. If it was his property, either legally or equitably, it was by far the most valuable part of his possessions, and yet he made no devise of it. The will was a solemn affirmation that he did not hold the land adversely to Mrs. Bright, and that his use was subject to and in recognition of her title. Considering the unusually close relationship of this brother and sister, and the

absence of other family obligation on the brother, the reasonable conclusion is that, though at one time McGruder may have regarded himself, and though he may have been, the equitable owner of the land, yet he intended the conveyance from Jones to Mrs. Bright to confer upon her the full legal title, free from any trust, with the mere expectation that he would have the use of the land for the remainder of his life.

[12] Staleness is also a forceful consideration against the claim. The case of the complainants is that McGruder was the real owner, and could have required his sister, Mrs. Bright, to convey it to him at any time from 1884 until his death in 1908. After 22 years of acquiescence by him in his sister's title, followed by positive affirmation of it in his will, it is too late for his heirs to allege against it. Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408, 34 L. Ed. 1032; 1 Perry on Trusts, 141.

The complainants, it is true, were not parties to the suit brought by Mrs. Bright in which the circuit court of Henrico county decreed that Mrs. Bright was the owner of the bonds and notes given by Davie for the purchase of a part of the land conveyed to her by Jones; but the decision of the state court is of great persuasive weight as to the legal principles involved, since the Supreme Court of Appeals of Virginia denied an appeal on the ground that the decree of the circuit court was plainly right.

Summing up the case in a practical way, the evidence leads to these inferences as to the relations of the parties and the status of the land: McGruder bought the land and paid the purchase money. He had the title made to Fannie Wrenn, and afterwards to his friend Jones, and then to his sister, Mrs. Bright, to protect it from the judgment against him in favor of the state. After the satisfaction of the judgment the conduct of McGruder shows that he expected to use the land and the proceeds of the sale of any of it without any objection from his sister, Mrs. Bright; but it also shows that he acquiesced in and affirmatively asserted his sister's ownership, that he had no intention of setting up a claim to the title against her, and that he intended the conveyance from Jones to her to operate as a gift, subject only to the expectation that he would use and control the land as long as he lived. There is no equity in the bill, and it must be dismissed.

Reversed.

THE MERCER.

(Circuit Court of Appeals, Second Circuit. April 25, 1916.)

No. 191.

COLLISION ⚿102—STEAM VESSELS MEETING—MUTUAL FAULTS.

A tug, with a tow alongside, *held* in fault for a collision with a meeting tug on North River, for not keeping a proper lookout, and therefore failing to see the other tug until within 600 feet of her, and for then

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

failing to reduce speed or stop until immediately before collision. The meeting tug also *held* in fault on the ground that, when she saw the other tug approaching head on and 600 or 700 feet away, it was her duty under article 18 of the Inland Rules (Act June 7, 1897, c. 4, § 1, art. 18, 30 Stat. 100 [Comp. St. 1913, § 7892]) to port her helm and signal for passing port to port, instead of which she gave alarm signals and reversed.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⚡102.]

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

Suit in admiralty for collision by John J. Pareis, owner of the steam tug Eva May, against the steam tug Mercer; the Pennsylvania Railroad Company, claimant. Decree for libelant, and respondent appeals. Modified.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Benjamin W. Wells, both of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

ROGERS, Circuit Judge. The libelant is the sole owner of the steam tug Eva May and has brought this suit against the steam tug Mercer to recover damages for injuries sustained by collision between his vessel and the steam tug Harrisburg, in tow of the Mercer. The court below held the Mercer solely at fault.

The Eva May left her berth at the foot of West Tenth street in the borough of Manhattan, New York City, at about 7 a. m. on December 24, 1912. She was bound for Jersey City. She was ready to start out at about 6 a. m., but there had been a rather heavy snowstorm during the preceding night, and, as it was still snowing, her master deemed it prudent to remain in the slip until the weather conditions became favorable. At 7 o'clock the looked-for change came. The snow stopped falling and the weather cleared, so that the captain of the tugs could see across the river with perfect distinctness. After leaving her berth the Eva May headed across the North River to the New Jersey side of midstream and then went down the river. It is claimed that she was proceeding slowly under one bell.

The tug Mercer, towing the tug Harrisburg on her starboard side, left Pier H., Jersey City, bound for Hoboken. The tide was flood, with a strong breeze from the northeast, blowing straight down the river. The mate of the Mercer testified that he was at an open window of the Harrisburg's pilot house, and the floatman of the Mercer testified that he himself was forward near the stemhead of his tug both keeping lookout. The Mercer claims it was proceeding slowly and carefully up the river, making about 4.5 knots; that when she was about abreast of Pier 7, Hoboken, and about 500 feet from the New Jersey shore, smoke and steam from the Eva May were seen right ahead and about 600 feet away by the lookouts on the Mercer and Harrisburg; that the weather was so thick on account of fog and falling snow that the master of the Mercer could not make out the Eva May until about 600 feet off the Jersey shore, when she at once blew one blast of the whistle, which was answered by the tug with a signal of two blasts; that, as soon as the Mercer received the cross-signal from the Eva May, her master rang for full speed astern and sounded alarm blasts.

It is alleged, however, by the libelant, that the Mercer was coming up the river with the tide at a high rate of speed. The libelant alleges that, when the Eva May made out ahead the Mercer, the former blew an alarm whistle, stopped, and reversed; that the Mercer replied with a signal of one whistle; that as the latter signal could not be safely complied with the Eva May repeated her alarm signal and continued backing; but that, notwithstanding the alarm signals, the Mercer came on ahead, without slowing or stopping, until just before the collision, and brought the Harrisburg into contact with the Eva May with such force that she very shortly thereafter filled and sank.

There is a conflict of evidence as to the whistle signals exchanged. The appellant's witnesses say the first signal, one blast, was blown by the Mercer, and answered by the Eva May with two; that the Mercer then sounded the alarm, reversed her engines, and again blew the alarm. The appellee's witnesses say that, immediately on sighting the Mercer, the Eva May blew the alarm and backed full speed; that the Mercer then blew one blast, and the Eva May then blew another alarm, and kept backing full speed, and the Mercer then blew an alarm and reversed her engines 450 feet from the Eva May.

The court below was satisfied, and we are satisfied, that the weather was not thick with fog and that no snow was falling at the time of the accident. The master of the Eva May testified that the atmosphere was clear and that one could see from shore to shore. He was corroborated by other witnesses, and among them by one Capt. Newman. The latter was not employed by either party and appears to be an intelligent and wholly disinterested witness. He witnessed the collision from the steam lighter Hector, owned by the Erie Railroad Company, in whose employ he was, and he testified that the weather conditions were good and that he had no difficulty in seeing the New York shore.

The court below thought the Mercer solely at fault, but failed to state the reasons. The captain of the Eva May testified that, when he discovered the Mercer, that boat was heading directly for the Eva May and was 600 or 700 feet distant. He was asked:

"Q. Was she heading so as to pass you on either side, or if her course had continued would you have come together? A. Right for us when I discovered them."

He also testified that as soon as he discovered the Mercer he immediately blew the alarm whistle and rang bells to stop and go back with the engine, full speed; and he added that the signals were obeyed and his boat kept backing full speed. He testified that the Mercer blew one whistle, and that as he could not comply with that signal he blew another alarm. Asked what, if anything, the Mercer did after he blew the second alarm, he said:

"She kept coming for us," and "she was coming very fast."

The result was that the boats came together. On cross-examination he testified as follows:

"Q. You say that you burn soft coal? A. I do. Q. And that there was this exhaust from your exhaust pipe? A. Yes, sir. Q. And that the wind was northeast about? A. Yes. Q. That would blow this smoke and steam in what direction? Down the river ahead of you? A. Down, ahead of us; yes, sir. Q. You were not blowing any fog signals, were you? A. No, sir. Q. This exhaust steam and smoke somewhat obscured the view below, I believe, you said? A. It did, ahead of me. Q. When you saw the Mercer, she was about dead ahead of you, was she? A. A trifle on our starboard or inside. Q. What do you mean by a trifle on your starboard bow? A. Just the inside, I think. Q. It was a head and head situation, I believe. You were coming head and head? A. Yes. Q. And I think you said that she was heading right for you? A. The two tugs. Q. And 500 or 600 feet away? A. Yes, sir."

On examination by the court the following testimony was given by him:

"Q. When you heard the first whistle from the Mercer, was the smoke still ahead of you? A. Yes, sir. Q. And somewhat obscuring your view? A. They came out of that smoke so that I could see them; but I blew the alarm whistle, stopped, and backed my boat. Q. When you backed your boat, when you started to back your boat, what was the condition as to smoke? It was obscuring your view to some extent? A. To some extent, yes; but we were close enough together so that we could see each other. Q. What made you think it was dangerous to continue the course, so as to bring you port to port, instead of stopping? A. We were too close together to go any closer together without stopping and backing; our rules are to stop and back to avoid a collision, which I did. Q. Then you felt that one or the other of you might make some error in maneuver, if you didn't stop? A. That is it."

On his redirect he testified:

"Q. At the time of the collision what effect had the reversed engines upon the forward motion of your tug? A. It would swing the bow of the boat to port. Q. You don't catch me. I mean, were you still going forward in the water, or had you stopped your headway, or which way were you moving at the time of the collision? A. She was going stern first; she had a trifle stern headway on her. Q. That is, your reversed engines had overcome your momentum? A. Yes. Q. And you had started to go astern? A. Yes, sir. Q. If the Mercer had answered your alarm whistle with alarm whistles, and stopped and backed would there have been any collision? A. No, sir."

As respects the finding by the District Judge that the Mercer was in fault, this court fully concurs in that conclusion. There is no good reason why the Mercer did not see the Eva May long before she did. The cloud of black smoke emitted by the Eva May was a much more conspicuous object than the tug herself, and if the Mercer had been alive to the situation, or her lookout not derelict, she would have seen or been advised by the lookout that a tug was coming down the river with her smoke and steam carried ahead of her by the northeast wind, and she would also have known, or at least had reasonable cause to believe, that her own presence in the river might be obscured from the pilot of the down-coming vessel. Under those conditions, it was her duty to blow passing signals and slow down, and, if necessary, stop until a passing agreement was entered into between her and the Eva May.

The Mercer did not, however, slow up or stop, but ran right into peril, stopping and backing only when she was within 100 or 150 feet of the Eva May. Her engineer testified that after the tow had straightened up the river he got a hook-up bell, and operated under a hook-up bell from that time until just before the collision, when he stopped and reversed full speed. According to the Mercer's own witnesses, she was from the time she started running under a hook-up bell with a flood tide until she was within 100 or 150 feet of the Eva May. She must have been making about 6 miles an hour, notwithstanding the testimony of her witnesses, shown to be inaccurate by their testimony concerning the weather conditions.

The District Judge came to the conclusion that the Eva May was navigated with care and caution and he absolved her from all fault. We find ourselves unable to concur in that conclusion. The Eva May did not, in our opinion, perform her entire legal duty. What she did was to blow her alarm whistle and stop and reverse. The result was that she was thrown across the track of the Mercer. The testimony satisfies us that the Eva May and the Mercer were approaching end on or nearly so. Article 18, rule 1, of the Pilot Rules for Certain Inland Waters reads in part as follows:

"When steam vessels are approaching each other head and head, that is, end on or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other."

The rule required these vessels to pass each other on the port side. There is evidence tending to show that the Eva May starboarded her helm. One of the claimant's witnesses testified that when the two tugs were close to each other the master of the Eva May was seen trying to put his helm aport. On cross-examination it was sought to weaken this evidence, but without success. This would tend to show that the Eva May's helm must have been starboarded, and that the master tried to shift it and could not do so. But, disregarding that, and accepting the testimony of the master of the Eva May, then it appears that the Eva May stopped and backed, when the law required her to port her helm. The master stated that, when he reversed his engines, the effect was to swing the bow of his tug to port. There is no doubt that as a result of what was done the Eva May was swung considerably across the river, and this contributed to the collision. Instead of porting her helm, she stopped and backed. In doing so she violated the law, and she has not shown anything to justify her in her departure from the statutory rule. The departure from that rule puts on the boat attempting to justify it the burden of establishing that the other boat assented by proper signals to the departure. And this burden has not been met in this case.

As both tugs were in fault the damages should be divided, and the decree below modified to conform to this opinion. It is so ordered.

NORTHRUP v. PHILADELPHIA & R. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 25, 1916.)

No. 241.

COLLISION ⚷71(2)—TOW AND STATIONARY DREDGE—FAULT OF TOWING TUG.

A collision in Kill von Kull at night between a canal boat, forming part of a tow of 15 boats in tiers of 3, and a scow alongside a dredge engaged in deepening the channel, *held* due to the fault of one of the towing tugs in directing the casting off of the lines between the rear starboard boat, which was to be taken out of the tow, and the boat ahead of them continuing to push at the stern of the tow, which forced the latter boat out of the course of the tow and into collision with the scow. The dredge *held* not in fault as obstructing the channel; it appearing that there was a clear channel of over 400 feet on the side of the tow.

[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 Southern District of New York.

Suit in admiralty for collision by George Northrup, owner of the canal boat Senator Rice, against the steam tug Bern, the Philadelphia & Reading Railway Company, claimant, and the Morris & Cummings Dredging Company, impleaded. Decree against the Bern, and claimant appeals. Affirmed.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for claimant-appellant.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for libelant-appellee.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for respondent-appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

ROGERS, Circuit Judge. This suit arises out of a collision, and the libelant sues as the owner of the canal boat Senator Rice. The libelant brings the suit on his own behalf as owner, and on the behalf of the underwriters on the boat, against the steam tug Bern, owned by the Philadelphia & Reading Railway Company. The injury to the Senator Rice occurred while that boat was in tow of the steam tugs Bern and Wyomissing, and resulted in the beaching of the boat. The injury resulted from a collision with a scow alongside of a dredge in the channel of the Kill von Kull. The owner of the Bern filed a petition, under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi), against the Morris & Cummings Dredging Company, alleging that that company was responsible for the injury to the Senator Rice.

On the night of January 7, 1914, the Senator Rice, loaded with 315 tons of coal, left Port Reading in tow, with other boats, of the steam tugs Bern and Wyomissing, bound for Thirty-Seventh street, East River, New York. The tow consisted of 15 boats, made up of 5 tiers of 3 each. The Senator Rice was in the fourth tier on the starboard

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

side. The Wyomissing was in charge of the tow, which it had on a hawser, and the tug Bern was assisting at the stern of the tow. The tow left on flood tide. The pilot knew that the dredge was there, and that the scow was next to the dredge. He had been past the dredge in the afternoon, and knew all about the situation. Moreover, he admitted that the dredge was lighted up at the time of the accident, and that he saw her and the scow. The tugs and tow proceeded on their way until in the vicinity of Elizabethport, about 2:15 a. m., when the steam tug Bern dropped back to take out of the tow the boat which was directly astern of the Senator Rice. The Bern made fast on her port side to the starboard side of the coal boat and started to back away before all the lines were cast off between the boats she had in tow and the one next to her. When the tug started to back, the last tier of the tow was thrown out of position, and the Senator Rice was shoved into a dredge which was lying about in the middle of the stream, breaking the stem and three timbers of the Senator Rice.

The libel charges that the collision was caused through the fault and negligence of the Bern and those in charge of that tug, in the following particulars: (1) In attempting to remove the boat from the tow before all the lines from said boat to the tow had been cast off. (2) In causing the Senator Rice to come in contact with a dredge which was at anchor. (3) In failing to give signals to the Wyomissing to stop. (4) In not preventing the Senator Rice from coming in contact with the dredge. The libel denies that the collision was caused by the Senator Rice, or those in charge of that boat.

The answer states that the tow was handled with the utmost care and with adequate help; that it was not caused or contributed to by any negligence on the part of the claimant, but was caused or contributed to by the negligence of said dredge or owners in unlawfully obstructing the channel. The answer of the Dredging Company states that it was engaged in the work of widening and deepening the channel of Staten Island Sound, between Elizabethport and the Baltimore & Ohio bridge, under a contract with the United States government, and it was duly permitted under its contract, and by authorization of the proper government engineer, to work by night as well as by day; that in doing such work it necessarily placed its dredge in the channel of the stream and worked with scows to receive the dredged material, and that it did so with as little interference with navigation as possible; that on the night of January 7, 1914, its dredge was brilliantly illuminated and had in position so-called passing lights, indicating on which side of the dredge a moving vessel should pass; that its dredge was not working in the middle of the channel, and there was always abundant room for a properly made-up tow to pass in safety between the dredge and the shore; that if a collision resulted, as alleged in the petition, it was solely due to fault and negligence on the part of the Philadelphia & Reading Railway Company, its agents and servants, and was in no way due to fault on the part of the respondent.

The dredge was engaged under the supervision of the government in dredging the waters of the Kill von Kull at a point where a channel 400 feet wide had to be deepened. The channel between the dredge and the New Jersey shore was 450 feet; and between the side of the scow next to the dredge and receiving the dredged material and the shore it was 415 feet. The contract between the Dredging Company and the government expressly requires the contractor to conduct the work in such a manner as to obstruct navigation as little as possible, and in case the contractor's plant so obstructs the channel as to impede the passage of vessels, it must promptly be so moved as to afford a practicable passage on the approach of any vessel.

It is impossible to have a dredge in the Arthur Kill without to a certain extent obstructing the channel. We cannot, however, hold that the channel was so obstructed in this instance as to impede the passage of this tow. All that the contract and the law requires is that there should be afforded a practicable passage for the tow. A 400-foot channel for a 75-foot tow is certainly no such obstruction as would render the dredge liable on the ground that it obstructed navigation within the meaning of the law. The injury which occurred could not have happened if those in charge of the tow had not approached so near the dredge. But, even as it was, the accident would not have happened if it had not been for an order that was given to which reference is hereinafter made. It is perfectly evident to us that those in charge of the tow, not only had the necessary channel, but that they were well aware that there was no necessity for withdrawing the dredge, and that they did not ask to have it withdrawn.

The government inspector was on the upper deck of the dredge when the accident occurred and saw the collision. He testified that all the lights were showing on the dredge and that on the approach of the tow he heard no danger blasts. This was confirmatory of the master of the dredge who heard no alarm from the tug.

The reason for this collision is not involved in the slightest uncertainty. That reason was the premature throwing off of the lines between the Wayne and the Senator Rice while the flotilla was passing the dredge. The Senator Rice was the starboard boat in the fourth tier, and the Wayne was directly behind her in the fifth tier. It appears that it had been planned to take the Wayne out of the tow at a point somewhat further up the Kills. The master of the Senator Rice testified that he had been informed of this plan when starting from Port Reading. Some time before reaching the dredge he received whistles either from his tug, the Wyomissing, or the helper, the Bern, which he construed as a signal to throw off the lines between the two barges. The result of the throwing off of the lines was that the Senator Rice did not keep its alignment in the tow. In no other way is it to be accounted for that the starboard boats in the first three tiers cleared the scow.

The testimony of the master of the Senator Rice is as follows:

"Q. Where were you on your boat at the time of this collision? A. I was walking to the bow about half way through her. Q. Just go on and tell us what you saw. A. What I saw, I was walking to the stern letting go of the lines on the other boat. Q. Why were you doing that? A. That was just before she struck I was letting the spring lines off the boat behind. Q. Why were you doing that? A. We were going to take the boat off. Q. What happened when you started to take these lines off? A. The boats were swinging towards the tow, and all I know she struck the dredge. Q. Are you able to say whether all the lines on this particular boat had been taken off? A. Yes, sir. Q. What about the lines from that boat to the boat on the port side? A. I don' know; I didn't see them. Q. You say you got the lines from the stern of your boat to the bow of the boat astern of you free, did you? A. Yes, sir. Q. How many lines did you throw off? A. Two spring lines. Q. Was that all you did? A. That was all. Q. Was it then the collision happened? A. Just a little while after."

The testimony of the captain of the Bern is as follows:

"Q. Had you given any signal to this man on the Senator Rice or the Wayne No. 4 to cast off their lines before you got by that dredge? A. Yes, sir; one line the inside tow line. Q. How did you do that? A. Well, I was laying just like that ready to shove. I said, 'Let go your inside tow line, so you will be handy to get off.' Q. Who did you say that to? A. I guess it was the captain of the Wayne 4. Q. Did he do it? A. Yes sir. Q. Was that the only line? A. Yes; and he had breast lines out besides. Q. Did they in any way interfere with the position of the boats in the tow from what they were before the casting off of the line? A. No. Q. That was before you came to the digger? A. Yes, sir. Q. How long before? A. A couple of minutes; I was just going by the digger. I thought everything would be all right. Q. You got three tiers through all right, didn't you, past the scow? A. Yes. Q. The Senator Rice hit the scow alongside of the mud digger? A. Yes, sir. Q. Do you know how she hit? A. Well, the only thing I know was on the corner of the scow. Q. The Jersey corner? A. The Jersey corner, on the mud scow. Q. Were you pushing then with your tug? A. Yes, sir. Q. How did you keep away, to keep yourself from getting in? A. I kept pushing all the time. Q. Did you succeed then in getting the Wayne No. 4 clear? A. Yes, sir. Q. And yourself, too? A. Yes, sir. Q. You didn't let go in order to back out and get away? A. Yes, sir. Q. Did the Senator Rice break out of the tow? A. She hit. I don't know whether she parted the tow line, or not, to the boat ahead. Q. He said he cast them off long before. A. Cast his own tow lines off.

"Mr. Mattison: No; cast the lines astern of him.

"Q. Do you know what condition the lines were in between the stern of the Rice and the Wayne No. 4? A. No. Q. You don't know whether they were on or off? A. Well, they must be on, because she hung on—hung on to the tow. Q. They were all moving right along? A. Yes, sir. Q. If his lines had been off her— A. He would drift away from the tow."

When the lines of the Wayne were cast off pursuant to orders, the strain on the lines not cast off, caused by the pushing of the tug Bern, resulted in throwing the bow of the Senator Rice so far out to starboard that it hit the scow. The collision was due solely to the negligence and lack of skill on the part of the captain of the Bern in ordering the lines cast off at the time he did and in so navigating the Bern as to force the Senator Rice out so far to the starboard. We think the court reached the right conclusion in this matter, and we agree in holding that the dredge was not at fault.

Decree affirmed.

CHICAGO & N. W. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied June 1, 1916.)

No. 2294.

1. CARRIERS ⚷37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—VIOLATION.

Under the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1913, §§ 8651–8654]), declaring that no carrier shall confine cattle or other animals in cars for more than 28 hours without unloading for rest, water, and feeding, but that the shipper may consent to the time of confinement being extended to 36 hours, the penalty provided for violation may be recovered, though confinement beyond the 36-hour period, which was consented to by the shipper, was not willful or with intent to do injury to the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⚷37.]

2. CARRIERS ⚷37—CARRIAGE OF LIVE STOCK—VIOLATION OF TWENTY-EIGHT HOUR LAW.

In an action to recover the penalty imposed by the Twenty-Eight Hour Law, where a carrier keeps cattle confined longer than the maximum period of 36 hours, unless necessitated by storm or accident, it is no defense that an accident occurred on the last part of the journey, where, despite such accident, the shipment might have arrived in less than 36 hours, had diligence been exercised.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⚷37.]

3. CARRIERS ⚷37 — CARRIAGE OF LIVE STOCK — ACTIONS — TWENTY-EIGHT HOUR LAW—EVIDENCE—SUFFICIENCY.

In an action to recover the penalty imposed by the Twenty-Eight Hour Law for keeping cattle confined longer than 36 hours, evidence that the confinement was occasioned by the carrier's negligence *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⚷37.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against the Chicago & Northwestern Railway Company to recover a penalty for violation of the Twenty-Eight Hour Law. There was a judgment for the United States, and defendant brings error. Affirmed.

The action was for violation of the "Twenty-Eight Hour Law." It appears that the stock was loaded October 4th at 6 p. m. at Ringsted, Iowa, a station on defendant's road, and conveyed by defendant over its road to the stockyards at Chicago, where it was unloaded at 9:05 a. m. of the 6th, having been confined in the car continuously for 39 hours and 5 minutes. The shipper agreed to 36 hours' confinement. The car containing the stock was one of an extra train carrying stock only. Defendant gave evidence that the train reached Clinton, Iowa, which station it left at 6:30 p. m. of the 5th, for Chicago; that at Nelson, Ill., there were picked up and put into this train 5 cars of stock, which had been left there by a prior train, because it was found to be too heavy. The schedule running time from Clinton to Chicago was 9 hours, but it had been done in 6 hours. The train reached Proviso, a station just outside of the city limits of Chicago, and 16 miles from place of unloading, at 2:48 a. m. of the 6th, and while running through this station a

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

drawbar was pulled out of car No. 21239, which was the fifth car from the engine, and one of those picked up at Nelson, and one of the timbers which held the drawbar, falling upon the rails, caused derailment of the car following. It was necessary to send for a wrecker to re-rail the car. The wrecker was at Palatine, all ready with its crew to start on such emergencies. Notice of this derailment was received by the foreman of the wrecking crew at 4 a. m. He immediately started for Proviso, reaching there at 5:05 a. m. The track was cleared at 5:35 and the train proceeded on its course at 5:40. This conductor left the train at Fortieth avenue at 6:30 or 6:40, and it was there taken in charge by another of defendant's conductors, and started for the stockyards. After going about 5 miles and reaching Brighton Park, which is about 2 miles from the stockyards, an air hose on one of the cars burst, causing a sudden setting of the brakes, and the pulling out of a drawbar on another car of the train. This necessitated the setting out of that car, and replacing the air hose, causing further delay of 28 minutes.

Various witnesses testified to having examined car No. 21239 prior to the pulling out of the drawbar, and that they observed nothing to indicate that the drawbar was defective. At the conclusion of the evidence for the government, and again at the close of all the evidence, defendant moved the court to instruct the jury to find a verdict for the defendant, which motion the court denied. In the court's charge to the jury it was stated that the jury had a right to consider the movement of the train from the point where the stock was received to the Chicago stockyards, in determining whether the defendant exercised due diligence to transport the stock within the 36 hours; that the company may not lay out a slow schedule over a long distance, depending upon its ability, toward the end of the journey, to run in the stock within the 36-hour limit. To these portions of the court's charge defendant took exception. The jury returned a verdict against defendant, and judgment was entered and fine imposed. It is stated in the record and in briefs of counsel that seven other suits are pending against the defendant in the District Court, depending upon these same facts, and which by stipulation between the parties are to be disposed of in like manner as the case at bar.

Charles A. Vilas, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., for the United States.

Before MACK and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] It is contended for plaintiff in error that the record herein discloses no evidence which would warrant the conclusion that plaintiff in error "willfully" violated the Twenty-Eight Hour Law. That the term "willfully," as employed in the act, does not imply deliberate intent to do injury to the stock or to its owner, has been too frequently considered and definitely determined to require further demonstration. The jury may conclude that the violation was willful, if from the evidence they find that the carrier in confining the stock beyond the statutory limit, manifested disregard of the law, or indifference toward its requirements. Newport News, etc., Co. v. United States, 61 Fed. 488, 9 C. C. A. 579; N. Y. Cent. R. R. Co. v. United States, 165 Fed. 833, 91 C. C. A. 519; United States v. A., T. & S. Ry. Co. et al. (D. C.) 166 Fed. 160; United States v. U. P. R. R. Co., 169 Fed. 65, 94 C. C. A. 433; United States v. Atlantic Coast Line R. R. Co., 173 Fed. 764, 98 C. C. A. 110; C., B. & Q. R. R. Co. v. United States, 194 Fed. 342, 114 C. C. A. 334; O-W. R. & Nav. Co. v. United States, 205 Fed. 337, 123 C. C. A. 471; St Louis, etc., Ry. Co. v. United States, 209 Fed. 600, 126 C. C. A. 422; Grand Trunk Ry. Co. v. United States, 229 Fed. 116, — C. C. A. —.

[2] It was stipulated by the company that the overtime of confinement of this stock was 3 hours and 5 minutes. It seems to be the theory of the plaintiff in error that, if it appears that unavoidable accident delayed the train in its course for a period of time at least as long as the 3 hours and 5 minutes, a complete defense will have been made, and that it was error for the court to charge the jury it may take into consideration the whole period of confinement, in determining whether any of the excess over 36 hours was in violation of the statute, and whether, in the exercise of due diligence by the carrier, the confinement should have terminated earlier than it did.

It is claimed that a delay of 2 hours 52 minutes unavoidably occurred at Proviso through a pulled drawbar, and consequent derailment of a car, and another of 28 minutes at Brighton Park through a bursting air hose and resultant pulling out of another drawbar—making 3 hours 20 minutes of unavoidable delay, but for which the stock presumably would have been unloaded 15 minutes before the expiration of the 36 hours.

The statute prohibits the carrier from confining the stock beyond the period fixed, without unloading into pens, etc., "unless prevented by storm or other accidents or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight." If the unloading is so prevented, the delay is excused; but if, notwithstanding unanticipated and unavoidable delays, the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, depending upon the facts of each case. Suppose an instance where, the shipper having consented to 36 hours' confinement, the time reasonably required to convey the stock from origin of shipment to unloading point was 10 hours, and that an excusable delay of 16 hours occurs in transportation; would this excuse the carrier in prolonging the confinement of the stock beyond the 36 hours? Plainly not, if in the exercise of due diligence the confinement, notwithstanding the delay, should not have exceeded 36 hours. In other words, since there were still 20 hours of the 36 in which to do what reasonably required but 10, the overtime of confinement would not be attributable to the delay in transportation. And surely the delay of 16 hours in the transportation would not in and of itself give the carrier the right arbitrarily to prolong the confinement from the original 36 to 52 hours, wholly regardless of the time reasonably necessary to reach an unloading point, without incurring the penalty of the statute, if the confinement is willfully and knowingly extended beyond 36, though within 52, hours.

So in the instant case, if conceding 3 hours 20 minutes of excusable delay at Proviso and Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the

36 hours, or, if exceeding 36, ought not to have been as long as 39 hours 5 minutes, its verdict would in that regard be justified. In considering the question of whether all or any of the overtime of confinement was made necessary by the proved delays, and whether in the exercise of due diligence the carrier could have brought the stock to the unloading point in materially less than the time here in question, it was entirely proper for the jury to consider the confinement and transportation of this stock from inception to unloading, and this only is what the court's charge, which is complained of, told the jury it might do. There was no error in this.

[3] Was there any evidence from which the jury might reasonably have concluded that in the exercise of due diligence the carrier should have unloaded the stock within the 36 hours, or in any event within a period substantially less than the 39 hours of their confinement? In brief for plaintiff in error it is said:

"The train was in Proviso, 136 miles distant, at 2:48 in the morning, or 8 hours and 43 minutes after leaving Clinton, having traversed that distance at an average speed of 15.7 miles per hour. At that point, but a very few miles from the stockyards, they therefore had 4 full hours left."

But the stock was not unloaded till 9:05—6 hours 17 minutes after reaching Proviso, 16 miles away. Deducting 3 hours 20 minutes for the delays at Proviso and Brighton Park leaves 2 hours 57 minutes clear running time, which was consumed to make 16 miles, with a train carrying stock which had then already been confined 36 hours or more. The purpose of the law being, as declared in the act, "to prevent cruelty to animals while in transit," humanitarian considerations would suggest that, as the maximum period of confinement is approaching or passed, reasonable diligence on the carrier's part will require corresponding increase of effort to minimize further duration of the confinement.

The jury may have concluded that, conceding the delay of 3 hours 20 minutes as claimed, the consuming of 2 hours 57 minutes for a 16-mile run with stock which had already been confined by the same carrier since 6 o'clock p. m., of the second day before, manifested such a disregard for the statute as to afford sufficient evidence of its willful violation. We cannot say that a verdict so based would be without evidence to support it, or a judgment given on such a verdict contrary to law. And indeed the jury might from the evidence have concluded that yet another hour was wasted at Proviso, at which station at 2:48 a. m., the car in the train was derailed. The wrecker was at Palatine with its crew ready to go out on any such emergency. But the foreman of the crew testified that he did not get notice till 4, that he started at once, reached Proviso at 5:05, cleared the track at 5:30, so that at 5:40 the train proceeded. In these days of lightning communication, the jury might not improperly have found that under the circumstances ordinary care did not admit of such delay in calling the wrecker, and that such hour or so of the delay at Proviso was neither necessary nor unavoidable.

We find no error in this record, and the judgment of the District Court is affirmed.

CHICAGO & N. W. RY. CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

Nos. 2295, 2296.

1. CARRIERS ⟹37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

In an action against a carrier to recover the penalty provided in the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1913, §§ 8651-8654]) for knowingly and willfully confining stock beyond 36 hours, it is not necessary to recover the penalty that there was a direct intent to injure the stock; the question of willfulness being determined from the entire circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟹37.]

2. TRIAL ⟹142—DIRECTED VERDICT—RIGHT TO.

Though the facts were conceded, verdict should not be directed, unless reasonable minds would not differ as to the conclusion to be drawn.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. ⟹142.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Actions by the United States of America against the Chicago & Northwestern Railway Company. There were judgments for the United States, and defendant brings error. Reversed and remanded.

These two cases were argued together, and will be so considered and disposed of. The actions were against plaintiff in error to recover penalties for violation of the "Twenty-Eight Hour Law." In one of the records it appears that by stipulation two cases were tried together in the District Court, thus making really three to be here disposed of. The declarations allege that the carrier knowingly and willfully confined in cars the stock mentioned in the respective declarations, in excess of 36 hours, in conveyance thereof over the defendant's railroad from the points named in the states of Minnesota and Iowa to Chicago. Defendant filed pleas of general issue, and all were tried by jury on the same day. Jury being impaneled, counsel for defendant stipulated that the confinement of the stock was in two of the cases 38 hours 35 minutes, and in one 37 hours 22 minutes, there being in each case a 36-hour agreement on the part of the shipper. The allegations of the declarations were admitted, excepting so much thereof as charged the defendant with willfully and knowingly confining the stock beyond the 36-hour period, and which alleged that the defendant was not prevented by storm or other accidental or unavoidable cause from unloading the stock. Thereupon the government rested, and defendant moved the court to instruct the jury to find defendant not guilty, stating as reason for the motion that there is no evidence that the defendant willfully and knowingly confined the stock beyond the statutory time. The motion was overruled, and, defendant resting its case, the court directed the jury to find the defendant guilty, which was done, and judgments rendered accordingly, and fines imposed.

Charles A. Vilas, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., for the United States.

Before MACK and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] On behalf of plaintiff in error it is urged that the record affords

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

no evidence whatever that the defendant willfully and knowingly confined the stock beyond the 36 hours; that the court committed error in denying defendant's motions for instructed verdicts of not guilty, and in instructing the jury to find defendant guilty. On the other hand, it is claimed for the government that the stipulation at the trial afforded prima facie evidence that the defendant willfully and knowingly confined the stock beyond the 36 hours, and that in the absence of further evidence the directed verdicts for the government were proper.

In order to establish willfulness of the act of confinement beyond the limit, it is not necessary that there be evidence of any direct intent to do injury to the stock. Our opinion in No. 2294 (234 Fed. 268, — C. C. A. —), another "Twenty-Eight Hour Law" case having same title as those here, and which is decided contemporaneously herewith, is referred to for some further discussion of the subject of willfulness.

The ultimate question of the willfulness of the act of confinement must be determined from the evidentiary facts, and it makes no difference that such facts appear by stipulation of the parties rather than through oral or documentary evidence.

[2] Unless it can be said that reasonable minds would not differ in the conclusion to be drawn from the conceded facts, the conclusion must be reached, not by the court as a matter of law, but by the trier of facts, the jury. From the facts appearing herein we cannot say that on consideration thereof reasonable minds would not differ as to whether or not the confinement of the stock beyond the 36 hours was willful on the part of plaintiff in error.

We thus find that the District Court properly refused the requested instructions to find defendant not guilty, but that it erroneously instructed the jury to find verdicts of guilty.

Judgments reversed, and causes remanded, with direction to District Court to grant a new trial in each case.

FIREMAN'S FUND INS. CO. v. GLOBE NAV. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1916.)

No. 2630.

INSURANCE ⚷607—MARINE INSURANCE—LIABILITY OF INSURER—INSURANCE OF FREIGHT ADVANCED BY SHIPPER.

Pursuant to the terms of the charter party, a charterer made an advance on freight, deducting the cost of insurance, and taking the receipt on draft of the master. Thereupon it insured the freight in its own name to the amount of the advance. The ship became disabled in a storm, the voyage was abandoned, and the insurer paid the insurance to the charterer, taking an assignment of the master's receipt. *Held*, that it could not recover thereon against the shipowner, for whose ultimate benefit the insurance was effected, through the charterer as its agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1512, 1513; Dec. Dig. ⚷607.]

⚷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 Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in personam in admiralty by the Fireman's Fund Insurance Company against the Globe Navigation Company and S. P. Weston, its trustee in bankruptcy, on an instrument in writing executed by A. W. Swenson, master of the American schooner Wm. Nottingham, as agent for said Navigation Company. Decree for respondents, and libelant appeals. Affirmed.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., and Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for appellant.

Clise & Poe, of Seattle, Wash., for appellees.

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

MORROW, Circuit Judge. On June 3, 1911, W. R. Grace & Co. chartered the American schooner Wm. Nottingham owned by the respondent, Globe Navigation Company. Under the terms of the charter party it was provided that:

"A sufficient amount for ship's ordinary disbursements at port of loading, say not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, subject to a charge of 7 per cent. to cover interest, insurance, and commission; advance to be indorsed on captain's copy of charter party and all the bills of lading."

No advance was indorsed on captain's copy of the charter party, nor was any such indorsement made on any of the bills of lading; but the charterer, before the vessel set sail, advanced to the captain the sum of £1,650, British sterling ($8,032.20). Upon receipt of that sum, the captain gave W. R. Grace & Co. an instrument in writing, in words and figures as follows:

"£1,650/o/o Stg. Seattle, Sept. 27, 1911.

"At sight after arrival of the American schooner Wm. Nottingham, under my command, at the port of Callao, or any other place at which her voyage may terminate, I promise to pay to the order of W. R. Grace & Co. the sum of sixteen hundred fifty pounds (£1,650/o/o) British sterling, or approved bankers' demand bills on London, for freight advance received at Seattle, Wash., as per receipt given, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of the obligation all my lien and claim against freight, vessel, and owners, with power to take in my name any and all steps necessary to enforce the same; and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel. In case of nonpayment, the holder shall also be entitled to the benefit of all liens in law, equity, or admiralty which the master or owners of the vessel may be entitled to against any part of the cargo or its owners for freight, or any other charges whatsoever. This claim to have priority of payment over all others that may be presented against the said freight and vessel. My vessel is now lying at the port of Astoria, Or., loaded with cargo Oregon pine and ready to sail for Callao, Peru.

"Signed in triplicate; one being accomplished, the others to stand void.

"A. W. Swenson,
"Master Am. Schr. Wm. Nottingham."

On October 6, 1911, W. R. Grace & Co. took out insurance on the advance mentioned in the foregoing writing, with Fireman's Fund Insurance Company, the libelant herein; premium for such insurance being paid by W. R. Grace & Co. for the respondent, the former deducting that amount from the sum advanced under the terms of the charter party. On October 2, 1911, the schooner sailed from the port of Westport, Or., for Callao, Peru, with a full cargo of lumber for delivery at the latter port. She never reached her destination. Shortly after sailing she became water-logged and was dismasted off the Columbia river. The vessel was abandoned at sea by her master, officers, and crew, was subsequently picked up by a tug and towed to the port of Astoria, and was later towed to the port of St. Johns, Or., where her cargo that had not been washed overboard was discharged and delivered to W. R. Grace & Co., the owner of the cargo, and the voyage terminated. Claim was thereupon made to the libelant by W. R. Grace & Co. for the insurance, amounting to $7,920, which was paid by the libelant; and in consideration of the payment of the insurance W. R. Grace & Co. assigned to libelant all its right, title, and interest in and to the "interest, whether on account of salvage therefrom or on any other account whatever." This libel was thereafter filed by the insurance company against the respondent, based upon the instrument signed by the master of the schooner, dated September 27, 1911.

The libelant alleged, among other things, that on February 14, 1912, for a valuable consideration, W. R. Grace & Co. assigned unto the libelant all of its right, title, and interest in and to its claim for the repayment of the said £1,650; that the libelant was the owner and holder of the claim and of the lien; that demand for payment of the indebtedness had been made by libelant upon respondent, and payment thereof had been refused; and that the amount ($8,032.20) remained unpaid and was due the libelant by respondent. It was further alleged that during the time mentioned the schooner Wm. Nottingham was owned by the respondent, and Swenson was the agent of the respondent in the execution of the instrument and in the receipt of the advance freight mentioned.

The answer of respondent admits that during all the times mentioned in the libel it was the owner of the schooner Wm. Nottingham, and that Swenson was the master thereof, but denies, among other things, that at any time Swenson was the agent of respondent in the execution of the instrument described in the libel, denies that he ever received the advance against freight mentioned in the libel, denies that W. R. Grace & Co. became the owner and holder of the instrument for a valuable consideration, or at all, denies that respondent has any knowledge that on February 14, 1912, or at any other time, for a valuable consideration, or at all, W. R. Grace & Co. assigned to the libelant all of its right, title, and interest in and to the said instrument described in the libel, and denies that it has knowledge as to whether said libelant is the owner and holder of said claim, and asks strict proof of same. The answer alleges, further, that:

"For a consideration therein [charter party] agreed upon, and as a part of the consideration therefor, it was agreed that one-third of the freight would be advanced and paid by charterers on account of the freight under said charter party, subject to a charge of 7 per cent. to cover interest, insurance, and commission; that when said schooner was fully laden and ready for sea said W. R. Grace & Co. advanced to this respondent the sum of £1,650 British sterling, and said W. R. Grace & Co. thereupon under the terms of said charter party insured the same, and charged the cost or premium therefor to this respondent, and respondent paid the same by allowing said W. R. Grace & Co. to deduct the same from one-third of the freight due under said charter party, said sum of £1,650 British sterling being said one-third of freight, less said deduction of 7 per cent. as provided in said policy [charter party] for insurance charges and interest."

The libelant is an insurance company, and it appears in evidence that on October 6, 1911, it issued a certificate of insurance to W. R. Grace & Co. in the sum of $7,920 on advances valued at sum insured. On the margin of the certificate of insurance is indorsed the following:

"This insurance is to cover against all the perils enumerated in the policy which may prevent the collection of said draft in whole or in part, including general average, salvage, and/or other charges arising from sea peril to which the advances hereby insured may be subjected. The ownership of draft to be deemed sufficient proof of interest."

It appears that the libelant did not write the insurance based upon the master's receipt or draft of September 27, 1911, and did not know of its existence until the loss had occurred. After the loss had occurred and the insurance had been paid, libelant took an assignment of the receipt or draft for the purpose of securing a return of the insurance; but the insurance had been paid in accordance with the terms of the policy, written by itself upon the receipt of a premium paid by the respondent through Grace & Co., acting for the respondent in the transaction. Had the voyage of the schooner been completed and the cargo delivered to the consignees, the amount of the receipt or draft would have been deducted by them from the freight due the vessel as advance or prepaid freight, and the respondent would have sustained no loss. The failure of the schooner to make the voyage and deliver the cargo resulted in a loss to the respondent of the freight on the cargo, including the advance or prepaid freight. The loss arose from a sea peril, to which the advance or prepaid freight insured in the policy was subjected. To protect the respondent against this loss, the libelant, upon the payment of the regular premium, issued its policy of insurance payable to Grace & Co. or order. It was paid by the libelant on the order of Grace & Co. upon the risk and for the loss for which the libelant had issued its policy.

E. T. Ford, the submanager of Grace & Co. at Seattle, in the state of Washington, testified that in placing the insurance with the libelant:

"We were acting for the Globe Navigation Company, to whom we charged and collected the amount of the premium. * * * We chartered this vessel and agreed to pay a certain amount of freight for her. At the same time we agreed to make a certain amount of advance against the freight, which we did. The advance we insured, and, in so doing, we practically stepped into the position of the Globe Navigation Company in insuring our own freight, with the understanding that, if they insured the freight, they would not insure more than the balance over the amount of this advance."

The question, in this case, is not whether the shipper, upon the loss of his cargo, can recover advanced freight from the owner of the vessel, either as advanced freight or upon the receipt or draft of the master; but the question is: Can the insurance company avoid its liability to the insured because the insurance was effected through the shipper as agent for the shipowner? We think not. It seems to us to require no discussion of cases to show that, upon the contract of insurance, the loss should remain with the libelant.

This conclusion renders it unnecessary to discuss the question of whether libelant mistook its remedy in suing upon the master's receipt or draft, instead of advance or prepaid freight. We do not think the libelant is entitled to recover upon either aspect of the case.

The decree of the District Court is affirmed.

In re KUHN BROS.

ZUTTERMEISTER v. CHICAGO TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied May 25, 1916.)

No. 2288.

1. BANKRUPTCY ⚷441—PROCEEDINGS—MATTERS OF LAW.

A proceeding to determine whether under the uncontroverted facts, and assuming all controverted facts to be resolved in favor of the trustee, the order approving the trustee's accounts was authorized, is one to review a matter of law under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), giving the Circuit Courts of Appeals jurisdiction to review or revise proceedings in the inferior courts in matters of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 914; Dec. Dig. ⚷441.]

2. BANKRUPTCY ⚷250(1)—TRUSTEES—DUTIES.

It is the imperative duty of a trustee of a bankrupt estate to exercise all diligence to collect the assets of the estate, and in the absence of explanation the trustee is deemed to be negligent in failing to collect assets listed in the schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ⚷250(1).]

3. BANKRUPTCY ⚷369—TRUSTEES—COLLECTION OF ASSETS.

That the accounts of the receiver, who did not collect notes due the bankrupt, were O. K.'d by the principal creditor and approved by the court, is no defense to a proceeding to surcharge the accounts of the trustee for his negligence in collecting such notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 570; Dec. Dig. ⚷369.]

4. BANKRUPTCY ⚷250(1)—TRUSTEES—DUTIES.

The bankrupt's schedules of his assets recited notes which were not collected. These notes were in fact secured by a mortgage, but that did not appear from the schedules, nor did the schedules show that an action to foreclose the mortgage had been instituted, wherein it was alleged that the attorney suing was the owner. *Held* that, as such allegations in the

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

foreclosure suit did not establish that the bankrupt was not beneficially entitled the trustee's failure to promptly collect the notes by foreclosure was not excused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ⚷250(1).]

5. Bankruptcy ⚷250(1)—Trustees—Duties.

That the creditor might have discovered the existence of notes due the bankrupt, which were secured by a mortgage, and had the same avenues of information as the trustee, will not excuse the trustee's failure to promptly enforce the obligations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ⚷250(1).]

6. Bankruptcy ⚷250(1)—Trustees—Duties.

That the bankrupt's schedules did not disclose that notes listed were secured by mortgage, where it could readily have been ascertained by the trustee, as could the pendency of a foreclosure suit, will not excuse the trustee's failure to promptly foreclose and collect the notes, though the maker was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. ⚷250(1).]

7. Bankruptcy ⚷250(1)—Trustees—Duties.

Where the bankrupt's right to lost notes was subsequently established by the trustee, the fact that investigation of notes listed would have established that some of them were lost will not excuse the trustee's failure to promptly foreclose a mortgage securing such notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350: Dec. Dig. ⚷250(1).]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of Kuhn Bros. Petition and objections by Fred J. Zuttermeister to the report of the Chicago Title & Trust Company, trustee. The petition and objections were overruled, and the report confirmed, and the petitioner petitions to review and revise the order. Order annulled, and proceeding remanded, with directions.

Vincent D. Wyman, of Chicago, Ill., for petitioner.

Sherman C. Spitzer, of Chicago, Ill., for respondent.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. On a voluntary petition in bankruptcy filed by Kuhn Bros. on March 10, 1900, respondent was appointed receiver. In May, 1900, the bankrupts filed their schedule. Under the heading "Bills of Exchange, Promissory Notes, etc.," in the list of assets, there were scheduled 15 items. Each stated a name, followed by the words "promissory notes," "principal note," "interest note," and in one instance "note and mortgage;" then followed the amount. One such item read, "James N. Tilton—notes, $3,169.27."

June 8, 1900, respondent was appointed trustee of the bankrupt estate. June 22, 1900, it filed its final account and report as receiver. This was O. K.'d by the attorneys who then and now represent peti-

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

tioner, and was approved October 23, 1900. No mention of the Tilton notes appears therein. The report recites, inter alia:

"This receiver further shows that Kuhn Bros. were engaged in the real estate, loan, and renting business at 88 La Salle street, Chicago; that they had been engaged in said business for a considerable time; that they had made a large number of loans to various persons; and that afterward they sold the loans, retaining in their possession the abstracts of title, insurance policies, and other papers connected with said loans. This receiver further shows that it prepared a list of the parties shown by the books of Kuhn Bros. to be indebted to that firm, and sent notices of its appointment to all of said parties, with a request to remit the amount of indebtedness; that a large number of said debtors called at this office and denied that they were indebted to said Kuhn Bros. in any sum whatsoever."

Prior to November, 1906, the trustee filed three reports, and in none of them is there any mention of the Tilton notes and mortgage. No inventory was ever filed by the receiver or by the trustee. In fact, the bankrupts owned a principal note of Tilton for $2,500 and interest notes. They had been executed by him in 1893 for a building loan, and were secured by a real estate mortgage to one of the bankrupts. In the course of business, the notes and mortgage had been sold to a customer, bought back in 1898, and delivered to an attorney for foreclosure. Foreclosure proceedings were begun in 1899 in the name of the attorney as legal owner of the notes. Neither as receiver nor as trustee did respondent have any actual knowledge either of the pendency of this suit, or of the bankrupts' interest therein or in the notes, until the end of 1906.

The bankrupts' loan register contained a statement of the transaction, with a notation that the abstract had been given to the attorney in 1899, and that the loan was being foreclosed June, 1899, by the attorneys. This register was one of hundreds of books of the estate in the possession of the trustee. The trustee began foreclosure proceedings in 1907. Without reciting the details, it is undisputed that if the trustee had made inquiries at once, and had ascertained the facts in 1900, much expense would have been saved, taxes could have been paid, avoiding forfeitures and tax sales, and a much greater sum would have been brought into the estate.

Petitioner objected to items of expenditures in the foreclosure suit in several reports of the trustee, on the ground that they were occasioned by the trustee's neglect in failing to act promptly. He further objected to the failure to charge the trustee with the amount due on the mortgage at the time of appointment, with interest, less the net amount realized, or the value of the property, less reasonable expenses of foreclosure in 1900 and taxes and operating charges, plus reasonable rental. The referee found "that said trustee is not guilty of such acts or negligence as to warrant the court in surcharging said trustee with its expenses as reported." He dismissed the petition, overruled the objections to the report, and confirmed it.

The present petition seeks to revise the order of the District Court affirming the order of the referee.

[1] 1. In the consideration of this petition, we have assumed all controverted facts as determined in favor of the respondent. That

a review thereof and of the uncontroverted facts to determine whether there is any substantial evidence to sustain the order, is a review as to a matter of law within the provisions of section 24b of the Bankruptcy Act, is well settled. Good v. Kane, 211 Fed. 956, 128 C. C. A. 454. The motion to dismiss is overruled.

[2] 2. The schedule gave notice to the trustee that the bankrupts claimed to own some notes executed by Tilton. It is the imperative duty of the trustee of a bankrupt estate to exercise all due diligence to gather in the assets of the estate, and it would seem clear that an examination of the schedule and a following up of all leads naturally suggested thereby would be the first step to be taken. In the absence of some explanation for a failure so to act, the trustee must be charged with negligence and must respond for the consequences thereof. In re Reinboth, 157 Fed. 672, 85 C. C. A. 340. In excuse, the trustee makes several contentions which we shall consider.

[3] (a) The receiver's accounts, silent as to this item were O K.'d by petitioner and approved by the court. No appeal was taken from that order. But the receiver's report did not purport to set forth that it had gathered in all of the assets of the estate; the approval thereof in no manner modified the trustee's obligations; at the best, it discharged the receiver, a mere temporary custodian, from liability for failure to get in this asset after approving its statement of cash receipts and disbursements. No basis whatsoever is afforded thereby to the trustee, the permanent officer in whom title is vested by law, for failing properly to examine the schedules and to take the necessary steps to conserve the estate.

[4] (b) The allegation in the pending foreclosure suit that the attorney was the legal holder of the notes is utterly immaterial, for, firstly, the trustee had no actual knowledge of the allegation or of the suit; and, secondly, there is no inconsistency between the allegation and equitable ownership thereof by the bankrupts.

[5] (c) The trustee cannot be excused from the performance of the duties for which it receives compensation because its beneficiaries, the creditors, have the same avenues of information open to them and fail to take advantage thereof. The creditors may, but are under no duty to, investigate and search for assets, or to suggest to the trustee possible sources of information, which the latter has at least the same opportunity of knowing. That this petitioner was the chief creditor, and could also have found out the facts in reference to the Tilton notes, neither estops him from charging the trustee with negligence nor lessens the latter's obligations to the estate. The creditor's acts and omissions furnish no measure of the diligence imposed upon the trustee.

[6] (d) Respondent's official in charge of the estate testified as follows:

"Q. What if any inquiry did you make to ascertain the whereabouts of the notes of James N. Tilton which were scheduled by the bankrupt? A. I never made any. I didn't know anything about it till 1906. Q. Did you ever look at the schedule to see what assets the bankrupt had? A. I presume I did. Q. Did you see that in the schedule? A. I don't remember seeing it, no. I may have seen it at the time."

A mere looking at a schedule and an overlooking of such an item is clear negligence. It is therefore no excuse for the failure to follow up the information that would have been acquired if the schedule had been carefully examined. Had this been done, the examination of the bankrupts, an inspection of the loan registers, and an inquiry at the attorney's office could not have failed to disclose the bankrupts' beneficial interest in the notes and mortgage.

That the schedule failed to mention the mortgage securing the Tilton note, though it gave this additional information as to one of the 15 items, or that the amount of the principal and interest was not separately stated, could not have misled the trustee; the most cursory investigation based upon the bare statement that Tilton owed the bankrupt money on notes would have led to the discovery that these notes were secured by a first mortgage and that Tilton's insolvency, therefore, did not destroy their value.

[7] That such an investigation would also have disclosed that the principal and some interest notes were lost would not have affected the situation. The bankrupts' ownership thereof, and the consequent right of the respondent to foreclose the mortgage, could have been proven in 1900 as readily as it was proven in the latter foreclosure proceedings.

The order dismissing the petition and approving the trustee's accounts must therefore be annulled, in order that the District Court or the referee may determine the issues, and charge the trustee with such losses as may be found to have been sustained by the estate through its negligence.

In re WISCONSIN ENGINE CO.

GAS POWER MACHINERY CO. v. WISCONSIN TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2312.

1. Bankruptcy ⟹150—Property of Bankrupt—Patent License—Duty of Trustees to Accept.

A trustee in bankruptcy is under no obligation to accept a patent license burdened with executory obligation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 228; Dec. Dig. ⟹150.]

2. Bankruptcy ⟹322—Claims—License—Promissory Note in Payment of Royalties.

Negotiable promissory notes given by a patent licensee in payment for the license on a royalty basis *held* payable in any event and properly allowed by the trustees in bankruptcy of such licensee at their discount value as of the date bankruptcy proceedings were begun, and not the pro rata amount of earned royalties apportionable to the date of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 508–510; Dec. Dig. ⟹322.]

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

3. BANKRUPTCY ⚷316(1)—CLAIMS—NEGOTIABLE NOTES IN PAYMENT OF CONDITIONAL OBLIGATION.

The mere giving of notes, to evidence or in prepayment of clearly conditioned obligations, will not annul the conditions, or make an otherwise unprovable claim allowable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 477; Dec. Dig. ⚷316(1).]

4. BANKRUPTCY ⚷322—CLAIMS—ALLOWANCE—NEGOTIABLE NOTES.

A contract provision that notes should be given in payment for patent license on royalty basis, and should be negotiable, is evidence tending to show that the amount of such notes should be payable in any event and should be allowable by the trustee in bankruptcy of the licensee at their face value, regardless of whether the notes had been negotiated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 508–510; Dec. Dig. ⚷322.]

Alschuler, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of the Wisconsin Engine Company, bankrupt. From a judgment of the District Court, reversing the order of the Wisconsin Trust Company, trustee in bankruptcy, allowing the claim of the Gas Power Machinery Company, the latter appeals. Reversed and remanded, with directions.

Howard M. Harpel, of Chicago, Ill., for appellant.

Joseph H. Marshutz, of Milwaukee, Wis., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. A claim on three negotiable promissory notes, all dated January 1, 1912, one for $2,500, which matured January 1, 1913, and two for $5,000 and $3,750, respectively, maturing January 1, 1914, and January 1, 1915, all payable to appellant, was allowed by the referee for $10,537.51, their discounted value as of January 21, 1913, the date bankruptcy proceedings were begun, over objections going to the validity both of the entire claim and of so much thereof as was not earned before bankruptcy. This order was reversed by the District Court, and the claim allowed for the pro rata amount held apportionable from January 1, 1912, to January 21, 1913. The claimant appeals.

On January 1, 1912, appellant, owner of certain letters patent and rights to inventions, entered into a license agreement with the bankrupt. After reciting this ownership, licensor's desire to have licensee undertake the exploitation thereof, licensee's desire to secure the exclusive rights therein, it contained, inter alia, the following provisions:

(1) An exclusive perpetual license to manufacture, use, and sell was granted subject to the further provisions of the agreement.

(2) Licensee agreed, so long as it enjoyed a practical monopoly in the machines and processes for producing gas in the manner specified in detail, to pay to the licensor a royalty of 50 cents per horse power capacity of each machine manufactured and sold under the agreement, "it being understood and agreed in this behalf that in any event the licensee shall pay to the licensor during the first year from the date hereof royalties to the total mini-

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

mum amount of at least five thousand dollars ($5,000), and during the first two years from the date hereof royalties to the total minimum amount of at least fifteen thousand dollars ($15,000), and during the first three years from the date hereof royalties to the total minimum amount of at least twenty-two thousand five hundred dollars ($22,500); and as evidence or prepayment of such sum the licensee will deliver to the licensor, at the time of the signing of this agreement, two sets of negotiable promissory notes of equal amounts for the aggregate sums of twenty-two thousand five hundred dollars ($22,500.00), made and executed respectively by the licensee and Edward A. Rumley, of La Porte, Ind., said notes to bear like date herewith, draw interest at the rate of 6 per cent. per annum, after maturity, and be payable at the following times and in the following amounts: Five thousand dollars ($5,000) shall be payable at the end of one year from the date hereof; ten thousand dollars ($10,000) at the end of two years from the date hereof; and seven thousand five hundred dollars ($7,500) at the end of three years from the date hereof. But if during substantially all of said third year from the date hereof the licensee enjoys or shall enjoy such substantial or practical monopoly of such exclusive right, then and in that event said royalties shall aggregate for said three years the sum of at least thirty thousand dollars ($30,000), and if at the end of said three years from the date hereof the licensor shall not have received royalties aggregating this amount, then and in such event the licensee will pay to the licensor an additional sum sufficient to make up such aggregate amount." It further provided for $100,000 for the first six years under like conditions, with the right, however, by payment of $200,000 in all during the first four years, to have the entire interest of the licensor free from any further royalties.

(7) Licensee agreed to push the business, to prosecute infringements, to advance the necessary money, "and to this end the licensee shall open an account on its books with the licensor, into which shall be charged against the licensor one-half of such sum of money as shall be so advanced and paid out by the licensee, and the same shall be repaid by the licensor from the sums which shall become due and payable to the licensor as royalties and to this end the licensee may retain 50 per cent. of such royalties until such advances are repaid: Provided that the share of such sum or sums payable by the licensor, and chargeable against it as aforesaid, shall in no event exceed one-half of said royalties, and in no event shall any portion of said $22,500 be applied toward payment of costs, but the same shall be payable to the licensor in any event in full, and no part thereof shall be retained by the licensee for any purpose after the same shall become due as aforesaid." Neglect by either party for 60 days after notice by the other to comply with any provision enabled such other at its option to terminate the agreement.

(9) Licensee might terminate the agreement if permanently enjoined, and if no longer able to enjoy the practical monopoly provided for, but it should remain liable for all royalties up to that time accrued.

(10) In the event of licensee's insolvency, licensor shall have the right to cancel the agreement; the contract shall not be assigned except to M. Rumely & Co.

The claim filed against the bankrupt estate is on the three notes executed by the bankrupt pursuant to section 2 of the license agreement.

[1] It is undisputed that a trustee in bankruptcy is under no obligation to accept a patent license burdened with executory obligations. It is, in this respect, like other property rights belonging to the bankrupt, whether resulting from a grant or conveyance coupled with executory obligations, like a lease of real or personal property, or from a purely executory agreement. Whether such a license is to be dealt with like the exclusive transportation privileges considered in Re Frank E. Scott Transfer Co., 216 Fed. 308, 132 C. C. A. 452, affirmed on this point in the Supreme Court April 3, 1916, in which bankruptcy was held to create an anticipatory breach, giving rise to a provable

claim for such damages as could be deemed certain, or whether the relation thereby created is like that of landlord or tenant, in which the tenant's bankruptcy has been held not to amount to an anticipatory breach (see cases cited in Re Desnoyers Shoe Co., 227 Fed. 401, 142 C. C. A. 97), we need not here determine, for the claim filed is neither for damages caused by such a breach nor for future royalties to be paid like rent solely for the continued use of the property granted.

[2] In our judgment, the indebtedness represented by the notes was the consideration for the grant of the exclusive license. It was expressed in terms of royalties, and properly so, because, in so far as royalties up to that amount would be earned under the agreement, payment of the notes would cancel any obligation in respect thereto. But it was not expressed as conditioned upon such royalties being earned. The parties contemplated the possible cancellation of the license before the expiration of three years because of licensee's breach of the agreement or its insolvency. Nevertheless the obligation to pay the $22,000 remained. It was to be paid in full "in any event," to quote the language of both the second and the seventh clauses of the agreement. Compare it with the provision for a $30,000 minimum for the first three years; both are described as royalties. The $30,000 is to become due, however, only if the licensee actually enjoys the very thing he contracted for, a practical monopoly. The $22,500 obligation, represented by the two sets of notes, is unconditioned.

[3, 4] There is no guaranty that, if royalties shall in fact become due, they shall amount to at least $22,500 for the period; there is an absolute undertaking that this amount shall be paid. While the mere giving of notes to evidence or in prepayment of a clearly conditional obligation would not annul the condition or make an otherwise unprovable claim allowable in bankruptcy (Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118), the provision that notes should be given and that they should be negotiable is additional evidence tending to resolve any doubt as to the intention of the parties that the amount therein stated was to be payable in any event. That the notes were not in fact sold is of no moment. The parties necessarily contemplated that they might be negotiated.

The order disallowing a portion of the claim must be reversed, and the cause remanded, with directions to allow the claim in the sum of $10,537.51.

ALSCHULER, Circuit Judge (dissenting). I cannot concur in the conclusion that the notes here in question represent consideration to the licensor for granting the exclusive license. The contract nowhere so states, but specifies "a royalty of 50 cents per horse power," etc., and provides for the guaranty of the annual minimum of "royalties" of the stated sums, and for the giving of the notes "as evidence or prepayment of such sum." The notes bear no interest till after their maturity at the respective times for payment of the minimum royalties, and so, if a present consideration, the payee's beneficial use of it is postponed till the minimum royalties would become payable. While the contract mentions these minimum sums as being payable "in any event," these words, in my judgment, are but a different form for stating that for each of those years the royalties shall not be less than the sums named; and, besides, elsewhere in the instrument are found conditions under which the payments might never accrue. Section 8 provides for cancellation of the contract by either party in case the other does not comply with its terms; section 9 for cancellation by licensee in case it is enjoined and cannot have practical monopoly of the rights granted, but in this case "it shall be liable for all royalties up to that time accrued," and shall have no further use of the patents. And so, if for any such reason the contract is terminated further royalties thereunder cannot accrue, any more than can rent accrue after the termination of the tenancy. In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118. These conditions seem to me quite inconsistent with the inference that the notes represent anything but royalties, as specified. The claim is on the notes, and I believe the District Court was right in rejecting so much thereof as did not represent the minimum royalties accrued at time of bankruptcy. On the authority of the recent opinion of the Supreme Court in Re Frank E. Scott Transfer Co., 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811 (April 3, 1916), it would seem that a claim based on an anticipatory breach of the contract through the bankruptcy would have been provable to the extent of the resultant damages shown.

In re RICKETTS.

McKEY v. PINCKARD.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied.)

No. 2267.

1. EXCHANGE OF PROPERTY ⟹10—CONSTRUCTIVE DELIVERY.

Where claimant's husband, who had many transactions with the bankrupt, a dealer in pictures, exchanged, for the benefit of claimant, pictures belonging to her for other pictures, and the exchange was noted in the bankrupt's books, and a receipt for consignment of the new pictures for sale on commission was executed, but possession was not taken, and nothing was done to make the change in ownership manifest to the public or to any part thereof, there was no constructive delivery of the new pictures to claimant.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 19, 21, 22, 24; Dec. Dig. ⟹10.]

2. FRAUDULENT CONVEYANCES ⟹139—DELIVERY—NECESSITY.

A delivery of chattels is necessary in Illinois to pass title to the buyer, except in the case of judicial sale, or where the bill of sale may by law be recorded, and where there is no delivery of the chattels, and possession is not taken by the buyer, the sale is fraudulent as to creditors of the seller.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 439-442; Dec. Dig. ⟹139.]

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

3. FRAUDULENT CONVEYANCES ⟹138—EXCHANGE—DELIVERY—NECESSITY.
Where there is a sale of chattels by way of exchange, delivery is just as essential to pass title as if the transaction were one of sale for money consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 438, 443, 448–452; Dec. Dig. ⟹138.]

4. FRAUDULENT CONVEYANCES ⟹165—RIGHTS OF SELLER'S CREDITORS—DELIVERY.
While the right of a defrauded vendor is superior to that of the fraudulent vendee's execution creditor, delivery is essential to pass title to the buyer, and if there be no delivery, and the buyer does not take possession, in Illinois, the sale is, regardless of the buyer's good faith, deemed fraudulent in law, and the buyer, because of his legal fraud, cannot assert his title as against execution creditors of the seller.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 494, 518; Dec. Dig. ⟹165.]

5. BANKRUPTCY ⟹185—TRUSTEE—RIGHTS.
Under Bankr. Act, § 47a,† the trustee has the rights of an execution creditor of the bankrupt, and as such may assert such rights as against one who bought chattels from the bankrupt, but never received possession; there being no delivery.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235, 273; Dec. Dig. ⟹185.]

6. COURTS ⟹372(4)—FEDERAL COURTS—STATE RULES.
In determining whether a sale has been consummated, the federal courts will follow the state rules.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. ⟹372(4).]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of Robb R. Ricketts, doing business as Moulton & Ricketts. Claim by Mary L. Pinckard, opposed by Frank M. McKey, trustee in bankruptcy of the estate of the bankrupt. From a decree for claimant, the trustee appeals. Reversed and remanded.

Clarence J. Silber, of Chicago, Ill., for appellant.

James Rosenthal, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Husband of appellee, a physician, had for several years invested and dealt in pictures, through the bankrupt. The plan followed was substantially this: Ricketts, either as owner or as agent for other dealers, would sell to Pinckard. Sometimes the pictures thus bought would be taken to his home or office, there hung, and at a later date returned to Ricketts, as agent to sell. Often, however, they would not be taken away from Ricketts' store. At times they were not even seen by Pinckard, but purchased by name or description. Frequently he had seen, known of, or even owned such pictures at an earlier time. Sometimes a lot of pictures then owned, or supposed to be owned, by Pinckard, would be exchanged for others that Ricketts had on hand. Whether so returned to Ricketts, or not taken away, but left with him, the pictures were to be sold by Ricketts for Pinckard at not less than the purchase price with 6 per cent. in-

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

† Act Juy 1, 1898, c. 541, 30 Stat. 557 (Comp. St. 1913, § 9631).

terest from the date of Pinckard's investment. Any excess above this price was to be shared by the parties.

When and how an accounting was to be made, does not seem to have been determined by the parties. A receipt was given by Ricketts for each picture so left with him to be sold, irrespective of whether Pinckard's ownership was through a sale or an exchange, in the following form:

(Name of Artist.) (Date.) Received on consignment from Dr. C. P. Pinckard one oil painting, size (specified), subject (......), by (name of artist), (style of frame). Value ($......).

[Signed] Moulton & Ricketts, by (Name of Employé).

In the case of an exchange, however, the receipt would be dated back to the time of the original purchase of the picture given by Pinckard in exchange, so that the 6 per cent. interest would be calculated from that date, and if the transaction involved a number of pictures, as in the case now before us, the time would be averaged.

Pursuant to this plan, Ricketts had sold to and received back from Pinckard in 1913, 12 pictures, valued at $40,000. Pinckard then donated them to his wife and proper entries showing the transfer were made in Ricketts' books. In January, 1914, Pinckard, acting for his wife accepted Ricketts' proposition to exchange the 12 for 41 other pictures of the same value. New receipts were executed to Mary L. Pinckard, and were dated back in accordance with the practice as above described. A "value" price was placed on each picture. In fact, the 12 pictures had theretofore been sold by Ricketts, and no account of the sale rendered to Pinckard, so that the actual transaction, while not so intended, was a sale, and not an exchange.

Bankruptcy proceedings were instituted against Ricketts on March 6, 1914, and the receiver came into immediate possession of 36 out of the 41 pictures. The other 5 were in the hands of prospective customers. This is an appeal from the order of the District Court confirming the order of the referee granting the prayer of appellee's reclamation petition as to the 36 pictures.

1. No question of rescission for fraud is raised; inasmuch as the proceeds of the sale of the 12 pictures are not traceable, such a proceeding, if maintainable, would be fruitless.

[1] 2. The referee found, and his uncontested findings are fully supported by the evidence, that:

"Said pictures were never removed at any time, after said sale [by Ricketts to Mrs. Pinckard] from the premises of said bankrupt; that they were not separated from said bankrupt's stock of pictures owned by him, but were left with said bankrupt by said petitioner, under the same physical conditions as before said sale to said petitioner, and said consignment back to said bankrupt, and that no delivery thereof was made by said bankrupt to said petitioner other than as herein found; that no actual possession of said 41 pictures, nor any of them, was ever taken by said petitioner, but all of them remained with said bankrupt, until the 6th day of March, A. D. 1914, on which day the Chicago Title & Trust Company, as receiver in bankruptcy of said estate, took possession of said pictures, as part of the assets of said bankrupt estate, excepting only the following, which were not then in possession of said bankrupt," specifying 5 of them; "that said pictures and all of them were capable of actual manual delivery, to said petitioner; that there was no actual or manual delivery or change of possession."

From the findings he deduced the conclusion that:

"The facts as herein found constitute a constructive delivery of said pictures by said bankrupt to said petitioner, and that the title to said pictures is in the petitioner, and that the petitioner as against said respondent trustee, is entitled to possession thereof as prayed for in said petition."

We cannot concur in this conclusion. No fact, either found by the referee or testified to by any witness, furnishes the slightest basis for holding that there was a constructive delivery. The pictures were in Ricketts' store; some of them were hanging on the walls. Pinckard not only did not take actual possession of them; he did not even see them at the time. He knew them; he had theretofore owned some of them; but neither of the parties did anything to the pictures as a result of or pursuant to the sale, or in any manner made manifest to the public, or to any part thereof, the change in the ownership.

Constructive delivery can be effected by a turning over of the possession of the premises, or of the key thereto, or, in case of property incapable of manual delivery, by a delivery of a symbol or a document of title. A separation of the articles themselves from others not sold, and a proper marking thereof, or of the place into which they are put, even a segregation without physical separation, as by marking them with the vendee's name (In re Pease Car & Locomotive Works [D. C.] 134 Fed. 919), may amount to either a constructive or an actual delivery according to the circumstances.

[2] But the entry of the sale in the vendor's books and the execution by him of a trust or consignment receipt, though evidencing a sale and a bailment back, valid inter partes, in no sense amounts to a delivery, either actual or constructive. And delivery of chattels is essential in Illinois to pass title, or to create a lien as against execution or attaching creditors, except only when dispensed with by reason of the publicity of the transaction, as in the case of a judicial sale, or the authorized recording of the document which permits retention of possession by the grantor. That this is and has been the law of Illinois from the earliest times, irrespective of the utmost good faith of the parties, is too well settled to require citation of authorities. Many cases will be found in Williston, Sales, §§ 366, 350.

It has often been urged that delivery would be a useless form, and therefore should not be insisted upon, when the vendee in good faith desires to lend the chattels so purchased to the vendor. But the answer has been uniform: Delivery is not an idle form; it has a definite purpose, to give publicity to the transaction. It must therefore be followed by such continuous possession on the part of the vendee, or by such other open acts, as will evidence to those who may be interested, that there has been a conveyance. Only if it can be found as the Supreme Court, reversing the trial judge, found in Cunningham v. Hamilton, 25 Ill. 228, that the chattel had been in the possession of the vendee "long enough to apprise all parties of the change of ownership," would a sale, followed by a loan to the vendor (in that case after two or three days' possession), be upheld as against the vendor's creditors, levying on the property while in his possession pursuant to the loan.

There was nothing whatever in this case to prevent Pinckard from taking physical possession of these pictures, having them sent to his home or his office, and subsequently turning them back to Ricketts as selling agent; or, if he preferred, he could have indicated clearly his wife's ownership and Ricketts' agency on each picture without removing or even separating them. By such actual or constructive delivery he would have given at least some publicity to the transaction sufficient, ordinarily, to sustain it. Instead of this, he avoided any publicity whatsoever. His entire good faith cannot help him, for in Illinois, as in most of the states, a transfer without delivery is deemed fraudulent in law as against creditors who shall acquire a lien on the property; fraud in fact is unnecessary.

[3] That Pinckard intended an exchange, not a sale, is immaterial so far as the necessity of delivery is concerned. Whether the 41 pictures were exchanged for the twelve pictures or sold for their money proceeds, delivery was equally essential to complete the transfer as against creditors.

[4] It follows that, even though, as between the parties, Ricketts had no title on March 6, 1914, yet, as the sale to Pinckard was fraudulent in law, Ricketts' execution creditor could have levied on the property on that day. While the right of a defrauded vendor is superior to that of the fraudulent vendee's execution creditor (In re Gold, 210 Fed. 410, 127 C. C. A. 142), the right of a vendee who, however honest in fact, is deemed guilty of fraud in law as against his vendor's creditors, by leaving the purchased chattels uninterruptedly in the vendor's possession, is subordinated to that of the vendor's execution creditor. Van Duzor v. Allen, 90 Ill. 499; In re Richheimer, 221 Fed. 16, 27, 136 C. C. A. 542.

[5, 6] That the trustee in bankruptcy has the rights of such an execution creditor (Bankruptcy Act, § 47a), and that the federal courts will follow the state court rule (In re Richheimer, supra, 221 Fed. at page 24, 136 C. C. A. 542), is conceded. Irrespective, therefore, of the relation between the parties established by the verbal arrangement for a sharing of possible profits in case of sale and the execution of the consignment receipts, appellee's rights as owner cannot be asserted as against the lien acquired by the trustee in bankruptcy.

The decree must be reversed, and the cause remanded, with directions to dismiss the reclamation petition, but without prejudice to the petitioner's right to file her claim as a creditor.

PARKER et al. v. ROSS.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied May 25, 1916.)

No. 2253.

1. Appeal and Error ⚷1022(3)—Review—Findings.

A decree based on the report of the master, who heard the evidence, will not, in case of conflict, be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4016; Dec. Dig. ⚷1022(3).]

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

2. WITNESSES ⚷317(1)—FALSE TESTIMONY.
Where part of the testimony of a witness was obviously false and evasive, the whole testimony, being uncorroborated, may be disregarded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1080; Dec. Dig. ⚷317(1).]

3. PRINCIPAL AND AGENT ⚷79(5)—FRAUDULENT INTENT—EVIDENCE.
In a suit to set aside a transfer of notes and mortgages, on the ground that defendant, an agent, procured it through his fraud, evidence *held* to show defendant's original fraudulent intent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 183-185; Dec. Dig. ⚷79(5).]

4. PRINCIPAL AND AGENT ⚷69(3)—DUTY OF AGENT—GOOD FAITH.
It is the duty of an agent, in entering into contracts with his principal, to exercise the utmost good faith.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 134, 135; Dec. Dig. ⚷69(3).]

5. PRINCIPAL AND AGENT ⚷69(3)—TRANSACTIONS—GIFTS.
Where the principal understands the transaction, he may give his entire property to his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 134, 135; Dec. Dig. ⚷69(3).]

6. PRINCIPAL AND AGENT ⚷69(3)—VALIDITY—CONSIDERATION.
Where defendant's principal, who transferred to him her entire property, did so intending that he should make a profit, the inadequacy of the consideration for the conveyance will not warrant its vacation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 134, 135; Dec. Dig. ⚷69(3).]

7. PRINCIPAL AND AGENT ⚷79(5)—TRANSACTION BETWEEN PARTIES—GOOD FAITH.
The agent of an aged, infirm woman, who occupied towards her a fiduciary relation, has the burden of proving that her conveyance to him of her entire property was free and voluntary, and unless this is established it will be set aside.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 183-185; Dec. Dig. ⚷79(5).]

8. EQUITY ⚷94—NECESSARY PARTIES—BENEFICIARIES.
An aged and infirm woman entered into a contract with her agent, whereby he was to pay her an annuity, and in event of certain contingencies to pay named beneficiaries sums of money after her death. Subsequently the guardian of the aged woman sued to set aside the conveyance, but did not join the beneficiaries as parties. *Held* that, while they were entitled to their day in court and were not represented by the agent, their claim against him being purely personal, they were not necessary parties in the suit to set aside the conveyance, as the agent might be protected by a requirement that sums of money to satisfy any claims the beneficiaries might have against him be deposited in court.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. ⚷94.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Edgar W. Ross, as guardian of Mary M. Gray, a feeble-minded person, against Charles W. Parker and another. From a de-

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

cree for complainant, defendants appeal. Reversed and remanded, with directions.

Louis E. Hart, of Chicago, Ill., for appellants.

William S. Oppenheim, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. The appellee, Edgar W. Ross, as guardian of Mary M. Gray, a feeble-minded person, brought suit against Charles W. Parker and Mary B. Parker for the purpose of disaffirming a contract entered into on February 3, 1911, whereby Mary M. Gray transferred notes and mortgages of the value of some $34,000 to the appellant, Charles W. Parker, in consideration that Parker pay $2,000 in cash to Mrs. Gray and the further sum of $150 a month, commencing March 1, 1911, during her natural life, and also pay to the Rosehill Cemetery Company the sum of $500, to Robert H. Gray, if living one year after Mary's death, $2,000, and to Helen or Leonora Ross, respectively, if then living, $1,000.

A motion to dismiss for failure to join alleged indispensable parties, to wit, the possible beneficiaries under the contract, was overruled. After answer, the cause was referred to a master to take testimony and to report the same, together with his conclusions of law and fact thereon. The master found, as a conclusion from his findings of fact, that "the contract of February 3d was unfair and oppressive as to Mary M. Gray. At the time it was made Charles W. Parker was Mrs. Gray's agent, and as such it was his duty to protect her interests and safeguard the property which he acquired for himself by the terms of the contract for a very inadequate consideration. At the time of the making of the contract Mary M. Gray was nearly 77 years old, feeble physically and mentally. Fiduciary relations existed between her and Charles W. Parker, and had existed for a considerable time prior thereto, growing out of the relation of principal and agent and other relations between them, which gave Parker an undue advantage, and enabled him to procure from her an unconscionable contract"—and as a conclusion of law, that the prayer of the bill should be granted.

All exceptions to the findings of fact and of law were overruled, the master's report was in all respects approved and confirmed, and a decree was entered requiring the defendants to turn over all property and moneys received by them under the contract, directing the clerk of the court to deliver to the plaintiff all securities theretofore received by him from defendants, together with the proceeds therefrom, and awarding a money decree against defendant, Charles W. Parker, for $10,267, the balance due after crediting him with all payments.

[1] 1. The master saw and heard the witnesses. If there were reasonable doubts as to the conclusions of fact to be drawn from their testimony, we should not overrule his findings. A careful examination of the record satisfies us, however, that his findings were in every essential respect sound.

It is unnecessary to rehearse the testimony; it suffices to state that it demonstrates clearly that an old-time friend, with whom the most trusting and confidential relations had long since been established, took advantage of the newly established fiduciary relation of general business agent in the management of the property of a feeble, 77 year old woman to induce her, without proper, independent advice, to transfer to him her entire property, valued at $34,000, in consideration of $2,000 cash, an annuity that could have been purchased from any responsible insurance company for less than $14,000, and contingent payments aggregating $3,500. At the same time, a former will, under which he was only a partial beneficiary, was revoked, and a new will executed, under which he became sole legatee.

It is true that Parker called in an attorney to his own office to draw the papers. The attorney testified that they had never sustained professional relations, though he had endeavored to sell loans to Parker. He claims to have talked fully with Mrs. Gray as to the plan proposed by her and embodied in the contract, and to have warned her of the danger in the event of Parker's bankruptcy. He further testifies that she told him just what she wanted, and that then Parker came in and expressed a willingness to make such a contract.

But, as the master finds, this old woman, who had never before attempted to transact her own business, had but a month before discharged her former agent, who for years had represented both her and her husband in his lifetime and acted now without consulting any one, surrounded and advised only by Parker, her then agent, an attorney called in by him, and witnesses and notary procured by him. The attorney did not even ask or learn the value of the property to be transferred in consideration of obligations which Parker was to assume; he was not there to give Mrs. Gray independent advice as to the adequacy of the consideration or the wisdom or fairness of the deal which had already been fully arranged with Parker; his warning was limited to the possible result of Parker's insolvency.

[2] Moreover, the master would have been fully justified in completely disregarding the uncorroborated evidence of this witness, in view of his palpably false and evasive testimony respecting his knowledge of his disbarment. He said:

"I quit the practice of law in May, 1913. I took a place with a bank at that time, as manager of the real estate department. That was my only reason for quitting. I have had no notice of disbarment. You will find it a matter of record, if I ever was. I don't know whether I have been disbarred. I think proceedings were brought to disbar me."

[3] 2. The subsequent written statements of Parker confirm his original fraudulent intent. In answer to an inquiry from Ross on January 4, 1914, after his appointment as guardian, Parker purported to give a list of the securities received by him, but he omitted two mortgages, aggregating $11,000, and theretofore assigned by him to his wife, the codefendant. Letters written by him in 1913 contained not only materially false statements, but also insincere assertions of a willingness to let any one have what he received from Mrs. Gray on reimbursement of the moneys paid out by him.

[4-7] 3. The law is clear. Mors v. Peterson, 261 Ill. 532, 104 N. E. 216, and cases cited. Both the confidential relations long existing

between the parties and the specific new relation of agent and principal required Parker to exercise absolute good faith in his dealings with Mrs. Gray, to take no advantage of his position. Of course, a principal may make and an agent accept a gift, a gift even of the entire estate, if the principal clearly understands the transaction. But while the contract recites that Parker's obligations are made "in consideration of absolute gift to me this day of certain real estate mortgages by Mary M. Gray," "gift" is clearly a misnomer. The transaction was a single one; the transfer was made in consideration of the unilateral obligation; it was a sale, not a gift, a business deal.

Mere inadequacy of consideration would not justify an annulment of the transaction. If Mrs. Gray had freely and voluntarily intended to benefit Parker in this substantial manner, she had a perfect right so to do, provided she were then mentally capable of understanding the matter and free from his undue and improper influence. But, in view of the relations of the parties, the burden is on the agent to establish that no undue influence was exerted. This he has completely failed to do. On the contrary, whatever may be said as to her mental condition, the evidence demonstrates that in February, 1911, and thereafter, Mrs. Gray was completely under the strong domination of this defendant, ready to heed his suggestions in every way. Parker's own statements justify the conclusion that he misled her in February, 1911. In October, 1913, he wrote to Ross:

"My transactions with Mrs. Gray have been along pure business lines. Everything has been open and above-board, and I have nothing to hide from you, or any one else who has the right to know. I was talking to my banker, Mr. C. O. Holmes, only yesterday about this matter, and he pronounced it an ideal arrangement for Mrs. Gray; said there was not one man in a thousand who would have done as I did for Mrs. Gray. I did not enter into this transaction with Mrs. Gray with the thought of making money out of her. She was a friend, and I treated her as such. She was not competent to handle her securities to her advantage. John V. Gray did not handle them himself, while living; why should Mrs. Gray attempt doing so? No. A broker would have to be paid for handling the business for her, and his commission would make quite a hole in her income, and at the same time she would have to stand the losses, if there were any, also the expense of foreclosure, etc., etc. You know what that means. It is expensive, and many times one gets a property on their hands that they do not want, and there is bound to be a loss. Mrs. Gray was in no position to handle the business. She brought it to me of her own free will. I never asked her to let me have her business to look after, as this office does not do that kind of business. We collect interest and foreclose mortgages for no one, except upon our own securities in this office. I am a broker, but we handle securities by buying and selling the same. That is our business. This is not a collecting office for other people. Therefore all the securities taken over from Mrs. Gray had to become the property of this office, without any strings upon it. It was all assigned in proper form, and every acknowledgment was witnessed. When the deal was closed, Mrs. Gray was paid a certain amount of money in cash, in the presence of her attorney and our office people. We owned the securities absolutely, and have handled them just as we do any other securities that we own. * * * I am not wincing over it. I take my medicine like a man. In the end I hope to clean up a little more than I put into the deal. If any one is laboring under the idea that I have made a bunch of money out of Mrs. Gray, let them come around with the ready cash that I have put into the deal, and they will get all that I have that Mrs. Gray ever owned."

Assuming, however, that the statement of the nature of the transaction is as deliberately false as are the statements of the results of the deal, and that both parties intended, not that Mrs. Gray, but that Parker, should get the financial advantage therefrom, his subsequent concealment and denial of this purpose, coupled with his personal activity in selecting the attorney, the notary, and the witnesses in consummating the deal in his office, fully support the contention that in executing the documents she was fully under his control. In this respect, at least, the case differs from Hunter v. Atkins, 3 Mylne & Keen, 113, and Pressley v. Kemp, 16 S. C. 334, 42 Am. Rep. 635.

[8] 4. The beneficiaries under the contract are entitled to their day in court to contest the claim of invalidity of a contract made partially in their interest. They are not represented by the obligee or her guardian; their interests may be adverse to her contentions. Nor is Parker their trustee. Their claim if any, against him is personal. They have no equitable interest in the property conveyed to him. The relative rights of plaintiff and defendants, however, can be adjudged without them. Any possible claim that they may have against Parker after Mrs. Gray's death can be preserved.

Parker is entitled, on payment over of the property and moneys found due the plaintiff, to be fully indemnified against any possible claim by the beneficiaries. This may be accomplished by permitting the clerk of the District Court to retain in his possession securities of the par value of $3,500, the income thereon to be paid to plaintiff, and a pro rata amount of the principal to be delivered to plaintiff when releases to Parker shall be secured from any of the beneficiaries of any obligation under the contract of February 3, 1911. The District Court will reserve jurisdiction over the cause to enable defendant Parker to apply for reimbursement from this fund on account of any payments that he may make to such beneficiaries pursuant to the terms of the agreement.

The decree is reversed, and cause remanded for such modification of the decree and such further proceedings as shall be in accordance with the views herein expressed. Costs in the District Court and three-fourths of the costs in this court will be borne by appellants.

NILES LAND CO. v. CHEMUNG IRON CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1916.)

No. 4554.

1. LANDLORD AND TENANT ⚷44(1)—LEASES—CONSTRUCTION.

If there be doubt and uncertainty as to the meaning of covenants of a lease, they are construed most strongly in favor of the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108, 109; Dec. Dig. ⚷44(1).]

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

2. LANDLORD AND TENANT ⚷103(1)—LEASES—FORFEITURE.

Forfeitures of leases are not favored in law or equity and will not be enforced, unless the right thereto is clear and conclusive.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 321, 324-327, 337-342; Dec. Dig. ⚷103(1).]

3. MINES AND MINERALS ⚷68(2)—MINING LEASES—CONSTRUCTION.

In an iron mining lease for a term of 50 years the lessee covenanted "to work the mine or mines now or hereafter discovered on said land in a good workmanlike manner during the existence of this license," and to pay the lessor a royalty of 25 cents per ton on all iron ore mined. It further agreed to pay a ground rent of $18,750 per year after the first year during the continuance of the lease, with provisos that if the royalty paid in any year should equal or exceed the ground rent for that year it should be in lieu of the ground rent, and if less the lessee should pay the difference, and that all sums paid as ground rent in any year should be credited on the royalty, which might be in excess of said ground rent in any succeeding year or years. By a further provision the lessor was authorized to declare a forfeiture of the lease in case the lessee should "fail to work such mine or mines in a good, workmanlike manner, or fail to pay the ground rent or royalty" when due. *Held* that, taking its provisions together, the lease did not require the lessee to operate the mine continuously during the term, but that the provision for ground rent was an agreed substitute for actual and continuous operation, and that it was not subject to forfeiture for failure to so operate it, so long as the ground rent was paid in accordance with its terms.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 189; Dec. Dig. ⚷68(2).]

4. MINES AND MINERALS ⚷68(1)—MINING LEASES—PRACTICAL CONSTRUCTION BY PARTIES.

The lessee not having done any mining on the land, except for exploration purposes, during the two years following the execution of the lease, the payment and acceptance without objection of the ground rent during such time amounted to a practical construction of the lease by the parties as not requiring continuous mining operations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188, 191; Dec. Dig. ⚷68(1).]

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit in equity by the Niles Land Company against the Chemung Iron Company and the Oliver Iron Mining Company. Decree for defendants, and complainant appeals. Affirmed.

John C. Weadock, of Detroit, Mich. (Stearns & Hunter, of Duluth, Minn., Nelson Sharpe, of West Branch, Mich., and Leo N. Sharpe, of Philadelphia, Pa., on the brief), for appellant.

Wm. W. Billson and A. L. Agatin, both of Duluth, Minn., for appellee Chemung Iron Co.

Frank B. Kellogg, C. A. Severance, and Robert E. Olds, all of St. Paul, Minn., and Frank D. Adams, of Duluth, Minn., for appellee Oliver Iron Mining Co.

Before HOOK and ADAMS, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge. This was a bill brought by the Niles Land Company, the appellant, against the Chemung Iron Company and the

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

Oliver Iron Mining Company, the appellees, to enforce forfeiture of a lease made by it on May 1, 1902, to the Chemung Iron Company, and by the latter subsequently assigned to the Oliver Company, demising to the Chemung Company the W. ½ of the N. E. ¼ and N. W. ¼ of the S. E. ¼ of section 27, township 58 N., range 20 W., situated in the county of St. Louis and state of Minnesota, for the term of 50 years, and to secure a cancellation of the lease, on the ground that the defendants failed to keep and perform one of the covenants of the lease, as a consequence of which the right of forfeiture accrued.

The lease was in the usual form of iron mining leases, containing, among others, these covenants:

(1) "In consideration of this license, the party of the second part [the lessee] hereby agrees to work the mine or mines now or hereafter discovered on said lands in a good workmanlike manner, during the existence of this license, and also hereby agrees to pay to said party of the first part a royalty on all iron ore mined or removed from said land of twenty-five (25) cents per gross ton while this license is in force. Said royalty shall be due and payable on the twentieth (20th) days of April, July, October, and January of each year during the time this license is in force for all the ore mined and removed from said land during the three months preceding the first day of the month in which payment is to be made as aforesaid."

(2) "The party of the second part, having heretofore explored said lands, now represents that iron ore exists therein, and in consideration of this license hereby agrees to pay said party of the first part a ground rent for the year ending May 1, 1903, of $12,500, after May 1, 1903, the sum of $18,750 per annum while this license is in force and not surrendered whether iron ore exists in paying quantities in said lands or not."

(3) "Said ground rent shall be paid semiannually on the twentieth days of July and January of each year: Provided, that if the royalty paid in any year to the said party of the first part shall be equal to or exceed the sum of said ground rent, then said royalty shall be in lieu of said ground rent, and should the royalty paid in any year be less than said ground rent said party of the second part agrees to pay such further amounts as ground rent as will, with such royalty paid, amount to said ground rent. All sums paid as ground rent in any year shall be credited on the royalty which may be in excess of said ground rent in any succeeding year or years."

(4) "Said party of the second part shall also, on or before the twentieth day of each month in each year this license is in force, furnish a written statement to the party of the first part of the entire quantity of iron ore or other minerals removed from said premises during the preceding calendar month as near as the same can be ascertained. * * *"

(5) "The party of the second part shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be assessed on said lands and on the iron ore and other minerals mined thereon while this license is in force."

(6) "The said party of the second part may surrender this license any time by giving fifteen days' notice in writing to said party of the first part, and by executing, acknowledging and recording a surrender of such license in the register of deeds of said county of St. Louis, and by paying up in full all royalty, rent, taxes or assessments that may then have accrued according to the terms hereof."

(7) "In case said party of the second part shall fail to make monthly reports of the ore removed, or shall knowingly make false reports of the quantity, kind, grade, of the iron ore removed from said lands, or fail to work such mine or mines in a good workmanlike manner or fail to pay the ground rent or royalty to said party of the first part when due as aforesaid, without demand from said party of the first part, then, in either of such cases, the party

of the first part may declare this license forfeited, null and void, by giving written notice to the party of the second part."

Plaintiff averred in its bill that under the lease the express obligation was imposed on the defendants, and each of them, to work the mine or mines of ore then existing and those thereafter to be discovered within a reasonable time after the making of the writing, and to continue to do so during the term of lease as long as iron ore could be found, and that on failure of the defendants to so work the mine the lease was forfeitable at the instance of the plaintiff. And it averred that the defendants have not worked the mine or removed ore from the leased premises, except for explorative purposes, and have not paid to the plaintiff any sums of money, except the semi-annual ground rent pursuant to the terms of the lease. And it further averred that the defendants thereby have so failed to work the mine that a right of forfeiture of the lease accrued to the plaintiff prior to January 20, 1912, and that on that date it gave due notice to defendants that it had exercised that right and had forfeited the lease, and now prays that the lease be declared forfeited, null and void, and for certain alternative relief.

The trial court, after a full hearing of the case, dismissed the bill on the merits, and plaintiff appealed, assigning for error that the court erred in not holding that plaintiff was entitled to the relief prayed for, and entering a final decree dismissing the bill. There are other assignments of error, calling in question the ruling of the court on the admissibility of evidence, which in the view we take of the main question, depending upon the construction of the covenants of the lease, become unnecessary to consider.

The facts of the case, so far as necessary for its determination, are practically admitted in the pleadings. The lease was made containing the covenants already referred to. The mine was not worked, except for exploration purposes, for the period of 10 years prior to the declaration of forfeiture by plaintiff in 1912. The amount reserved for ground rent, namely, $12,500 for the first year and $18,750 for each of the subsequent years, was regularly paid by one or both of these defendants to the Niles Company as and when required by the covenants of the lease. Nothing was paid for royalty as such, except in so far as it may be deemed paid by the payment of the ground rent. All taxes on the land accruing during these years were regularly paid, as required by the covenants of the lease, by one or both of these defendants. The several payments of ground rent were received by the plaintiff with full knowledge of all the facts and without objection or complaint by plaintiff. The case hinges upon the true meaning of this covenant found in clause 1 of the lease:

"The party of the second part [the lessee] hereby agrees to work the mine or mines now or hereafter discovered on said lands in a good workmanlike manner during the existence of this license."

The question is: Does this clause, taken in connection with all the other provisions of the lease, require continuous mining operation by the lessee at the peril of forfeiture provided for by clause 7 of the lease?

[1, 2] There are two generally accepted rules of construction which may aid us in answering this question: (1) Covenants of a lease are most strongly construed against the lessor, and if there be doubt and uncertainty as to the meaning of any such covenants, they are construed most strongly in favor of the lessee. (2) Forfeitures of leases are not favored in law or equity, and will not be enforced unless the right thereto is clear and conclusive.

[3] Do the provisions of the lease reserve to the lessor a clear and conclusive right to forfeit the lease for failure to conduct continuous mining operation on the leased premises? Appellant contends that clause 1 of the lease, which reads:

"The party of the second part [the lessee] hereby agrees to work the mine or mines now or hereafter discovered on said lands in a good workmanlike manner during the existence of this license"

—plainly and clearly obligated the lessee to operate the mine continuously during the existence of the lease, and that clause 7 conferred upon the lessee the right of forfeiture of the lessee's rights for failure to do so. Does this clause, taken by itself, mean that the lessee is to work the mine "in a good workmanlike manner" whenever or wherever he works it, as contended by counsel for appellees, or does it mean that the lessee agreed to continuously work the mine during the existence of the lease, and that, too, in a good workmanlike manner, as contended by counsel for appellant? In other words, does the clause relate to the manner of doing the work or to the quantum of work to be done? Is the stress of the covenant to be placed on the words "good workmanlike manner" or upon the words "during the existence of this license"?

The answer to this question, if uncertain in itself, is materially aided by its context and by other related provisions of the lease, which must all be taken into consideration in placing the true construction upon it. Immediately following the clause just cited are found provisions for the payment by the lessee of a royalty of 25 cents per gross ton on all ore mined on the premises. Then follows an agreement on the part of the lessee to pay to the lessor a ground rent of $12,500 per year for the first year of the term and $18,750 per year for the balance of the term of the lease. Then follows, in clause 7, this covenant:

"In case the said party of the second part shall * * * fail to work such mine or mines in a good workmanlike manner, or fail to pay the ground rent or royalty to said party of the first part when due, * * * the party of the first part may declare this lease forfeited, null and void. * * *"

Appellant argues that the continuous operation of the mine was a requirement to secure to the lessor the payment of royalties which were to measure the rent reserved as consideration for the lease. If payment of royalties were the only provision for payment of rent, this argument would be very persuasive: unless the mine should be operated, no ore would be produced, and, of course, no royalty would be payable. But it is not true that the payment of royalties was the only consideration. A very substantial amount is agreed to be paid in any event by the lessee—$18,750 per year, whether the mine be worked or not, and if worked so as to produce royalties such royalties were to be credited on the ground rent obligation, and if the royalties were equal to or in excess of the ground rent the same were to be in lieu of all ground rent.

These provisions, taken together fairly disclose the intention of the parties to the lease to have been that the payment of the ground rent absolutely and in all events was the substantial consideration for the lease. If it be true that the lease could be canceled and the lessee's rights forfeited merely for failure to work the mine, it would seem so unreasonable as not to have been within the fair contemplation of the parties that the lessee should be required to make the large annual payments of ground rent, whether iron ore existed in paying quantities or not. This would subject the lessee to the possibility of losing the mine at any time, and to a continuing liability to pay $18,750 a year for the period of 50 years.

In our opinion, these clauses, when taken together, disclose a clear intention to commute the minimum uncertain output of the mine and the royalties to result therefrom to a certain and definite sum designated "ground rent." In other words, the provision for ground rent is an agreed substitute for actual and continuous operation. We think this is made more clear when we consider that in clause 7 of the lease, providing for the forfeiture, no reference is made to continuous operation or mining as an obligation resting on the lessees which might avoid forfeiture. It is there provided that if the lessee shall "fail to work the mines in a good workmanlike manner," or "fail to pay the ground rent or royalties," etc., the lessor may declare a forfeiture.

In this important clause, containing the lessor's remedy for failure of performance by lessee, the obligation "to work the mine in a good workmanlike manner" alone is mentioned as the only ground for invoking the remedy of forfeiture; and so it appears that, whatever view might be taken of the provisions of the other clauses of the lease when the parties contemplated the severe and ruinous remedy of forfeiture, it did not seem reasonable to subject the lease to total forfeiture for failure to continuously operate the mines. Other provisions afforded satisfactory assurance for the performance of that obligation.

[4] Again, it appears that the parties by the continuous course of dealing for 10 years or more, with full knowledge of all the facts and circumstances, treated the lease as not obligating the lessee to continuous mining operations. This, in our opinion, amounts to a practical construction of the covenant in question, in harmony with the contention of the appellees, and this, in cases of doubt, is and should be of controlling importance.

The decree below was right and is affirmed.

RICHARDS v. AMERICAN BANK OF ALASKA.*

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2440.

1. APPEAL AND ERROR ⚷324—PERFECTION OF WRIT—DISMISSAL.

Judgment was rendered against plaintiff in error and another on the theory that they were liable as partners. Plaintiff alone brought error, without obtaining or petitioning for a severance or giving any notice to his codefendant; but such codefendant filed an appearance in the Circuit Court of Appeals, stating that, had he been notified of the writ of error, he would have refused to join, that he waived any errors against him, and requesting the court to pass on the merits of the writ, regardless of his supposed rights. *Held*, that the Circuit Court of Appeals had jurisdiction to pass on the writ, regardless of the fact that plaintiff in error did not serve notice upon or obtain a severance from his codefendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1806–1809; Dec. Dig. ⚷324.]

2. TRIAL ⚷252(15)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Plaintiff in error, defendant below, delivered to his codefendant a sum of money to enable the latter to purchase a one-fourth interest in a mine; but there was no evidence that any general partnership for the acquisition of the entire property existed, although it was understood that the two should be jointly interested in the share purchased. The codefendant, to purchase the whole mine, borrowed money, executing a note purporting to be an obligation of a firm composed of himself and plaintiff in error, and as a partner signed the latter's name. *Held*, that an instruction the jury should consider whether any partnership agreement, as alleged by the holder of the note, was made, and, if so, whether plaintiff in error's codefendant was authorized to borrow money and bind the firm, was improper, not being authorized by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 605; Dec. Dig. ⚷252(15).]

3. APPEAL AND ERROR ⚷1066—REVIEW—HARMLESS ERROR.

In such case, where it did not appear that the jury's finding was based on any ratification by plaintiff in error, the improper instruction was reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⚷1066; Trial, Cent. Dig. § 558.]

In Error to the District Court of the United States for the Fourth Division of the District of Alaska; Frederic E. Fuller, Judge.

Action by the American Bank of Alaska, a corporation, against Edwin Richards and another. There was a judgment for plaintiff, and the named defendant brings error. Reversed and remanded.

Richards was a miner on Dome creek, Alaska. Williams had been employed by him, and in 1909 Williams and Johanson were working on a lay which had been turned over to them by Richards. In August, 1910, Williams and Johanson quit working on the lay, owing Richards $600 or $700. In the spring of 1910 Williams was in correspondence with Boulton, who owned a one-half interest in a lease on a mine on Flat creek, in the Iditarod country, about 1,100 miles distant from the Hot Springs country, where Williams and Richards were, and wished to sell one-half of his interest for $2,000. Shively and Kennedy owned the other half interest. In September, 1910, Boulton sent a telegram, addressed to Richards at Hot Springs: "Send $2,000 at once through N. C. Fifty thousand at stake. Freeze-out game. Don't fail to see letter." The message was meant for Williams. After discussing the matter with Williams, Richards finally told the latter that he would give him the money to go

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

*Rehearing denied October 16, 1916.

down there, and Williams went, taking with him $2,500, which had been furnished by Richards. Williams went to the Iditarod country, deposited the money in his own name in the Miners' & Merchants' Bank, bought one-half of Boulton's one-half interest in the lay for $2,000, then decided to buy the Shively and Kennedy half at $4,500, was unable to get the money at the Miners' & Merchants' Bank, but, upon the representation that Richards was his partner, he got from the plaintiff bank, through its president, Hurley, $3,500. He gave the bank a note for the money, payable in 90 days, dated October 6, 1910, signed, "Richards & Williams by Ed Williams." Two weeks later, on October 24, 1910, Williams wrote Richards a letter, apologetic in its terms, saying: "How I got the money is the hardest part for me to tell. You may be angry, but I didn't do it with any selfish motive, or try to take advantage of the kindness you did for me." He went on to say that he had deposited the money with the plaintiff bank. "Mr. Hurley is the manager. I told him the money was yours. He told me, in case anything should happen me, unless I deposited it in yours and my name, you would have some trouble getting it, so I did as he advised, and signed the check 'Richards & Williams.' * * * Now, Dick, I had to sign the note 'Richards & Williams,' and I sincerely hope you won't be offended." Letters by mail took about 30 days to pass between Hot Springs and Iditarod. Shortly after writing that letter, Williams received from Richards a letter which the latter had written on September 21, 1910, in which he spoke of what he had learned concerning Boulton's lay, and said: "So, if you have not interested yourself in it, by the time you get these lines, I would advise you to call it off as far as I am concerned. Keep enough money to secure yourself, and return balance to my credit at N. C., Hot Springs." In answer to the letter of October 24th, Richards on December 8, 1910, wrote to Williams expressing his surprise, and among other things saying: "Regarding that account at the bank in both our names, that is certainly a mistake. When I gave you a check for the money, and you get a letter of credit on it, my name should not be used at the bank. I never had the least idea you should assume any obligations beyond what would relieve the situation. * * * Well, now, Ed, to make this short, I believe the best way out of this, you should try and get some of those moneyed fellows down there to go in with you. Consider me out of it altogether. * * * You are perfectly welcome to use that money until you can make it." On December 16th Richards wrote a letter to Williams, in which he stated that he would not be responsible for any note, check, or other written instrument to which Williams might have signed his name in the Iditarod country. On December 26, 1910, Richards wrote to Williams, saying: "Certainly I am not going to worry anything about. Since you put the money into it, go to it and make something out of it. I imagine the proposition must be all right. * * * As you know, I looked at the thing to be of mutual advantage to both of us, but I did not calculate on putting more money than what you had." The note fell due in January, 1911. Williams was unable to pay it. He told Hurley that Richards did not want to stay in the transaction; that he would have to get other partners. He finally made a sale of a one-half interest to McKenzie and McLellan. On February 24, 1911, on the insistence of Hurley, Williams made the plaintiff a mortgage on the three-quarters interest in the lease, and executed a new note for $3,500, which he signed: "Edward Williams. Edwin Richards, by Edward Williams, His Attorney in Fact." He had no power of attorney from Richards, and no express authority to sign his name to the instrument. In fact, Richards knew nothing of the new note until December 28, 1911. Williams had written him, however, that the original note, if not paid when due, must be renewed. On January 2, 1912, Richards wrote the plaintiff bank, denying the authority of Williams to sign the note. An action was brought on the note the following September, which after three trials resulted in a verdict for the plaintiff, the substance of which is that the jury found that there is due, owing, and unpaid from the defendants to the plaintiff the sum of $3,500, principal on the note, together with no interest thereon, together with an attorney's fee for plaintiff's attorneys in the sum of $750. At that time there was $1,295 interest due on the note. Judgment was entered that the plaintiff recover from the defendants as copartners, and from Richards as an individual, $3,500, and the attorney's fee of $750; that the plaintiff recover from defendant Williams as an individual $3,500, with interest thereon from February 24, 1911, at 12 per cent. per annum, amounting to $1,312.50, the judgment against Williams having been taken by default.

Louis K. Pratt and Thomas A. Marquam, both of Fairbanks, Alaska (Metson, Drew & MacKenzie and E. H. Ryan, all of San Francisco, Cal., of counsel), for plaintiff in error.

Charles J. Heggerty, of San Francisco, Cal., Thomas McGowan and John A. Clark, both of Fairbanks, Alaska, and Knight & Heggerty, of San Francisco, Cal. (McGowan & Clark, of Fairbanks, Alaska, of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant in error moves to dismiss the writ of error on the ground that the judgment sought to be reviewed is a joint judgment against two copartners, and that the plaintiff in error alone, and without obtaining or petitioning for a severance or giving any notice to his codefendant, sued out the writ of error. In Masterson v. Herndon, 10 Wall, 416, 19 L. Ed. 953, the court, through Mr. Justice Miller, said:

"We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join."

And the learned justice, referring to the rule that without summons and severance an appeal must be dismissed, declared the reason therefor to be that with such summons and severance the court below would be enabled to execute its decree so far as it could be executed on the party who refused to join in the appeal, and that party would be estopped from bringing another appeal for the same matter, and said:

"The latter point is one to which this court has always attached must importance."

In the present case both grounds for dismissal have been obviated by the appearance which Williams, the codefendant with the plaintiff in error in the court below, has filed in this court. In that paper Williams states that, even if his codefendant had notified him of his purpose and intention to prosecute a writ of error to review the judgment, with a request that he join him, he would have refused so to join, and he states that he waives and releases any and all errors that may have been committed in the court below during the progress of the trial, and he asks this court to pass upon the merits of the said writ of error without any reference to any supposed rights he may ever have had in connection with the action and the record and proceedings therein. This we think is a sufficient appearance in the case to entitle this court to proceed. In Hill v. Western Electric Co., 214 Fed. 243, 130 C. C. A. 613, the Circuit Court of Appeals for the Sixth Circuit held that, where the omitted party to the appeal entered his appearance, waived notice of the appeal, and submitted himself to the jurisdiction of the court as fully as though he had been duly and formally cited, and also waived time for filing brief "and other proceedings," he thereby became a party to all intents and purposes as though originally joined. The motion to dismiss must be denied.

[2] Error is assigned to the following instruction to the jury:

"You should consider, therefore, whether or not the defendants Williams and Richards entered into any partnership agreement as alleged by the plaintiff, and whether or not, if you find that they did enter into such agreement, it was contemplated thereby that said Williams should have authority to borrow money for the purposes of such partnership, and whether or not the moneys borrowed by him from the plaintiff were for such purposes."

The complaint had alleged that Williams and Richards were a mining copartnership, engaged in business in the Iditarod district. The answer denied the allegation. There was no evidence that a partnership agreement was ever entered into. In fact, the evidence was that no such agreement was made. If a partnership existed, it must be inferred from facts and circumstances, from the fact that the money was advanced by Richards to Williams, and it was agreed that Williams was to "go down there" and use his own judgment as to making the purchase. From these facts, and from expressions used by both in the correspondence which followed, it would appear that there was a tacit understanding that they should be jointly interested in a quarter interest in Boulton's lease. Williams, who was the principal witness for the plaintiff, testified as follows:

"Q. Did you have any conversation with Richards at any time after getting this telegram from Boulton, between that and the time you left, that you would go down there and buy a quarter interest, or any interest, with Boulton, and take the assignment of the lease in the name of yourself and Mr. Richards? A. No, sir. Q. Did you have any conversation with him, or did you have any verbal contract, or any written contract, that you would go down there and buy into that lease on Flat Creek, and that he and you would mine there as copartners during the summer of 1911? A. No, sir. Q. Was there anything said between you—now I am talking about down there at Hot Springs and before you left—about any partnership name? A. No; there was not. Q. Was there anything said about you going down there and putting that money he had given you in a bank in the name of the partnership of Richards and Williams? A. No, sir. Q. Was anything said between you about dividing profits and losses of any business down there? A. No, sir. Q. Was there anything said between you about your buying anything with that $2,500, other than a quarter interest in the Boulton lease? A. I can't say we discussed about buying. I was just given the money and sent down there to use my own judgment."

The whole of the evidence in the case, and there is no evidence to the contrary, is that there was no thought, either by Richards or Williams, of a general copartnership. The utmost that can be claimed for the evidence is that their minds met upon a joint venture to purchase, and perhaps to operate as a mining copartnership, a one-fourth interest in the lease then held by Boulton. There was no thought of the possibility of purchasing any other interest than that one-fourth, nor was there any suggestion of giving to Williams power to borrow money. The money which Richards had given him was ample for the purpose they had in view—$2,000 for the purchase of the one-fourth interest; $500 for Williams' expenses. There was no testimony, and no deducible inference from the evidence, which justified the submission to the jury of the question whether it was contemplated by the agreement that Williams should have authority to borrow money for the purpose of such partnership. The evidence, such as it was, was to the contrary, as witness the language with which Williams notified Richards that he had borrowed the $3,500:

"Now, Dick, how I got the money is the hardest part for me to tell. You may be angry, but I didn't do it with any selfish motive, or try to take advantage of the kindness you did for me."

[3] If it appeared from a special finding, or otherwise, that the jury's verdict was based on the ground that Richards subsequently ratified the act of Williams, we might pass over this assignment of error as harmless; but, the verdict being general, we cannot say that the erroneous instruction so given did not affect the result.

The judgment is reversed, and the cause is remanded for a new trial.

OESTING v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. July 24, 1916.)

No. 2712.

1. INDICTMENT AND INFORMATION ⚷196(1)—PLEA—EFFECT.
After a plea of not guilty, the only objection that can be made to the indictment in the trial court is that it fails to describe the various acts intended to be proved with that reasonable certainty which the law requires.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628, 630; Dec. Dig. ⚷196(1).]

2. INDICTMENT AND INFORMATION ⚷196(2)—APPEAL—OBJECTIONS.
By accused's failure to demur to an indictment, or to move to quash, or in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter going to the form in which the offense is stated; but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 629; Dec. Dig. ⚷196(2).]

3. POST OFFICE ⚷48(4)—OFFENSES—INDICTMENT.
An indictment charging that accused, under the name of "Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy," devised a scheme and artifice to defraud, is not objectionable as charging that the scheme and artifice was conceived by the corporation, but charges that accused devised the scheme.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⚷48(4).]

4. POST OFFICE ⚷35—OFFENSES—FRAUD.
Under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), denouncing the offense of using the mails in connection with any scheme to defraud, it is not necessary that the scheme alleged appear on its face to be fraudulent; it being sufficient

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*Rehearing denied October 9, 1916.

that it is a scheme reasonably calculated to deceive persons of ordinary comprehension.

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

5. Post Office ⚷48(4)—Offenses—Indictment—Sufficiency.

An indictment charging that accused, "under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy," a California corporation devised a scheme to defraud by means of pretenses to be effected through the mails, the scheme consisting in advertisements that Dr. Jordan was a physician qualified to treat diseases of men and had cured many persons afflicted with such diseases, thus inducing persons to communicate through the mails with accused relative to supposed ailments, enabling him to obtain money for worthless treatment, regardless of their real condition, charges an offense, and cannot be held insufficient on the ground that it did not follow that accused represented that Dr. Jordan was still living, or that his quack treatments might be of benefit to hypochondriacs.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⚷48(4).]

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. H. Sawtelle, Judge.

Paul Oesting, alias Paul Allen, was convicted under Criminal Code, § 215, of using the mails in connection with a scheme to defraud, and he brings error. Affirmed.

The plaintiff in error was sentenced upon a plea of guilty to an indictment the substance of which is as follows: That at a time and place named, under the name of Dr. Jordan, L. J. Jordan, Incorporated, and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the state of California, and under the guise of the said Jordan's Museum of Anatomy, the defendant devised a certain scheme or artifice to defraud, or for obtaining money by means of certain false pretenses, representations, or promises, to be effected by means of the post office establishment of the United States. The scheme was then set forth, which was in substance that the defendant should place advertisements in newspapers of general circulation, or in letters, documents, or other prints setting forth that Dr. Jordan was a physician practicing in the city and county of San Francisco, especially qualified to treat private diseases of men, enumerating the diseases, and had cured many persons afflicted with said diseases and by means of said advertisements and other prints he then and there intended to induce certain persons named, and divers other persons whose names are unknown, to communicate and open correspondence with Dr. Jordan by means of the post office establishment of the United States, relative to their real or supposed ailments; that when said persons would communicate with Dr. Jordan, whom the defendant then and there well knew was not a doctor, and did not exist, the said Dr. Jordan should write or communicate with such persons by means of letters placed in the post office, stating to them, with intent to defraud each and all of them, and without any proper knowledge of the real condition of said persons, that they were afflicted with diseases which he could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment of certain sums of money, thereby intending to induce said persons to send to him large sums of money for the purpose of procuring from him medicine and treatment for diseases which they had been induced by the defendant to believe themselves afflicted with, etc., and that he would then send to each of said persons medicine or treatment not properly designed and having no value for their cure, he having no professional knowledge of such person's condition, or whether they were diseased, or whether such medicine or treatment would benefit them. The indictment

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then proceeded to describe the acts done by the defendant in executing his scheme and artifice, by writing letters, copies of which letters are set forth. No objection of any kind was made to the indictment in the court below.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Annette Abbott Adams, both of San Francisco, Cal., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). **[1, 2]** The defendant in error contends that the plaintiff in error, having pleaded guilty to the indictment and having presented no objection to the indictment in the court below, cannot be heard to object to the same in this court. Many authorities are cited for and against the contention. We may accept the rule to be this: First, that after a plea of guilty the only objection that can be made to the indictment in the court of first instance is that it "fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment" (United States v. Bayaud [C. C.] 16 Fed. 376); and, second, that by the defendant's failure to demur to an indictment, or to enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter which goes to the form in which the offense is stated, but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged (Hardesty v. United States, 168 Fed. 25, 93 C. C. A. 417; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Harris v. United States, 227 U. S. 340, 33 Sup. Ct. 289, 57 L. Ed. 534). Pickett v. United States, 216 U. S. 456, 30 Sup. Ct. 265, 54 L. Ed. 566, cited by defendant in error, does not hold to the contrary. In ruling therein that objections to an indictment cannot be made for the first time on writ of error, the court obviously had reference to such errors in the indictment as are curable by verdict, or which may be waived by the defendant, and that distinction is sufficiently pointed out in the opinion.

[3] We find no merit in any of the objections which are made to the indictment. Some of the objections are of such a character that it is difficult to understand how they could have been intended to be taken seriously. Referring to the charge that the plaintiff in error, under the name and guise of "Dr. Jordan, L. J. Jordan, Incorporated, and Jordan Museum of Anatomy," devised a certain scheme and artifice to defraud, etc., the objection is made that the charge is equivalent to saying that a corporation conceived the scheme, and that the defendant is charged only with acting for the corporation. No such meaning can be found in the language of the charge. It distinctly alleges that the defendant acted under the guise of a corporation, and that he conceived the scheme. It would make no difference whether there was or was not such a corporation, so long as the defendant devised the scheme to defraud, whether acting for the corporation or in his own behalf.

[4] But it is said that the scheme as alleged does not appear to be of a fraudulent nature, or calculated to deceive, and cases are cited to show what must be alleged in an indictment for obtaining money under false pretenses. But the rule in those cases has no application to a prosecution under section 215 of the Criminal Code. That section does not require that the scheme should be fraudulent upon its face. Rumble v. United States, 143 Fed. 772, 75 C. C. A. 30. All that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence and that the mail service of the United States be used and intended to be used in execution of the same. Rimmerman v. United States, 186 Fed. 307, 108 C. C. A. 385.

[5] It is urged that, from advertising that "Jordan was a physician," etc., it does not follow that the defendant intended to claim that Jordan still existed at the time of the advertising, but merely that he was or had been a physician prior to that time. This we may pass by as a mere quibble on words. But it is said that, even supposing that the defendant did intend to advise well people that they needed medical treatment, it does not follow that he intended to defraud, because it is well known that there is a large class of well people who are hypochondriacs, and who are benefited by medical treatment through its effect upon the mind. In answer to this fanciful suggestion, it is only necessary to point to the language of the indictment, which shows that the aim of the defendant's scheme, both by advertising and by correspondence, was to convince well people that they were ill, and that they needed treatment from the imaginary Dr. Jordan.

We find no error. The judgment is affirmed.

CUTTING v. WOODWARD et al.

(Circuit Court of Appeals, Ninth Circuit. July 24, 1916.)

No. 2733.

APPEAL AND ERROR ⚷80(4)—DECISIONS APPEALABLE—FINAL DECREES.

In a suit to obtain a decree setting aside and canceling as fraudulent the purchase by defendant of stock in the capital stock of another corporation and to obtain a decree compelling defendant to account for all moneys and property of the plaintiff corporation, which he had received and misappropriated, a decree designated as an interlocutory decree adjudged that the contract between defendant and the directorate of the plaintiff corporation was fraudulent and void, and vested no title to the shares of stock in defendant, but that such shares remained the property of the corporation, which was entitled to have them restored to its name, and further provided for an accounting. From such decree, defendant appealed. *Held* that, as it purported to determine no title to the stock and was under control of the court until an accounting, such decree was not in any sense final, as no execution could be issued thereon, and an appeal therefrom must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 494; Dec. Dig. ⚷80(4).]

⚷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 Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by Henry J. Woodward and others against Henry C. Cutting. from an interlocutory decree, defendant appeals. Appeal dismissed.

The appellees, who were stockholders in the Monetary Trust Company, brought suit against the appellant, joining with him as a party defendant the Monetary Trust Company, to obtain a decree setting aside and canceling as fraudulent the purchase by the appellant from the Monetary Trust Company of 2,350 shares of the capital stock of the Point Richmond Canal & Land Company, also to obtain a decree of the court compelling the appellant to account for all moneys and property of the Monetary Trust Company, which, it was alleged, he had received and misappropriated. The prayer of the bill was that the appellant be required to render a full and accurate account of all moneys, assets, and property he had received belonging to the Trust Company, and to pay over the same to the treasurer of said company, and that the attempted fraudulent transaction of the appellant, whereby he claimed title to 2,350 shares of the capital stock of the Point Richmond Canal & Land Company, be held void and ineffectual, and that he be required to surrender said shares and cause the same to be reissued in the name of the Monetary Trust Company. Upon the issues and the evidence the court rendered what was designated an "interlocutory decree." It adjudged and decreed that the contract which purported to have been entered into on or about December 20, 1906, between certain members of the board of directors of the Monetary Trust Company and the appellant, which purported to transfer 1,175 shares of the capital stock of the Point Richmond Canal & Land Company from said Trust Company to the appellant, "is fraudulent and void, and vested no title to said shares of stock in said Cutting, but said shares of stock still remain the property of the Monetary Trust Company, and the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal & Land Company." It was further decreed that the appellant had no right or title in the income, profits, and dividends received on said shares, and that the appellees, on behalf of the Monetary Trust Company, are entitled to have an accounting thereof. The decree ordered that the appellant account for all moneys due and owing from him to the Monetary Trust Company for and on account of certain other 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, sold and transferred by the Trust Company to the appellant prior to December 20, 1906, and a full accounting of all interest and income therefrom, and all other property which had come into the possession of the appellant belonging to the Trust Company, or paid out on behalf of the Trust Company for the appellant's benefit, and all financial transactions of every character between the Trust Company and the appellant during the period covered by the bill. From that decree the appeal is taken.

Jacob M. Blake, of San Francisco, Cal., for appellant.

John B. Clayberg, Welles Whitmore, and Clayberg & Whitmore, all of San Francisco, Cal., for appellees Woodward.

W. H. H. Hart, of San Francisco, Cal., for appellee Monetary Trust Company.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellees move to dismiss the appeal on the ground that the decree is not final. In McGourkey v. Toledo & Ohio Ry. Co., 146 U. S. 536, 545, 13 Sup. Ct. 170, 172 (36 L. Ed. 1079), the court observed that the cases on the subject of the finality of decrees "are not altogether harmonious." Both parties to this appeal cite decisions of the Supreme Court in support of their respective contentions. But the question, so far as the present case is concerned, is, we think, not difficult of solution. In determining whether a decree which does not dispose of the whole case is final, so as to allow of an appeal, the controlling question is whether the decree finally determines some separable portion of the case in such a way that the defendant may be injured by denying him an appeal at that stage of the proceedings. In Forgay v. Conrad, 6 How. 204 (12 L. Ed. 404), Chief Justice Taney said:

"When the decree decides the right to the property in contest, and directs it to be delivered up, * * * or directs it to be sold, * * * and the complainant is entitled to have [it] carried immediately into execution, the decree must be regarded as final to that extent, * * * although it [may be] necessary * * * by a further decree [to adjust] the accounts between the parties."

In Perkins v. Fourniquet, 6 How. 206, 12 L. Ed. 406, the court said:

"The appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the Circuit Court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree."

In Pulliam v. Christian, 6 How. 209, 12 L. Ed. 408, the decree set aside a deed, and directed the trustees under that deed to deliver up all property remaining in their hands undisposed of, but without deciding how far they might be liable for the proceeds of sales previously made, and it directed that an account be taken of those proceeds. It was held that the decree was not appealable. The court said:

"There is no sale or change of the property ordered which can operate injuriously to the parties."

In Beebe v. Russell, 19 How. 283, 15 L. Ed. 668, the decree was that the defendants execute conveyances of certain pieces of property which were alleged to have been fraudulently withheld from the plaintiff, and it then referred the matter to a master to take an account of rents and profits received upon that property. The decree was held not appealable. On the other hand, in Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94, and in Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898, it was held that, where a decree decided the right to property in contest and directed that it be delivered by the defendant to the complainant, it is a final decree, although the court below retains possession of the decree for the purpose of adjusting accounts. But in the case at bar there is no decree directing the transfer of property from the appellant to the appellees, or to the Monetary Trust Company. So far as the title to the shares of stock is concerned, the decree goes no further than to establish the necessary premise to an accounting. It declares that the transfer was fraudulent, that it vested no title, that the shares of stock still remain the property of the Trust Company, and that that company is entitled to have them restored to its name on the books of the Point Richmond Canal & Land Company. But there is no decree that the shares be surrendered by the appellant, or that they be transferred or assigned to the Monetary Trust Company. There is nothing in the decree upon which execution can issue, and there is no necessity of an appeal for the immediate protection of the appellant's rights. See, also, Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Keystone Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; McGourkey v. Toledo & Ohio Ry., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; California National Bank v. Stateler, 171 U. S. 447, 19 Sup. Ct. 6, 43 L. Ed. 233; Maas v. Lonstorf, 166 Fed. 41, 91 C. C. A. 627. Under the plain rule of the decisions cited, we hold that the decree is not final.

The appeal is dismissed.

LEHIGH VALLEY R. CO. v. BROOKLYN EASTERN DIST. TERMINAL.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 259.

SHIPPING ⚷110—SINKING OF CAR FLOAT IN LOADING—IMPROPER METHOD OF LOADING.

The sinking of a car float while being loaded with loaded cars at a float bridge of respondent railroad company under direction of its train conductor *held* due to his negligent method of loading, for which respondent was liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 420, 421; Dec. Dig. ⚷110.]

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

Suit in admiralty by the Brooklyn Eastern District Terminal against the Lehigh Valley Railroad Company. Decree for libelant, and respondent appeals. Affirmed.

The following is the opinion below of Learned Hand, District Judge:

I think the float was seaworthy. She was still a young boat, made with extra strength, and she had been thoroughly overhauled within three months. The last master who was available swore that she was dry when he left her the day before, and there is the evidence of the tug master that she did not list when she was towed over to the Jersey pier, showing that she had not a great quantity of water. That there was some water in her I can well believe, but the bridge tender's estimate of seven inches, based upon his ear, can certainly not count for much as evidence. The evidence against her condition comes only from Ericson's observations, from vague talk about former unspecified trouble in loading her, and from the fact that she was changed to a two-track float later. Ericson's testimony was honest, and probably it was accurate; but it was after the accident and the inferences to be drawn from it rest only in expert opinion. Perhaps it is true that the float yielded too much in the middle when fully loaded; but that did not cause the accident, because she was not loaded so much at the time she sank. If it be suggested that she had taken in water on the way over while she was loaded, then she would have continued to fill on her way back and every time she was loaded, and I can only say that, if so, she would not have been available at all for the use she constantly and successfully filled. That argument proves too much. Finally, as to the change in her use after the accident, the law has always declined to admit such evidence, since it involves

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

a new issue, which has no necessary relation to the issue in suit. We have no means of knowing why the boat was changed. It may be that this accident showed that under circumstances which might arise, owing to the railroad's mismanagement, she was subject to damage, and that one track was taken off against its recurrence. Whatever the reason, it seems to me not to overbalance the testimony given in favor of the float, especially as I shall show that she developed no weakness, except under abnormal conditions, which she was in my judgment not to be expected to endure.

This involves Meyers' handling of his train. Having 15 cars, his plan was to put 5 on each track, which was, of course, the proper way. He backed his train down on the center track to the bumpers and cut off the last 5 cars. Then he tried to pull off the rest, of which 2½ were on the float and 2½ on the bridge. This he could not do, so he cut off the second string of 5, took the last 5, and backed them down onto the port track, so that 2½ were on the float and 2½ on the bridge. Then he went over to pull off the second string of 5. This he was again unable to do, but meanwhile the float gave evidence of distress, and, while he was trying to get off the port string, filled through her hatches and sank. Meyers' plan had been to run the second string half on the starboard track and half on the bridge. Then he meant to run the whole port string onto the port track, perhaps to the bumper, but certainly far enough aft not to put the float down by the head. Then he could go again to his starboard string and back that to the proper place on the float. Thus he would have never had more than 2½ cars unbalanced upon either of the side tracks, and she would not have had an undue list to port or starboard. When Meyers found that he could not pull off his second string, but was forced to leave it on the cut-off, he concluded that he ought not to run the whole third string of 5 onto the port track for fear of giving her too great a list to port. The second string should have been on the starboard track, where they would have exerted their whole weight in a turning movement to starboard; in fact, they were on the cut-off, where they exerted a much feebler moment.

Meyers' reasoning was therefore perfectly sound and prudent, so far as the thwartships list was concerned. What he forgot was the effect of his disposition upon putting the float down by the head. We need not agree with Clark that he should not leave in any case any part of his second string on the bridge. We may grant the propriety of his contemplated plan, but we must remember that his execution was not in accordance with it. Had he put the second string half on the bridge and half on the float, the float's bow would have been depressed by the weight of 2½ cars and by so much of the weight of the other 2½ as the buoyancy of the pontoon could not counteract. This we may suppose would not have been too much, Clark to the contrary notwithstanding. If in that posture Meyers had run his third string upon the port track, he would have run it right aft to the bumpers, or at least to where it balanced amidships. Thus he would have added no turning moment to set the float down by the head. It is true that as the third train was passing it would have set her down; but the string was to pass right on to its position of rest, and in that position it would have added nothing to the turning moment forward and aft.

Instead of this, however, Meyers let the third string rest on the port track in exactly the same position as the second string lay on the cut-off, and as it would have lain on the starboard track, had all gone well. The result was to depress the bow of the float by just twice the turning moment which the maneuver contemplated. He had 10 cars on bridge and bow, instead of 5, and that proved too much. In considering how he should avoid giving her too great a list to port, he forgot all about setting her down by the head, and this was the cause of the trouble. As she sank she had a slight list to port, due to the fact that the second string was still on the cut-off and did not exert their proper turning moment to starboard.

Obviously Meyers' proper way, and his only way, was to pull off the second string before he put any on the third track, even if he had to do this by twos or even ones. This was an awkward and troublesome method, but it was the only safe one, and to disregard it was to expose the float to an unnecessary danger. That she yielded enough to put a hatch under water does not seem to me evidence that she was not seaworthy, or that she was not able to endure the risks inherent in her calling.

Decree for libelant on libel, and for respondent on cross-libel.

S. C. Pratt, of New York City, for appellant.

Foley & Martin, of New York City (W. J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee.

Before COXE, Circuit Judge, and VEEDER and MAYER, District Judges.

MAYER, District Judge. On December 8, 1911, car float No. 9 of the Terminal Company was sunk while being loaded at a float bridge of the Lehigh Valley Railroad Company by Meyers, the conductor of the railroad company. It was contended below that the accident was due to the unseaworthiness of the float, and that, if there was an error by the conductor in the method of loading, that error was purely one of judgment for which the railroad company should not be held liable. The charge that the car float was not seaworthy has now been abandoned.

The manner in which the conductor loaded the float is not in dispute, although whether his method was prudent was the subject of some differences of opinion on the trial. Fifteen cars were to be loaded from the float bridge to the float. Thirteen of these cars weighed various amounts, but all above 70 tons each. The details of the handling of the train by Meyers are clearly and fully explained in the opinion of Judge Learned Hand and need not be here repeated. The result was that the weight was distributed so as to put the float down by the head, with the obvious consequence that the terminal company's float sank. We agree with the District Court that the conductor's method was negligent, and could readily have been avoided, and that the railroad company cannot be excused merely because the correct method would have required a little more time and trouble.

The decree is affirmed, with interest and costs.

THE SENECA.

(Circuit Court of Appeals, Third Circuit. May 17, 1916.)

No. 2089.

SHIPPING ⟹168—OFFENSES AGAINST NAVIGATION LAWS—CARRYING EXCESS OF PASSENGERS.

Evidence held insufficient to sustain a libel by the United States against a steamer, under Rev. St. § 4499 (Comp. St. 1913, § 8275), to recover the penalty for carrying more passengers than allowed by the vessel's inspection certificate.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⟹168.]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in admiralty by the United States against the steamer Seneca, Michael Blasins, claimant. Decree for respondent, and libelant appeals. Affirmed.

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

J. Warren Davis, U. S. Atty., of Trenton, N. J., and Charles F. Lynch, Asst. U. S. Atty., of Paterson, N. J.

Alexander & Ash, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the United States filed a libel against the steamer Seneca to recover a penalty of $500 for carrying more passengers than allowed by the vessel's inspection certificate, in violation of section 4499, Revised Statutes. The case was heard on final proofs, and resulted in a decree dismissing the libel. Thereupon the government appealed.

The appeal raises no question on principles of law, and involved a simple issue of fact, namely, whether the government had, by the weight of the evidence, sustained the burden of proving the Seneca had carried an excess of passengers. That issue the court below, in the opinion quoted, in the margin,[1] determined against the govern-

[1] "The libel charges that the steamer Seneca carried 27 more passengers than she was permitted to by her certificate of inspection. This steamer ran between Hoboken, N. J., and different fishing banks, stopping at the Battery, New York City, to receive and discharge passengers. On the day in question there were undoubtedly more persons on board than were permitted by the certificate of inspection. The questions as to such persons are, how many, and were they passengers within the meaning of section 4499, R. S.?

"The method employed by the respondent in ascertaining the number of passengers carried was that of selling and collecting tickets, no one being allowed to go on board unless he had a ticket, and the testimony on the respondent's behalf is that on the day in question but 72 (the authorized number) tickets were sold; that no person without a ticket was knowingly allowed to go on the boat; that after the boat had left the New York stopping place a passenger made it known that several persons, estimated at from 6 to 9 in number, had jumped over the steamer's rail while she was at such landing place, and while passengers were coming on board over the gangplank; that these came on the boat without the knowledge or permission of the respondent; that they could not be identified; and that they obtained their passage without pay. The persons thus surreptitiously obtaining place on the steamer, in the circumstances, were trespassers, and, if the number of these accounts for the excess number of persons carried on that day, no case, in my judgment, has been brought within the meaning of that section. The City of Lowell, 204 Fed. 271, 122 C. C. A. 395; The Melville, 213 Fed. 620, 130 C. C. A. 212, and cases cited.

"Were there others in excess of the permitted number? A suit of this character—to recover a penalty—while classified as civil, is quasi criminal in character (The Pope Catlin [D. C.] 31 Fed. 408–409), and a recovery in such a case must be supported by convincing testimony. The case for the prosecution depends mainly upon the accuracy with which the *counting machine* used on the day in question registered the number of persons as they left the boat, on its return trip, at the New York landing, and whether the count made by one of the inspectors of the persons remaining on the boat at that time did not include some members of the crew. The accuracy of the machine's count was put in question by the respondent, who supported its contention by persuasive evidence tending to discredit said count. In such circumstances, the prosecution was called upon to corroborate the accuracy of this count by evidence showing the make and reputation of machines such *as the one used*, or *how that one worked* immediately preceding or succeeding the use in question, or *whether its registering mechanism had ever been tested as to accuracy.* In the absence of such or other corroborating testimony, the doubt cast upon the accuracy of the count is too weighty to permit a judgment for such penalty.

"The respondent is entitled to a decree dismissing the libel."

ment. After full argument in this court, and a subsequent examination of the testimony by the judges comprising this court, we see no reason to differ from the conclusions reached by Judge Rellstab.

The decree below is therefore affirmed.

AUTOPIANO CO. v. CLAVIOLA CO. et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 246.

PATENTS ⚷328—VALIDITY AND INFRINGEMENT—NOTE SHEET GUIDE.

The O'Connor reissue patent, No. 13,398 (original No. 789,053), for a note sheet guide for player pianos, is valid, and covers a highly meritorious and broadly new invention. As so construed, *held* infringed by four different forms of defendant's mechanism, each of which embodies the principle of operation of the patented device.

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

Suit in equity by the Autopiano Company against the Claviola Company, the Superior Pneumatic Action Company, and Kindler & Collins. Decree in part for complainant, and both parties appeal. Affirmed on defendants' appeal, and reversed on complainant's appeal.

See, also, 222 Fed. 276, 138 C. C. A. 38.

This is a suit for infringement of reissued letters patent No. 13,398, granted April 2, 1912, to James O'Connor for a perforated note sheet guide. An interlocutory decree of the District Court, Southern District of New York, sustained the validity of the patent, and held that claims 1 to 12 and 16 to 27, both inclusive, had been infringed by defendants' device Exhibit 2, but that claims 9, 21, and 23 had not been infringed by defendants' devices Exhibits 3 and 4, nor had claims 9 and 21 been infringed by defendants' device Exhibit 5. Both complainant and defendants have appealed.

This is the third appearance of the patent before this court. The original patent, No. 789,053, dated May 2, 1905, of which the patent in suit is the second reissue, came before the court in the first instance on appeal from a decree of the District Court, Southern District of New York, dismissing a complaint against the Amphion Piano Player Company. The District Judge held that the web-guiding device therein described was not a pioneer invention, but merely an improvement on prior devices regulating the lateral displacement of note sheets in musical instruments by means of the substitution of surface control of the sheet for edge control, and that in view of the language of the specification and claims, of the prior art, and of the proceedings in the Patent Office, the patent could not be construed to cover an edge-controlled device such as the defendant made. On appeal to this court the decree of the District Court was affirmed without opinion. Autopiano Co. v. Amphion Piano Player Co., 186 Fed. 159, 108 C. C. A. 291. Thereafter the original patent was surrendered and reissued; the reissue, No. 13,283, bearing date August 15, 1911. Through an unfortunate mistake of the attorney who prosecuted the application for reissue, certain broad claims were withdrawn and narrow claims substituted. Shortly afterward a second reissue was applied for, and was granted April 2, 1912, in its present form. The reissued patent came before this court on appeal from a decree of the District Court, Southern District of New York, dismissing a complaint against the American Player Action Company on the ground of noninfringement and because claims 21 and 22 had been broadened beyond the invention originally disclosed. On appeal to this court the decree of the District Court was affirmed, not upon the grounds re-

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

lied upon by the District Judge, but for the reason that the complainant was estopped from claiming infringement against the particular defendant in continuing the manufacture and sale which it had entered upon while the first reissue was the only public announcement of complainant's alleged monopoly. Contrary to the conclusions of the District Judge, this court found that the second reissue was valid, and that the defendants' device infringed. Contrary to the conclusion of the District Judge in both Amphion and American cases, this court held that the invention of O'Connor was highly meritorious and broadly new. Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 C. C. A. 38.

The present defendants first employed a device known in this case as Exhibit 2, against the manufacture of which a preliminary injunction was granted by the District Court, Southern District of New York. Thereupon the defendants put out a device employing little levers and valves between the edges of the note sheet and control openings, resembling those present in the Amphion case. These devices are represented by Exhibits 3, 4, and 5 in this case, and were complained of by supplemental bill. On final hearing the District Judge sustained the patent in suit, and held that the defendants' device Exhibit 2 infringed 24 of the 27 claims of the patent in suit, but that the defendants' devices Exhibits 3, 4, and 5 did not infringe the claims in issue. In arriving at the latter conclusion the District Judge stated in substance that he felt constrained to follow the interpretation which had been placed upon the original patent in the Amphion case, and that the merits of the questions raised by the use of little levers and valves in connection with the reissue patent should be passed upon by this court. The claims in issue with respect to Exhibits 3, 4, and 5 are claims 9, 21, and 23, which read as follows:

"9. In a web-driving apparatus, in combination with a roll thereof, a motor for driving the roll sidewise and means normally held out of operation by the interposition of the sheet when in its normal position for moving the roll sidewise to restore the web to normal position when deflected therefrom."

"21. The combination of a tracker-bar having a series of music apertures, means for drawing a perforated note-sheet forward over the tracker-bar, a pneumatic control opening appurtenant to the tracker-bar and arranged so that a lateral deviation of the note-sheet will change its condition, a pneumatic motor connected to adjust the lateral relation between the note-sheet and tracker-bar, and connections between said control opening and said pneumatic motor arranged so that when a lateral deviation of the note sheet changes the condition of the control opening, the pneumatic motor will operate to restore the normal lateral relation between the tracker-bar and note-sheet before the forward run of the note-sheet in abnormal lateral position can produce discord."

"23. The combination of a tracker-bar having a series of music apertures, means for drawing a perforated note-sheet forward over the tracker-bar, two pneumatic control openings appurtenant to the tracker-bar and arranged so that a lateral deviation of the note-sheet in either direction will change the condition of one of said control openings, a pneumatic motor connected to adjust the lateral relation between the note-sheet and tracker-bar, and connections between said control openings and said pneumatic motor arranged so that when a lateral deviation of the note-sheet changes the condition of a control opening, the pneumatic motor will operate to restore the normal lateral relation between the tracker-bar and note-sheet before the forward run of the note-sheet in abnormal lateral position can produce discord."

Of these claims, claim 9 was in the original patent, but was not in issue in the Amphion case; claims 21 and 23 are reissue claims, of which claim 21 was in issue in the American case.

Frederick P. Fish, Louis W. Southgate, and O. Ellery Edwards, Jr., all of New York City, for plaintiff.

Thomas A. Hill, of New York City, for defendants.

Before COXE and WARD, Circuit Judges, and VEEDER, District Judge.

VEEDER, District Judge (after stating the facts as above). Inasmuch as this patent and the vicissitudes through which it has passed were fully discussed in our former opinion in the case of Autopiano Co. v. American Player Action Co., 222 Fed. 276, 138 C. C. A. 38, it is unnecessary to repeat the statement. The patent comes before the court for the first time in a form which embodies the invention actually made and without any intervening equities. We are now free to give effect to the claims in issue. As we said in our former opinion:

"The invention of O'Connor was a highly meritorious one and broadly new. The prior art contains nothing which should require it to be narrowly construed."

O'Connor introduced a very necessary and important improvement in the autopiano art by providing automatic instantaneous adjustment whenever there was a sidewise deflection of the note sheet on the tracker-bar. He accomplished this by his combination of control openings opened and closed by the deflection of the note-sheet, which control openings govern the operation of bellows motors connected to adjust the relation between note-sheet and tracker-bar. Instantaneous adjustment was affected by having the note-sheet in normal position hold the apparatus out of operation, so that when deflection occurred correction would take place instantly without the necessity of bringing the elements in operative positions.

The device by which this result was effected is described and illustrated by the patentee. The bearings which carry the shaft of the music roll are arranged to slide lengthwise in the frame pieces to adjust the music roll and note-sheet. In a block, secured by a screw to the under side of the tracker-bar, is a hole called a guide or control opening. This block is connected by a tube to a valve apparatus at the right of the air chest, which in turn is connected by a tube to a bellows motor having an arm arranged to engage a thrust collar on the shaft of the music roll. These parts automatically move the music roll instantly to the right to correct any deflection of the note-sheet to the left, the motion of the bellows motor being transmitted through the arm provided for this purpose. The mechanism for adjusting the music roll to the left is a duplicate of that just described and operates in the same manner. The guide or control openings are spaced so that the note sheet, when placed in correct or normal position on the tracker-bar, will maintain both openings in the same condition. In this way the note-sheet, when in normal position, performs the function of holding both motors out of operation. When the note-sheet is deflected from normal to abnormal position it destroys the inoperative or balanced condition of the motors and causes the proper bellows motor to operate before there can be the least forward run of the note-sheet over the tracker-bar in abnormal position.

The defendants' device Exhibit 2, which the District Judge held to infringe claims 1 to 12 and 16 to 27, both inclusive, of the patent in suit, is a servile copy of the patented structure, and requires no discussion. After a temporary injunction had issued the defendants developed the devices shown in Exhibits 3, 4 and 5. In Exhibit 3 the bearings which carry the shaft of the music roll are arranged to slide lengthwise in the frame pieces to adjust the music roll and note-sheet sidewise. A block secured to the frame piece beneath the under side of the tracker-bar has a hole which forms the right-hand guide or control opening through a tube connection with a double bellows motor. The bellows motor has an arm connected by a link to a pivoted lever, the upper end of which is connected with a draw-bar at the rear of the apparatus. This draw-bar is in turn connected with the shaft carrying the right hand bearing of the music roll. In this way the bellows motor and opening are arranged to adjust the music roll automatically to the right to overcome any deflection of the note-sheet to the left, the motion of the bellows motor being transmitted through the pivoted link and draw-bar. For adjustment to the left a similar mechanism is provided, the two bellows motors being connected by a link to form a double bellows motor. The double bellows motor is connected with the exhaust chest by a tube and passages which have restricted openings into the motors so that there is normally a partial vacuum in each motor, the effect of which is to cause the motors normally to balance and lock each other from operation. Just below the tracker-bar is arranged a rod carried by two pivoted arms which extend forward beyond the face of the tracker and are arranged so that the note sheet will fit in between them. The rod is provided with collars both inside and outside the arms. Springs arranged between the arms and the collars allow the arms to be sprung slightly apart so that the note-sheet can be fitted snugly between them. The rod carries at each end a little valve. The right-hand valve is set in position to control the right-hand control opening, while the left-hand valve is set to control the left-hand control opening. The rod and valves are made of a length slightly less than the distance between the two control openings. The openings are positioned relatively to the tracker-bar so that the valves will be held at equal distance from the two blocks by the note-sheet when it is placed in normal position on the tracker-bar. In this position the valves will hold the two bellows motors out of operation, because the flow of air into the control openings, and thus into the two bellows motors, will be equal; that is, the balance of the two connected and opposed motors will not be disturbed. Thus the note-sheet, when in correct position, performs the active function of holding both bellows motors out of operation; when the note-sheet is deflected from normal to abnormal position, it instantly destroys the inoperative condition of the motors and causes the proper bellows motor to operate. Hence any deflection to either side is instantly corrected without any forward run of the note-sheet in abnormal position, the adjustment in either direction corresponding exactly to the deflection. This is plainly shown in operation; there is almost a continuous flutter or vibration of the bellows motors.

This is precisely the principle of the patent in suit. It makes no difference whatever in operation, function, or combination that in the O'Connor device the note-sheet itself by a deflection to one side opens one control opening and closes the other, while in the defendants' device the note-sheet by deflection to one side does exactly the same thing by pushing on the little levers and shifting the valves, that is, opens one control opening and closes the other. The little levers and valves are merely added parts which do not in the least change the law of operation or affect the arrangement whereby a deflection of the note-sheet to one side opens the proper control opening and closes the other. O'Connor's arrangement by which the margins of the note-sheet accomplish the functions of opening and closing the guide openings directly is undoubtedly a better mechanical arrangement than the interposition of the levers and valves between the edges of the note sheet and the control openings, because it eliminates friction on the edges of the note-sheet. But this is merely the best arrangement of one of the elements of O'Connor's combination.

That side levers and valves are merely interposed parts can be clearly seen by comparing Exhibit 3 with Exhibit 2. The interposition of the levers and valves calls for no change in the connections between the control openings and motor, or in the double bellows motor, or in the link, arm and draw-bar connecting the double bellows motor to adjust the music roll sidewise. In short, the two control openings, opened and closed by sidewise deflections of the note-sheet, the two bellows motors connected to adjust the music roll, and the same law of instant correction, are present in defendants' device precisely as in the patent in suit. The use of the little levers simply impairs the most valuable way of using the control opening; but no one can infringe a combination claim by impairing the action of one of the elements, unless the principle of operation is changed.

In defendants' device Exhibit 4 the two pneumatic control openings are formed by the ends of two little bent brass pipes, which are carried on a block secured to the left-hand frame piece so that the control openings stand in line with the tracker-bar. A lever pressed to the right by a spring projects through a hole in the tracker-bar, and is connected by a link to a pivoted lever which carries the two valves for co-operation with the two control openings. The same double bellows motor arm, link, pivoted lever, and draw-bar are used as in Exhibit 3, and the two control openings are similarly connected to the double bellows motor by two tubes. The note-sheet, when in normal position, performs the active function of holding the double bellows motor out of operation. A deflection of the note-sheet one way or the other opens one and closes the other control opening, so that the double bellows motor operates to shift the music roll exactly as in Exhibit 3.

The defendants' device Exhibit 5 is substantially like Exhibit 4, save that a single control opening and a single bellows motor are employed, and the bellows motor arm connects directly with the draw-bar. The bellows motor has a spring inside tending to expand it. The lever is forced to the right by a weight. The note-sheet when in normal position performs the active function of holding the bellows motor out of operation by keeping the control opening part way open. A deflection of the note-sheet in one direction opens the control opening wider and causes the bellows motor to work to adjust the music roll in one direction, while a deflection in the opposite direction closes the control opening to cause the bellows motor to work to adjust the music roll in the other direction. In the American case, we held that a device containing one bellows motor, a spring, and one control opening was the equivalent of the two bellows motors and two control openings of O'Connor.

We are of opinion, therefore, that the defendants' devices Exhibits 3 and 4 infringe claims 9, 21, and 23 of the patent in suit, and that the defendants' device Exhibit 5 infringes claims 9 and 21. The decree appealed from is affirmed as to defendants' device Exhibit 2, and reversed as to defendants' devices Exhibits 3, 4, and 5.

LOCK JOINT PIPE CO. v. MELBER et al.

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

No. 2105.

PATENTS ⇐202(1)—ASSIGNMENT—CONSTRUCTION OF RESERVATION.

A patentee made a full assignment of his patent for the remainder of the term, but subject to a reservation "to myself the unrestricted personal right and license" to operate under the patent "which right and license I may exercise and make use of in person or through and by my duly authorized agent; * * * it being understood and agreed that this license is not assignable." *Held*, that he could not, under the guise of appointing an agent, authorize another to conduct a business under the patent in competition with his assignee, and in which he himself had no interest, except to the extent of a royalty paid him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-288; Dec. Dig. ⇐202(1).]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Lock Joint Pipe Company against Frederick Melber and the Electric Welding Company. Decree for defendants, and complainant appeals. Reversed.

Drury W. Cooper, of New York City, for appellant.

Elbert L. Hyde, Frederick W. Winter, and Edward A. Lawrence, all of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This case calls for a construction of an assignment of a patent and a determination of rights reserved therein by the patentee.

The plaintiff, holding title to a patent, sought to restrain the defendants, claiming rights thereunder, from exercising them in the manner pursued, and to obtain an assessment of damages sustained. The trial court entered a decree dismissing the bill. This is an appeal from that decree.

Frederick Melber was granted Letters Patent No. 672,176, on April 16, 1901, for Cement or Concrete Construction. On April 15, 1911, he assigned the patent to Allen M. Hirsch, reserving to himself, however, an "unrestricted personal right and license" to operate under

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

the patent, "in person or through and by (his) duly authorized agent," without right to assign the license.

Lock Joint Pipe Company, the plaintiff, acquired the patent by assignment from Hirsch and built up a business involving the patent, which, when this litigation began, amounted to about $500,000 a year.

Melber, the patentee, was a consulting engineer, and, so far as the testimony discloses, was at no time engaged in the business of constructing or contracting for cement or concrete work. On September 1, 1914, after the business of the plaintiff had grown to substantial proportions, Melber performed what appears to be his first act under the patent rights reserved, by appointing the Electric Welding Company, one of the defendants, his agent, with authority to operate under the patent. This appointment was made upon Melber's conception of his right to operate through an agent, the effective words of the instrument of appointment being:

> "I, Frederick Melber, * * * have appointed the Electric Welding Company * * * my duly authorized agent, to exercise for me and in my place and stead, during the life of the letters patent, the aforesaid rights which I saved and reserved to myself in the assignment to Allen M. Hirsch."

Collateral to this contract was another between Melber and the Welding Company, providing for the payment to Melber of a royalty on the steel parts of the patent manufactured and sold by the Welding Company, and restricting its broad rights granted by the first instrument, "to the designing, manufacturing and selling of *steel* for use in concrete construction."

The patent is for cement or concrete construction and is concerned with the making of structural shapes or units, such as sewer pipes, composed of cement, fortified with metallic reenforcements along the lines of tension-strains, which project at the ends of the unit and overlap the protruding ends of adjacent units when properly located in the process of laying or erection, so that when the overlapping metallic ends are themselves overlaid with plastic cement the units are welded into an integral, or monolithic, structure. It thus appears that the things with which the patent has to do are cement and fabricated steel parts and the uniting of the two in a way to create strength and withstand strain.

But Melber's peculiar type of fabricated steel reenforcements is the essence and the novel thing of his patent. Without the steel parts and their use in perfecting a union with other parts in a structure, nothing is left of Melber's patent for cement or concrete construction save the cement or concrete. Therefore, competition in the manufacture, use and sale of the steel reenforcements, is, in effect, competition with the entire patent.

Thinking that it had acquired Melber's "unrestricted personal right and license" to make and sell the steel work of the Melber patent, the Welding Company informed the plaintiff of its agreement with Melber and demanded of the plaintiff that it purchase its fabricated steel reenforcements from it, under a threat that refusal would be followed by the Welding Company going into the market and entering into competition with the plaintiff in this feature of the Melber patent. The plaintiff refused to yield to this demand, and the Welding Company, true to its word, began the manufacture and sale of Melber's steel parts in active competition with the plaintiff.

Fabricated steel of the Melber type, advertised to be within the Melber patent, was sold by the Welding Company in various parts of the country, notably in the far West. Of the several instances of competition with the plaintiff, one only will be mentioned. This is known as the Los Angeles transaction. In this instance the Welding Company sold fabricated steel through the Herringbone Metal Lath Company, which it describes as its agent, to certain successful bidders for sewage construction in Los Angeles, under specifications calling for the Melber structure.

The validity of the patent is admitted, and the instrument between Melber and Hirsch as a valid assignment of the patent is not questioned, though it is coupled with a license back to the assignor or with rights reserved by the assignor. Pope Mfg. Co. v. Clark (C. C.) 46 Fed. 789, 792; Russell v. Kern (C. C.) 58 Fed. 382. The rights reserved are treated by both parties as a license. The question is whether Melber exceeded his reserved rights by appointing the Welding Company his agent, with power to manufacture and sell a patented part in unrestricted competition with the assignee of the patent. This calls for a construction of the reservation clause of the assignment.

In construing the assignment, the whole instrument must be considered and a meaning given to each part, when possible, that is consistent with the meaning of every other part. The assignment consists of but two parts important to the present consideration. The first has to do with the assignment of the patent; the second, with the rights reserved. The first part of the instrument is in the following language:

"I do * * * sell, assign and transfer unto the said Allen M. Hirsch the *whole right, title and interest* in and to the said Improvement in Cement or Concrete Construction and in and to the letters patent therefor aforesaid; *the same* to be held, and enjoyed by the said Allen M. Hirsch for his own use and behoof and for the use and behoof of his legal representatives, to the *full end of the term* for which said letters patent are or may be granted, *as fully and entirely* as the same would have been held and enjoyed by me had this assignment and sale not been made."

From this language it is clear that the patentee intended to assign the patent, not merely to grant a license, and that by this language he assigned the title to the patent and all rights therein save those which he expressly reserved. The rights reserved appear in the second part of the instrument in the following language:

"*This assignment* is made however *subject* to the following express condition to which the said Allen M. Hirsch for himself, his assigns and for his and their legal representatives assents by the acceptance hereof or by doing any act in accordance therewith, to wit, *I hereby save and reserve to myself* the unrestricted *personal right and license*, which right and license *I* may exercise and make use of *in person* or through and by *my duly authorized agent*, namely, to *contract for, make, erect, design, operate under, sell and execute work* in any part of the United States or the territories thereof, *in cement or concrete construction* embodying the invention or improvement of and in accordance with said patent number 672,176 without payment of royalty or license fees of any kind whatever; it being understood and agreed that *this license is not assignable* to any other person or corporation."

The defendants maintain that by this clause Melber reserved to himself every right which he had in the patent before he assigned it, save the right to assign the same and the right to give licenses thereunder. These include the right to contract for and build concrete construction embodying the invention of the patent, and to make, use and sell the individual parts of the patent anywhere and everywhere in competition with the assignee. With this construction of the clause, in so far as it goes, we are in entire accord; but the defendants go further, and maintain that Melber may exercise these unquestioned rights by surrendering them to another designated his agent, to be exercised in turn by the agent under authority of the phrase that Melber "may exercise and make use of (his reserved rights) in person or through and by (his) *duly authorized agent*." With this construction of the clause, illustrated by the contract between Melber and the Welding Company and interpreted by the conduct of the parties under that contract, we do not agree. As the instrument of assignment is Melber's, its language is presumed to be his. As we read that language, it appears to us that Melber, in assigning the title of the patent to another, was particular to reserve to himself certain rights in the patent which *he* could exercise. He first defined the rights as personal, and then declared how he should exercise them, namely in person or through his agent. In other words, the rights reserved were personal to Melber, first, because they were so declared, and second, because of an express inhibition against their assignment to another. Being personal, they were to be exercised by Melber in person, but this does not mean by Melber alone and unaided. As the work is of a character that may readily and very largely be performed by agents, it was provided that the rights might be exercised by Melber through an agent. The provision for the exercise of the rights through an agent is not inconsistent with their personal character, so long as that personal character is maintained in the relation of the principal to the agent.

In the exercise of these rights we think that Melber may contract for and perform concrete construction work as though he had not assigned the patent. He may do this wholly by his own personal acts or he may do it through servants and agents employed to carry on the work in which he is engaged under the rights reserved, whether that work be seeking contracts, actual concrete construction or the manufacture and sale of the patented parts entering into such construction. This would be the exercise by Melber of the rights reserved either directly in person or through an agent. In either event, there would be an exercise of the rights by Melber. What did Melber do? Did he engage in concrete construction or the manufacture of parts embodying the invention of the patent, or did he alone, or through another, seek and obtain contracts either to do construction work or to furnish patented parts? There is no evidence that he did any of these things. What he did was to grant to the Welding Company, in the guise of appointing that company his agent, authority, as expressed in his own language, "to exercise for me and in my place and stead * * * the aforesaid rights which I saved and reserved to myself in the (said) assignment." By this instrument he did not authorize the Welding Company to act for him in work which he was seeking or in which he was engaged. He gave to the Welding Company, without limitation, the rights which he had *saved and reserved to himself,* with authority to the Welding Company to act not for him but for itself in his place and stead, upon a consideration that it would pay him a certain proportion of the profits which it made in and about its business. True, the comprehensive grant by this instrument was limited by another to the manufacture and sale of steel parts, but by the latter instrument Melber nevertheless delegated to the Welding Company authority to exercise every right which he had reserved for his personal use with respect to those parts, without which the invention is nothing. This delegation or surrender of the rights reserved was in legal effect an assignment by Melber made against the express provision of the clause that the rights reserved are not assignable. If it is not an assignment, we are at a loss to know by what act Melber could violate the provision against assignment.

As we have said, we are of opinion that the rights reserved by Melber are personal to him, to be exercised by him directly, or by him through another. When he ceases to have a personal relation to their exercise, the rights cease to be personal, and are then exercised beyond the authority of the reservation clause. The tests of a legal exercise of such personal rights may be many, but certainly one is that Melber must have a personal relation to their exercise and not merely a personal profit growing out of their exercise by another, in which he is inactive and has no part or of which he may be entirely ignorant. When the Welding Company was authorized by Melber to do what he was authorized to do by the reservation clause, and proceeded to make and sell steel parts, appoint agents, enter into contracts and conduct a general business under the invention of the patent, in which Melber had no participation and in which he had no interest other than in the royalties to be received from the business conducted by the Welding Company, it is difficult to believe that the personal rights reserved to Melber were being exercised by him. In our opinion, the reserved rights had lost their personal character when they were exercised by one to whom Melber had surrendered them for a royalty, that is, for a proportionate share of the profit made out of their use by another, and that they were so exercised without legal right.

It is urged by the defendants that the reservation clause of the assignment is so clear in expression that it is susceptible of but one construction, which is the construction placed upon it by the defendants, and that its language is wholly without ambiguity and raises no question whatever. To this view was the learned trial judge so clearly inclined that he dismissed the bill without hearing the defendant and without leaving the bench. Yet, if the case had originally been submitted to us, we feel that we would have been equally prompt in deciding it the other way. Obviously, therefore, the language does raise a question. Every question has two sides. In some, one side is so prominent, according as it is viewed, that it obscures the other.

Curiously enough, the question in this case must be of that kind, for when two courts hold so clearly to opposite views there must be a question with two distinct sides, and the language out of which such a question arises must be ambiguous indeed.

When an assignment of a patent is susceptible of two constructions and is made so by the ambiguity of its words, the rule is well established that it should be given that construction which prevails most strongly against the party responsible for its terms and chargeable with its obscurity. Christian v. Bank (C. C. A. 8th) 155 Fed. 705, 709, 84 C. C. A. 53; Walker on Patents, § 278, and cases cited. As the language of the assignment is the language of the patentee, its uncertainty must be resolved against him and his privies.

The decree below is reversed and the District Court is directed to proceed with the trial in a manner consistent with this opinion.

MORGAN CONST. CO. et al. v. FORTER-MILLER ENGINEERING CO. et al.

FORTER-MILLER ENGINEERING CO. et al. v. MORGAN CONST. CO. et al.

(Circuit Court of Appeals, Third Circuit. June 6, 1916.)

Nos. 2090, 2091.

1. PATENTS ⚷318(3)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for profits made by infringement of a patent for an improved form of furnace for heating ingots and billets in rolling mills, by the use of infringing furnaces, where the inquiry was limited to the saving of labor cost, the proper standard of comparison was with the furnaces in previous use by defendant, and which were replaced by the infringing furnaces; and, the improved structures being of a unitary character, complainant was entitled to recover the entire difference in cost of the heating operation as between the two different types of furnace.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 570, 571, 575; Dec. Dig. ⚷318(3).]

2. PATENTS ⚷318(6)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

A defendant which made and sold rolling mill furnaces which infringed complainant's patent on an accounting for profits is not entitled to a deduction of the cost of changes subsequently required to satisfy the purchaser.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 576; Dec. Dig. ⚷318(6).]

Cross-Appeals from the District Court of the United States for the Western District of Pennsylvania.

Suit in equity by the Morgan Construction Company and Alexander Laughlin against the Forter-Miller Engineering Company and Dilworth, Porter & Co., Limited. From the final decree, both parties appeal. Decree against Dilworth, Porter & Co. modified and decree against Forter-Miller Engineering Company affirmed.

For prior opinion, see 213 Fed. 451, 130 C. C. A. 97.

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

Marshall A. Christy, of Pittsburgh, Pa., for Morgan Const. Co.
Clarence P. Byrnes and C. M. Clarke, both of Pittsburgh, Pa., for Forter-Miller Engineering Co.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This suit was brought by the Morgan Construction Company and Alexander Laughlin against the Forter-Miller Engineering Company and Dilworth Porter & Co., Limited, and is based upon the asserted infringement of patent No. 632,020, granted to Charles H. Morgan on August 20, 1899, for an "improvement in furnaces for heating ingots or billets for rolling mills." The Engineering Company is charged with building certain furnaces, and Dilworth, Porter & Co. are charged with using five of the furnaces so built. This court sustained several claims of the patent, and held them to be infringed. 213 Fed. 451, 130 C. C. A. 97. Thereupon the District Court appointed a master to state an account, and in the hearings before him the plaintiffs confined themselves to a demand for profits. The master and the district court sustained the demand in part, and a decree was entered awarding $10,605.88 against the Engineering Company, and $14,496.84 against Dilworth, Porter & Co. From this decree the cross-appeals before us have been taken.

[1] 1. The plaintiffs restricted their claim against Dilworth, Porter & Co. to the profit arising from a lower cost of labor; and this at once raises the question, With what furnace should the five infringing structures be compared? We think the answer is not difficult. Nos. 1 and 2 replaced two Siemens furnaces, which had been used for heating billets in the same mill; No. 3 replaced five Siemens furnaces, which had been used in another mill; while Nos. 4 and 5 did not replace any other furnaces, but were additional structures. Nos. 1 and 2 were built in 1907, and the other three were built in 1911. The defendants offered some evidence concerning the cost of operating other kinds of furnaces elsewhere, and presented these furnaces as standards of comparison, asserting them to be essentially of the same type as the Morgan structure. They were rejected by the master and the district court, and we agree with this rejection, holding the Siemens furnace to be the proper standard.

The next question is whether comparison should be made between the total cost of the heating operation in each type of furnace, or should be confined to the cost directly attributable to the inclined section of Morgan's patent. Can such a cost be ascertained, and, if so, is this a case for apportionment, such as was presented in Seeger Co. v. American Car Co. (C. C. A. 3d) 219 Fed. 565, 135 C. C. A. 333? Here also we agree with the master and the District Court. In our opinion, the invention of the patent does not lie in one element so exclusively as to permit a fairly accurate ascertainment or apportionment of cost, but is of such a character that the proper comparison is between the whole cost of the two heating operations respectively. We think it impracticable to assign a definite fraction of the cost to the presence or to the absence of the inclined section referred to, and we refer to the opinion in 213 Fed. 451, for the reasons why the improved structure of the patent should be regarded as unitary in its nature and in its use. This subject of apportionment is often difficult, and minds may readily differ about it, as they differ continually about the subject of patentable invention. In both regions, there will always be a borderland, where one view of the facts is not easy to distinguish from the other.

Taking the Siemens furnace, therefore, as the standard, the next inquiry is the labor cost of heating in that structure, and the sum that was saved by using the infringing furnace. In each case we disregard the cost of getting the billets to the charging end of the furnace, and we disregard also the cost of moving the billets to the rolls, after they have been fully taken out of the furnace. After the billets have been heated and have left the furnace, a separate operation begins, namely, the task of moving them to the rolls, and this is outside the scope of the patent. At this point we encounter what appears to be some confusion in the master's computation. Considering the cost at Nos. 1 and 2, we observe that (in the first instance) the evidence before him appeared to show that in the Siemens furnace the heating operation cost 62 cents per ton for labor, and that the total wages for heating in each of the infringing furnaces was 34.2 cents, making a prima facie difference, or profit, of 27.8 cents. But on closer scrutiny it appeared that the 62 cents included an item of 14 cents, and that this was the wages of four men called "drag-outs," who took the billets out of the furnace and dragged them over to the rolls; and it appeared, further, that about the time when Nos. 1 and 2 were put into use this item was reduced to 12 cents, the saving being effected by installing a mechanical conveyor, which received the billets as they came out of the furnace and carried them to the rolls. The plaintiffs conceded therefore that 2 cents of the apparent profit of 27.8 cents was really due to the conveyor, and not to the patented furnace, and should be credited to the defendants. And they conceded a further allowance of 2.5 cents (also included in the 34.2 cents) for the cost of operating the pusher, so that, after these two allowances were made, the difference between the cost of operating a Siemens furnace and the cost of operating either No. 1 or No. 2 was reduced to 23.3 cents. This was the plaintiffs' calculation, but the master declined to accept it, holding that the 14 cents paid to the drag-outs was not part of the cost of heating, but was the cost of a separate operation, and therefore should not be considered. But instead of striking it out of the 62 cents, he struck it out of the balance of 23.3 cents above referred to. The plaintiffs do not object to the deduction in itself; they only complain that the master has taken it off in the wrong place, and insist that his method should be corrected by restoring the previous credit of 2 cents already allowed for the use of the conveyor. We agree with this contention. If the cost of moving the billets to the rolls is an improper item in one branch of the comparison, it is equally improper in the other, and should be eliminated from both sides.

But the plaintiffs complain that the master was mistaken about another item that is closely connected with the 2 cents just considered.

As already stated, the 62 cents included 14 cents paid to the drag-outs for taking the billets out of the Siemens furnace and moving them over to the rolls. When the infringing furnaces were built and the conveyor was installed, the work of dragging was dispensed with, but some other work was still necessary before the conveyor could properly handle the billets, the reason being that several billets at a time would slide down the gravity incline of the infringing furnace, and these would require separation because the conveyor and the rolls could only take them singly. This work was done by 3 pull-out boys at a cost of 6 cents a ton, and the master allowed this item also as a credit to the defendants. Now, if this labor was made necessary by the operation of the patented structure, the cost is a proper allowance; otherwise, it should be rejected. This proposition is not disputed, and the correct answer depends on what the facts are. The master has found that the labor *was* made necessary by the operation of the Morgan furnace, and although the evidence is not very satisfactory, we cannot say that it does not justify his conclusion. Accepting it, therefore, we are of opinion that on the plaintiffs' appeal the decree should be so modified as to increase the award against Dilworth, Porter & Co. by 2 cents a ton only. Concededly, this applies to the five infringing furnaces, and not merely to Nos. 1 and 2.

[2] 2. The appeal of the Forter-Miller Engineering Company does not require extended discussion. The master's report has satisfactorily disposed of all the questions except one, and we agree with the following paragraphs:

"The next question to be considered is the question of profit made by the Forter-Miller Engineering Company from its manufacture and sale of the five infringing furnaces to the Dilworth-Forter Company. This profit is shown by the testimony to be on Nos. 1 and 2 furnaces, $3,131.45.

"The defendant at a late date introduced evidence to the effect that the original form of these two furnaces was without the gravity discharge, and therefore was noninfringing for the space of two months, and that when they were changed the work was done, not by the builder, the Forter-Miller Engineering Company, but by employés of Dilworth, Porter & Co., the other defendant. This evidence was introduced in the hope of eliminating the manufacturer's profits on these two furnaces, and also of providing a method of comparison of the cost of working the furnaces in infringing and noninfringing forms. This testimony is in direct contravention of the former testimony of the same and other witnesses in the District Court, as well as in these proceedings, and, although relevant, does not carry the weight which it otherwise would. Defendant relies upon blueprint Exhibit A, which accompanied the original bid or proposition of the Forter-Miller Engineering Company, as accepted by Dilworth, Porter & Co., showing how the furnaces were to be built, and upon evidence produced by one witness whose recollection is not always reliable, and by another, an officer of the manufacturer, who says that he does not remember a change being made in these furnaces, and that, although he was away from his office for long periods, he would have known of such a change if the work was done by his company. The master, therefore, considers this proof insufficient to controvert the former positive testimony, and as a result disregards this evidence. As for this original two months' form of the furnaces forming a basis for comparison in cost of operation, it must appear from the defendant's statement of the amount of steel heated in these furnaces, by months, that the furnaces in this noninfringing form were unsatisfactory and were soon altered to the form which precipitated this suit.

"The testimony shows on furnaces Nos. 3, 4, and 5, that the Forter-Miller Company made a profit of $6,371.83, making a total recovery of profits for the five infringing furnaces of $9,503.28. To be added to this is $1,102.50, the profit made by the Forter-Miller Company from the manufacture and sale of the furnace built for the Portsmouth Steel Company, making a total of $10,-605,88. These figures are taken from the two statements made by Mr. A. K. Barker, treasurer of the Forter-Miller Engineering Company, with the deduction of certain items wrongly charged therein."

The excepted question is this: The master refused to allow a credit of about $1,600 claimed by the Engineering Company under the following circumstances: When Nos. 4 and 5 were built and accepted in December, 1911, they infringed, but Dilworth, Porter & Co. afterward became dissatisfied with their operation. The following extract from the testimony will show what was done:

"The large billets did not slide on the slope, and then we made the slope steeper. This brought the last billets too close to the air inlets, and we therefore moved the end wall further out on the one furnace, but as this was not sufficient, we put an overshot on both furnaces, bringing the gas and air entrances further away from the billets."

In a word, the position is this: The Engineering Company, having built two infringing furnaces, was required several months afterward to make some changes in order to satisfy Dilworth, Porter & Co. Apparently, the changes were intended to make the infringement more effective, and the question is who should bear the cost. It seems to us, briefly, that the infringement was complete before the changes were made, and that the Engineering Company's liability attached then; the plaintiffs can hardly be asked to make good the loss that the Engineering Company subsequently suffered.

On the appeal in No. 2090 the decree is reversed, with instructions to modify the award against Dilworth, Porter & Co. in accordance with this opinion; on the appeal in No. 2091, the decree against the Forter-Miller Engineering Company is affirmed.

AMERICAN CARAMEL CO. v. WHITE.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. On Petition for Modification of Decree, June 7, 1916.)

No. 2068.

1. PATENTS ⚷240—INFRINGEMENTS—IMPROVEMENTS.
The manufacture of a patented article under an improvement patent constitutes an infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⚷240.]

2. PATENTS ⚷328—VALIDITY—INFRINGEMENT—ANTICIPATION.
Patent No. 532,554, for a candy cutting machine, *held* valid showing an invention which was not anticipated and to be infringed by defendant's machine for cutting candies.

On Petition for Modification of Decree.

3. PATENTS ⚷222—INFRINGEMENT—DAMAGES.
When a patentee has failed to properly mark the goods which he has offered for sale so as to show the patent, no damages for infringement

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

can be recovered without proof that defendant was notified of the infringement and continued thereafter to make, use, or vend the patented articles.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ⚿222.]

4. PATENTS ⚿312(1)—INFRINGEMENT SUITS—BURDEN OF PROOF.

Where defendant denied the averments of the bill that he was notified of the existence of complainant's patent, complainant has the burden of proving such notification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544, 545; Dec. Dig. ⚿312(1).]

5. PATENTS ⚿314—INFRINGEMENT SUITS—STIPULATIONS.

A bill for infringement averred that complainant's machines were duly marked patented, that complainant had caused notice to be given to defendant of his infringement, and requested defendant to desist, and that defendant had disregarded such notice, well knowing the rights of complainant were being infringed. The answer specifically denied the markings and disregarding of the notice, and generally denied the averments of the bill. The parties stipulated that subsequent to the grant of letters patent, and prior to the institution of suit, complainant gave defendant notice of infringement, and requested defendant to cease. The only proof of an infringing sale was a stipulation that witnesses would testify that prior to the filing of the bill they had purchased from defendant machines like those illustrated in drawings, which machines it was adjudged infringed. *Held*, that, as plaintiff might have relied on the stipulations as establishing defendant's infringement after notice of the patent, complainant was entitled, notwithstanding the absence of proof, either that complainant's machines were marked patented, or that defendant infringed after notice of complainant's patent to an opportunity to supply such proof which is essential to recovery of damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 550–553; Dec. Dig. ⚿314.]

6. PATENTS ⚿325—INFRINGEMENT SUITS—RIGHT TO COSTS.

In a suit for infringement of a patent, where complainant was entitled to an injunction at the time of the filing of the bill, and such relief was denied only because of the expiration of the patent pendente lite, complainant is entitled to costs regardless of its right to recover damages for the infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607–612; Dec. Dig. ⚿325.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the American Caramel Company against Jacob White. From a decree for defendant, complainant appeals. Reversed and remanded with directions.

John M. Coit, of Washington, D. C., for appellant.

Charles C. Linthicum and Walter M. Fuller, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from a decree dismissing, on the ground that the claims are invalid in view of the prior art, a bill for an injunction and accounting based on the alleged infringement of letters patent No. 532,554, for a candy cutting machine, granted to Milton S. Hershey. In American Caramel Co. v. Mills,

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

149 Fed. 743, 79 C. C. A. 449 (C. C. A., 3d Circuit), a similar decree of the Circuit Court (138 Fed. 142) was reversed. The patent has expired since the commencement of the suit.

[1, 2] The first claim of the patent in suit is as follows:

"1. The combination, with a slotted table, of a shaft having blades and journaled above said slot, a rolled journaled below the slot, said shaft and roller being so geared that their adjacent parts move in the same direction, and a plate or pad adapted to be drawn between said blades and the roller by the frictional action thereof, for the purpose specified."

The other claims differ from the first only in describing the plate or pad as "flexible" in the second and third claims and the shaft as "vertically adjustable" in the third claim.

In the application, the invention is described as "an improvement in that class of devices used for cutting candy, caramels and similar products," its object, "to subdivide sheets of the product into parts suitable for use," and its particular advantage and superiority, the reduction in the amount and therefore the cost, of machinery by reason of utilizing the device in a twofold manner, in that the—

"successful application of the device through which is applied the frictional force required to move the pad carrying the material to be cut also necessitates the cutting of that material."

We shall consider in their order the defenses of anticipation, lack of invention, and noninfringement.

1. While there is no contention of novelty in the elements, the combination concededly is not exactly anticipated. The nearest device is said by appellee's witnesses to be the noodle-making machine of the Baumgartner patent, No. 146,304. As described and claimed, this is a small hand-driven machine to roll dough and to cut it into noodles. We are not here concerned with the additional mechanism for rolling the dough. As a dough-cutting machine, it has some of the elements used by Hershey, but it lacks the table, either with or without slot, and necessarily so, if the underlying roller is to co-operate with another roller under it for and during the rolling process, and with the overlying knives for and during the cutting operation. In Hershey's device, the table serves to support the pad on which the material to be cut has been placed, not only during but also before and after the cutting, and also to guide it between the knives and the underlying roll. Concededly in Baumgartner, the narrow adjustable rollers, located some distance in front of and behind the knives, cannot offer any support or guidance to the pad either before it is engaged by the knives or after it has completely passed over the underlying roll; manual support and guidance is essential in feeding the pad with the contents to the cutters and in receiving it therefrom. These rollers are therefore no mechanical equivalent for the Hershey table. We have referred to the Baumgartner patent, not only because it is the device mechanically nearest to Hershey's, but also because, though dealt with in the Court of Appeals, it was not introduced in evidence or considered by the expert witnesses in the Mills Case.

2. Little is to be added to the reasons given by Judge Archbald in the Mills Case, in which we fully concur, for upholding Hershey's

contention that inventive genius, even if not of a high order, and not merely mechanical skill was involved in producing his device. The Parker machine patent, 270,468, as pointed out in the Mills Case, is of an entirely different construction and mode of operation. Though extensively used by Hershey in his factory, it did not fully meet the needs of the candy trade. Others had tried to solve the problem of getting a clean-cut caramel by mechanical means; Hershey succeeded, combining the slotted table with its underlying roller disclosed by Duff in patent 115,039, granted a quarter of a century earlier for a confectioner's paste breaking and rolling machine, with the still older cutting knives, and causing both to co-operate with the roller in the manner and with the results attained by Hershey was not so obvious as to have suggested itself either to Duff, who knew that the rolled lozenge paste, referred to in his patent, must be cut, or to any of his successors. In our judgment, Hershey first conceived the possibility of a better result from a new relationship of old elements, and then found the elements in this and kindred arts that would answer his requirements. Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 273, 138 C. C. A. 23.

3. Infringement is not seriously controverted. The machines manufactured by defendant practically, though with some variations, in accordance with the Woolf patent, 651,789, or the Ellis patent, 918,427, while not exact copies of the Hershey device, either duplicate or offer a mechanical equivalent for the elements of his combination, functioning in the same manner.

In the Woolf machines, the slotted table is replaced by a table made up of several sections. The roller underlying the knives projects up between two of the table sections. These sections, thus divided, serve the identical function of Hershey's slotted table. That the Woolf machine has, in addition, a belt whereby the pad is automatically fed along the table to the knives, instead of being manually pushed until engaged by the knives and roller, in no wise saves the machine from the charge of infringement, even though it may support the Woolf patent as for an improvement. Frictional action by the blades and rollers on the pad by which it is drawn and moved on between them is none the less exerted in the Woolf device because the action of the roller on the pad is indirect through the belt that lies between them. Direct contact of pad and roller is not requisite under the Hershey claims. A claim rejected in the Patent Office described the pad merely as "adapted to be moved between the blades and roller." The limitation in the substituted claims and Hershey's accompanying statement that "the main difference is that the present claims specifically confine the force by which the pad is moved to the friction exerted thereon by the blades and the rollers between which it is drawn," read in the light of the rejected claims, lays the stress on the word "friction." It in no way, however, limits the frictional action to that produced by direct contact of the roller and pad.

While the blade shaft of the Ellis and Woolf devices is not vertically adjustable, the same functional purpose is served by making the underlying roller vertically adjustable. In this respect, too, there is mechanical equivalency.

Defendant's machines were adapted to and used for cutting caramels. To do this, the paste must be cut through. Assuming, as defendant contends, that Hershey's claims are limited by the Patent Office proceedings to a machine in which "the pressure of the blades necessary to produce sufficient friction to move the pad must be such as to entirely cut through the material carried by it," infringement is not escaped by an adjustability which, while it allows, may also prevent, a full cut and direct contact of the blades with the pad.

While the evidence of defendant's manufacture and sale of infringing machines is confined to a stipulation that two machines like those illustrated in certain drawings were sold by him before the bill was filed, and while these drawings do not show the pad, an element in each of the Hershey claims, it is apparent from the whole evidence that the machines were designed to be used, and that at least one of them was, in fact, used with a flexible pad. Whether defendant by his manufacture and sale infringed, or only contributed to the infringement, is immaterial. In either event, complainant was entitled to the relief prayed for, and, since the expiration of the patent pendente lite, is entitled to an accounting of profits and to damages.

The decree must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

NOTE.—Judge SEAMAN concurred in reversing the decree, but did not read the opinion.

On Petition for Modification of Decree.

MACK, Circuit Judge. The bill of complaint in this case charged that the patented machines had gone into extensive public use, and were all duly marked patented together, with the date of the letters patent. It further charged that the complainant had caused notice to be given to the defendant of his infringement of the complainant's rights; had requested the defendant to desist and refrain therefrom; and that the defendant had disregarded such notice. The only other allegation tending to charge the defendant either with knowledge or notice of the complainant's rights or of his infringement thereof is the general allegation that "the defendant, well knowing the premises and the rights accruing to your orator aforesaid," infringed. The answer specifically denied the marking and the disregarding of any notice. If the general allegation of knowledge of complainant's rights can be deemed to charge actual knowledge of the patents and the infringement thereof, that charge must be deemed to be denied by the general denial of each allegation in the bill not specifically answered or admitted.

No proof was offered to sustain the allegation of marking. The only proof of knowledge or of any notice to the defendant was the stipulation of the parties—

"that subsequent to the grant of letters patent and prior to the institution of this suit, the complainant gave written notice to the defendant that he was infringing the said patent, and requested the defendant to cease such infringement."

The only proof of an infringing sale was the stipulation of the parties that certain witnesses would testify, if called, that prior to the filing of the bill of complaint, they had purchased from the defendant machines like those illustrated in certain drawings and held by us in the opinion heretofore filed to be infringements.

No proof was offered of the date either of the sale or of the notice, and therefore there is no proof as to whether or not the infringing sales preceded or followed the giving of the notice.

[3] There can however, be no recovery of damages or profits when a patentee has failed properly to mark the goods that he has offered for sale—

"except on proof that the defendant was duly notified of the infringement and continued after such notice to make, use or vend the article so patented."

[4, 5] Because of defendant's denial, the burden was on the plaintiff to prove an infringement after the notice. Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426. No such proof was offered. In view, however, of the fact that the plaintiff relied upon stipulations, and that it may have rested under the belief that the stipulations, though silent as to the dates, were intended fully to supply the proof required of it, we are of the opinion that justice requires that an opportunity be given to the complainant to supply evidence of the date of the notice, and if it can, evidence that defendant in fact infringed after the receipt of the notice. If such proof be made the accounting of profits and damages will proceed.

Such accounting however, must be limited to acts of infringement committed after the notice. A patentee may fully protect himself against infringements by properly marking his own goods. If he fail so to do, the statute specifically provides that he shall recover no damages except only in the one event that the infringer be duly notified of the infringement and thereafter continue in his wrongdoing. To permit a patentee to disregard the specific duty imposed upon him by the statute of properly marking the patented articles and to continue for years in the violation of his duty and then to award him profits and damages for a period of six years preceding suit because one, who perchance may have been ignorant of his infringement, continues to infringe even in a single instance after the notice, would be, in our judgment, a complete perversion both of the letter and the spirit of the statute. It would enable a patentee, who has utterly disregarded his statutory duty, to recover the most highly punitive damages. The very purpose of the statute is to bar a patentee from recovering damages for acts done during the period when the patentee himself is violating his obligation toward the public. While no case has come to our attention in which the right of the patentee to damages for infringements committed before, as well as after, notice is discussed, it has been assumed in numerous cases that the recovery is limited to infringements after notice and, in the absence of other notice, after suit.

[6] If no proof of infringement after the notice is offered, an accounting will be unnecessary, and in that event the District Court will

dismiss the bill of complaint. Inasmuch however, as the right to injunction at the time of filing the bill has been sustained, and this relief has been denied only because of the expiration of the patent, pendente lite, the costs will, in any event, be awarded to complainant.

The decree will be reversed, with directions to proceed in accordance with the views expressed herein and in the former opinion of this court.

BUFFALO SPECIALTY CO. v. INDIANA RUBBER & INSULATED WIRE CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2249.

PATENTS ⚷202(1)—LICENSES—CONSTRUCTION.

Complainant was the assignee of a patent for a pneumatic tire provided within its air-chamber with a free semi-liquid substance adapted to coagulate when exposed to the external atmosphere and thus seal any punctures, and was manufacturing and selling such fluid substance which was known as "dope." Defendant, the original owner of the patent, assigned it, taking back at that time a shop license under the letters patent, with privilege to manufacture said material or materials in its factory, but covenanting not to manufacture for sale or sell or offer for sale any of the materials except in a local retail way from its factories. *Held*, that the shop license authorized defendant to manufacture in unlimited quantities tires with the patented device, the only restriction being upon the sale of the dope; this being particularly true in view of the fact that there had been a long acquiescence in defendant's manufacture of tires.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–288; Dec. Dig. ⚷202(1).]

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Buffalo Specialty Company against the Indiana Rubber & Insulated Wire Company. From a decree for defendant, complainant appeals. Affirmed.

Appellant brought this suit against the appellee to restrain infringement of all the claims of patent No. 578,551, granted to C. E. Duryea March 9, 1897, for improvements in vehicle tires.

The device of the patent consisted in a pneumatic tube or bicycle tire treated internally with a semi-liquid compound which, when a puncture occurs, is forced by the action of the compressed air within the tube into the wound or aperture and which, as it becomes exposed to the air, congeals or hardens and thus repairs the leak. The fluid is hereinafter termed "dope." It is not patented and may, the patentee says, consist of any "liquid or semi-liquid which will retain its free-flowing characteristics while contained within the tube, but which will preferably harden or become more dense when exposed to the outer atmosphere." Liquid glue, or thick mucilage combined with glycerine, and fine powder, such as flour, reduced to paste, are named. Claim 5 reads as follows: "A pneumatic tire provided within its air-chamber with a free semi-liquid substance adapted to coagulate when exposed to the external atmosphere to seal a puncture or vent in the tire, substantially as described" —and fairly describes the invention.

Infringement is based upon the following facts: Appellant was and is engaged in the business of manufacturing and selling dope. Defendant was and is engaged in the business of making and selling pneumatic bicycle tires. The

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

latter, being on November 5, 1898, the owner of the patent in suit, sold and conveyed it to appellant's predecessor in title, the Buffalo Speciality Manufacturing Company, and took back, as a part of the transaction, what was in the transfer agreement termed "a shop license under said letters patent," in the following language, viz.: "That the said party of the second part is hereby granted a shop license under said letters patent with the privilege to manufacture and use said material or materials in its factory and also in the factory of the Peoria Rubber & Manufacturing Company of Peoria, Illinois, but said party hereby covenants and agrees not to manufacture for sale, sell nor offer for sale in anywise any of said materials, and also that the said Peoria Rubber & Manufacturing Company likewise will not manufacture for sale, sell nor offer for sale the same, during the continuance of this contract, except in a local retail way from the factories of each of said the Indiana Rubber & Insulated Wire Company and said Peoria Rubber & Manufacturing Company respectively."

Appellee thereupon proceeded to manufacture the doped wheel at its said two factories, gradually increasing its output until, at the time this suit was begun, it had built up a trade of immense proportions, practically all with the Chicago house of Sears, Roebuck & Co. This was in March, 1911, or more than 11 years after appellant's predecessor obtained the title. Appellant acquired title to the patent on July 1, 1905, the owners of the appellant corporation being practically the same as those of its predecessor.

It is appellant's contention that it had no knowledge of the action of appellee in building up said large trade until about the time of suit; that such action was in violation of said shop agreement, the true intent of which, it claims, was that appellee should make and use or make and sell said invention only in a local retail way from the factories of said two plants of appellee.

At the time this suit was begun appellant also began a suit in an Indiana state court for reformation of said contract of shop license, so that the same should express in clear terms the meaning which it is herein sought to place thereon; also for injunctive relief and for damages. In the third paragraph of the complaint filed in this latter suit, appellant herein describes the shop license clause as follows, viz.: "That on the 5th day of November, 1898, and at the time of the sale, assignment, and transfer by the defendant of all of its interest in said letters patent, the defendant negotiated with said Buffalo Specialty Manufacturing Company for a shop right or license to manufacture and sell said dope in a local retail way only, and that, for valuable consideration moving between the parties thereto," etc.—reciting the said above set out clause of said shop-license contract. No complaint is made of the sale of dope as such, but only of its sale as an element of the tire of the patent.

Such further action was had as to said state court suit as that the court dismissed the bill at appellant's cost for want of equity, a decision which, it appears, was afterwards affirmed on appeal. This decision is pleaded herein as res adjudicata.

Appellant's claim of infringement is based upon the proposition that appellee, having breached the license contract by making and selling the device of the patent in quantities, became an infringer. The District Court sustained both noninfringement and the plea of former adjudication, and dismissed the bill for want of equity, which action is assigned for error.

Albert H. Graves and Charles K. Offield, both of Chicago, Ill., for appellant.

W. H. Thompson, of Indianapolis, Ind., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). We are at a loss to understand how any confusion could have arisen as to the construction of the contract for a shop license. Such a license is as good and effective to vest a right in a grantee as any other, to the extent of its terms, no matter what it is called. By that instrument appellee was granted a "license under said letters patent." That language, by all fair interpretation, means that it was given a right, power, or authority to manufacture and market the tire of the patent (Robinson on Patents, vol. 2, § 812, p. 590; Walker on Patent Law [4th Ed.] §§ 296, 297, p. 259; 30 Cyc. p. 956, cl. 11, n. 83) without limit as to time (30 Cyc. p. 957, cl. c., n. 97). It was also given the privilege to *manufacture* and *use* the materials named in the patent for the purpose of making said tire at its two factories in unlimited quantities, if desired. It, however, covenanted "not to manufacture *for sale, sell* nor *offer for sale* the same," meaning the dope, during the life of the contract, except in a local retail way from the factories, etc. The manufacture and sale of dope was the special feature of appellant's business, and the manufacture and sale of it by appellee would necessarily have interfered with that business. That the terms "material" and "materials" referred to the dope appears from the third paragraph of appellant's complaint in the Indiana state court. It also appears from the language of the clause in controversy—the use of the term "manufacture and use" in the clause reading, "with the privilege to manufacture and use said material or materials" in its two factories, and the use of the terms "manufacture for sale, sell nor offer for sale," when referring to the dope. It also is the natural construction to be placed upon the words "material" or "materials" as employed in the contract.

We are clear that there is in the contract no attempt to limit appellee in the right to make the tire of the patent and market it, and in so doing to manufacture and use the dope to the degree it finds desirable in connection with its said two factories. The fact that such a construction was followed by appellee for so many years without objection adds strength to that conclusion. We are of the opinion that to hold otherwise would do violence to the language and the intention of the parties. The contract was not breached. Nor can infringement be predicated upon the facts of the case.

In view of the foregoing, we deem it unnecessary to consider the other defenses raised.

The decree of the District Court is affirmed.

HAMMOND et al. v. MANHATTAN ELECTRICAL SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. June 9, 1916.)

No. 294.

PATENTS ⚷328—CONSTRUCTION—INFRINGEMENT.

Patent No. 1,086,820, for a device for making electrical contact, with the posts of dry cells or batteries by means of two superposed flat metallic plates, *held*, in view of the previous art, not to be infringed by defendant's device for making such contact.

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

Suit by William P. Hammond, Patrick J. Fitzgerald, and Morris F. Fitzgerald, copartners, doing business as the Fitzgerald Manufacturing Company, against the Manhattan Electrical Supply Company. From a decree finding that defendant's device did not infringe complainants' patent, they appeal. Affirmed.

The District Court has held valid patent No. 1,086,820, granted to the plaintiff Hammond on February 10, 1914. It has held that one of the defendant's devices (marked "Exhibit 7") infringes this patent, but that another form of the defendant's device (marked "Exhibit A") does not infringe. From the latter holding the plaintiff has appealed.

C. E. Dunn, of New York City, for appellants.

Howson & Howson, of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

CHATFIELD, District Judge. This patent shows a device for making electrical contact with the posts of dry cells or batteries. Two superposed flat metallic plates with a circular opening in each are attached to each end of the contact cord. Each plate has a finger-engaging flange projecting at a right angle from the outside edges of the plate. Resilient spring arms spread the two plates apart unless pinched together so that the openings in the plates may slide upon the post of the cell. The spring arms then hold the plates in place by spreading when the finger pressure is released.

It appears that the use of two such washer-like plates with a slightly overturned edge (that upon one washer being turned down and that upon the other turned up) was old in the art. One form of defendant's device, which it is claimed was placed upon the market at about the same time as the issuance of the patent in suit, shows (Exhibit 7) upturned flanges running from the circumference of the washers back along the sides of the resilient arms. No appeal has been taken from the decree holding this to be an infringement of both claims 1 and 2 of the patent.

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

Claim 1 locates the finger-engaging flanges in such a position as to be susceptible of receiving the clamping nut of the binding post between the flanges, while claim 2 locates the flanges merely at the outer edges of the plates and opposed to each other. Claim 2 is broader in that it includes more possible forms of the device. But any pair of opposed flanges capable of transmitting forces which will draw the two plates together when the outside surfaces of the flanges are pinched, would necessarily require such shape and dimensions of the parts as to make the clamping nut and the binding post occupy a position between the flanges or between the parallel tangential components of the compressing force. In other words, even if the nut is of unusual shape or size, it must (or some part of the nut must) be small enough to screw down within the projections of the two parallel components of the compressing force.

In this sense mere extension of the finger-engaging flanges, so as to rigidly transmit this compressing force from some other point of pressure, or to apply the parallel compressing components by rigid transmission members, would not avoid the charge of infringement unless the prior art limits the plaintiff to the precise form of flange (that is, shape of flange) disclosed in the patent.

Examination of the file wrapper, also of the British patent to Nickells, No. 5,476, of 1906, as well as the T. A. Hammond patent, No. 940,012, of 1909, and the W. P. Hammond patent, No. 1,039,279, of 1912, makes it apparent that the patentee was limiting his construction in order to show patentability over the earlier patents and prior art. He sought to describe a connector which could be easily applied and in which the available parallel components of the compressing forces should be as great as possible. He therefore made the flanges surround or be directly opposite the center of the post and the nut, and sought to avoid the idea of the defendant's structure which is to exert a sufficient compressing component on each side of the post, but which removes the points of application of that pressure to points further toward the center of the springing arms, and more distant than the radius of the nut (at all positions of compression) from the center of the nut itself.

The prior art device showed the spring arms so shaped that pressure brought the holes in the plates in line ready to be placed upon or taken off the post, and in applying his idea to this device the patentee, following the teachings of the patents above recited (including one of his own) sought a mechanically operative structure in which the flanges would be directly at the natural point for exerting pressure both to pinch the springs together and to press the contact plates down upon the post of the battery.

Hence in both claims 1 and 2 he stated that the flanges were to be "projecting * * * from the outer edges of the plates."

This the defendant's pressure flanges do not do in the form known as "Exhibit A." Each form of device is claimed to have some advantage of convenience and utility. With this we have nothing to do, and while the claims seem to be valid in a strict sense they are not infringed by the structure called "Exhibit A."

The decree of the District Court will be affirmed.

WILLIAMS v. BARNES et al.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2098.

PATENTS ⚿259—INFRINGEMENT—WHAT CONSTITUTES.

The claim of complainant's patent No. 901,462 reads as follows: "In a time register, the combination of an engaging member having angular peripheral projections, adapted to be rotated by a clock-driven arbor, a record dial having a central aperture provided with angular indentations corresponding in size * * * to the angular projections on the engaging member, and means for securing the said dial in position on the engaging member." Under such patents, watchman's registering clocks were manufactured, and a watchman by inserting stationary keys in various parts of the building could record on the dial the exact minute at which he reached such station. After being once used, the paper dials would, of course, no longer record the watchman's progress. *Held*, that such dials, as they were to be consumed by use, were not part of the patented invention, and defendant by manufacturing such dials for use in clocks manufactured under complainant's patent did not infringe; the dials alone not being patented.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400-402; Dec. Dig. ⚿259.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Lynn A. Williams, trustee, against Francis W. Barnes and others. From a decree for defendants, complainant appeals. Affirmed.

Arthur J. Baldwin and Drury W. Cooper, both of New York City, for appellant.

Percy B. Eckhart, of Chicago, Ill., for appellee.

Before MACK and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

MACK, Circuit Judge. Appeal from decree dismissing, at the conclusion of plaintiff's case, a bill for contributory infringement in alleged violation of claim 1 of letters patent, No. 901,462. The claim reads as follows:

"In a time register, the combination of an engaging member having angular peripheral projections, adapted to be rotated by a clock-driven arbor, a record dial having a central aperture provided with angular indentations corresponding in size and contour to the angular projections on the said engaging member, and means for securing the said dial in position on the engaging member."

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We shall follow the District Court and assume, without in any manner deciding, that this claim is valid; that there is invention therein; that it is a true combination. But on this assumption, we agree with the District Court that there is no infringement to be found in defendant's acts, stated in the decree as follows:

"That the defendants herein made, manufactured and sold paper dials of the kind described in said patent to owners of watchman's clocks, manufactured and sold by said Newman Clock Company equipped with the means for holding said dials in place as described in said patent in suit with the intent by defendants and for the purpose of having the purchasers of such dials use said paper dials in the aforesaid watchman's clocks manufactured and sold by said Newman Clock Company, equipped with the aforesaid means described in said patent."

The Newman Clock Company is one of plaintiff's two licensees.

The case falls within the principle of Morgan Envelope Co. v. Albany Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500, and not within that of Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 805.

The alleged infringement is not in the manufacture of the paper dials, as they are not patented, but in their sale for use as an element in the patented combination.

As the Victor Case holds, it is not determinative of the question of such contributory infringement that the element is unpatented. The test is whether the element, as part of the patent combination, is perishable in its nature, consumed in the use, and necessarily to be replaced in each successive use of the combination. If it is, then, at any rate in the absence of some restriction, the purchaser of the device in which the combination is to be effected for practical use is impliedly licensed to replace the consumable element.

Now the whole purpose of this combination in an old art was to have that part of the paper record dial which engages with the rotating member of the clock exactly conform to it in shape, thus tending to prevent substitution. The practical use to which the combination was to be put was in a watchman's registering clock. Stationary keys in various parts of a building, when inserted in the clock, would make individualized impressions on the dial, indicating, if honestly done, the exact minute of a 24-hour period at which each key was inserted and at which the watchman was at each station.

That these dials were not physically destroyed, either in the operation or in effectuating its purpose, or that their preservation might indeed be desirable in order to satisfy insurance companies that their rules had been followed, or for any other reason, does not distinguish this case from the Morgan Envelope Case; for here, as there, a single use did destroy the dial, not, it is true, as a piece of paper, but as an element of the patented combination. After 24 hours, the piece of paper as such could again be fitted into the clock, but it would no longer serve its function as an element in the combination. Each day required a new record sheet. As an object on which the specific transactions of a 24-hour period were to be recorded, it was consumed in its 24-hour use. It then became worthless for registering purposes; it was no longer a record dial.

Assuming for the moment that the adjustment, the exact fitting of the paper dial to the clock arbor, can be said to cause them to coact in producing the result in the sense that the phonograph disc and stylus of the Victor machine coact, the fundamental difference between this dial and the phonograph record is that the latter, not only is not physically destroyed in a single use, but it is not destroyed as a record; it is designed to be used, and is used, over and over again in its original function as an element in the patented combination, to produce the identical result attained by its original use.

Decree affirmed.

RUBES v. E. J. WILLIS CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 278.

PATENTS ⚿328—INVENTION—ELECTRIC HORN.

The Chalas patent, No. 874,792, for an electric alarm horn, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by Ernest Rubes against the E. J. Willis Company. Decree for defendant, dismissing bill on three claims of patent No. 874,792, to Chalas and others, and complainant appeals. Affirmed.

J. Edgar Bull, C. A. L. Massie, and Ralph L. Scott, all of New York City, for appellant.

Drury W. Cooper, of New York City, for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

HOUGH, District Judge. The device of the patent is an electrically operated horn wherein noise is produced by agitation of the armature of a "make and break" apparatus, which agitation is transmitted to a diaphragm, by a rod which (when the horn is not sounded) always presses against both armature and diaphragm, but is not mechanically affixed to either. In the language of the patent the rod is "loosely mounted," and as a matter of fact it is a "snug fit" between armature and diaphragm. The first and second claims are but variants of the same statement of invention; the third is more general.[1]

[1] These claims are as follows:

"1. In an electric horn, the combination of a vibrating plate, an electro-magnet, an armature, a spring plate adapted to press the armature towards the electro-magnet, a rod *loosely mounted* between the armature and the vibrating plate, the said rod being adapted to maintain the armature slightly away from the electro-magnet against the action of the said spring plate, and means for producing intermittent currents in the electro-magnet."

"3. In an alarm device, a horn, a diaphragm arranged in operative relation thereto, an electro-magnet, an armature influenced by said electro-magnet, a circuit interrupter operated by said armature and a connection between said armature and said diaphragm whereby vibrations of the armature are mechanically transmitted to the diaphragm."

When this patent was applied for there was no novelty in moving a diaphragm by an armature and magnet operating upon the "make and break" principle. O'Brien, No. 752,408, and many other patents. Invention must be found, if at all, in the means whereby the movement of the armature is communicated to the diaphragm. Here is the crucial point of the case, for there has been shown no earlier apparatus for electrically sounding a horn embodying the "loosely mounted" rod of the patent. But we entirely agree with the court below that the exact mechanism of plaintiff is shown in the patent to Lungen (No. 352,472) and passed into commercial use as applied to the art of ringing a bell or gong. Lungen further pointed out in the specification of his patent that his device might be used with a vibrating armature "to give motion to any alarm."

Considering the antiquity of many varieties of "make and break" apparatus, and the close correspondence between striking resonant metal, and striking or otherwise agitating a diaphragm, we are of opinion that there was no invention in substituting a diaphragm for a bell in Lungen's apparatus and thereby presenting complainant's device. It is true that invention is sometimes found in the transference from one art to another of a particular sequence of mechanical processes; but the difficulty or ingenuity of such transfer is to be considered in each instance, and where the degree thereof is so slight as is here displayed, nothing more than a fair mechanical knowledge of familiar devices was necessary to effect it.

Upon the ground that, in view of the state of the art, this patent is void for lack of patentable invention, the decree below is affirmed, with costs.

NATIONAL MALLEABLE CASTINGS CO. et al. v. T. H. SYMINGTON CO.

(Circuit Court of Appeals, First Circuit. June 8, 1916.)

No. 1147.

PATENTS ⚷316—SUIT FOR INFRINGEMENT—RIGHT TO ADJUDICATION ON ALL CLAIMS.

Where a District Court in a suit for infringement of a patent, or the Circuit Court of Appeals on appeal, has found certain claims of the patent valid and infringed, under Rev. St. § 4922 (Comp. St. 1913, § 9468), defendant is entitled to a finding as to the remaining claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 562; Dec. Dig. ⚷316.]

In Equity. Suit by the National Malleable Castings Company and others against the T. H. Symington Company. Decree for defendant, and complainants appealed. Reversed, 230 Fed. 821, — C. C. A. —. On petition for rehearing. Overruled.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PER CURIAM. The opinion was passed down in this case on February 3, 1916, finding infringements of claims 3, 5, and 6, the decree remanding the case to the District Court, with directions enjoining the defendants as stated in the decree. No order was directed with reference to the other claims, which were numerous. The judgment to be entered should, of course, dismiss the bill with reference to those other claims.

Various other supplemental matters have been brought to our attention, and further relief requested with reference thereto.

It is maintained by the defendant that this court should grant some relief with reference to claims other than claims 3, 5, and 6, as said to be required by sections 4917 and 4922 of the Revised Statutes (Comp. St. 1913, §§ 9462, 9468), relieving the defendant from payment of costs, on account of the apparent finding of this court favorably to the respondent on the various other claims. There was no finding or decree of the District Court as contemplated by the sections referred to; therefore, as the infringements of the sections thus referred to were never brought to our attention on appeal by any plea of proof, we have no jurisdiction with reference to the matter of costs by reason of anything provided in those sections.

A petition for rehearing has been filed; but the court gave unusual attention to the merits of the case, and it finds nothing in that petition which requires its attention.

Our judgment found that the respondent had infringed the claims enumerated in the judgment, but made no finding with reference to the other claims as it should have done; therefore, we will make proper correction with reference thereto.

The respondent on appeal also justly claims that the proposed judgment should be amended as stated herein.

The decree entered on the 3d day of February, 1916, is annulled, and in lieu thereof is entered the following decree:

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We adjudge and decide that claims 3, 5, and 6 of the plaintiff's patent are valid and infringed; and the decree of the District Court is reversed. We also find that the remaining claims in the complainant's patent are either not infringed or are invalid; the case is remanded to the District Court with directions to enjoin the respondent from further constructing, using or selling the cheek-plates (referred to in the interrogatories and made a part of the record in this case) when combined, or adapted to be combined, in the structures of claims 3, 5, and 6, and also for an accounting in reference to all such combinations, and for the costs in the District Court and on this appeal.

The petition for rehearing is denied.

AMERICAN GRAPHOPHONE CO. v. GIMBEL BROS.

(District Court, S. D. New York. June 2, 1916.)

No. 11/176.

1. PATENTS ⚷328—INVENTION—DOUBLE USE.

   The Phillips patent, No. 623,925, for a music-cabinet, has, as an indispensable element of each of the claims, a "series of pockets or receptacles adapted to receive the music-disks when not in use," which pockets were old and perform no different function in combination of the patent than in the old devices from which they were taken, and showing only the required and self-suggested changes necessary to adapt them to the new and analogous use, and the patent is void for lack of invention.

2. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—PHONOGRAPH.

   The Hawthorne patent, No. 671,625, claim 5, for a phonograph or graphophone with the recording, reproducing, or shaving device so adjusted as to adapt them to use with sound record cylinders of different diameters as limited by the prior art, *held* not infringed.

3. PATENTS ⚷27(1)—INVENTION—DOUBLE USE.

   The mere fact that a double use of an existing device produces cheapness or a better result, or has a wider range of use than before known, does not, of itself, bring the new use within the domain of invention.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 31; Dec. Dig. ⚷27(1).]

4. PATENTS ⚷328—INVENTION—GRAMOPHONE NEEDLE BOX.

   The Sheble patent, No. 730,169, for a gramophone needle box, in view of the prior art, is void for lack of patentable invention, and also for lack of co-operative relation between the parts of the combination.

5. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—TALKING-MACHINE.

   The Emerson patent, No. 777,615, for a disk talking-machine, adapted for reproducing from records of both the zigzag and up and down types, as limited by the prior art, *held* not infringed.

6. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—GRAPHOPHONE REPRODUCER.

   The Macdonald patent, No. 830,446, for a graphophone reproducer, as limited by the prior art and the proceedings in the Patent Office, *held* not infringed.

7. PATENTS ⚷168(2)—CONSTRUCTION—REJECTION OF CLAIMS.

   Where claims are rejected by the Patent Office on reference to prior devices and others substituted by the applicant, the claims as allowed, must be interpreted with reference to the rejected claims, and cannot be con-

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strued to cover either what was rejected or was disclosed by the references.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⇐168(2).]

8. PATENTS ⇐328—INFRINGEMENT—TALKING-MACHINE.

The Kraemer patent, No. 899,874, for a talking-machine, relating particularly to the manner in which the sound boxes are connected to the sound conveying and amplifying devices, limited as it must be to avoid anticipation by the prior art, *held* not infringed.

9. PATENTS ⇐58—ANTICIPATION—FOREIGN PATENT.

While a United States patent may not be invalidated for anticipation by a foreign patent of prior date if the invention is shown to have been made by the American patentee before such date, the burden rests upon the patentee to establish such priority beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. ⇐58.]

10. PATENTS ⇐328—INFRINGEMENT—TALKING-MACHINE.

The Macdonald patent, No. 957,694, for a talking-machine of the disk type, in which the reproducer is carried at the end of a swinging arm capable of moving transversely across the face of the record during the act of reproduction, limited as it must be to avoid anticipation by the Jetter patents, Nos. 750,977 and 776,183, *held* not infringed.

11. PATENTS ⇐112(4)—PRIORITY OF INVENTION—PRESUMPTION FROM DECISION OF PATENT OFFICE.

A decision of the Patent Office, determining priority in interference proceedings, is not binding upon the courts, and not even of weight as raising a presumption, where it was entered by consent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 165; Dec. Dig. ⇐112(4).]

In Equity. Suit by the American Graphophone Company against Gimbel Bros. On final hearing. Decree for defendant.

C. A. L. Massie and Ralph L. Scott, both of New York City, for plaintiff.

Charles N. Butler, of Philadelphia, Pa., for defendant.

THOMAS, District Judge. This is the usual bill in equity, charging the defendant with infringement by sale of a talking-machine known as "The Keen-O-Phone" of seven letters patent of the United States, as follows: The Phillips patent, No. 623,925, dated September 12, 1899; the Hawthorne patent, No. 671,625, dated April 9, 1901; the Sheble patent, No. 730,169, dated June 2, 1903; the Emerson patent, No. 777,615, dated December 13, 1904; the Macdonald patent, No. 830,446, dated September 4, 1906; the Kraemer patent, No. 899,874, dated September 29, 1908; and the Macdonald patent, No. 957,694, dated May 10, 1910. The bill charges that the alleged inventions described in the patents are capable of conjoint use, and are conjointly used by the defendant, and this allegation is not controverted. The answer denies the validity and infringement of each of the patents.

I. The Phillips Patent, No. 632,925.

[1] The invention of this patent is described in the specification as relating—

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"to a new and useful music-cabinet designed for use in connection with a music-producing mechanism; and the objects of the invention are: First, to furnish a new and improved case or cabinet for supporting the mechanism such as is ordinarily used in music-boxes, and at the same time to furnish pockets or receptacles, for the disks or tune-sheets used in connection with such music-boxes and for sheets of music, if required; and, second, to so construct the cabinet as to give improved tone to the music of the character described," and "is adapted for use in connection with that class of musical instruments which are worked automatically and which use a music-disk or tune-sheet which is adapted to revolve, bringing either openings or projections in contact with the fingers or operating comb-teeth."

The patent contains two claims, and infringement of each of them is charged. These claims are as follows:

"1. In a music-cabinet, the combination of a series of pockets or receptacles adapted to receive the music-disks when not in use, a sounding-board placed above such receptacles, a horizontal partition above the said sounding-board, a space between said horizontal partitions and said sounding-board for the reception of the operating mechanism, and a space above said horizontal partition in which latter space the music-disk is adapted to revolve.

"2. The combination of a series of pockets or receptacles adapted to receive the music-disks when not in use, a sounding-board above said pockets or receptacles, an arch *E*, a horizontal partition above the arch *E*, said arch *E* extending from the sounding-board to the said partition, a space between the partition and the sounding-board for the reception of the operating mechanism, a space above said horizontal partition for the reception of the disks when in operation, a door adapted to close said pockets or receptacles which receive the music-disks when not in use, and a lid adapted to close the space above the horizontal partition, all substantially as described."

The defendant has introduced in evidence several prior patents and several prior uses showing musical constructions and pockets for holding music upon which it bases the contention: First, that the claims of the patent are simply a bringing into juxtaposition of old devices from the prior art; and, second, that when so brought together in the patent in suit, there is no co-operation or coaction between them, and no double effect is produced or double duty performed by the combined result. The test in all cases of this kind is, Does the result come from the combined effect of the several parts, or simply from the separate action of each? If the former, it is patentable; if the latter, it is not. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719; Pickering v. McCullough, 104 U. S. 318, 26 L. Ed. 749; Barnes v. Vandyck-Churchill Co., 213 Fed. 636, 130 C. C. A. 300; Regina Co. v. New Century Music Box Co. (C. C.) 138 Fed. 903; Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241.

It does not appear that the claimed "series of pockets or receptacles adapted to receive the music-disks when not in use," which is an indispensable element of each of the claims, has any functional relation to the "sounding-board" or "the space between said horizontal partition and said sounding-board for the reception of the operating mechanism," or the "space above said horizontal partition in which latter space the music-disk is adapted to revolve."

Furthermore, "the series of pockets or receptacles adapted to receive the music-disks when not in use" are confessedly old, and perform no different function in the combination of the patent in suit than they did in the old devices from which they were taken, and the case is clearly the adaptation of an old device to an analogous purpose in practically the same art, with the required and self-suggested changes. If it is, it is clearly a double use, and not patentable. Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Seiler v. Fuller & Johnson Mfg. Co., 121 Fed. 85, 57 C. C. A. 339; Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294.

II. The Hawthorne Patent, No. 671,625.

[2] The invention of this patent relates "to phonographs, graphophones, and similar machines the object being to secure adjustments of the recorder, reproducer, and shaving knife relatively to the phonogram blank or the sound record cylinder." The purposes of the patentee are explained by his description in his specification, as follows:

"It is evident from the construction that whatever may be the diameter of the sound-record cylinder the recorder, reproducer, or shaving-knife carried by the bracket *D'* may be adjusted radially of said cylinder to accommodate any one of said devices to a cylinder of greater or less diameter. Thus if the machine has been in use with a phonogram or cylinder of small diameter and it is desired to use one of greater diameter or one that is commonly known as 'concert size' the recorder, reproducer, or shaving-knife may be adjusted radially outward to accommodate said device to the larger phonogram or cylinder. Of course a reverse adjustment may be used when changing from a large to a smaller phonogram or cylinder. It will also be seen that according to the construction above described the recorder, reproducer, or shaving-knife may be adjusted lengthwise of the arm *B*, according to the character of the record to be made or reproduced. For example, if a light engraving of the sound-record is required, a better result is obtained by placing the recorder substantially in the position shown in Fig. 1, and the reproducer should occupy the same position when it is in use. If a heavy engraving is required, such as a record of a band, it is better to place the recorder at the right-hand end of arm *B*, or at the back of the phonogram-blank, as in such position the limiting-weight or the weight of the diaphragm bears heavier on the recording-stylus, and hence a deeper cut will be made.

"With the heavy engraving the reproducer may be thrown to the back of the phonogram, and thus the angle best suited to a proper reproduction secured. Again, it may be found desirable to place the recorder or reproducer at the front of the cylinder for certain records. With the present form of adjustment it is possible, by moving the recorder or reproducer along the arm *B*, to ascertain precisely the position of the said devices or either of them, best suited to the work required."

Only the fifth claim of this patent is in issue, and it is as follows:

"5. In a phonograph or graphophone comprising a sound-record cylinder, an arm supported on the frame of the machine, and embracing the sound-record cylinder, a recording, reproducing, or shaving device supported on said arm, and means to adjust said devices lengthwise of said arm, substantially as described."

[3] The substantial defense of this claim is that the patent is for a cylinder machine, and that the claim in controversy is specifically limited to a cylinder machine, and by its definite terms to a "phonograph or graphophone comprising a sound-record cylinder," while the defendant's machine is one having a spiral record or a flat disk, and that the patent shows and describes a circular supporting arm, *B*, "curved on the arc of a circle so as to be concentric with the sound-record cylinder," without which the machine would be inoperative, and that

the claim in controversy is limited to this "arm supported on the frame of the machine and comprising this sound record cylinder," and that as defendant's machine has no element that corresponds either in structure; operation, or result to this arm, there is no infringement. The Hawthorne patent clearly belongs to the type shown in Edison patents, No. 465,972, No. 610,706, and No. 437,426, on which Hawthorne has placed the type of device shown in the patent to White, No. 467,530. Whether or not White in his patent, No. 467,530, specifically describes the use or purpose described by Hawthorne, I think it is reasonably clear that the White device is adapted for performing the same purpose as is performed by Hawthorne. Undoubtedly a patentee is entitled to all the uses to which a device can be put, as is the public, but there is clearly, under the authorities, no patentable novelty in a particular double use of an existing device, and the mere fact that the double use produces cheapness, or a better result, or has wider range of use than before known, does not, of itself, bring the new use within the domain of invention as is recognized by the courts. Reckendorfer v. Faber, supra; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307. And manifestly, if the Hawthorne claim in suit could be expanded to cover defendant's construction, it would include and therefore be invalidated by White and Edison, upon the well-settled principle that that which infringes if later anticipates if earlier. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

Moreover, the claim in controversy cannot be reconstructed to include the alleged infringement in view of the prior art, as is illustrated by the patent to Berliner, No. 564,586, the structure of which bears substantially the same relation to the Hawthorne device as does the defendant's, to wit, Berliner's sleeve *37* in which is adjustably telescoped the arm *36*, having fixed thereto the sound-box 31, corresponds approximately to defendant's journaled tone-arm having adjustably telescoped therein the tone-arm section fixed to the sound-box.

My conclusion therefore is that, in view of the secondary character of the patented invention as recited in claim 5, this claim cannot be so extended as to include the defendant's device. In order to sustain the charge of infringement, substantial identity between the elements of the combination must be found in their capacity to do the same work in substantially the same way, and it is not sufficient to say that they will do *one* part of their work in substantially the same way. If the differences in organization introduce different modes of operation except in a single instance and the identity is partial and incomplete instead of general, there is no infringement. Westinghouse Air Brake Co. v. N. Y. Air Brake Co., 119 Fed. 874, 56 C. C. A. 404.

There is nothing in the plaintiff's contention to justify the claim that the weight of the arm *B* is communicated to the stylus, or that such arm oscillates with the stylus, and indeed such a construction of the patent does not seem to be tenable in view of the description and drawings, by which the weight of the arm *B* must be carried by the rods *A* and *I*, the arm having the roller which runs on the front rod, and being raised with the arm to clear the cylinder of the tools by turning a spring pressed cam screw.

III. The Sheble Patent, No. 730,169.

[4] The invention described in this patent, according to the specification—

"has relation to gramophone-needle boxes, and has for its object the provision of a box or case of novel form adapted to contain new needles and old ones in separate compartments, so that the new needles may be easily and quickly picked out of the case and the old needles deposited therein and maintained in a separate compartment, without danger of getting them mixed or of mistaking one kind for the other.

"The needles used on gramophones and like instruments are minute objects, and, being subjected to wear and damage, must be removed and replaced from time to time, and as it is desirable to preserve the old needles, it is necessary in order to avoid the tedious and difficult operation of picking out a new needle from a mass of new and old ones mixed together, to keep them in separate receptacles, or at least in separate compartments in a single receptacle. If kept in boxes or drawers having vertical sides and a flat bottom, the needles, or some of them, will lodge in the angles of the box and prove aggravatingly hard to find and pick up.

"In carrying my invention into effect I provide a neat compact box made of two pieces of wood hinged together, one forming the body and the other the lid of the box, and I form in the body part a plurality of concave or semispherical or similarly-shaped cavities having concave bottoms, and I fit a flat disk with a central hole in a groove at the edge of one of said cavities, so that it will be flush with the upper surface of the body of the box, or nearly so. The lid of the box, which is a single flat piece, shuts down tightly on the body, and completely closes the concave cavities and is secured in its closed position by a spring-catch and prevents the needles from falling out of the respective cavities in which they are contained or becoming mixed with the needles in the other cavity."

Both claims of the patent are in issue and are as follows:

"1. A gramophone-needle box composed of a block having separate cavities for the reception of old and new needles, a lid adapted to close both cavities and a disk covering one of said cavities and having a hole in its center, whereby one cavity is left uncovered when the lid is opened, substantially as described.

"2. In a gramophone-needle box, the combination with the body of the box, composed of a single block of wood having two concave cavities in its upper surface, one of said cavities being formed with a grooved edge, of a disk fitted in said groove and formed with a central hole and a lid hinged to the body of the box and adapted to tightly close both cavities, substantially as described."

The defendant, in its alleged infringing device, does not use "a gramophone-needle box" or "a lid adapted to close both cavities," or a lid "whereby one cavity is left uncovered when the lid is open," or a box or lid "substantially as described," as required by claim 1; and it does not use a "gramophone-needle box" having "a lid hinged to the body of the box and adapted to tightly close both cavities," or the construction substantially as described in claim 2. The essential characteristic of each of the claims of the patent is "a gramophone-needle box" having the characteristics recited in each of the claims.

The construction of these claims must be determined by the state of the art and what occurred in the Patent Office. An examination of the file wrapper and contents shows that the case turned in the Patent Office on the lid construction recited in the specification of the patent already quoted from, and that in carrying the invention into effect the inventor provided "a neat, compact box made of two pieces of wood hinged together, one forming the body, and the other the lid of the box," and that "the lid of the box, which is a single, flat piece, shuts down tightly on the body, and completely closes the concave cavity, and is secured in this closed position by a spring-catch, and prevents the needles from falling out of the respective cavities in which they are contained, or becoming mixed with the needles in the other cavity." The application was rejected by the examiner, whereupon the patentee distinguished his case from the references by stating distinctly that "applicant's box is fitted with a flat, hinged lid, which tightly closes both cavities and prevents the needles in one cavity from becoming mixed with the needles in the other."

Undoubtedly if an inventor presents a broad claim and strikes it out and then presents and obtains an equally broad claim, he loses no right by such action, and may justly claim that his allowed claim is a broad one and have relief accordingly, but the case does not fall within that rule. There was here clearly an express limitation to specific means and construction as a condition precedent of obtaining the grant. The difference between the application as made and as allowed consisted of something more than mere changes of expression for substantially the same meaning, and to give the patent the broad construction contended for would be directly in the teeth of the well-settled rule that where an inventor seeks a broad claim which is refused, in which refusal he acquiesces, substituting therefor a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; Knapp v. Morss, 150 U. S. 221, 227, 14 Sup. Ct. 81, 37 L. Ed. 1059; Winchester Repeating Arms Co. v. Peters Cartridge Co., 184 Fed. 333, 106 C. C. A. 363.

This view of the patent is supported by the patent to Waite, No. 367,941, and the patent to Garson, No. 305,171, and the patent to Cogswell, No. 186,307, which the defendant has offered in evidence as part of the prior art. Waite and Garson each show it to have been old prior to the patent in suit to use a box having two compartments for different articles and a hinged lid for tightly closing both compartments, as, indeed, does Cogswell in his patent. The Simonds patent, No. 248,617, shows a box having two concave compartments for holding matches and burnt sticks, and Utley's patent, No. 121,069, shows boxes comprising compartments containing concave cavities in combination with hinged lids for tightly closing the same, the hinged lid having a second concave cavity for holding water. The Valentine patent, No. 187,434, shows boxes having a box containing a concaved cavity covered by a lid.

I am forced to the conclusion that in view of the prior art, what Sheble did was, broadly construed, within the circle of what was well known before, and belonged to the public, and all that Sheble did was to apply an old process to a new subject without any exercise of the inventive faculty, and without the development of any idea which can be termed new or original. If this was all that he did, certainly there is no patentable novelty, in view of the authorities cited.

Furthermore, there is no co-operative relation or combination between the ring *D* for the cavity *C* and the cavity *B*; and between the ring *D* and the lid *E*, and between the two cavities *B* and *C*, as is required by the patent law. Reckendorfer v. Faber, supra; Pickering v. McCullough, supra; Cameron Septic Tank Co. v. Village of Saratoga Springs (C. C.) 151 Fed. 242; Dodge Cold Storage Co. v. N. Y Cent. & H. R. R. Co., 150 Fed. 738, 80 C. C. A. 404.

IV. The Emerson Patent, No. 777,615.

[5] The patent relates, as the specification states—

"to disk talking-machines in which the sound-box, with its diaphragm and reproducing-stylus, is carried by a swinging arm pivoted some distance away from the turn-table and is fed across the disk by the record-groove itself. The sound-records commonly employed with this type of machine contain the record-groove in the form of grooves of uniform depth, containing lateral undulations corresponding to the sound-waves. The sound-box is arranged so that its diaphragm is at right angles to the disk; that is, vertical. Another form of sound-record contains the record in the form of a groove of varying depth, the irregularities consisting of vertical undulations corresponding to sound-waves. The first-mentioned records are conveniently spoken of as 'zigzag' records. The other type I shall refer to as 'up and down' or 'vertical.'

"The object of the present invention is to adapt a talking-machine for reproducing from records of either type.

"The invention consists in providing means for supporting the sound-box interchangeably, so that its diaphragm may lie either practically parallel with the record-disk or at right angles thereto and in adding a small attachment in place of the ordinary needle."

This patent contains five claims, but the charge of infringement is restricted to claims 3 and 5, which are as follows:

"3. The combination of a sound-box and means for supporting it interchangeably with its diaphragm either parallel to or at right angles to the surface of the sound-record."

"5. The combination with a sound-box and its diaphragm, of supporting means therefor that holds said diaphragm in operative position for a laterally-vibrating stylus, said means being adjustable to present said diaphragm in another position operative for a vertically-vibrating stylus."

The issues involved in this patent are, broadly speaking, the same as those involved in the prior patents under consideration, and present the questions of anticipation, aggregation, want of patentable novelty, and noninfringement. Berliner's patent, No. 564,586, clearly shows a vertically adjustable horizontal bearing, provided with an unnumbered set screw, which corresponds to the horizontal bearing provided with a set screw shown and described in the patent in suit.

Berliner has the horizontal arm which turns in a bearing where it is fixed by a set screw when adjusted, and the arm is provided with an eye or ring. The corresponding horizontal arm, which turns in the bearing where it is fixed by the set screw when adjusted as shown in the patent in suit, and the arm of the patent in suit, is provided with an unlettered eye or "usual split ring." Berliner also has a sound-box or case and a rigid tube projecting from one side of the case, commencing with a flexible tube, and this flexible tube turns in a ring. Emerson has a corresponding sound-box or case and a rigid tube projecting from one side of the case, connected with the flexible tube, and this tube terminates in a ring at the end of an arm. Berliner's sound-box placed vertically is provided with an eye and stylus for his laterally undulating records, and Emerson has a corresponding sound-box placed vertically and provided with a stylus. The only difference between Berliner and the patent in suit is that Berliner does not show the "L-shaped or angular device" of the patent in suit for playing the vertically undulating record, but the defendant, in its infringement, does not have this "L-shaped or angular device" required for the second adjustment of the Emerson device, for defendant uses the same stylus for both records. Emerson and Berliner both seem to be in the same position with respect of providing means for permitting the sound-box as a whole to move vertically when used with a vertical undulating record, for Emerson neither shows nor describes any means for permitting the vertical oscillation of his sound-box, nor does he refer to the subject, but the means were at hand in the Bell & Tainter patent, No. 341,214. Moreover, sound-boxes adapted to be turned to different positions for use with different styli are shown in Thompson's British patent, No. 7,203 of 1898, and Schoenner's United States patent, No. 630,521.

There is a further necessity for giving the claim of this patent a restricted construction, by reason of the patentee's action pending the application for the patent, where, to distinguish his claims from the patent to Clark & Johnson, No. 624,625, which had been cited as a reference, the patentee said:

"Obviously this old construction is not capable of being adjusted so as to present the diaphragm horizontally"

—and his subsequent insertion of the following claim:

"The combination of a sound-box and means for supporting it interchangeably in different positions as and for the purpose described"

—which was rejected upon reference to the Edison patent, No. 605,667, and canceled by the applicant.

I am therefore forced to the conclusion that if these claims are broadly construed, they are met by the prior art, and if narrowly construed they are not infringed.

V. The Macdonald Patent, No. 830,446.

[6] The invention of this patent relates more particularly to the reproducer of a graphophone, and has for one of its objects the adaptation of what are called "pivot point" reproducers for use with records of varying depth. It contains five claims, of which the fourth and fifth are alone in issue. These claims are as follows:

"4. The combination of a sound-record with a sound-reproducer having a casing, a sound-conveying tube or chamber, a diaphragm disposed obliquely to the tube or chamber, a stylus-lever fulcrumed between its ends on said casing and having one arm engaging the diaphragm, and a stylus on the other arm vibrating perpendicular to the record.

"5. The combination of a sound-record with a sound-reproducer having a casing, a sound-conveying tube or chamber, a diaphragm disposed obliquely to the tube or chamber, a stylus-lever pivoted between its ends on said casing and having one arm engaging the diaphragm, and a stylus on the other arm vibrating perpendicular to the record."

Pending the proceedings in the Patent Office claims 4 and 5 were inserted in lieu of and to distinguish them from the following original claims 4 and 5, which had been rejected:

"4. A sound-reproducer having a sound-conveying tube, a diaphragm and sound chamber disposed obliquely to the axis of said tube, and a stylus-carrying lever and stylus.

"5. A sound-reproducer having a sound-conveying tube, a diaphragm and sound-chamber disposed obliquely to the axis of said tube, and a stylus carrying lever fulcrumed upon pivot points, and a stylus."

The applicant acquiesced in the rejection, and amended his claims by substituting the present claims 4 and 5, and to distinguish the present claims, which were subsequently allowed, in a letter to the Patent Office emphasized the importance of the perpendicularity, not of the *stylus plane,* but of the *stylus,* by stating that:

"In vertically undulating records this vibration of the stylus perpendicular to the record is quite desirable, as is also the oblique diaphragm, which most nearly resembles the ear-drum in its relation to the sound conducting tube."

[7] It is fairly evident, from an examination of the file wrapper and contents of this patent, that the assertion of this relationship carried the claims through. If that be so, the claims as allowed must be read and interpreted with reference to the rejected claims, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices, and the patentee is estopped from maintaining that the amended claim covers the combination shown in the references, and from claiming a construction of the breadth of the claim that was rejected. Computing Scale Co. v. Automatic Scale Co., supra. So that the only question is whether the defendant uses either of the characteristic features of the specification and claims as limited and accepted by the patentee. I do not think that it does. The defendant uses the type of stylus-lever and stylus both parallel to the diaphragm as shown in the Clark & Johnson patent, No. 624,625, and which was referred to by the Patent Office as anticipating claims 4 and 5 as originally drawn, and from which it was necessary to distinguish Macdonald's claims in order to secure their allowance.

Moreover, the defendant's diaphragm is not oblique to a straight or any tone-arm section or sound-conveying tube connected with a diaphragm chamber as is required by the description and claims of the patent in suit, and in defendant's infringing device the section of the tone-arm or conveying tube directly connected with the sound-box or diaphragm chamber is at right angles to the diaphragm and is connected with the second section, which is parallel to the diaphragm. I do not think there is sufficient identity between the Macdonald patent in suit and the defendant's machine to support the charge of infringement. Noninterchangeability of parts is universally recognized as strongly tending to negative infringement. The fact that the alleged infringing device may effect the same result does not always determine the question of infringement. The rule on this point is concisely stated by the Supreme Court in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 18 Sup. Ct. 707, 723 (42 L. Ed. 1136):

"But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there."

The conclusion is that infringement of this patent cannot be found without giving to the claims in suit a construction of the breadth of those rejected and withdrawn from which the claims in controversy were distinguished because of this "vibrating of the stylus perpendicular to the record." Moreover, the Butterworth patent, No. 707,204, the Emerson patent, No. 777,615 (one of the patents in suit), and the Clark & Johnson patent, No. 624,625, manifestly narrow the range of patentable novelty in the patent in suit, and limit Macdonald to a stylus disposed of at *right angles* to a stylus lever and diaphragm so that a broad construction of claims 4 and 5 of Macdonald's patent would amount to nothing more than the substitution of Clark & Johnson's stylus lever (of the same order as that of Macdonald) and stylus for the stylus shown in the Butterworth patent.

Then, too, the Eldred patent, No. 657,731, and the Bell & Tainter patent, No. 341,214, must be taken as a bar to any actual invention by Macdonald broadly construed, so that the conclusion is still more imperative, in view of these references, that the claims must be limited to the mechanism shown and described, if ground should be found for sustaining them.

VI. The Kraemer Patent, No. 899,874.

[8] The invention of this patent, as is stated in the specification—
"relates to talking-machines, and has reference particularly to the manner in which the sound-boxes of such machines are connected to the sound-conveying and amplifying devices thereof.

"As is well known, record-tablets for the mechanical reproduction of recorded sounds, whether of cylinder, disk, or other form, are of two types, depending on the character of the undulations of the record-groove, these being termed the vertically undulating and the laterally undulating types. For reproducing sounds from these two types of record-tablets, machines differing in construction have heretofore been required, so that a person having but one machine could use only records of one of these two types.

"The object of my invention is to provide a talking-machine so constructed that it may be used to reproduce sounds from either of these two types of records, differing in the character of the sound-undulations of the record-groove. This is accomplished by providing a sound-box which is arranged to assume either of two operative positions, in one of which the stylus of the sound-box will co-operate with a record of the vertically undulating type to reproduce the recorded sounds, and in the other of which it will co-operate with a record of the laterally undulating type. Thus, the sound-conveying device of the talking-machine, consisting of either an amplifying horn alone or a combined horn and tone-arm, may have a joint therein, permitting movement of the sound-box to either of its two positions.

"In the preferred embodiment of the invention, a tone-arm is employed, and a joint is provided near the free end thereof, such that the sound-box may be moved from one operative position to a second operative position in which its diaphragm is disposed at a right angle to the plane of the diaphragm when the box is in the first position."

It contains seven claims, all of which are in issue, and which are as follows:

"1. In a talking-machine, a sound-box having a diaphragm and a tubular connection thereto for carrying sounds, said connection having a joint therein permitting movement of the sound-box to either of two operative positions, a single stylus being adapted to vibrate the diaphragm in either of said positions and said stylus projecting in substantially the same direction from the sound-box in both of said positions, substantially as set forth.

"2. In a talking-machine, a sound-conveying tube, and a sound-box pivotally mounted thereon and provided with a single stylus, said box being movable about the pivotal axis through ninety degrees to carry it to either of two operative positions, in both of which said stylus projects in substantially the same direction from the sound-box, substantially as set forth.

"3. In a talking-machine, a sound-conveying tube and a sound-box having a diaphragm mounted on said tube and movable from a position in which the diaphragm is parallel to the axis of the tube to a position in which the diaphragm extends across said axis, substantially as set forth.

"4. In a talking-machine, a sound-conveying tube, a sound-box having a single stylus, and two telescoping tubular pieces, one on said tube and the other on said box, permitting movement of the sound-box relatively to the tube to either of two operative positions, in both of which said stylus projects in substantially the same direction from the sound-box, substantially as set forth.

"5. In a talking-machine, a sound-conveying tube, a sound-box having a single stylus, two telescoping tubular pieces, one on said tube and the other on said box, permitting movement of the sound-box relatively to the tube to either of two operative positions in both of which said stylus projects in substantially the same direction from the sound-box, and a pin on one of said pieces entering a slot in the other, substantially as set forth.

"6. In a talking-machine, a sound-conveying tube having a tubular portion at its end turned at an acute angle to the axis of the tube, and a sound-box having a stylus pivotally mounted on said portion and adapted to be turned about the same to either of two operative positions, substantially as set forth.

"7. In a talking-machine, a sound-conveying tube having a tubular portion at its end, turned at an angle to the axis of the tube, and a sound-box having a stylus and a tubular piece fixed to the box and telescoping with said portion to permit turning the sound-box relatively to said tube to either of two operative positions, in both of which the stylus of the sound-box projects in substantially the same direction from the sound-box, substantially as set forth."

[9] The prior patents put in evidence as either anticipating or limiting are: (1) A French patent, No. 381,305, to Deutsche Telephonwerke (published January 9, 1908), showing and describing a structure comprising substantially the same means as Kraemer's for effecting the same purpose in substantially the same way, although there is a difference of mechanical details; and (2) the Bontchev patent, Second Addition, No. 8,101, published January 8, 1908, which shows a structure in which a hinge may be placed in the middle like that of a structure similar to the defendant's machine in which the sound-box turns on a pintle or hinge extended through the axis of a joint in the tube, and which also has a sharp elbow between the hinged sections of the

tone-arm. These foreign patents clearly antedate the patent in suit, and while a patent may not be invalidated for anticipation by a foreign patent of prior date if the invention is shown to have been made by the American patentee before such date, yet where anticipation is otherwise clear, the burden rests upon the patentee of the United States patent to establish such priority beyond a reasonable doubt. Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 78 C. C. A. 394. I am inclined to the view that Kraemer's claims, if broadly construed so as to include the defendant's device, are anticipated by these foreign patents, and that, if not so anticipated, the claims must be so directly limited to their specific construction as not to include what the defendant uses. It is difficult to reach the conclusion that these foreign patents do not contain an adequate description of a structure which anticipates the Kraemer construction, broadly construed. Each of these foreign patents has the telescoping tubular pieces required by Kraemer's claims 4, 5, and 7. If "telescoping" is construed broadly enough to cover a construction different from the longitudinal movement of the one tube parallel to the axis of the other, as in the collapsing or expanding movement of the sections of a telescope, Kraemer's advance in the art was, at the most, a change of form of the machine, without a change of mode or operation as a result, and the essential elements of the telescoping seem to me to be found in these two foreign patents, so as to bring the Kraemer patent within the rule that a change of mechanical structure is not patentable unless it produces a new and entirely different result.

VII. The Macdonald Patent, No. 957,694.

[10] This patent relates to talking-machines, more particularly to the class known as disk machines in which the reproducer is carried at the end of a swinging arm which is capable of moving transversely across the face of the record during the act of reproduction. The object of the invention as stated in the specification—

"is to provide a construction of swinging arm which shall readily respond in a vertical direction to any irregularities in the surface of the tablet and at the same time be capable of freely moving transversely across the face of the record without the necessity of carrying or moving the usual horn, and at the same time be capable of transmitting the sound vibrations from the hollow swinging arm to the horn without loss or modification due to an imperfect or incomplete union between the swinging arm, which moves and the horn, which, during the act of reproduction, is stationary.

"Moreover, the invention has for its object to provide a construction wherein the horn may be readily turned so as to direct the great volume of the sound in any desired direction without the necessity of moving the machine, and, furthermore, of attaching the reproducer to the hollow swinging arm in such a way as to avoid the loss of sound vibrations or modifications thereof through the introduction of false vibrations.

"With this object in view the invention consists of the usual stationary supporting arm attached in any suitable manner to the machine casing, which supporting arm is provided with an annular ledge upon which rests a ring, free to turn in a horizontal plane on the ledge, the interior face of the ring being cut on the lines of a sphere whose center is the center of the ring, combined with a hollow reproducing arm having a spherical end of bearing fitting snugly within the spherical portion of the ring and capable of rocking in a vertical plane about trunnions passing through the ring and into the spherical portion of the swinging arm.

"Furthermore, the invention consists in providing a flange on the base of the horn which rests on a suitable annular ledge in the stationary supporting arm, said flange being engaged on its upper side by a clamping ring secured to the stationary supporting arm by screws or other suitable devices, the entire joint between the horn, the stationary arm, the ring and the hollow swinging arm being treated with a nonfluid lubricant, such as petroleum jelly or the like, whereby the joint is not only lubricated but is also rendered air-tight, to the end that the sound vibrations are fully and completely transmitted from the hollow arm to the horn without any escape or diminution thereof."

The patent contains 12 claims, of which all but the fifth, sixth, and seventh are in issue, and the claims in issue are as follows:

"1. In a talking machine, the combination of a stationary supporting arm having a horizontal annular ledge, a ring resting on said ledge and having its interior surface corresponding to a spherical zone whose center is the center of the ring, a hollow swinging arm carrying the reproducer at one end, the other end having its exterior surface in the form of a spherical zone fitting snugly within said ring, and diametrically opposite trunnions engaging said ring and hollow arm.

"2. The combination of a swinging arm carrying the reproducer at one end, a ring within which the other end of the arm is joined on lines corresponding to a portion of the surface of a sphere, trunnions securing said ring and arm together, and a stationary arm supporting said ring.

"3. The combination of a swinging arm carrying the reproducer at one end, a stationary arm, a ring mounted on said stationary arm to turn in a horizontal plane and trunnions connecting the ring to the swinging arm to permit said arm to turn in a vertical plane.

"4. The combination of a stationary arm, a substantially horizontal hollow swinging arm having a vertically extending elbow at one end and a reproducer at the other end, a horizontal ring jointed to said elbow on spherical lines, trunnions also connecting said ring and elbow, and a stationary arm supporting said ring."

"8. The combination of a swinging arm carrying the reproducer at one end, a stationary arm having a circular opening provided with a circular bearing upon its inner wall, supporting means supported by and to turn upon said bearing and horizontal trunnions supported by said means and engaging said swinging arm at its other end to permit vertical movement of said swinging arm.

"9. In a talking-machine the combination with a sound conveying tube, a fixed support having a circular opening therein, a horizontal circular bearing provided upon one of said parts, circular supporting means for said tube conforming to said opening and tube and engaging said bearing to support said tube and permit horizontal swinging movement of said tube and opposite horizontal trunnions supported by said fixed support to support said conveying tube and to permit vertical swinging movement of said conveying tube.

"10. The combination of a swinging arm carrying the reproducer at one end, a fixed support having a circular opening in which the other end of said arm is situated, supporting means interposed between the end of the arm situated within said circular opening and said fixed support and movably engaging one of said parts to permit the arm to turn in a horizontal plane, and a connection between said supporting means and the other of said parts to permit said arm to turn in a vertical plane.

"11. The combination of a swinging arm carrying the reproducer at one end, a fixed support having a circular opening in which the other end of said arm is situated, supporting means interposed between the end of the arm situated within said circular opening and said fixed support and movably engaging one of said parts to permit the arm to turn in a horizontal plane, and trunnions connecting said supporting means with the other of said parts to permit said arm to turn in a vertical plane.

"12. The combination of a swinging arm carrying the reproducer at one end, a stationary arm having a fixed support, and trunnions secured to the swinging arm and carried by the fixed support."

An examination of the parts of the specification quoted from shows that the machine to which these claims are drawn is for a previously known type of construction, and that it comprises a tone-arm supported at its upwardly extending rear end or elbow by an outwardly and upwardly extending stationary arm, which "supports a movable horn." The substantial question in this patent turns upon the effect of two patents to Julius Jetter, No. 750,977, issued February 2, 1904, on an application filed March 7, 1903, and No. 776,183, issued November 29, 1904, on an application filed April 28, 1904. The application for the Macdonald patent in suit was filed May 23, 1905, and was issued May 10, 1910. Jetter's patent, No. 776,183, is a modification of an earlier patent to him, No. 750,977, and incorporates in the structure of the earlier patent a movement which apparently has the characteristic features of the device of the Macdonald patent in suit. Jetter's patent, No. 776,183, has on the rear end of its tone-arm a spherical bearing corresponding to the spherical bearing on the rear end of the tone-arm in suit. Jetter also shows in this patent a ring with a spherical interior surface of the bearing of Macdonald's patent, and a ring corresponding to Macdonald's ring. Jetter has a casting fixed at the end of his stationary arm, and provided with an eye or cylindrical opening which corresponds to the eye or cylindrical opening at the top of Macdonald's arm. Jetter also shows in the patent, No. 776,183, trunnions supported by a part engaging a ring, so that it is pivoted in correspondence with the trunnions in Macdonald's construction. It would seem that while Jetter's and Macdonald's trunnions connect different parts, both provide for the lateral and vertical oscillation of the tube, and I think it can be fairly concluded that if Jetter's patents can be carried back of Macdonald's application, they either invalidate the patent and its several claims, broadly construed, or else limit the claims so that the defendant's device does not infringe. Defendant's machine comprises a concealed horn wholly below the disk or horizontal parts of the machine below the turn-table; a fixed cylindrical tube or socket extending through the deck into and forming the mouth of the horn, and having a flange screwed fast to the deck, a rotary, cylindrical tube, which turns in the fixed cylindrical tube or socket with a flange or saddle, which rests on the tube of the fixed cylindrical tube, and a tone-arm which has a downwardly extending rear end or elbow provided with a spheroidal terminus, which is pivoted in the plain cylindrical flange or saddle at the top of the rotary tube; the saddle at the lower end of the tone-arm being wholly above the fixed tube or socket. If the construction of Jetter's patent is inverted, it will show substantially the construction of the defendant's machine as above described, excepting with respect of the differences in detail necessarily involved in the reversal of Jetter's construction for use with a horn below instead of above the tone-arm connecting therewith and other details common to Jetter and the patent in suit which the defendant does not employ.

Applying the well-established test that that which if later infringes anticipates if earlier (Miller v. Eagle Mfg. Co., supra), it must follow that the defendant's machine cannot infringe the Macdonald patent without holding Jetter's earlier device an anticipation, because Jetter's device is closer than defendant's to Macdonald's since Jetter and Macdonald use the overhead horn with the corresponding details of like function for connecting the tone-arm therewith, while defendant has the concealed underneath horn permitting the omission of the details required by Macdonald. Any ground of identity subsisting between the defendant's devices and those of the patent in suit is a ground of identity between the devices of the patent in suit and those shown in the Jetter patents.

[11] The only question, therefore, with respect of this patent is as to the effect of the proceedings in the Patent Office. The earlier Jetter patent was issued more than a year, and the later Jetter patent issued more than six months, before the application for the patent in suit was filed. Macdonald has introduced no proofs attempting to carry his invention back of the date of his application, and the plaintiff relies solely on a consent decree entered in the Patent Office which purports to establish priority to Macdonald. There is no estoppel arising from a decision in interference proceedings in the Patent Office which is binding upon the courts. Such decision is not res judicata; it simply raises a presumption which is for the losing party to overcome. The only issue in interference is one of priority. While an interference decision may, in certain cases, be persuasive, it is not to be allowed to prevail over other considerations which may control. Elliott & Co. v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 C. C. A. 175. Macdonald reduced his invention to practice when he filed with the Patent Office an application containing specifications so careful, exact, and complete that one skilled in the art could, by merely following their construction, produce a machine which will meet the description and produce the results asserted for it by the application. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 C. C. A. 280. And there is nothing on which Macdonald can be given a date as early as Jetter's patent, No. 750,977. His patent, No. 776,183, was not involved in the interference, and it was issued by the Patent Office prior to the date of the Macdonald application, and by its grant it is presumptively an invention anticipating Macdonald, which presumption could not be overcome by introducing the examiner's decision, if on the merits. It has been held in this circuit by Judge Townsend, in National Enameling Co. v. New England Enameling Co., 123 Fed. 436, that a prior adjudication, sustaining a patent which was entered into by consent as the result of settlements between the parties, and in which the question of the validity and scope of the patent were not considered by the court, is not sufficient as a basis for the granting of a preliminary injunction in a subsequent suit against another alleged infringer, and by Judge Ray in Earll v. Rochester S. & E. R. Co. (C. C.) 157 Fed. 241, that a decree, adjudging the validity and infringement of a patent entered by consent of the parties, is not such an adjudication as constitutes a proper founda-

tion for the granting of a preliminary injunction in a suit against a different defendant. A similar ruling was made by Judge Lacombe in Bishop & Babcock Co. v. Bernstein (C. C.) 123 Fed. 408, that a decree pro confesso cannot be held to constitute prior adjudications of a patent. The defendant's means are those of old and well-known joints, which would invalidate Macdonald's patent if construed broadly to cover defendant's device, and, if narrowly construed, the defendant's do not infringe.

Claims 1, 2, 3, and 4 are limited to the use of a ring which defendant does not have, and claims 2 and 4 require this ring to have a spherical bearing surface which the defendant does not employ.

Claim 8 requires, not only the stationary arm which the defendant does not employ, but also that the stationary arm shall have a "circular opening, provided with a circular bearing upon its inner wall," which the defendant does not employ.

The defendant does not employ "the sound conveying tube" and the "fixed supports having a circular opening in them" and the "horizontal circular bearing" provided on one of said parts, which are recited as elements of claim 9; neither does the defendant use "the circular opening means for said tube conforming to said opening and tube, and engaging said bearing to support said tube," or the "opposite horizontal trunnions supported by said fixed support."

Claim 10 must be limited to "supporting means interposed between the ends of the arms situated within said circular opening and said fixed support" which the defendant does not employ; nor does the defendant employ supporting means "between the end of the arm situated within said circular opening and said fixed support" as required by this claim. And there is the further limitation in claim 10, requiring the "swinging arm" to have its spherical terminus located within the eye at the top of the stationary arm, for this claim states that there must be "a fixed support having a circular opening in which the other end of said arm is situated"; in defendant's device, the end of the tone-arm acts as a saddle that is always above and holds the end of the tone-arm above, not within, the fixed sockets.

Claim 11 also requires the end of the tone-arm to lie within the eye of the tube of the stationary arm which the defendant's device does not have, and there is the further requirement in this claim that the supporting means of the ring "shall lie between the end of the arm situated within said circular opening and said fixed support," which the defendant does not have.

Claim 12 is limited to the "stationary arm," which the defendant does not use.

My conclusion therefore is, with respect of the Macdonald patent, that the plaintiff in any aspect is not entitled to a decree.

Let a decree be entered, dismissing the bill of complaint.

Ordered accordingly.

AMERICAN GRAPHOPHONE CO. v. GIMBEL BROS.

(District Court, S. D. New York. June 2, 1916.)

No. 199.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—SOUND-RECORD.
The Macdonald patent, No. 714,651, for a sound-record and method of forming the same, is limited by the proceedings in the Patent Office to a record in forming which the tablet on which it is cut is revolved at a surface speed of approximately 44 meters per minute; also *held* not infringed.

2. PATENTS ⚷168(2)—CONSTRUCTION.
Courts should not, by construction, enlarge a claim of a patent which the Patent Office had admitted after imposing limitations which the patentee acquiesced in, beyond the fair interpretation of its terms.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⚷168(2).]

3. PATENTS ⚷232—INFRINGEMENT—PROCESS PATENT.
A purchaser in the open market of a product which has been made in infringement of a patented process cannot be held liable as an infringer.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 365; Dec. Dig. ⚷232.]

4. PATENTS ⚷234—INFRINGEMENT—PATENT FOR PROCESS AND PRODUCT.
Where a patent includes claims for a process and also for the product of such process, the latter are to be construed in connection with, and are limited in scope by, the former, and are not infringed unless the process claims are also infringed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. ⚷234.]

In Equity. Suit by the American Graphophone Company against Gimbel Bros. On final hearing. Decree for defendant.

S. T. Cameron, C. A. L. Massie, and Ralph L. Scott, all of New York City, for plaintiff.

Charles N. Butler, of Philadelphia, Pa., and Frederick P. Fish, of Boston, Mass., for defendant.

THOMAS, District Judge. [1] This case arises on a final hearing of a bill in equity on pleadings and proofs, charging the defendant with infringement of letters patent of the United States No. 714,651, dated November 25, 1902, for a new and useful improvement in recording and reproducing sounds. The patentee in his specification states that the invention relates to the art of recording and reproducing sounds, and that its object is to obtain complete and accurate records and reproductions of articulate speech and of all other sounds, practically the same in volume and tone-color as the original sounds. The patentee then goes on to state that it has long been realized by those skilled in the art that the best reproductions of sound obtained by the method patented by Bell & Tainter in 1886, and now in general use, besides being very small in volume compared with the original sounds, differed therefrom in character to a greater or less degree, and that these differences have been recognized as of two principal sorts: First, the absence of components characterizing the original sounds (especial-

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

ly noticeable in closed sounds, aspirates, sibilants, and high-pitched sounds); and, second, the presence of foreign sounds or characters. The latter difficulty has been attributed to various causes, generally to so-called "false vibrations," but after every effort to overcome these difficulties, and to eliminate false vibrations, the characteristic differences stated above, distinguishing the reproduced from the original sounds, still remained very strongly marked, and that the complete result of sound reproduction involves two operations: First, the making of the record; and, second, the reproduction of the recorded sound. Later on in his specification the patentee says (page 3, lines 105, et seq., and page 4, lines 1 to 12 inclusive):

"In the practical making of sound-records prior to the present invention, the record tablets have usually been in the form of cylinders of wax-like material, about one-half decimeter in diameter, revolving at about one hundred and ten revolutions per minute, giving a surface speed to the tablet of about one hundred and seventy-five decimeters, in round numbers. By the present invention the surface speed of the tablet is such as to give the revolving diaphragm perfect freedom of vibration without any damping effect due to the contact of the undulation with the heel of the stylus. The requisite surface speed might be attained by increasing the number of revolutions per minute given to cylinders one-half decimeter in diameter, or thereabout, as heretofore employed. There are practical objections to this, however, and it is therefore preferable to drive the cylindrical tablet at the same number of revolutions viz., about one hundred and ten per minute, and to so increase the diameter of the tablet as to secure the requisite surface speed, and it has been found that a cylinder about one and one-fourth (1.25) decimeters in diameter will attain a sufficient surface speed when revolved at the rate mentioned. Obviously the same results might be obtained by increasing the number of revolutions and making the diameter less than one and one-fourth (1.25) decimeters or by decreasing the number of revolutions and increasing the diameter of the tablet, and such changes would come within the scope of this invention, the essential feature of which is that the surface speed must be such as to permit the diaphragm to make its full sweep without any contact between the heel of the recording-style and the crests of the undulations."

The patent contains seven claims and the charge of infringement is restricted to claims 3, 5, and 6, which are as follows:

"3. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a tablet, causing said style to vibrate in a plane approximately perpendicular to the surface of the tablet by impressing sonorous vibrations thereon, and simultaneously moving said tablet at such a speed that sounds requiring one minute in their production form a record approximately forty-four meters in length."

"5. A sound-record consisting of a tablet of wax or wax-like material having an undulatory sound-groove cut or engraved therein, said undulations being of great and varying amplitude and having long, gentle, easy slopes, thereby giving reproductions sensibly equal in volume to the original sounds.

"6. A sound-record consisting of a tablet having a sound-groove with undulations of varying depth, said undulations being of such lengths that sounds occupying one minute in their production form a record approximately forty-four meters in length."

The charge of infringement relates to art composition disks known in the market as "Pathe," "Rex," and "Keen-o-phone," containing vertically undulating spiral curves, successively reproduced at increasing speed, the records being formed by molding the soft impression from a matrix with the aid of hydraulic pressure and hardening the molten products. The defendant purchased its records in the open market ready made, and without any knowledge on its part as to how they were made, and no evidence has been introduced, other than a claimed inference or conjecture, as to the complete process by which these records were made, although there is some evidence that the different records were made by different operations; and no evidence has been offered to connect the defendant, either directly or indirectly, with the manufacture of the records. The defenses are noninfringement, nonpatentability, and anticipation. The application for the patent was filed on December 5, 1898, and contained seven claims, as follows:

"1. The method of forming a sound-record which consists in placing a vibratory recording-style in contact with a record tablet and simultaneously impressing sonorous vibrations upon the style and imparting movement to the tablet with a surface speed sufficient to cause the style to form in the tablet undulations with long gentle slopes as contradistinguished from short, abrupt undulations, substantially as described.

"2. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a record tablet, impressing sonorous vibrations upon the style, and simultaneously. moving the tablet relative to the style with a surface speed sufficient to prevent the heel of the style from making contact with the undulations, substantially as described.

"3. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a wax or wax-like record tablet at a small angle with the tangent at the point of contact and simultaneously impressing sonorous vibrations upon the style and moving the tablet with a minimum surface speed of about 44 meters per minute, substantially as described.

"4. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a suitable tablet, impressing sonorous vibrations upon the style and decreasing the resistence offered by the tablet to the cutting action of the style by imparting a high surface speed to the tablet, and thereby cutting long, deep undulations in the record-groove, substantially as described.

"5. A sound-record, having the record-groove formed with undulations having long, gentle, easy slopes as contradistinguished from short, abrupt undulations, substantially as described.

"6. A sound-record, having the record-groove cut or engraved in a tablet of wax or wax-like material, the undulations of the record having long, gentle, easy slopes as contradistinguished from short, abrupt undulations, substantially as described.

"7. The sound-record formed by engraving substantially as herein described, said record corresponding in amplitude and character to the vibrations of the sound-wave, and being characterized by long gradual slopes, and by the absence of abrupt curves and sharp slopes, substantially as described."

The first action of the Patent Office was on January 18, 1899, when the examiner in charge of the application informed the applicant that claim 3 was objectionable because the cutting-style places at a small angle with a tangent at the point of contact was descriptive of an element of the mechanism by which the process is carried out, and should not be recited in a process or method claim, and that such description renders it uncertain whether applicant regards the essence of the application covered by this claim to reside in the particular mechanism or the method. Claims 1 to 4 were rejected because they did not distinguish from the ordinary and well-known method of forming graphophone records, the only difference specified being in the speed with which the surface of the tablet is driven, a speed variously defined in the several claims, and because also the effect of an increase in the speed of the tablet in forming and reproducing sound-records appears to be understood from any one of the following publications and prior uses: (1) The article in the International Encyclopedia, published in 1898, entitled "Phonograph"; (2) the British patent to Thomas A. Edison, No. 1644, of April, 1878, for graphophones, wherein was shown a means for producing a phonograph record by driving the tablet at a high speed and forming deep undulations therein; (3) the talking-machines of commerce have long been provided with governors, which include adjustable means for varying the speed of the tablets, they being run sometimes at a high and sometimes at a low speed; (4) the ordinary gramophone of commerce is usually run at a speed of 70 turns a minute, according to the printed instructions accompanying it, and is provided with a governor capable of being speeded considerably higher, and that at 70 turns a minute, the outer spirals of a diameter of about 6½ inches, would have a speed of about 38 meters a minute, and that these claims simply show the carrying forward or more extended use of an original idea, a mere improvement in degree.

Claims 5, 6, and 7, as originally filed, were also rejected on the ground that they did not distinguish from the ordinary record, and also for the reason that these original claims were anticipated by the British patent to Edison, to which reference has been made. The applicant thereupon amended his claim by erasing claims 1 and 2, and substituting therefor the following:

"1. The method of forming a sound-record which consists in placing a vibratory recording style in contact with a record tablet and simultaneously impressing sonorous vibrations upon the style and imparting to the tablet a high surface speed sufficient to cause the style to form in the tablet undulations of relatively great amplitude with long, gentle slopes as contradistinguished from short, abrupt undulations, substantially as described.

"2. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a record tablet, at an acute angle, impressing sonorous vibrations upon the style and simultaneously moving the tablet relative to the style with a surface speed sufficient to prevent the heel of the style from making contact with the undulations, and to cause the style to cut continuously a record corresponding in form to the sound-waves, substantially as described"

—and by erasing claims 4, 5, 6, and 7, as originally filed, and substituting in their place the following:

"4. A sound-record having the record-groove formed with undulations having long, gentle, easy slopes as contradistinguished from short, abrupt undulations, the undulations corresponding approximately in amplitude to the acoustical vibrations, substantially as described.

"5. A sound-record having the record-groove cut or engraved in a tablet of wax or wax-like material, the undulations of the record having long, gentle, easy slopes as contradistinguished from short, abrupt undulations, and giving reproductions sensibly equal in volume to the original sounds, substantially as described.

"6. The sound-record formed by engraving substantially as herein described, said record corresponding in amplitude and character to the vibrations of the sound-wave, giving reproductions sensibly equal in volume to the original sounds, and being characterized by long, gradual slopes, and by the absence of abrupt curves and sharp slopes, substantially as described."

This amendment was accompanied with an elaborate written argument by the applicant's solicitor, and the report of a microscopical study made by Arthur J. Hall, M. D. Following the receipt of these claims by the Patent Office, there was an oral discussion of the claims between the examiner and Mr. Mauro, the applicant's solicitor, with a view to distinctly bringing out and defining applicant's invention, in which the examiner called Mr. Mauro's attention to an article on the "Improved Graphophone," found on page 80 of the Electrical World for August 18, 1888, in which the statement appears that a record disk some 12 inches in diameter was designed to be run at a speed of 40, 50, or 60 revolutions a minute, and thereupon the specification was amended, the object of this latter amendment being to point out in the specification what is meant by "high speed," and to also clearly indicate how to impart a speed to the tablet which will prevent the heel of the style from making contact with the crests. A short time after this, the specification was again amended. Thereupon the examiner rejected the amended claims on the ground that they were not distinguishable in anything patentable in an art which had already reached a high state of development and perfection, and whatever improvement the applicant had made was that his result was better than a common result which was already good, and this rejection was accompanied with the suggestion that a claim for "a sound-record consisting of an undulating groove engraved or cut in a wax or wax-like tablet, the undulations being of such lengths that sounds requiring one minute of time to make them would require not less than approximately forty-four (44) meters of groove to record them," would distinguish his invention from the prior art. Following this letter of rejection, the applicant again amended his specification by striking out part of his amended specification, and substituting therefor what is found on page 2 of the printed patent as granted at lines 88–104, as follows:

"With a cylindrical recording-style the position of the heel of the style will be determined by the angle which the axis of the style forms with the plane of the recording-surface (or to the tangent, if it be a cylinder), and I shall hereinafter refer to the angle which the axis of the style forms with said recording-surface or with said tangent as determining the position of the heel and cutting edge of the style; but it is to be understood that in so doing I do not limit myself to a cylindrical style, as a wedge or other shaped style may be advantageously employed, in which case the angle which the heel of the style forms with the surface of a flat tablet or the tangent of a cylindrical tablet will determine its position."

There were one or two other slight changes in the specification, and an erasure of claims 4, 5, and 6 as amended, and the substitution in their place of the following:

"4. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a tablet, causing said stylé to vibrate in a plane approximately perpendicular to the surface of the tablet by impressing sonorous vibrations thereon, and simultaneously moving said tablet at such a speed that sounds requiring one minute in their production form a record approximately forty-four meters in length.

"5. A sound-record consisting of undulations of varying depth, said undulations being of great amplitude and having long, gentle, easy slopes as contradistinguished from a record of the same sounds having relatively shallow, short and abrupt undulations.

"6. A sound-record consisting of undulations of varying depth cut or engraved in a tablet of wax or wax-like material, said record giving reproductions sensibly equal in volume to the original sounds, and having long, gentle, easy slopes as contradistinguished from a record of the same sounds having relatively short, abrupt undulations.

"7. A sound-record consisting of undulations of varying depth, said undulations being of such lengths that sounds occupying one minute in their production form a record approximately forty-four meters in length."

Accompanying this amendment was a written argument from Mr. Mauro. The Patent Office then rejected claims 1, 5, and 6 as stated in the last amendment: First, for want of novelty, a ground of rejection which had been more especially emphasized in an office letter, in which it was shown that graphophone records have been formed at speeds differing widely from one another, and resulting necessarily in undulations of different lengths, having slopes of different degrees of abruptness; and, second, for lack of invention, in that the invention recited a change in the prior art only in the matter of degree. This rejection was followed by two affidavits, one from Andrew Devine, who had had large practical experience in the talking-machine art, and one from Alexander Graham Bell. There was also an affidavit from the patentee himself, and a further one from Mr. Easton, the president and general manager of the plaintiff corporation. The purpose of these affidavits was to show that the change in degree accomplished a result not heretofore known in the art, but which had been the object and aim of those most keenly interested in the advancement of the art to attain, and this involved invention. Along with these affidavits, Mr. Mauro again submitted an elaborate written argument, whereupon there was another rejection by the Patent Office. Claims 5 and 6 as substituted, being again rejected for the reasons of record, and claims 1, 2, and 3 being rejected on newly discovered references, particularly No. 520,106 to Cox, granted May 22, 1894, for telephones, etc., which, viewed in connection with the patent to Edison No. 454,941, appeared to anticipate the claims as at present drawn, and not meeting the spirit of the applicant's inventions. There was also an objection to claim 6 as then substituted, on the ground that the volume of the reproductions is not a function of the record alone, but also of the reproducing appliances, together with the suggestion that if this claim was so drawn as to use the phrase, "giving reproductions sensibly equal in volume to the original sounds," as a means for defining the length and amplitude of the vibrations rather than the record itself, "the objection might be removed." The examiner then suggested a claim as follows:

"A sound-record consisting of undulations of varying depth cut or engraved in a tablet of wax or wax-like material, said undulations being of great amplitude and having long, gentle, easy slopes, thereby giving reproductions sensibly equal in volume to the original sounds."

The applicant was then advised by the examiner that claims 4 and 7 appeared to be allowable, and that claims 2 and 3 might be allowed if applicant would frame them so as to restrict them to the production of an original record, thus avoiding the Cox patent. Following this rejection, there was a further amendment by erasing claim 1 and substituting in its stead the following:

"1. The method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a record tablet and simultaneously vibrating the style by the action of sound-waves and imparting to the tablet a high surface speed, thereby forming undulations of great amplitude with long, gentle, easy slopes, as contradistinguished from a record of the same sounds having short, abrupt undulations"

—and by substituting, in accordance with the suggestion of the Patent Office, a new claim—the present claim 5 of the patent. Following this, there was a further rejection of claim 7 as drawn. Subsequently the applicant, with one or two formal amendments to his specification, and after an interference had been declared with one Leon F. Douglass, of Chicago, Ill., the issue involved being the method of forming a sound-record which consists in placing a vibratory cutting-style in contact with a tablet, causing said style to vibrate in a plane approximately perpendicular to the surface of the tablet by impressing sonorous vibrations thereon, and simultaneously moving said tablet at such a speed that sounds requiring one minute in their production form a record approximately 44 meters in length, amended the application so as to take the case from out the interference proceedings, and the claims were renumbered and the patent issued.

It is also to be noticed, as a part of the history of the patent in suit, that public use proceedings were begun on the application of the National Phonograph Company, supported by affidavits of Edison, Miller, Worth, and Ott, to prior knowledge and use, upon which the Commissioner of Patents held that a prima facie case of prior public use had been made out.

The history of the Macdonald patent, as shown in the file wrapper and contents as above recited, clearly demonstrates that Macdonald's advance in the art is a process and product consisting of the use of, and limited to, a uniform and critical speed of 44 meters per minute. It was clearly the purpose of the Patent Office, in granting the patent, to limit Macdonald by his representations that his sole discovery, in view of the prior art, was a uniform critical speed of 44 meters, which, as Macdonald and his solicitor insisted, involved something different from and more than a change of degree, and that any substantial departure from that speed in either direction resulted in deterioration.

[2] The answers and declarations of Macdonald and his attorney in the Patent Office and the amendments which related to the essence of the alleged improvements, and which were directed to the question of invalidity, were understandingly and deliberately made and assented to by him and his experienced solicitor, and the patent was granted with this avowed understanding by Macdonald and his solicitor. Macdonald had an opportunity to appeal from the decision of the examiner, but he did not. He therefore must be held to have been bound by it. It was the purpose of the Patent Office to limit Macdonald to a process or product involving a uniform, critical speed of 44 meters, and Macdonald is bound by that limitation. Computing

Scale Co. v. Automatic Scale Co., 204 U. S. 609, 617, 621, 27 Sup. Ct 307, 51 L. Ed. 645; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437; Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 86, 5 Sup. Ct. 1021, 29 L. Ed. 67; Shepard v. Carrigan, 116 U. S. 593, 598, 6 Sup. Ct. 493, 29 L. Ed. 723; Roemer v. Peddie, 132 U. S. 313, 317, 10 Sup. Ct. 98, 33 L. Ed. 382; Knapp v. Morss, 150 U. S. 221, 224, 14 Sup. Ct. 81, 37 L. Ed. 1059; Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500; Greene v. Buckley, 135 Fed. 531, 68 C. C. A. 70.

This rule that courts should not, by construction, enlarge the claim which the Patent Office has admitted and the patentee acquiesced in beyond the fair interpretation of its terms, is nowhere better stated than by Mr. Justice Bradley, speaking for the Supreme Court in Burns v. Meyer, 100 U. S. 671, 672 (25 L. Ed. 738):

"It is well known that the terms of the claim in letters patent are carefully scrutinized in the Patent Office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous inventions and the state of the art, determines the applicant is entitled to. The courts, therefore, should be careful not to enlarge, by construction, the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms."

And this brings us to the substantial question involved, Has the defendant infringed the claims in controversy by purchasing, in the open market, records ready made without knowledge on its part as to how they were made, and without any charge or pretense that the defendant has been guilty of any act of contributory infringement? Claim 4 is, in express terms, for a process or method. A process is a mode of treatment of certain materials to produce a given result. As was said by Mr. Justice Bradley in Cochrane v. Deener, 94 U. S. 780, 788 (24 L. Ed. 139):

"It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing."

The alleged infringing records were, according to the plaintiff's contention, molded and not made by moving a "tablet" at such a speed "that sounds requiring one minute in their production require approximately 44 meters in length" as claim 3 requires, uniform and critical speed for which the patent was granted, and there is nothing before me in the record which warrants me in finding the steps by which these records were manufactured.

[3] But a process patent is not infringed by selling the product, and the vendee of a product which has been made in infringement of a patented process cannot be held liable to the patentee, or in any extent to be an infringer. Similarity or even identity in appearance of a product is not sufficient, and the charge of infringement can only be sustained by certain proof that the defendant uses the process of the patent. Schwartz v. Housman (C. C.) 88 Fed. 519; Welsbach Light Co. v. Union Incandescent Light Co., 101 Fed. 131, 41 C. C. A. 255; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235; National Phonograph Co. v. Lambert Co. (C. C.) 125 Fed. 388.

[4] The fifth and sixth claims are, in form, claims for products,

but for products as the result of a patented process. The process and the product must be regarded as inseparable and the process inheres in the product as it is made, as is held by the Supreme Court in Merrill v. Yeomans, supra. The process and the product are but one, and it may well be assumed that the product results from the use of the process described in the patent, and that the product is not one which may be produced in any other way. Plummer v. Sargent, 120 U. S. 442, 7 Sup. Ct. 640, 30 L. Ed. 737; Mosler Safe Co. v. Mosler, 127 U. S. 354, 361, 362, 8 Sup. Ct. 1148, 32 L. Ed. 182. A case directly in point is Downes v. Teter-Heany Development Co., 150 Fed. 122, 80 C. C. A. 76, decided by the Circuit Court of Appeals for the Third Circuit, in which it was distinctly held that where a patent includes claims for a process and also for the product of such process, the latter are to be construed in connection with, and are limited in scope by, the former, and are not infringed unless the process claims are also infringed.

Furthermore, with respect of claim 5, which requires the sound-record to be a "tablet" of wax or wax-like material and to have "a sound-groove cut or engraved therein, and to give reproductions sensibly equal in volume to the original sounds," the defendant has nothing to do with the manufacture of the records, or any records, or any steps used in the process of manufacturing its "pressed" records, which, according to the plaintiff's conjecture, are made by placing "pressing plates in a hydraulic press and bringing them down upon a mass of thermo-plastic material." Indeed, there is no evidence whatever to show that defendant's records, or any records comprised in the process of their manufacture, give reproductions "sensibly equal in volume to the original sounds" as required by claim 5.

That this is the proper view to take of these claims is confirmed by the correspondence between the applicant and the Patent Office, pending the granting of the patent, to which reference has already been made, particularly in the letter of February 25, 1899, canceling a prior claim, and in the applicant's letter of March 15, 1899, replying to the examiner's action of March 2, 1899, in which the examiner renewed his prior rejections on the ground that the expressions, such as "giving reproductions sensibly equal in volume to the original sounds," have been examined in detail in former actions, and are held not to express patentable distinctions. This letter of the applicant of March 15, 1899, replying to the examiner's letter of March 2, 1899, says distinctly that:

> "This claim defines a means whereby a record made by applicant's inventions may be readily distinguished from all sound-records heretofore made, in that it defines the record as giving reproductions sensibly equal in volume to the original sounds."

This alleged ground of distinction which the applicant made, and which he is estopped from denying, if not a claim for a process, is a claim for a result, which is clearly unpatentable. O'Reilly v. Morse, 15 How. 61, 14 L. Ed. 601. So construed, none of the claims in controversy are infringed.

The questions of patentability and prior use, broadly construed, have to do with the fact of high speed, the feature of the Bell & Tainter patent referred to in the specification, of the Edison British patent, No. 1644, of 1878, and of the talking-machines of commerce prior to Macdonald which had adjustable means for varying the speed of the tablets; they sometimes being run at high and sometimes at low speed. Whether what Macdonald did was the product of original conception, or a mere carrying forward or a more extended application of an original idea, or a mere improvement in degree, it is not necessary to consider, in the view which I have taken upon the defense of noninfringement, and which I am bound to and do sustain.

Decree accordingly.

SEIBERLING v. FIRESTONE TIRE & RUBBER CO.

(District Court, N. D. Ohio, E. D. April 25, 1916.) No. 236.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT.
   The Seiberling and Stevens patent, No. 762,561, for machine for making outer casings for double tube tires, was not anticipated, and discloses invention of nearly a pioneer character, which entitles its claims to a liberal construction. Claims 1, 2, and 14 also *held* infringed.

2. PATENTS ⚷328—VALIDITY AND INFRINGEMENT.
   The State patent, No. 941,962, for Pneumatic tire shoe manufacturing machine was not anticipated, and discloses patentable invention, although for improvements and not of broad scope; also *held* infringed.

In Equity. Suit by Frank A. Seiberling against the Firestone Tire & Rubber Company. On final hearing. Decree for complainants.

Squire, Sanders & Dempsey, of Cleveland, Ohio, and Robert F. Rogers, of New York City, for plaintiff.

Charles C. Linthicum, of Chicago, Ill., and S. H. Tolles, of Cleveland, Ohio, for defendant.

KILLITS, District Judge. It is to be regretted that time is yet unavailable to the court for that full analysis which this case deserves of the reasons impelling the court to a decree for complainant. As the importance of this cause, however, is such that a review is not improbable, we trust that a brief discussion of the impressions entertained by this court will meet whatever demand exists for a memorandum from the court of first instance.

[1] We are unable to find proven any anticipation of either Seiberling and Stevens' (patent No. 762,561) or State's (patent No. 941,962) inventions, except so far as the latter may be said to have been, in part, at least, anticipated by the former. It seems clear that State's patent is decidedly narrowed by the earlier grant to Seiberling and Stevens.

None of the alleged anticipations was either intended to produce, nor had the capacity to produce, one important result which is one of the desiderata aimed at both by the patentees of the grants in suit and the defendant, namely, to lay down the fabric so that a structural rearrangement thereof would be brought about to meet most efficiently the changing direction of strain to which a tire is subjected in use, circumferential, transverse and, to some extent at least, torsional. That these inventions do operate to stretch the fabric circumferentially of

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

the tire and also on the wings of the fabric, as it is being laid down, in the direction of the radius of the circumference, and that these results are highly desirable in an efficient product, no one has very effectively disputed.

The patents to Johnston (No. 669,837), Moore (No. 512,112), and Caldwell Syndicate (British No. 23,135 of 1898) are for the application of fabric woven to approximately the shape it is to take in the tire, the fabric to be used on the Johnston or Caldwell machine having rather more shaping toward the radius than that contemplated for Moore's use, the latter also using a fabric already formed into a ring or endless band. In neither of these is there a suggestion that what the patentees of the grants in suit sought to do, to the result above alluded to, was aimed at. Neither does Jeffery (No. 607,-245) seek this result. He offers no means for reducing the circumference of the wings of the fabric so that, stretched radially, it will tend in the process to take cylindrical shape.

Vincent's patent (No. 794,473) is later than that of Seiberling and Stevens. He does not specify any purpose to rearrange the fabric cords or to stretch it radially, unless such may have been in his mind in the statement that he proposes—

"to shape and stretch the canvass layers exactly to the same amount whatever be their number, so as to permit the different elements of the tire to work equally."

We do not understand that any one in this case is seriously claiming that Vincent's machine brought about successfully the entire result aimed at in the inventions owned by complainant, or to say that the "patting" into contact and place of the successive layers of fabric to the shape of the core by Vincent's stepped paddles effected the same desirable result which flowed from the operation of the spinning wheels which both parties to this case use.

In view of the working of Plaintiff's Exhibit 32 in the presence of the court, and of the testimony of Hall that this exhibit was made exactly after the detail of drawings in the Seiberling and Stevens patent in suit, and of the product of this exhibit in practical use shown in evidence, and, further, in view of the state of the art at the time the Seiberling and Stevens application was made, we feel justified in concluding that their invention was not only the first practical invention to produce mechanically automobile tires having the qualities of service demanded in the use thereof, which qualities were peculiarly the fruit of mechanism effecting the rearrangement of cords to meet the various directions of stress, above alluded to, but that it employed therefor novel and patentable combinations of mechanical elements; that it was decidedly an advance step in the art and so far occupied the field that it anticipated, in a large measure, both the State and Stevens inventions.

In fact, we regard the Seiberling and Stevens mechanism so nearly pioneer invention that the claims of the patent grant therefor should receive liberal interpretation, and we are forced to hold that the three sued upon, Nos. 1, 2, and 14, are valid. The judgment of the court in this respect is not shaken by a consideration of the shaping devices employed by any of the patents above referred to. That the rolls employed by Moore to assist in shaping the fabric could not perform the functions of complainant's spinning-rolls was pretty thoroughly exhibited to the court in the fact that a modification of Moore's mechanism was shown to be necessary in order to get it to work at all upon complainant's core. As Moore did not design any of his devices to perform the functions of a spinning-roll, the fact that a modification might induce any one to perform that function is not anticipation. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. He does not claim the result which both parties to this case admit is desirable, alluded to above, nor can it be seen in a study of the Moore invention that his mechanism would bring that result about, especially when we consider that it was intended only to be used upon pre-shaped fabric already formed into a ring or endless band.

Seiberling and Stevens' machine is the only one, at their application date, offering a mechanism by which, through a hinging or folding action advancing by short stages only, and thereby occupying such small areas of the fabric that the tendency to wrinkle under contraction is overcome, the fabric is gradually laid down with a rearrangement of the cords thereof taking place, so that the radial tension due to the compression of the tire is provided for and a fabric originally flat is laid into a cylindrical shape in the form of a tire carcass, with an absence of wrinkle on the inner side. It would seem that a machine which is the first with capacity to take flat and unshaped fabric and transform its cord structure in such a way as to form from it an endless tube, with the demands of tension brought about by use met in all particulars, is a decided step in advance. This is what the Seiberling and Stevens invention did, for the first time, so far as this record informs us, and, judging from the fact that both parties aim to produce the same result, it must have been essential that the invention should so stretch the fabric that the otherwise square spaces formed by the intersection of its cords should become lozenge-shaped, circumferentially, on the tread, and, on the sides, radially with increasing or decreasing greater chord according to location.

Without going into the extensive detail necessary to exhibit our difficulties, it is enough to say that, having regard to its specifications and the results aimed at, we are unable to read any one of the claims in the Seiberling and Stevens grant on the structure shown by any one of the alleged anticipating patents referred to, and, of course, their claims are not remotely comparable to those of this patent, and not anticipatory when we regard again what the Seiberling and Stevens invention set out to do, and did in fact do, although, perhaps, subject to improvement of detail.

In this connection we might say that we are unable to follow counsel for the defendant in finding anything in the Seiberling patent (No. 725,155) inconsistent with the foregoing conclusions.

[2] As indicated above, we are forced to the conclusion that the Seiberling and Stevens grant very greatly narrowed the field for State. We are not, however, able to find anything in either Seiberling and Stevens, or in Vincent's patent which substantially impairs the pre-

sumption, to be indulged by this court, that the Patent Office was provident in its grant to State or in the allowance of any claim to State, or that State's patent, when regarded as for an improvement in the art of forming a tire carcass out of flat fabric by mechanical means, is anticipated. Nor do we feel called upon, for the present purposes, to take up each of the State claims sued upon to sustain this memorandum by an analysis and criticism of them respectively. It is sufficient to hold that we regard this patent as valid, and that we do not discredit any one of the claims sued upon. Some of them may include devices which were old, as the take-up roll, or the stretching-roll, but these old devices are used in new combinations, as co-acting elements, bringing about results not before flowing from any combination.

If State occupied the primacy of Seiberling and Stevens, it might be said of his invention, as it may be of their's, that, even if it were a combination of old and known devices, yet accomplishing successfully a new result, or an old result more efficiently and to a greater commercial advantage, it is patentable. Webster Loom Company v. Higgins, 105 U. S. 590–591, 26 L. Ed. 1177.

It is not shown that either the Seiberling and Stevens combination, even if of old and known devices, or State's, adding to the elements of the former combination other old devices, was obvious to attain the advantages sought and gained. The desirability to do what these inventions accomplish must have been very apparent—how to do it plainly did not readily occur to mechanics skilled in the art. In our judgment, therefore, and on the authority just cited, it makes no difference whether or not *all* the operations performed by the devices in either combination were customary to and known to hand work.

State's invention is, of course, an advance on that of Seiberling and Stevens, the special features being the mechanism for spinning the fabric and in the take-up roll. Comparing defendant's machine with State's, we find that the two have all essential features in common so far as invention is concerned. Some of the features of the two they hold in common with Seiberling and Stevens. That is, regarding Seiberling and Stevens' invention of such character that its claims are entitled to a liberal interpretation, its first claim may be read on either State or Stevens. Each has combination "of a tension device to simultaneously smooth and flatten strips of fabric, a revoluble core to receive said strips from said device, means to form said strips approximately longitudinally about said core," whatever may be said of the balance of the claim, "means to regulate the tension on said feeding device." We are not unmindful of the contention of defendant that it employs no "means to form said strips approximately longitudinally about said core," but that is precisely what the combination of its so-called retarding-roll and its spinning-rolls accomplishes. We have been unable to comprehend the distinction sought to be made between the effect of defendant's so-called retarding-roll which has a concave surface fitting upon the convexity of the core and the tread-forming roll employed by Seiberling and Stevens on top of the core and by State near that part of the core's circumference opposite to the point where the fabric engages the core. It looks to us as though the so-called retarding-roll performs precisely the same function of tread-forming, and passing over the same amount of fabric in the operation, which is performed by the tread-forming rolls of either of the other two inventions.

As we read defendant's brief, we are struck with the fact that, going to the first claim of Seiberling and Stevens, it analyzes it to make but one element of the tension device and the means to regulate the tension. As we read this claim, there are two elements, one of a tension device, and one by which the tension which results from the device is regulated, one of which clearly is employed by Stevens as well as by State. If Seiberling and Stevens have one element (the regulation device) which is unnecessary in practice, a combination omitting it but having all the other elements of this first claim, cannot be said to be patentable against that claim.

But State, and subsequently Stevens, offered mechanism in advance of the primary invention both to spin the fabric upon the core and to take up the strip of cloth interposed between the layers of fabric on the stock-reel to keep them from sticking together. Defendant made much of the assumption that State's invention was limited to spinning-rolls set at a receding angle to the core, and insisted its mechanism offered a distinct and patentable improvement in that its spinning-rolls "tilted" with reference to the core, but State does not limit his claims to a roll set at a receding angle. In alternate claims the spinning-roll is described as an element of combination in these terms:

"Spinning-roll mounted on the support for passing radially along the sides" or "a spinning-roll mounted on the support at a receding angle to the plane of the core for passing radially," etc.

Whenever a claim in the State patent uses the spinning-roll in combination with the first description, it is broad enough we think to cover Stevens' structure for the same mechanism. If in practice it were found that a "tilting" adjustment of the spinning-roll to the core was of advantage, it strikes us that the thought would readily occur to one of ordinary mechanical skill and bent on working out a practical machine. So considering the attempts to discriminate between these two machines, because Stevens' roll "tilts," the applicability to the Stevens mechanism of those State claims which do not limit the roll to one which is not at a receding angle is apparent.

Take the fourth claim, for instance; every element of that combination is found directly or in mechanical equivalent in the Stevens machine. Take the twelfth claim, for another example; every element in combination described therein is found either actually or equivalently performing the same functions to the same end in Stevens' machine. Of this claim it may be said that it covers every essential element of the Stevens machine not found elsewhere described in State or taken from Seiberling and Stevens, except the brass horn over which Stevens first passes his fabric and which is admittedly devoid of a necessary function. The Stevens take-up roll is found in State's and the remaining essential elements are found in all three.

Our conclusion is that the Stevens machine used by defendant is substantially the State invention. If we could follow defendant in its claim that the State patent had been anticipated in any substantial degree to its avoidance as a valid grant by the Seiberling and Stevens grant, we should be compelled with equal force to hold that the Stevens mechanism was also wanting in patentability for the same reason. Considering the primacy of the Seiberling and Stevens invention, and the character of its claims, especially the first, the conclusion which would find either State's or Stevens' combinations without patentability, because anticipated, would make the use of either infringement. Decree will run for the plaintiff, finding both his patents valid and infringed by defendant.

SWIFT v. INLAND NAV. CO. et al.

(District Court, W. D. Washington, N. D. March 8, 1916.)

No. 82-E.

1. PATENTS ⟹290—INFRINGEMENT SUITS—JOINDER.
   Though complainant claimed that more than one had made and sold an invention covered by his patent, it is improper to join them without averments that they were jointly acting and co-operating in the manufacture or sale.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 470-472; Dec. Dig. ⟹290.]

2. EQUITY ⟹117—PLEADING—DEFECTS—WAIVER.
   Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that every defense in point of law or upon the face of the bill, whether for misjoinder or insufficiency of fact to constitute a valid cause of action, shall be by motion to dismiss or in the answer, and where the party desires to raise the issue it must be taken in limine by demurrer or motion to strike out, or it is waived, an objection to misjoinder cannot be taken as a matter of right save by motion or plea or answer, nor can it be insisted upon at trial, though it may be raised by the court on its own motion whenever it is deemed to be necessary or proper to assist in due administration of justice.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 285-292; Dec. Dig. ⟹117.]

In Equity. Suit by Edward A. Swift against the Inland Navigation Company, a corporation, and the Colman Dock Company, a corporation. On motion to dismiss as to Colman Dock Company, motion denied with leave to amend bill.

Tucker & Hyland, of Seattle, Wash., for complainant.

Bronson, Robinson & Jones, of Seattle, Wash., for defendant Colman Dock Co.

NETERER, District Judge. The bill of complaint states that the Inland Navigation Company is a Washington corporation, and that the Colman Dock Company is a Washington corporation, each having its principal place of business in Seattle, Wash.; that the plaintiff is the owner of certain letters patent, and then charges "that the said Inland Navigation Company, a corporation, and the Colman Dock

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Company, a corporation, defendants herein * * * did * * * wrongfully make, sell, use and cause to be made, sold and used, and is now selling, making and using, or causing to be made, used, or sold * * *" in violation of plaintiff's rights as set forth in said letters patent, a certain useful appliance covered by said letters patent, and asks that "each of said defendants, Inland Navigation Company, a corporation, and Colman Dock Company, a corporation * * * and each of them * * * appear * * * and * * * answer to the premises and to stand and abide such order and decree as shall be made against them." The Colman Dock Company has moved to dismiss the bill of complaint against it, "upon the ground that the facts therein stated are insufficient to constitute a valid cause of action in equity against this defendant."

[1] There is no question as to misjoinder of parties raised. The only question presented is whether the bill states a cause of action. So far as the defendants are severally and individually making or selling the invention claimed to be covered by plaintiff's patent, they would be improperly joined. Blake v. Greenwood Cemetery (C. C.) 16 Fed. 676; Colgate v. Western Electric Mfg. Co. (C. C.) 28 Fed. 147; Diamond Match Co. v. Ohio Match Co. (C. C.) 80 Fed. 117; Bradley v. Eccles (C. C.) 133 Fed. 308. The bill unquestionably states a cause of action against the Colman Dock Company. It also states a cause of action against the Inland Navigation Company. They are not, however, directly charged with jointly acting or co-operating with relation to the making and vending. Parramore v. Joseph (C. C.) 109 Fed. 332; Bradley v. Eccles (C. C.) 133 Fed. 309. There is no community of interest alleged and the singular verb is employed when reference is made to defendants, showing not joint conduct, but rather individual conduct.

[2] Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that every defense in point of law upon the face of the bill, whether for misjoinder or insufficiency of fact to constitute a valid cause of action in equity, shall be by motion to dismiss, or in the answer, and where the party desires to raise the issue "it must be taken in limine by demurrer or motion to strike out or it is waived." Simkins, Federal Suit in Equity (2d Ed.) 296. The objection to misjoinder cannot be taken as a matter of right, except by motion, or plea, or answer, nor can it be insisted upon at the trial, but may be taken by "the court sua sponte wherever it is deemed by the court to be necessary or proper to assist in the due administration of justice." Oliver v. Piatt, 3 How. 412, 11 L. Ed. 622; 15 Curtis, 497. To the same effect is Nelson v. Hill, 5 How. 133, 12 L. Ed. 81; 16 Curtis, 334. In Barney v. Latham, 103 U. S. 205, at page 215, 26 L. Ed. 514, the court said:

"In Oliver v. Piatt, 3 How. 333, 411 [11 L. Ed. 622], we said, 'It was well observed by Lord Cottenham, in Campbell v. Mackay, 1 Myl. & Cr. 603, and the same doctrine was affirmed in this court in Gaines and Wife v. Relf and Chew, 2 How. 619, 642 [11 L. Ed. 402], that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances, and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.' We further said that the objection of multifariousness cannot, 'as a matter of right, be taken by the parties, except by demurrer, or plea, or answer, and if not so taken, it is deemed to be waived'; that although the court may take the objection, it will not do so unless it deems such course necessary or proper to assist in the due administration of justice. Story, Eq. Pl., §§ 530, 540; Shields v. Thomas, 18 How. 253 [15 L. Ed. 368]; Fitch v. Creighton, 24 How. 159 [16 L. Ed. 596]. No objection was taken by the defendants in the court below to the complaint upon the ground of multifariousness or misjoinder, and the plaintiffs should not be heard to make it for the purpose, or with the effect, of defeating the right of removal."

"Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant, except by demurrer, plea, or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. Oliver v. Piatt, 3 How. 333, 412 [11 L. Ed. 622]; Nelson v. Hill, 5 How. 127, 132 [12 L. Ed. 81]." Hefner v. Northwestern Life Ins. Co., 123 U. S. 737, at page 751, 8 Sup. Ct. 337, 31 L. Ed. 309.

"The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his codefendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to litigate it in the same action. Oliver v. Piatt, 3 How. 333 [11 L. Ed. 622]; Walker v. Powers, 104 U. S. 245 [26 L. Ed. 729]." United States v. Bell Telephone Co., 128 U. S. 315, 352, 9 Sup. Ct. 90, 32 L. Ed. 450.

The motion must be denied, but I think the bill should be amended, and an order to that effect may be presented.

PANTHER RUBBER MFG. CO. v. I. T. S. RUBBER CO.

(District Court N. D. Ohio, E. D. July 8, 1916.)

No. 353.

PATENTS ⚷236—INFRINGEMENT—WHAT CONSTITUTES.

Complainant's patent for rubber heel attachment for boot and shoe heels, consisting of a heel section or body molded to a concavo-convex form, and provided with a raised marginal portion and openings therethrough, *held* not infringed by rubber heels manufactured by defendant which did not resemble in form those described in the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 372, 373; Dec. Dig. ⚷236.]

In Equity. Suit by the Panther Rubber Manufacturing Company against the I. T. S. Rubber Company. Bill dismissed.

Hull, Smith, Brock & West, of Cleveland, Ohio, and Howson & Howson, of New York City, for plaintiff.

F. O. Richey, of Elyria, Ohio, for defendant.

CLARKE, District Judge. This cause comes on for a hearing upon the motion of the defendant to dismiss the petition upon the ground that claim No. 1 of the patent in suit is not infringed by the defendant's construction.

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The record presented to the court upon this motion consists of the bill of complaint, the answer of the plaintiff to the interrogatories of the defendant, various exhibits and various affidavits which have been filed.

In answer to the defendant's interrogatories the plaintiff says that it relies upon claim No. 1 of the patent in suit which reads:

"A rubber heel attachment for boot and shoe heels consisting of a heel section or body molded to a concavo-convex form and provided with a raised marginal portion and openings therethrough substantially as specified."

Wholly irrespective of whether or not the particular form of the piece of rubber which the patent in suit contemplates shall be attached to the leather heel of a shoe can be the subject of that inventive genius which it is the purpose of the patent laws to protect, by giving to the discoverer as against the public a monopoly of its manufacture, there is no doubt in the mind of this court that the construction of the defendant does not infringe the first claim of the patent in suit upon which the plaintiff's petition and its answers to the interrogatories show that it relies. It does not look like it, it does not have a raised marginal portion, and it does not have openings "therethrough" for the purpose of nailing it to the leather.

The claim of the plaintiff that the centrally located shallow channels or scorings in the shape of a shield in the rubber heel manufactured by the defendant constitutes a "raised marginal portion" as described in claim No. 1, and in the drawings of the patent in suit, seems to this court entirely fanciful.

Whatever may be thought of the validity of the patent in suit, it is a sufficient disposition of the motion we are considering for the court to conclude, as it does, that the construction of the defendant's patent does not infringe claim No. 1 of the patent in suit, and the bill will be dismissed, at the costs of the plaintiff.

This conclusion, of course, involves the overruling of the motion of the plaintiff for preliminary injunction.

In re KOMAR.

(District Court, N. D. New York. July 17, 1916.)

1. BANKRUPTCY ⚷393—DISCHARGE—HABEAS CORPUS—RIGHT TO.

Under General Order No. 30 (89 Fed. xii, 32 C. C. A. xxx), providing that if, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced on habeas corpus, for the purpose of testifying, and, if committed after the filing of his petition, on process founded on a claim provable in bankruptcy, the court may discharge him from such imprisonment, while, if arrested or imprisoned upon process in any civil action during the pendency of the proceedings in bankruptcy, the court may issue a writ of habeas corpus to bring the petitioner before it to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable, the petitioner shall be discharged, a bankrupt imprisoned on process issued before the filing of his petition in a

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civil action on a claim provable in bankruptcy, such as one for breach of marriage promise unaccompanied by seduction, is entitled to discharge on habeas corpus, the same as if he had been imprisoned after the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 619–622; Dec. Dig. ⚷393.]

2. BANKRUPTCY ⚷421(1)—DISCHARGE—CLAIMS DISCHARGEABLE.

A judgment for breach of contract to marry is dischargeable in bankruptcy when unaccompanied by seduction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 772; Dec. Dig. ⚷421(1).]

In Bankruptcy. In the matter of the bankruptcy of Nathan Komar. Petition by Nathan Komar for writ of habeas corpus. Writ issued, and prisoner discharged.

On a writ of habeas corpus sworn out by Nathan Komar he asks his discharge from arrest on civil process issued out of the Supreme Court of the state of New York, Onondaga County, N. Y., on a judgment in favor of one Libbie Kodish, who objects to such discharge or release.

Hancock, Spriggs & Hancock, of Syracuse, N. Y., for petitioner.

Saul Kauffman, of Syracuse, N. Y., opposed.

RAY, District Judge. May 13, 1916, Libbie Kodish, after issue joined and tried, obtained a judgment in the Supreme Court of the state of New York against the above-named Nathan Komar for damages in the sum of $2,603.55 for breach of promise of marriage. There was no allegation or proof of seduction under promise of marriage, but the plaintiff now alleges that there was a willful and malicious injury to her person, in that the defendant, now the bankrupt, held himself out as ready and willing to marry the plaintiff, and publicly hugged and kissed her, and showed other evidence of affection, when in point of fact he was engaged to another woman, whom he subsequently married, and did not intend to marry the plaintiff, and that such conduct resulted in great injury to the plaintiff's feelings and health, and that such conduct was willful and intentional. The allegations of the complaint constitute a cause of action for breach of promise to marry, and were supported by the proof, and resulted in the judgment referred to, and on which judgment execution against the person was issued to the sheriff of Onondaga county, N. Y., June 17, 1916, and by virtue thereof the defendant was arrested June 19, 1916, by said sheriff, and he gave bail to the jail limits of said county.

[1] On the 22d day of June, 1916, the said Nathan Komar was duly adjudged a bankrupt on a petition filed that day, and the bankruptcy proceedings are now pending. The bankrupt has not been discharged in such proceedings. July 7, 1916, on the petition of said Komar, a writ of habeas corpus was duly issued out of and under the seal of this court, and a release is sought under and by virtue of the provisions of General Order 30 (89 Fed. xii, 32 C. C. A. xxx). On the trial of the action above referred to the presiding judge charged the jury that no punitive or exemplary damages could be recovered. It is

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seen that said Komar was arrested on such body execution and gave bail to the jail limits prior to the commencement of such bankruptcy proceedings. General Order 30 provides:

"If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any manner relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."

It is expressly provided in such General Order that:

"If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested, *or* imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not he shall be remanded to the custody in which he may lawfully be."

This General Order first provides generally for producing a bankrupt in custody when he files his petition for the purpose of testifying in the bankruptcy proceedings no matter what the cause of arrest. It next provides specially that if committed after the filing of his petition upon process in a civil action founded on a claim provable in bankruptcy the court may in certain cases discharge him. It then provides that if the petitioner during the pendency of the proceedings in bankruptcy be arrested, or imprisoned upon process in any civil action, the court may, etc., and if it appears that such process has been issued for the collection of any claim provable in bankruptcy he shall be discharged if the claim is so provable.

I am unable to discover any reason why a bankrupt, arrested and imprisoned in a case where the claim is dischargeable in bankruptcy on civil process after he has filed his petition in bankruptcy should be discharged from arrest and a bankrupt arrested and imprisoned on precisely such a claim on civil process before the filing of his petition should not be. While there is some obscurity in the language used in General Order 30, and room for differences of opinion, my conclusion is that the Supreme Court, in adopting the General Order referred to, did not purpose to make any distinction between the two cases, and that the language used does not make the distinction claimed.

The question has been considered and decided both ways since the enactment of the present bankruptcy law and the adoption of the General Order referred to. In Re Claiborne (D. C.) 109 Fed. 74, 5 Am. Bankr. Rep. 812, Judge Brown held that a bankrupt, held on civil process when the claim was provable in bankruptcy and the arrest was made prior to the filing of the petition in bankruptcy, could not be discharged on habeas corpus; while in People ex rel. Taranto v. Erlanger, Sheriff (D. C.) 132 Fed. 883, 13 Am. Bankr. Rep. 197, Judge Holt held that in such a case the bankrupt could and should be so discharged, and in Turgeon v. Emery (D. C.) 182 Fed. 1016, Judge Hale held the same. In Matter of Adler (C. C. A. 2d circuit) 144 Fed. 659, 75 C. C. A. 461, 16 Am. Bankr. Rep. 414, Judge Coxe said:

"General order 12 (32 C. C. A. xvi, 89 Fed. vii) provides that from the date when he is required to appear before the referee the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy 'and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge,' and General Order 30 (32 C. C. A. xxx, 89 Fed. xii) requires the District Court to discharge on habeas corpus a bankrupt imprisoned upon process in any civil action for the collection of a claim provable in bankruptcy."

I do not find that either of the cases referred to was appealed. If a claim against a bankrupt is provable and dischargeable in bankruptcy and reduced to judgment prior to the filing of a petition in bankruptcy, and the bankrupt is imprisoned on an execution against his person issued and executed by taking the defendant in such execution into custody a day before the petition is filed, I see no reason why such bankrupt should not be discharged on habeas corpus, if another bankrupt, with a judgment against him for a precisely similar cause of action, obtained before the bankruptcy, but who was arrested on an execution against the person to collect such judgment the day after he filed his petition is to be and is entitled to be discharged on habeas corpus. If the debt or judgment is provable and dischargeable in bankruptcy, why should the bankrupt remain in custody in the one case and not in the other? The question of the discharge of the bankrupt from his provable debts is not determined in either case, and will not be until he has filed his application for a discharge and it has been passed upon by the court or judge. In either case, if the bankrupt fails to secure his discharge, the claim and judgment will remain in full force and effect, and all legal and equitable remedies will be open to the judgment creditor, notwithstanding the release on habeas corpus. I am inclined to agree with Judges Hale and Holt. Judge Brown followed prior holdings under the old Bankruptcy Act, as will be seen by a reference to the opinion of Judge Holt, and in the act referred to the language was different from what it is here.

[2] I cannot see that the judgment against Komar established a cause of action for willful and malicious injury to the person, but the contrary. A judgment for a breach of contract to marry is dischargeable in bankruptcy if not accompanied by seduction. In re Fife (D. C.) 109 Fed. 880, 6 Am. Bankr. Rep. 258. See, also, Collier on Bankruptcy (10th Ed.) 394, 395, and cases there cited. Having been bailed to the jail limits, the petitioner is under restraint and imprisoned within the meaning of the law. Being of this opinion on the two propositions involved, the petitioner, notwithstanding his gross ill treatment of the plaintiff in the action as established by the judgment is entitled to his discharge.

The writ of habeas corpus is sustained, and the petitioner discharged, and there will be an order accordingly.

UNIVERSAL SAV. CORP. v. MORRIS PLAN CO. OF NEW YORK et al.

(District Court, S. D. New York. January 28, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⚷67—UNFAIR TRADE—PLAN FOR CONDUCTING—BANKING BUSINESS—INFRINGEMENT.

A plan of industrial banking, put into effect by defendants, *held*, on the evidence, not an appropriation of one devised by complainant's assignor, but to be essentially different, and not an infringement of complainant's rights, conceding that property rights may exist in a mere idea or scheme for conducting business, without physical means or devices for carrying it out.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. ⚷67.]

2. ATTORNEY AND CLIENT ⚷129(1)—BREACH OF CONFIDENCE BY ATTORNEY—REMEDY.

The remedy of a client for the disclosure by his attorney of information imparted to him in confidence, to the client's injury, is by an action at law for damages.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 284–287; Dec. Dig. ⚷129(1).]

In Equity. Suit by the Universal Savings Corporation against the Morris Plan Company of New York and others. Decree for defendants.

S. M. Brandt, of Norfolk, Va., and Olcott, Gruber, Bonynge & McManus, of New York City, for complainant.

Satterlee, Canfield & Stone, of New York City (R. Randolph Hicks, of Norfolk, Va., and Harlan F. Stone and Huger W. Jervey, both of New York City, of counsel), for defendants.

HAZEL, District Judge. [1] This is a bill in equity for an accounting and for an injunction to prevent the defendant corporation, the Morris Plan Company of New York, and the individual defendants, from appropriating or using the plan of industrial banking, referred to as the Morris plan of industrial banking, of which the complainant, the Universal Savings Corporation, claims to be the owner. It is averred in the bill that in 1898 this idea or conception of a plan of industrial banking originated with David Stein, whose object or purpose was to establish a system of banking peculiarly adapted for use by workingmen, mechanics, or persons without financial means or credit, who, having no security, are ordinarily unable to obtain loans without the payment of exorbitant interest. It was believed that money might safely be loaned to a person on receipt of his promissory note, in which two other persons similarly situated financially had joined, by requiring the amount advanced to be repaid in 50 weekly installments, and by requiring the borrower to buy the investment stock of the banking association to the value of the amount borrowed, thus creating a fund which at the end of the installment period would equal the amount borrowed. Under said plan the borrower, on maturity of the note, was to have the option of using the installment accumulation either for paying the debt or for a share of the paid-up stock bearing interest at 5 per cent., which was usable as collateral for other loans or could be hypothecated by the lender to discharge the original debt. The bill also alleges that the stock of the proposed banking association was to be divided into A, B, and C classes. In complainant's brief it is stated that class A is the installment stock, divided into shares of $50 each, payable in weekly installments of $1; B, the capital stock, of the par value of $100; and C, the investment stock, also payable on the installment plan of $1 per week, said stock being $50 per share.

The defenses are: (1) That the complainant's system is not the system under which defendants operate; (2) that there was no property right in complainant's plan or system; (3) abandonment and dedication to the public; (4) that the conception or idea, if it constituted a property right, was vested in Stein's trustee in bankruptcy; (5) laches; and (6) res adjudicata.

In support of the allegations of the bill there was testimony showing that in the year 1901, at Newport News, Va., David Stein, complainant's assignor, assisted in the organization of the Merchants' & Mechanics' Savings Association, which adopted his alleged invention or plan of banking; that he was a director of the association for a short time; and that the witness Batchelor, an attorney, prepared the charter, by-laws, form of notes, and application blanks used by said association. Subsequently, in 1904, Stein interested the defendant, Arthur J. Morris, a practicing attorney, in a proposal to organize at Norfolk, Va., a banking association similar to that of the Merchants' & Mechanics' Savings Association, and submitted to Morris a letter (Plaintiff's Exhibit 1) accompanied by a table, purporting to explain in detail his method of operation, and requesting Morris to call a meeting of persons with a view to perfecting the organization of such a company. He testified that it was agreed between him and Morris that, if the meeting eventuated in an association, he should be manager, and Morris counsel, thereof, and that he enjoined Morris from using said plan, table, or system without his consent; but there was substantial contradiction of such testimony by Morris.

However, the proofs show that in October, 1904, a meeting was held in the Monticello Hotel at Norfolk, attended by various persons, to whom Stein was introduced by Morris as the originator of the plan of banking under which the Merchants' & Mechanics' Savings Association of Newport News was being operated. At this meeting reference was made to Plaintiff's Exhibit 1 to demonstrate the possible accumulations on an investment of a certain amount of money in accordance with the Stein plan, subject to losses and expenses of operation; but no definite action was taken, although it appears that a prospectus and subscription agreement, dated March 5, 1905 (Plaintiff's Exhibit 2), was later prepared by Morris, and signed by him and one Upton and a third person. Little was done to obtain further subscriptions, and the proposed banking organization did not materialize.

To show continued connection by Morris with the Stein plan to the year 1907, Stein gave testimony that efforts were made to apply the said plan to the Portsmouth Investment Company, a corporation about to be liquidated, and a new prospectus and subscription agreement (Plaintiff's Exhibit 3) were prepared; but such testimony is not fully credited. Morris, though admitting that he prepared the prospectus (Plaintiff's Exhibit 2), based upon the by-laws of the Merchants' & Mechanics' Savings Association, denies having prepared Plaintiff's Exhibit 3, and claims that it was not written in his office. His stenographer corroborates such testimony. Stein swore also that his relations with Morris continued practically down to the incorporation of the Fidelity Savings & Trust Company; that he frequently discussed his plan with Morris and counseled with him in relation thereto; and that he believed the latter was continuing his efforts towards promoting the desired organization. Morris, however, contradicted such testimony, claiming that his connection with the matter positively ceased in 1905, and that he advised Stein to counsel with the witness Upton, who perhaps could help him. On this point there was much dispute, but the burden rested upon complainant to prove by a fair preponderance of the evidence that such relations continued, and that Stein had reason to believe that Morris would continue to promote the original undertaking. In this it has failed. There is evidence that Stein subsequently conferred with Upton, to whom Morris delivered the prospectus prepared by him; but little was done to organize a company, and the work of promotion was apparently abandoned.

About five years later, in April, 1910, the Fidelity Savings & Trust Company was organized by Morris under chapter 49a of the Code of Virginia. Such company concededly embodies the Morris plan of industrial banking, notwithstanding its organization under the statute law of the state of Virginia, and I think was essentially different from Stein's plan of banking, or the plan under which the Merchants' & Mechanics' Savings Association was carrying on its business. It is true the form of notes, application blanks, Constitution, and by-laws were perhaps modeled on those of the Merchants' & Mechanics' Savings Association, and that there were other similarities; but such similar features, as hereinafter stated, were old expedients.

It appears that since its organization the Fidelity Savings & Trust Company has been successfully operated, and that numerous banks have been organized throughout the country, with large capital stocks, to engage in such plan of banking, all meeting with extraordinary success. Demands for banks of this kind have become so extensive as to necessitate the formation of the Fidelity Corporation of America and the Industrial Finance Corporation of New York as organizing agencies to supply such demand. It is pointed out that the popularity of such institutions is indicated by the fact that the Industrial Finance Corporation of New York began business in June, 1914, with a subscribed capital stock of $1,500,000 and an authorized capital of $7,000,000, and was instrumental in the organization of the Morris Plan Company of New York, defendant herein.

The principal question is whether the respective plans of banking under discussion are substantially similar. I think they are fundamentally different. There are, of course, similar elements embodied in each plan; but the feature of a fixed capital subscribed by independent investors, present in the Morris plan, but not in the Stein plan, is of vital importance, and makes the former plan appeal more readily to investors than the Stein plan, wherein the organizers subscribe for capital stock payable in installments; the fund so obtained being loaned out, and the borrower at the time of borrowing receiving investment stock convertible into capital stock. Under the Morris plan, on the contrary, the borrower purchased certificates of investment, or obligations of the company, which were not convertible into capital stock. The witness Williams, a banking expert, clearly differentiated the two plans, showing that one is operated upon a mutual basis, the members or borrowers subscribing to the capital stock and participating in the profits and losses, and the other upon a fixed capital, the stockholders being the managers and proprietors of the banking institution, and the borrowers and savers not participating in the profits and losses.

Complainant, however, contends that the letter and table delivered by Stein to Morris disclose a fixed capital stock in the Stein plan. True enough, the letter indicates a capital stock realized by the sale of class A stock, and states that the profits will inure to the benefit of B stock, and that "we will also sell more B stock, * * * from which these people will not get any profits before the annual meeting." The wording of the letter conveys the idea that the plan was mutual in its character, the members and borrowers contributing the capital stock, which was not a fixed capital stock, but one that fluctuated. That this is a proper interpretation is shown by article 2, sections 5 and 6, of the by-laws of the Merchants' & Mechanics' Savings Association, which substantially provide that holders of A stock can convert the same into B stock. The table shows a calculation of profits to be derived from loaning $20,000 in accordance with the Stein plan; the theory being that payments and interest would be immediately reloaned on similar terms. In my judgment there is no property right in such table, as it is merely a mathematical computation.

The feature of accepting as security for a loan to one of the makers a note made by him and two joint makers, as a guaranty of good character, without requiring as security either real estate or personal property, was not a new expedient; such being a known form of security in co-operative banking institutions abroad. In the pamphlet of Henry W. Wolff in evidence, published 1898, it appears that in so-called village banks or friendly societies, limiting the borrowing powers of members, notes of hand signed by two sureties were deemed sufficient security, and it is stated therein that payment of loans by weekly installments was a method generally adopted by loan societies and similar bodies, although perhaps not the best method for village banks. Members of such savings societies are required to take up a share in the society, for which they may pay in one sum or in weekly installments. There is also testimony to the effect that Stein remarked to various witnesses at the time of the organization of the Merchants' & Mechanics' Savings Association that he had become acquainted with the plan under which it was being organized in Russia. However this may be, it is difficult to conceive that a property right exists in an idea or scheme for conducting business without physical means or devices for carrying it out. Bristol v. E. L. A. Society, 52 Hun, 161, 5 N. Y. Supp. 131; Burnell v. Chown (C. C.) 69 Fed. 993; Bristol v. E. L. A. Society, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568.

[2] Complainant contends that Stein's plan was imparted to Morris as his attorney in confidence, and with a restriction against using the same without his consent; but, according to the evidence of the defendants, neither the Merchants' & Mechanics' Savings Association, Batchelor, Upton, nor the witness Koteen were committed to secrecy —the plan being imparted to them without restrictions against publicity. Under these circumstances I am disinclined to credit Stein's version that he took the precaution to protect his plan by agreement with Morris. It is true that an attorney should be held to the highest good faith in dealing with a client; but it is not at all certain in my mind that an agreement by a lawyer to associate in the promotion of a system of industrial banking creates the relation of attorney and client, or precludes him from afterwards engaging in the same business or from using an original idea or conception in combination with the plan imparted to him by his former associate. In any event, if the relationship of attorney and client actually existed between Stein and Morris, and if the former, in disregard of the confidence reposed in him, disclosed information imparted to him by the latter to his injury, the remedy is at law to recover for the damages sustained. Weeks on Attorneys (2d Ed.) § 10. Whether Morris should have been prompted by a devotion to the interests of his erstwhile client or associate to inform him that he had discovered an additional element which, when combined with the features of the Stein plan, would overcome objections thereto, and render it more inviting to investors, is a question I am not called upon to answer.

Inasmuch as I have reached the conclusion that the defendants are not appropriating the plan of Stein, or the result of labor or research on his part, but have merely adapted known features in connection with features originated by Morris to a system of industrial banking, it is unnecessary to pass upon the defenses of laches, res adjudicata, and the trustee's title to the Stein plan.

The bill is without equity, and is dismissed, with costs.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(District Court, N. D. Iowa, W. D. August 8, 1916.)

No. 169.

1. CARRIERS ⟹37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—VIOLATION.

Where, after cattle had been kept confined by the initial carrier for more than 28 hours, they were delivered to defendant, who kept the animals confined for less than 28 hours before it delivered them to a third carrier, which unloaded them for food, water, and rest, defendant cannot

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

be held liable for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1913, §§ 8651-8654]), for its acceptance of the animals from the original carrier did not carry with it a liability for the penalty, the offense of the original carrier having been already completed, as the owner had not consented to the confinement of the stock for more than 28 hours.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⚿37.]

2. PLEADING ⚿8(1)—PETITION—SUFFICIENCY.

Conclusions of law in the petition at variance with the averments of fact cannot be relied on to state a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12, 25, 28; Dec. Dig. ⚿8(1).]

At Law. Action by the United States of America against the Chicago, Milwaukee & St. Paul Railway Company. On demurrer to petition. Demurrer sustained.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Hughes, Sutherland & Taylor, of Cedar Rapids, Iowa, for defendant.

REED, District Judge. The United States brings this suit to recover from the defendant railway company $500 the penalty provided for an alleged violation of the 28-hour law.

[1] The petition alleges that the defendant railway company is a common carrier by railroad, and is a connecting carrier with the Chicago, Rock Island & Pacific Railway Company, which is also a common carrier by railroad in the United States.

It further alleges that on March 21, 1916, at about 8 o'clock a. m. of that day, one F. N. Jones delivered to the Rock Island Company at Athol, in the state of Kansas, an immigrant car loaded with household goods and five horses and five head of cattle, to be shipped and delivered to himself at Miles City, Mont.; that said car was carried by the Rock Island Company to the city of Council Bluffs, Iowa, at which point it delivered the car to the defendant herein at the hour of 7:40 p. m. on March 22, 1916; that the defendant company carried the car with the horses and cattle loaded therein over its line to Sioux City, Iowa, and there delivered the car with its contents to the Sioux City Terminal Company, an independent carrier, on March 23, 1916, at 6:10 p. m. of that day; and the terminal company carried and delivered the car to the Sioux City Stockyards Company, to unload said horses and cattle for food, water, and rest at 6:25 p. m., March 23d.

The petition further alleges that the time consumed by the Rock Island Company in conjunction with the defendant in carrying the car from Athol, in the state of Kansas, to the city of Sioux City, Iowa, where it was delivered by the defendant to the Sioux City Terminal Company, was 58 hours; that there was no written agreement of the owner or person in charge of said shipment, that the live stock might be confined for a period of 36 hours; and that the defendant, in conjunction with the Rock Island Company, knowingly and willfully confined said stock for a longer period than 28 consecutive hours.

The defendant demurs to the petition upon the ground that it appears upon the face thereof that the defendant company did not detain the stock in its custody in excess of the 28-hour period.

It appears from the allegations of the petition as above stated that from the time the defendant company received the live stock at Council Bluffs, at 7:40 p. m., March 22, 1916, and carried and delivered the same to the terminal company at Sioux City, Iowa, at 6:10 p. m., March 23d, was 22 hours and 30 minutes; also that the car was in the custody of the Rock Island Road from 8 o'clock a. m., March 21st, until it delivered the same to the defendant company at Council Bluffs at 7:40 p. m., March 22, 1916, was 35 hours and 40 minutes. It thus appears that the Rock Island Company confined the stock beyond the 28-hour period, and fully incurred the penalty for violation of the 28-hour law; and to warrant recovery against defendant it must be charged, either with a part of the time the stock was in the custody of the Rock Island Road, or with a part of the time the Sioux City Terminal Company detained it after the defendant delivered the car to that company. I am unable to believe that when the Rock Island Company delivered the car to the defendant company at Council Bluffs, it transferred to the defendant company, with the delivery of the stock, its liability for the penalty it had incurred; nor that the time the car remained with the terminal company before it delivered it to the stockyards company, can be charged to the defendant; and, inasmuch as the defendant company did not have the car in its custody in excess of the 28-hour period, it is not liable for a violation of the act in carrying this shipment. United States v. Sioux City Stockyards Co. (C. C.) 162 Fed. 556; St. Joseph Stockyards Co. v. United States, 187 Fed. 104, 110 C. C. A. 432, and the cases there cited.

[2] It is true that the petition alleged that the defendant, in conjunction with the Rock Island Company, did "knowingly and willfully confine said horses and cattle, and each of them, upon its said line and road without unloading said horses and cattle for rest, water, and feeding for a period longer than 28 consecutive hours," but this is a conclusion only which the facts alleged do not support, while the facts alleged do show that the Rock Island Company kept the stock in its custody for 35 hours and 30 minutes of the 58 hours and 15 minutes from the time the car left Athol, Kan., to the time of its delivery to the Sioux City Stockyards Company, at 6:25 p. m., on March 23, 1916.

It follows that the demurrer to the petition must be sustained, and it is accordingly so ordered.

THE APPAM.

(District Court, E. D. Virginia. July 29, 1916.)

1. WAR ⟹16—PRIZE—RIGHT OF ASYLUM IN NEUTRAL PORT—TREATY—NEUTRALITY LAWS.

Article 19 of the treaty of July 11, 1799, between Prussia and the United States (8 Stat. 172) renewed in its essentials by article 12 of the treaty of 1828 (8 Stat. 384), which provides that "the vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, * * * nor shall such prizes be arrested, searched, or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions," applies only to prizes brought into the ports of one country by vessels of war of the other for necessary temporary purposes, as in case of stress of weather, want of fuel or provisions or necessity of repairs, and contemplates their removal to a port of the captor country as soon as the cause of their entry has been removed. Neither under such treaty nor under the doctrines of international law as generally accepted by civilized nations at the present day may a prize be taken alone by a prize crew into a port of a neutral country for indefinite asylum, or there held pending a disposition of her case by a prize court of the captor country.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⟹16.]

2. WAR ⟹16—PRIZE—JURISDICTION OF COURTS OF NEUTRAL COUNTRY.

Courts of admiralty of the United States have jurisdiction to entertain actions for the restitution to their owners of prizes of war because of violation of the neutrality laws, and such jurisdiction is not limited to cases of capture within the territorial limits of this country, or where the capturing vessel was illegally fitted out in this country, but extends to a case where the right to restitution of the prize property is claimed by reason of its having been brought into our ports in violation of our neutrality.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⟹16.]

3. WAR ⟹16—PRIZE—JURISDICTION OF COURTS OF NEUTRAL COUNTRY.

Under modern authority title to a prize does not become vested in the captor by the mere fact of capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where the prize is not taken into the captor country and an uncondemned prize, taken into a port of a neutral country for asylum in violation of its neutrality, is subject to proceedings by its owner for restitution in the admiralty courts of that country irrespective of the action of the prize courts of the captor country.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⟹16.]

In Admiralty. Suits by British and African Steam Navigation Company, Limited, against the steamship Appam, and by Henry G. Harrison, master, against the cargo of the steamship Appam to recover possession of vessel and cargo. Decree for libelants.

These are suits in admiralty, brought respectively by the owner and master, to recover possession of the British steamship Appam, now lying at Newport News, Va., and her cargo.

On the 15th of January, 1916, about 3 o'clock in the afternoon, during the existence of a state of war between the Empires of Great Britain and Ger-

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

many, the steamship Appam was captured on the high seas by the German cruiser Moewe, in latitude 33.19 N., longitude 14.24 W.

The Appam, flying the British flag, and registered as an English vessel, is a modern passenger and cargo steamship, 440 feet long, 58 feet broad, 35 feet deep, and 7,800 tons gross burden, built in Belfast, Ireland, in February, 1913, since which time she has been engaged in commerce, with the exception of a short period about a year prior to her capture, as hereinafter shown, when she was used as a transport for troops. She had made 12 voyages to, and was on the return trip of her thirteenth voyage from, the West Coast of Africa to Liverpool, carrying a general cargo of coca beans, palm oil, kernels, tin, maize, 16 boxes of specie, and other articles. At the West African port, she took on 170 passengers, of whom 22 were Germans, 19 men and 3 women, eight of them being military prisoners of the English government. She had a crew of about 160 all told, and carried a three pounder gun on her stern.

The Moewe, flying the German ensign, approached the Appam on her starboard side, and when about 100 yards away, fired a gun across the bow of the latter as a signal to stop, which she did, and she was boarded, without resistance, by an armed crew from the Moewe, who brought with them several buckets with peculiar looking things in them, some round. Two bombs were slung, one over the bow, and one over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry, but he had to take his ship, and asked him how many passengers he had, and what cargo; whether he had any specie, and how much coal. When the shot was fired by the Moewe, the captain of the Appam instructed his wireless operator not to touch the wireless instrument, and his officers "on no account to let any one touch that gun we have on board." The officers and crew of the Appam, with the exception of the engine room force, 35 in number, and the second officer, were then ordered on board the Moewe, where the captain was told by the officer commanding that vessel: "You are a very lucky man; I would have fired at you if you had attempted to escape; I would have sunk you." The captain, officers, and crew of the Appam were then sent below, between-decks, down in the hold, where they were kept until the evening of the 17th of January, when they and also about 150 persons, officers, and crews of five or six vessels previously sunk by the Moewe, were ordered back to the Appam, and kept on board as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam that he was now a member of the German Navy; to which the chief replied that he did not think he was; and the senior officer said "This is no laughing matter, and if you do not obey my orders, I will blow your brains out, but if you obey me, not a hair of your head will be touched." He also told them to tell his staff the same thing, and if they did not obey his orders, to bring them to him, and they would be shot. He thereupon inquired as to the quantity of coal on hand, the various revolutions of the engines, also the coal consumption for different speeds, and directed that steam be kept up handy, and about 6 o'clock in the evening, the engineer was directed to set the engines at the revolutions required, and they got under way. The German officer told the chief engineer to report to him at 8 o'clock the next morning, the tonnage of coal and stores that he had, which he did. On reporting on the second morning, Mr. Berg was, for the first time, seen by the engineer, and he was told that he (Berg) was now in charge of the ship, and asked him for the same information as to fuel consumption and revolutions which he had given to the former officer, and also said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did do so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor was stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who relieved each other, and were constantly in the engine room, but did not interfere with the working of the engines. Lieut. Berg gave directions as to working the engines, and was the only officer on board who wore uniform. On the night of the capture, January 15th, the specie in the specie room was taken by the boarding party and lowered into a boat, and then taken on board the raider. After Lieut. Berg was put in charge of the

Appam, and the officers and men were ordered back on board of her, bombs were slung over her bow and stern, one large bomb, said to contain about 200 pound of explosives, was placed on the bridge, and several smaller ones in the chart room. When the captain of the Appam came on board from the Moewe, Lieut. Berg pointed to a large object standing on the deck, and said to him: "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said: "There are other bombs about the ship; I do not want to use it, but I shall be compelled to if there is any trouble." During the passage, the captain of the Appam asked Lieut. Berg if they met an English cruiser what would be done, and Lieut. Berg replied that if possible he would give them 10 minutes to get into the boats, but if the cruiser attempted a capture, she would be blown up. The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed, and Lieutenant Berg asked the crew of the Appam to drop the anchor, as he had not men to do it, on reaching Hampton Roads.

During the trip westward, the officers and crew of the Appam were not allowed to see the ship's compass to ascertain her course; and all lights were obscured during the voyage; no one was allowed to smoke or strike matches on deck, and the power of the navigation lights was lessened also. The German prisoners, with the exception of two who went on board the Moewe, were armed, and placed over the passengers and crew of the Appam as a guard all the way across. They wore armulets, consisting of a white band around the arm, and had rifles and revolvers, and received their orders from Lieut. Berg.

For two days following the capture, the Appam remained in the vicinity of the Moewe, until she was started westward. Her course for the first two or three days was southwesterly varying, and afterwards westerly, and so continued until her arrival at the Virginia Capes on the 31st of January. The entire engine room staff of the Appam was on duty operating the vessel across to the United States; the deck crew of the Appam kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German civilian prisoners. The night before the Appam arrived at the Capes, all of her crew were ordered below, and not allowed on deck after 9 o'clock.

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port, and from the nearest available port, namely Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles, and from Hampton Roads, 3,051 miles.

The evidence shows that the Appam was in first-class order, quite seaworthy, and with plenty of provisions both when captured and at the time of her arrival in Hampton Roads.

There is no conflict in the testimony as to the facts stated, the same having been testified to by the master, first officer and chief engineer of the Appam. No witnesses were called in reply by the respondents, though Lieut. Berg was present in court during the entire trial, and the German crew remaining with him on the ship were within easy call of the court.

Upon her arrival at Hampton Roads, the collector of the port was duly advised of the presence of the ship by Lieut. Berg, and application was at once made to the secretary of state for the vessel's internment, and also for the internment of the crew of the Appam, because of alleged resistance to capture. The right of internment of the Appam was denied, and her crew was released with their personal effects.

Subsequent to the filing of the libels, the perishable portion of the cargo of the Appam was ordered sold by the court, bringing some $634,000, which fund is now in the registry of the court awaiting the court's determination of this matter.

Frederick R. Coudert, James K. Symmers, Howard Thayer Kingsbury, and Ralph James M. Bullowa, all of New York City, and Hughes & Vandeventer, of Norfolk, Va., for libelants.

John W. Clifton, of Washington, D. C., Norvin R. Lindheim, of New York City, Walter S. Penfield, of Washington, D. C., and Hughes, Little & Seawell, of Norfolk, Va., for respondents.

WADDILL, District Judge (after stating the facts as above). From this brief summary of the facts, it will be seen that the question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.

The libelants earnestly urge that this cannot be done, and that the coming in, as well as the insistence upon the right of asylum under the circumstances of this case, constitutes a violation of the neutrality of the United States, entitling the owners to restitution of their property; whereas, the respondents maintain the right to bring in their prize, as well as the right of asylum for the same, during pleasure, pending the continuance of the war, and insist that such right exists as well under general international law as under treaty existing between this country and Prussia, now a part of the German Empire; that the prize is the property of the German government by reason of its capture from a citizen of a belligerent country on the high seas, by one of its duly commissioned war vessels; that the title or right of possession thereto cannot be inquired into by this government, or the respondents impleaded in the courts of the United States: that the court of the captor country alone can determine the validity of the seizure and title to said prize; and that this government, under the existing treaty cannot deny to the capturing country the right of asylum for said prize.

The court has been most fortunate in having the benefit of the arguments of able and accomplished counsel presenting the respective contentions; and almost every conceivable question and kindred subject, bearing incidentally on the issues involved, have received the careful consideration of counsel, and the case has been fully, ably, and completely presented and argued, which greatly lightens the burden of the court in reaching its conclusion, as well on the merits of the controversy, as in determining the crucial points involved, and eliminating those unnecessary to be passed upon.

The court will not attempt any general discussion or review of the authorities upon many of the views presented, as to do so would serve no good purpose, and unduly lengthen this opinion, but will confine itself to the consideration of the several material questions arising in the case, under its peculiar facts and circumstances. This, it will be borne in mind, is not a case of a war, public, or merchant vessel seeking internment in the waters of the United States, nor of any such vessel coming in for temporary sojourn; nor a war vessel bringing in its prize captured at sea; nor of such war vessel sending its prize under the convoy of a war vessel; nor of a captor with its prize, forced in by reason of stress of weather, want of fuel or provisions, or for necessary repairs; but that of a vessel captured at sea, placed in charge of a prize master and 22 German sailors, who had been British prisoners on the Appam, and who, together with the Appam's crew, working under duress and threat of the loss of their lives, navigated the ship across the ocean, some 1,500 miles further from the scene of the capture than to the nearest German port, into Hampton Roads, an inland water of the United States, within the jurisdiction of this court, for the purpose of indefinite asylum; the wording of the commission of the prize master being to "take her to the nearest American port and there to lay her up."

Treating this case in its true light, these considerations arise, and become material, namely: (1) What are the rights existing between this country and Germany, respecting the right of entry of prizes of war captured at sea, and of asylum, in the waters of the United States, whether arising under treaty or international law; (2) has this court jurisdiction to entertain these suits for restitution of the property in question to its owners; and (3) what is the character of the property seized, whether public or private, and can the court, as against the German government, who claims the right to adjudicate its title by its own prize court, determine the rights thereof, and afford relief as between the litigants.

[1] *First.* The respondents vigorously maintained from the coming in of the prize, and the inception of this litigation, the right to bring the Appam and her cargo in for the purpose of asylum, as well under treaty with this country, as under international law, and rely especially on the treaty between the United States and Prussia of 1799, as renewed and continued in 1828, in support thereof.

Promptly after the institution of these proceedings, the German government, acting through its Ambassador at Washington, filed protests with the Secretary of State of the United States, against the prosecution of the same, and the seizure of the ship and cargo, and requested that the United States, through their proper legal department, intervene, and cause the dismissal of the proceedings. Whereupon the Attorney General, acting through the United States attorney for this district, appeared as amicus curiæ, and brought to the attention of the court the aforesaid position of the German government; and the same defense was, in more elaborate form, interposed by the German government, in the proceedings in this cause. The German Ambassador, Count J. H. von Bernstorff, stated his government's position in his communication to the Secretary of State, as shown by the following extracts therefrom:

"As the Appam was captured at sea by a German man of war and brought to the Virginian port as a prize ship according to the treaty existing between our countries, you may well appreciate my surprise at the action which has been taken.

"Article 19 of the treaty of 1799 between Prussia and the United States, renewed in part by article 12 of the treaty of 1828, provides that 'the vessels and effects taken from' the enemies of the contracting parties may be carried freely wheresoever they please and that such prizes shall not be 'put under legal process, when they come to and enter the ports of the other party,' etc.

"In view of the terms of the treaty, I am at a loss to understand why such action has been taken by a court of your country. * * *

"Besides the Appam flies the naval flag of and belongs to the German government and therefore the possession of the captors in a neutral port is the possession of their sovereign. The sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel, and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize, and cannot wrest from the possession of the captor a prize of war brought into its port."

He insisted also that article 21 of the Hague Conventions concerning the rights and duties of neutral powers in naval war had no application, because not assented to by Great Britain. In a later communication, he further contended that his government was entitled to the rights claimed under general principles of international law, as well as under the specific terms of the treaty aforesaid.

The Secretary of State, Hon. Robert Lansing, although he complied with the German Ambassador's request to make known his country's contention to the court, made specific reply to his communications, setting forth his interpretation of the treaty relied on, as well as his understanding of the international law involved, and the position of the government of the United States regarding both matters, and of the right of the Appam and her cargo to seek asylum in the waters of the United States. The following extracts from the letters of the secretary of state to the German Ambassador, dated respectively March 2 and April 7, 1916, show fully and clearly his conclusions and rulings in the premises (from letter of March 2, 1916, referred to):

"Article 19 of the treaty of 1799, to which Your Excellency refers, reads as follows:

"The vessels of war, public and private, of both parties, shall carry (conduire) freely, wheresoever they please, the vessels and effects taken (pris) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (prises) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (conduites) out again at any time by their captors (le vaisseau preneur) to the places expressed in their commissions, which the commanding officer of such vessel (le dit vaisseau) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (vaisseau) that shall have made a prize (prise) upon British subjects shall have a right to shelter in ports of the United States, but if (il est) forced therein by tempests, or any other danger or accident of the sea, they (il eera) shall be obliged to depart as soon as possible."

"(The last provision of the above treaty, excepting Great Britain from its operation, was abrogated by the treaty of 1828.)

"This translation is taken from the published treaties of the United States, and while not conforming strictly to the original French text (a copy of which is inclosed), is sufficiently accurate for the purposes of this note. At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men of war, it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of article 19, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The Appam, however, as Your Excellency is aware was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privilege of carrying out their prizes again 'to the places expressed in their commissions.' The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the Appam, the commission of Lieutenant Berg, a copy of which was given to the Collector of Customs at Norfolk, not only is a commission of a prize master, but directs him to bring the Appam to the nearest American port, and 'there to lay her up.' In the opinion of the government of the United States, therefore, the case of the Appam does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and by the British treaties referred to in article 19, and by other contemporaneous treaties, the government of the United States considers itself free from any obligation to accord to the Appam the privileges stipulated in article 19 of the treaty of 1799.

"Under this construction of the treaty, the Appam can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions, or necessity of repairs, but to leave as soon as the cause of their entry has been removed."

(From letter of April 7, 1916, referred to.)

"The government of the United States agrees with the German government's statement that the treaty speaks of a mode of warfare in use at the time the treaty was negotiated. It is precisely for this reason that the government of the United States does not believe that the treaty was intended to apply to circumstances of modern warfare which are essentially different from those in vogue at the close of the eighteenth century. The government of the United States does not understand upon what ground the imperial government contends that a treaty granting concessions under specifically mentioned circumstances, can be construed to apply to a situation involving other and different circumstances. To grant limited asylum in a neutral port to a prize accompanied by the capturing vessel is not the granting of a right of 'laying up' in a neutral port a prize which arrives in the control of a prize master and crew.

"Your Excellency's government further contends that article 19, besides being applicable to modern conditions, is not contrary to the general rules of international law, and therefore not subject to a restricting interpretation, and in support of this cites as declaratory of the general rules of international law article 23 of Hague Convention 13. As indicated by the imperial government, the United States did not in the case of this convention, and never has, assented to the sequestration of prizes in its ports. The ground of this position of the United States is that it does not, in the opinion of this government, comport with the obligations of a neutral power to allow its ports to be used either as a place of indefinite refuge for belligerent prizes, or as a place for their sequestration during the proceedings of prize courts. The contention of the government of the United States in its note of March 2d in this case, is consistent with this long-established and well-known policy of the American government in the light of which the treaty of 1799 was negociated and has been enforced and applied. Provided the vessel enters an American port accompanied by a German naval vessel, article 19 contemplates in the view of this government merely temporary sojourn of the prize in an American port and not its sequestration there pending the decision of a prize court.

"Holding the view that article 19 is not applicable to the case of the Appam, this government does not consider it necessary to discuss the contention of the imperial government that under article 19 American courts are without jurisdiction to interfere with the prize, and for the same reason it cannot accede to the request that the 'legal steps before an American court should be suspended.'"

The letter further stated that the question of the court's jurisdiction was one for judicial ascertainment, and not executive determination.

The correct determination of the questions presented by the notes of the diplomatic representatives of the two governments will, in large measure, dispose of the more important issues involved in this litigation, since it is apparent that if the view taken by the German Ambassador of the Prussian treaty be accepted, then the Appam had the right by express treaty to come in for the purpose of laying up, as her prize master's commission directed; and the German government would be entitled to the free use of the waters of the United States during the existence of the war, as a rendezvous, or indefinite place of abode for prizes of war.

The gravity of this situation is manifest, and if the contention is correct, its value to the German government, on the one hand, and the serious responsibilities and consequences to the United States on the other, cannot well be overestimated. The weight that should be given to the opinion and ruling of the secretary of state, an able and accomplished diplomat, in construing the Prussian treaty, need not be dwelt upon, since the court is in full accord with his interpretation, further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, rendered after its authority had been invoked by the German government, in this very matter.

The history of the adoption of this treaty with Prussia, the conditions that brought about the same, and the contemporaneous opinions of the eminent statesmen of that day, who participated in its procurement and acceptance by the two countries, has been gone into fully in the effort to show that it was meant to give asylum to prizes in neutral waters, and that its particular purpose was to afford the United States an asylum for their prizes in Prussian waters. Whatever may have been the view of those representing this country at that time, it seems clear to the court that no such enlarged and far-reaching view of the treaty as is now claimed for it, can, for a moment, be entertained at this day, in the light of present methods of warfare, and the laws, rules, and regulations affecting the neutrality of nations in existence now for nearly one hundred years. Anciently it was believed permissible for one nation to grant to another rights and privileges in its waters not granted to others. Such may be said to have been the character of our treaties of Amity and Commerce of 1778, with France; but the painful outcome of our experiences, growing out of those treaties, and the position taken by this government, ultimately, in connection with them, would seem to dispel the idea that this country, even in that early period, ever intended to afford a harbor of refuge for prizes of war of any other nation, and certainly such idea is now uniformly negatived by the customs of all nations. Article 17 of the Treaty of Amity and Commerce is substantially in the terms of the Prussian treaty now being considered; and under the interpretation placed upon it by the United States (see Mr. Jefferson's letter to Gallatin, June 28, 1801, Moore's Digest, § 1302, p. 931), the claim here made that a prize master could bring in his prize for indefinite asylum was not maintained.

A careful review of the provisions of the Prussian treaty, when read in the light of the rulings and interpretation placed upon other contemporaneous treaties, especially article 17 of the Treaty of Amity and Commerce with France in 1778, convinces the court that the secretary of state's ruling is correct, and that under the same, prizes cannot be brought into the waters of the United States for the purpose of laying up by a prize master, but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and then, not for an indefinite period, but for the temporary causes recognized by international law.

What are the rights of the Appam under general international law? Was she entitled to come into the waters of the United States, and, if so, has she the right of asylum therein? These questions must be answered in the light of that law. The generally accepted doctrine, now, is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is, consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

The provisions of articles 21 and 22 of the Hague Convention (13) of 1907 are declaratory of the existing law of nations, and the fact that article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasizes its policy respecting the subject. It is true Great Britain did not ratify the action of its commissioners, assenting to the provisions of articles 21 and 22 of the Hague Convention, though most of the other powers, some 43 in number, including Germany and the United States, did. Still, it nevertheless shows what the policy of the United States and Germany alike was, in regard to the use of their waters and harbors for belligerent prizes. Articles 21 and 22 are as follows:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

The American delegates reported regarding these articles:

"Articles 21 and 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectionable. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse, and should not be approved."

The Hague Convention (13) was signed at The Hague on the 13th of October, 1907, and was ratified by the Senate of the United States in executive session on the 17th of April, 1908. That body, however, excepted and excluded article 23 (36 Stat. L. pt. 2, p. 2438). The law, as shown in Dana's note (1866) to Wheaton's International Law (8th American Ed.) § 391, is as follows:

"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in cases of necessity; and they may remain in the ports only for a meeting of the exigency. The necessity must be one arising from perils of the seas, or need of repairs for seaworthiness, or provisions and supplies."

The British government, at the beginning of the Civil War in the United States, took this position, and so instructed the British admiralty. Subsequently, like position was taken by other prominent powers, and the same view has been taken generally from time to time by different nations down to our war with Spain in 1898, and to the present time. It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports, and put in a condition to be taken to the port of the captor for adjudication." 2 Op. Atty. Gen., 86.

Mr. Seward, Secretary of State, replying to the Peruvian Legation as to the position of the United States respecting the war between Spain and Peru, said:

"This government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessel of either party will be allowed to bring their prizes into the ports of the United States." Moore's Digest, § 1302, p. 738.

In the Flad Oyen Case (1 C. Rob. 135) Lord Stowell, considering the subject, said:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair advantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

"Wisely, therefore, did the American government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities would be to make their coasts a station of hostility."

Reference may also be had to Hall's International Law (5th Ed.) p. 618, and Laws of War, Risley, p. 176; Bluntschli on International Law, § 778, Int. Law, Note.

The right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for.

[2] *Second.* Considering the question of the jurisdiction of the court to entertain these suits, for restitution of the Appam and her cargo to the owners of the same, raised by the respondent, and earnestly insisted upon in argument, it may be said, without discussing the precedents of other countries favorable thereto, that the jurisdiction and authority of the courts of admiralty of the United States to entertain possessory actions for the restitution to their owners, of prizes of war seized for violation of the neutrality laws, is no longer open for serious consideration. The subject was long one of much con-

troversy, particularly whether restitution should be made by the executive or judicial branches of the government, and the authorities for a time sustained the view that the courts were without such power. Moxon v. The Fanny, 2 Pet. Adm. 309, Fed. Cas. No. 9,895; Findlay v. The William, 1 Pet. Adm. 12, Fed. Cas. No. 4,790; Stannick v. The Ship Friendship, Bee Adm. 40, Fed. Cas. No. 13,291; Moodie v. The Ship Amity, Bee Adm. 89, Fed. Cas. No. 9,741.

But this position is no longer maintainable, and has not been since the decision of the Supreme Court in the case of The Betsy, 3 Dall. 6, 1 L. Ed. 485. There the question of jurisdiction was directly raised, and the Supreme Court held that the district courts, being possessed of all the powers of courts of admiralty, instance as well as prize courts, were competent to decide whether restitution should be made, and the law has been thus settled for more than 100 years. The Santissima Trinidad, 1 Brock. 478, Fed. Cas. No. 2,568, affirmed in 7 Wheat. 283, 5 L. Ed. 454, a case from this court, was a decision of Chief Justice Marshall, sitting in the Circuit Court, in which he at length considered the question of whether restitution could be made, as well by the court, as by the executive branch of the government, and whether the same should be awarded at the instance of the private owners, and he sustained the jurisdiction of the court in both particulars, and ordered restitution of the prize seized for violation of the neutrality laws of the United States, to its owners. The Supreme Court, on appeal, affirmed the decision of the District Court, rendered by Judge Saint George Tucker, the able jurist and author, and that of Chief Justice Marshall, sitting in review on circuit, and said:

"1. That 'whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality.' "

It is earnestly insisted on behalf of the respondents that notwithstanding these and like decisions containing the same views, restitution will be decreed only in cases where the prize was captured within the territorial limits of the United States, or the capturing vessel was illegally fitted out in this country, and that the court is without jurisdiction, save in the two classes of cases named.

There is much force in this position, especially as the adjudicated cases in the United States Supreme Court are mainly confined to those arising from the violation of the neutrality of one or other of the two prescribed classes. But it does not follow that had there been neutrality violations in other respects, a like remedy would not have been accorded. The jurisdiction was assumed, and the remedy afforded, because of the violation of the neutrality of the United States; and, where the same arose either from an invasion of our territory by a belligerent, and the capture of an enemy vessel in our waters, or by the fitting out of a vessel within this country for the purpose of depredating upon the commerce of the enemy, undoubtedly relief could be afforded by the restitution of the property thus unlawfully and forcibly taken, to its lawful owners. It was, however, not because it occurred in either of the two ways indicated. Had a like result followed in other unlawful manner, whereby there was an infraction of the neutrality of the United States, exactly the same relief should and would have been given. The question, therefore, to be determined in the present case is, in the language of the Supreme Court in the Santissima Trinidad Case, 7 Wheat. 354, 355, 5 L. Ed. 454, whether a proper case has been made out against the prize property, upon examination and inquiry, justifying its restitution to those from whom it was taken, by reason of bringing the same into our ports in violation of our neutrality; if so, the relief asked for by the libelants should be granted, entirely regardless of whether a like case may have heretofore arisen, or whether any other court of the United States may have been called upon to meet a similar contingency. Let it once be conceded that the prize is within neutral territory, and it was there brought in violation of the laws of neutrality, whether arising from breach of treaty obligation, or by reason of international law, then, under the laws of the United States, the right of restitution arises, and its courts of admiralty, charged with the administration and enforcement of international law respecting maritime matters, should, in a proper case, afford relief, by restoring the prize property to its lawful owner.

In Paquete Habana, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (44 L. Ed. 320), Mr. Justice Gray, speaking for the Supreme Court, said:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, * * * not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." Hilton v. Guyot, 159 U. S. 113, 163, 164, 214, 215, 16 Sup. Ct. 139, 40 L. Ed. 95; The Estrella, 4 Wheat. 298, 4 L. Ed. 574; The Brigantine Vrow Christina Magdalena, Fed. Cas. No. 7,216; The Adventure, 8 Cranch, 221, 3 L. Ed. 542.

The last-named case is an illuminating one in the light of the contention made here. The Adventure was a British vessel which had been captured on the high seas by two French frigates, and after taking out parts of her cargo, she was given by the captors to the American crews (then neutral) of two vessels which the French frigates had just captured and burned. The Adventure was thereupon navigated by her donees to Norfolk, where she arrived on the 1st day of October, 1812, and was promptly libeled by the acting captain and crew as their property, acquired under the donation of the French captor. The United States appeared and interposed a claim for forfeiture under the "Nonimportation" act. The case finally reached the Supreme Court of the United States, where it was decided adversely alike to the claim of the government, and that of the libelants and determined in favor of the British owners, subject to the adjustment of complications which had arisen between that government and this country, growing out of hostilities which occurred after the bringing in of the prize property; and that the donees, the libelants, as citizens of a neutral country, were entitled only to a proper reward for safe-keeping the property, and bringing it into a neutral port, the court saying:

"Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize master navigating the prize in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage, and, on her arrival in a neutral territory, the donee sank into a mere bailee for the British claimant, with those rights over the thing in possession which the civil law gave for the care and labor bestowed upon it."

This decision is significant in its bearing upon this case. It was a capture on the high seas, and jurisdiction was entertained, and the property restored to its owner, although it did not come within the two exceptions contended for by the respondents. Moreover, it negatives the idea of a complete title in the captor, and in effect maintains that the prize master could not have brought the prize into neutral waters, without forfeiting the same to the owner; and that his right to bring the vessel infra presidia (a place of safety) into this country, unless excused on account of necessity, would have been an unneutral act, reviving the right of the owner to the vessel.

The Queen v. The Chesapeake, 1 Oldright's Nova Scotia Reports, 769, was the case of an American vessel sailing from New York, captured by certain persons bearing a commission from the Confederate States government, shipped thereon as passengers. After sailing from New York, they overpowered the captain and crew, and took the vessel into a Canadian port. Suit was instituted in the name of the crown for forfeiture of the vessel for violation of the British neutrality. Claim was made on behalf of the private owners, and restitution was ordered, on payment of costs and expenses. Moore's Digest, International Law, vol. 1, p. 366, vol. 7, p. 937. In the course of his opinion deciding the question, the judge of the vice admiralty court said:

"By the affidavits upon which I granted a warrant it is certain that the Chesapeake, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it ipso facto subjects that prize to forfeiture. For a neutral state to afford such protection would be an act justly offensive to the other belligerent state."

At the prior hearing of the case, the court also said:

"I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions and refreshments and acts of that nature which the law of nations universally tolerates, but that no proximate acts of war are, in any way whatever, to be allowed to originate on neutral grounds."

This power on the part of the courts of the United States may not be given specifically by any statute, as required for the exercise of criminal jurisdiction, but arises from the authority reposed in them under the Constitution as courts of admiralty and common law, charged with the duty of administering the law of nations.

[3] *Third.* Respondents further maintain that the Appam and her cargo cannot be proceeded against in these causes, because title to the

same vested in the German government by reason of capture at sea by a German war vessel from an enemy country; that the Appam is a lawful prize of war, entitled to remain in the waters of the United States, a neutral power, without interference on the part of that government; and that its title can only be inquired into and divested by the action of the prize court of their own country.

No claim that the Appam is a public war vessel of the German Empire can be maintained under the facts of this case. Indeed, in the pleadings, the contention is not made, and on the contrary she is claimed to be a prize of war, which places her in an entirely different category as respects title and ownership. Under modern authority, title does not become vested in the captor of the prize by mere capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where the prize is not taken into the captor's country. In the Nassau, 4 Wall. 640, 18 L. Ed. 413, the Supreme Court of the United States said:

"It is the practice with civilized nations, when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that judicial inquiry may be instituted to determine whether the capture was lawful, and, if so, to settle all intervening claims of property."

In the Manila Prize Cases, 188 U. S. 260, 23 Sup. Ct. 417, 47 L. Ed. 463, the Supreme Court said:

"Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation."

The Resolution, 2 Dall. 1, 5, 1 L. Ed. 263.

The reason of this rule is manifest, and arises from the fact that until lawful condemnation by a court of competent jurisdiction is had of the prize property, the title of the captor, as between himself and the owner, is incomplete and inchoate, and circumstances may readily arise, of which this case affords an example, in which the title of the captor might never become vested, by reason of his own act.

Nor is the contention tenable that the Appam and her cargo have the undisputed right to stay in the United States, and that that goverment cannot controvert her right, or this court entertain jurisdiction of these proceedings, and grant the proper relief to the libelants, irrespective of what the German prize court may do regarding the condemnation of the prize property. If the prize had been taken to a port of the captor country, or that of one of its allies, instead of to this, a neutral country, in violation of its laws, and of its international obligations to other countries, there would be great force in the position taken. Here, a very different situation arises, in which it is manifest that the claim that this court should wait, or be controlled by what the German prize court does, is without merit. This position as to the effect of the prize court proceedings of the captor country has been often taken, and nowhere more positively denied than by the Supreme Court of the United States; and the same may now be said to be generally settled adversely to the claim made.

In L'Invincible, 1 Wheat. 238, 4 L. Ed. 80, the court said:

"That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction is evident from this fact that there are acknowledged cases in which the courts of a neutral may interfere to divest possession; to wit, those in which her own right to stand neutral is invaded."

In The Divina Pastora, 4 Wheat. 52, 4 L. Ed. 512, the court said:

"But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

In the Santissima Trinidad Case, 7 Wheat. 354, 355 (5 L. Ed. 454), supra, the Supreme Court further said:

"And (2) that 'where the property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can, by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment.'"

Other cases sustaining these general views will be found in the same volume of Wheaton's Reports, The Santa Maria, 7 Wheat. 490, 5 L. Ed. 505; The Arrogante Barcelones, 7 Wheat. 496, 5 L. Ed. 507; The Monte Allegre, 7 Wheat. 520, 5 L. Ed. 513.

In the case of The Henrick and Maria, 4 C. Rob. 43, Lord Stowell said:

"Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The res ipsa, the corpus, is not within the possession of the court; and possession, in such cases, founds the jurisdiction."

Dr. Lushington, the great authority on maritime matters, said:

"I wish it, moreover, to be expressly understood that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established." The Polka, Spinks Ecclesiastical and Admiralty Reports, 447.

In Dana's Note to Wheaton's International Law, 1866, it is said:

"But apart from any such practice of neutrals, it seems clear that to allow prizes to fly to a neutral port and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports. It seems therefore to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or, if passed, will not be respected by other nations." Wheaton's Int. Law (8th Am. Ed.) § 391.

The further contention is made by the respondent that the violation of neutrality, to be cognizable, must be proved to have contributed to the capture, and that subsequent or otherwise unrelated violations are immaterial. This proposition the court cannot assent to; that is, that there may be no violations of neutrality after the prize is captured, entitling the belligerent owner to restitution at the hands of a neutral government, in whose country the property may be found. In this case, the fact should not be lost sight of that the violation of the neutrality of the United States is exceedingly closely related to the capture itself. This capture, it is true, was well away on the high seas, but the captors of their own volition, and for their own purposes, determined not to take, or attempt to take, the prize to one of their own ports, or that of their allies, where alone the validity of the capture could be determined, though in distance not more than half so far away as the United States, nor to hazard longer the chances of her recapture at sea, but required the ship's officers and crew, under duress, to bring the ship into the nearest port of the United States, there to be laid up, and she was so brought, and the effort to secure permission to lay up was unsuccessfully made. From the moment of the capture, to that of entering the Virginia Capes, the Appam and her cargo were subject to recapture by the ships of the owner's country or that of their allies, or to be retaken by the owner. Should other or greater rights be secured by taking refuge in the harbor of a neutral, which the Appam had no right to enter without flagrantly violating the laws of neutrality? Does not such violation, having for its object the getting away with the prize and the safe-keeping of the same, so relate back to the original seizure as to become a part thereof? Is not the capture, the flight to a supposed place of safety, and the successful entry therein, but one continuous occurrence, and should she, thus attempting to avail herself of the use of neutral waters for the purpose of escape with her prize, in contravention of the laws of neutrality, do so without at the same time incurring the consequences of the violation? The failure to take, or even attempt to take, the prize to a port of the captor's country, or that of an ally, where prize proceedings could regularly and lawfully have been inaugurated, should prevent the captor from denying to the owner a day to be heard in the courts of the neutral country, where, of choice, the prize had been brought and deposited, respecting his right to restitution of his property by reason of the violation of the neutrality of such neutral country. The validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the prize property to its owners (The Estrella, 4 Wheat. 308, 4 L. Ed. 574), and in a proper case to restore the same to them.

The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the imperial government of the German Empire; and it will be so ordered.

DERNBERGER v. BALTIMORE & O. R. CO.

(District Court, N. D. West Virginia. July 31, 1916.)

1. NEGLIGENCE ⚷136(7)—PROVINCE OF COURT AND JURY—DIRECTED VERDICT.
Where the evidence is such that a verdict based thereon would be set aside, it is proper for the trial court, particularly in negligence actions, to direct a verdict for defendant; the scintilla rule not prevailing.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 287, 288; Dec. Dig. ⚷136(7).]

2. RAILROADS ⚷301—CROSSINGS—CARE.
While a railroad company's right to use its tracks at highway crossings is superior to that of the public, it owes travelers the duty of exercising due care for their safety, while travelers have the reciprocal duty of exercising care for their own safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. ⚷301.]

3. RAILROADS ⚷335(3)—CROSSING ACCIDENTS—DEFENSES.
The failure of a railroad company to comply with statutes requiring the ringing of bells and blowing of whistles before reaching a highway crossing furnishes no basis for recovery by one injured at such crossing, where the injured person was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1087; Dec. Dig. ⚷335(3).]

4. RAILROADS ⚷307(7)—OPERATION—CARE.
That state statutes require a railroad company to take specified precautions as the blowing of whistles and ringing of bells before reaching a highway crossing does not excuse the company from exercising care commensurate with the danger at the crossing, which is to be measured by the amount of travel at such crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 980; Dec. Dig. ⚷307(7).]

5. RAILROADS ⚷335(1)—CROSSING—ACCIDENTS—CONTRIBUTORY NEGLIGENCE.
A traveler, injured in a crossing accident, cannot recover, where he failed to exercise due care for his own safety, regardless of the negligence of the railroad company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1084; Dec. Dig. ⚷335(1).]

6. COURTS ⚷96(1)—PRECEDENTS—DECISIONS.
A decision by the Circuit Court of Appeals sitting for a particular district is binding on the District Courts therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 334; Dec. Dig. ⚷96(1).]

7. RAILROADS ⚷327(8)—CROSSING ACCIDENTS—CARE—STOP, LOOK, AND LISTEN.
A railroad track is a warning of danger, and it is the duty of a traveler, approaching a crossing that is obstructed, to stop, look, and listen at a point close enough to the track to ascertain the approach of trains; therefore, where a traveler stopped over 150 feet away from the track, and then at a slow pace drove thereon, and was struck by a train and killed, no recovery can be had.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1051; Dec. Dig. ⚷327(8).]

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

At Law. Action by Martha Dernberger, administratrix, against the Baltimore & Ohio Railroad Company. A verdict was directed for defendant, and plaintiff moves for new trial. Motion denied.

R. E. Bills, C. M. Hanna, and Reese Blizzard, all of Parkersburg, W. Va., for plaintiff.

James W. Vandervort and B. M. Ambler, both of Parkersburg, W. Va., for defendant.

DAYTON, District Judge. Upon the trial of this case, I felt, under the law, in duty bound to sustain the defendant's motion and direct a verdict for it. Motion has been made to set aside this verdict and grant plaintiff a new trial, and it is this motion I am now to pass upon. As matter of introduction it seems proper to review, to a limited extent, the authorities enunciating the rule governing federal courts in determining when a verdict should be directed by the court and when the matter should be submitted to the jury. Such review is constantly necessary, because the great number of these negligence cases arising in our courts and constantly increasing—cases always appealing to a greater or lesser degree to our human sympathies—makes the temptation a constant one for judges to shirk the grave responsibility imposed upon them by the law in this particular, and allow the jury to do its will.

[1] In Commissioners, etc., v. Clark, 94 U. S. 278, at page 284, 24 L. Ed. 59, Mr. Justice Clifford says:

> "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In Meguire v. Corwine, 101 U. S. 108, at page 111, 25 L. Ed. 899, Mr. Justice Swayne says:

> "A judge has no right to submit a question where the state of the evidence forbids it."

And again, in Bowditch v. Boston, 101 U. S. 16, at page 18, 25 L. Ed. 980, he says:

> "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves * * * expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice. Merchants' Bank v. State Bank, 10 Wall. 604, 637 [19 L. Ed. 1008]; Improvement Company v. Munson, 14 Wall. 442 [20 L. Ed. 867]; Pleasants v. Fant, 22 Wall. 116 [22 L. Ed. 780]."

This proposition is affirmed in Anderson v. Beal, 113 U. S. 227, 241, 5 Sup. Ct. 433, 28 L. Ed. 966, and Arthur v. Cumming, 91 U. S. 362, 365, 23 L. Ed. 438; In Delaware, etc., R. R. Co. v. Converse, 139 U. S. at page 472, 11 Sup. Ct. at page 570, 35 L. Ed. 213, Mr. Justice Harlan says:

"But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Phœnix Ins. Co. v. Doster, 106 U. S. 30, 32 [1 Sup. Ct. 18, 27 L. Ed. 65]; Griggs v. Houston, 104 U. S. 553 [26 L. Ed. 840]; Randall v. Baltimore & Ohio Railroad, 109 U. S. 478, 482 [3 Sup. Ct. 322, 27 L. Ed. 1003]; Anderson Co. Commissioners v. Beal, 113 U. S. 227, 241 [5 Sup. Ct. 433, 28 L. Ed. 966]; Schofield v. C. & St. P. Ry. Co., 114 U. S. 615, 618 [5 Sup. Ct. 1125, 29 L. Ed. 224.] 'It would be an idle proceeding,' this court said in North Penn. Railroad v. Commercial Bank, 123 U. S. 727, 733 [8 Sup. Ct. 266, 31 L. Ed. 287], 'to submit the evidence to the jury when they could justly find only in one way.' "

In Patton v. Texas & Pacific Ry. Co., 179 U. S. at page 660, 21 Sup. Ct. at page 276, 45 L. Ed. 361, Mr. Justice Brewer quoting this last passage, states "that cases are not to be lightly taken from the jury," but adds:

"At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility."

There has been no modification of these principles in the recent cases. District of Columbia v. Moulton, 182 U. S. 576, 582, 21 Sup. Ct. 840, 45 L. Ed. 1237; McGuire v. Blount, 199 U. S. 142, 148, 26 Sup. Ct. 1, 50 L. Ed. 125; Empire State Cattle Co. v. Atchison Ry. Co., 210 U. S. 1, 10, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Hepner v. United States, 213 U. S. 103, 112, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960. In this last case the Supreme Court applies the rule in an action brought by the government to enforce a statutory penalty and sustained a directed verdict for the plaintiff. The application of this rule to negligence cases has been many times reiterated. Patton v. T. & P. Ry. Co., 179 U. S. 658, 659, 21 Sup. Ct. 275, 45 L. Ed. 361; Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 339, 40 L. Ed. 485, where it is said:

"There can be no doubt, where evidence is conflicting, that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. Union Pacific Railway Company v. McDonald, 152 U. S. 262, 283 [14 Sup. Ct. 619, 627, 38 L. Ed. 434]. The rule is thus announced in that case: 'Upon the question of negligence * * * the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' Delaware, Lackawanna, etc., Railroad v. Converse, 139 U. S. 469, 472 [11 Sup. Ct. 569, 35 L. Ed. 213] and authorities there cited; Elliott v. Chicago, Milwaukee & St. Paul Railway, 150 U. S. 245 [14 Sup. Ct. 85, 37 L. Ed. 1068]; Anderson County Com'rs v. Beal, 113 U. S. 227, 241 [5 Sup. Ct. 433, 28 L. Ed. 966]."

The law, sound reason, and common experience point out that there is peculiar necessity for the enforcement of this rule in negligence cases. The law's recognition of this fact cannot be better stated than it has been by the Circuit Court of Appeals for this Fourth Circuit, speaking through Judge Brawley, in Travelers' Ins. Co. v. Selden, 78 Fed. 285, 290, 24 C. C. A. 92, 96, as follows:

> " 'Such is the constant practice,' says Justice Swayne in Bowditch v. Boston, 101 U. S. 16 [25 L. Ed. 980], because 'it gives scientific certainty to the law in its application to the facts, and promotes the ends of justice.' The court cannot allow the jury to assume the truth of any material fact without some evidence legally sufficient to establish it, and the jury cannot legally infer the existence of a material fact unless there is some proof of it. 'The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings.' Railroad Co. v. Woodson, 134 U. S. 622, 10 Sup. Ct. 630 [33 L. Ed. 1032]. It therefore follows that, when the facts and circumstances are admitted and undisputed, it becomes a question of law for the court to decide whether they support the averments of the pleadings, *and it is error to leave a question of law to the arbitrary determination of a jury,* for everybody knows that a case of this kind can have but one result if left to a jury, moved, as it must be, by the natural and creditable instincts of human nature, to sympathize with the afflicted. No case can be conceived which more strongly invokes the obligation to duty imposed upon the courts as set forth in the oft-quoted language of Mr. Justice Miller in Pleasants v. Fant, 22 Wall. 116 [22 L. Ed. 780]: 'It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.' "

The Circuit Court of Appeals for the Eighth Circuit, in Midland Valley R. Co. v. Fulgham, 104 C. C. A. 151, 181 Fed. 91, has felt compelled, apparently from its experience in these negligence cases, to condemn what is a very general weakness in jury deliberation, when it says:

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action * * * is indispensable to the maintenance of a verdict sustaining it."

The statement has been made above that sound reason and common experience indicate a peculiar necessity for the enforcement of this rule in negligence cases. This statement is made advisedly, after long and earnest study of existing conditions. Courts must enforce the law as it is, not as they would have it be. Inferior courts must take the legal precepts as they come from the legislative enactments and the decisions of courts of last resort, made by law, binding upon them. None of us can help but deplore the fact that our Legislatures, for example, do not require counties and municipalities, in conjunction with railroads, to make all railroad crossings either overhead or underneath street and road ones, so that deplorable accidents such as the one in this case would be impossible. No such provision has been made, and we must, in the discharge of our duty, recognize and enforce the reciprocal rights existing by the law, as it is, between railroads and the traveler on the highway. In the practical enforcement of the law in negligence cases, certain psychological conditions exist that do not exist in the trial of other cases, or, at least, exist in a much more accentuated and acute degree. Some one has been injured, has endured pain, has in case of death been deprived of the association, support, and affection of a near relative. Human nature at once calls forth regret and sympathy from court, counsel, jury, and all those who may hear the fact of there having been such accident. In most cases three distinct classes are involved: First, the plaintiff, who has suffered; second, the impersonal corporation; and, third, the latter's employé or employés by whose alleged negligence the injury resulted. If a corporation, as is usually the case, the defendant in the mind of average jurors is conceived to be endowed with large wealth and with unusual potentialities to defend and litigate, while the plaintiff is a personality, poor and helpless, and deprived, to a degree at least, of his original means of caring for himself.

In the trial of the case, it takes a degree of self-restraint, hard to obtain in jurors, and more or less in judges, too, necessary to prevent them from unconsciously determining to help and decide for the injured plaintiff, if any excuse can be found for so doing. The appeal to self-interest, "to put yourself in his place," is strong. The practical result in many, if not most, cases is that the legal relations of the parties are reversed. The defendant, instead of being entitled to have his negligence affirmatively shown, is put to it to show that, in all particulars, he has been free from it, and no excuse can be found to sustain the charge of it against him. The thousands of cases tried in our courts bring home to us the full conviction that juries go farther, and feel that it can hardly be expected of them to understand the fine and minute distinctions as to the legal principles, governing this class of cases, so often embodied in instructions and charges given by the court, and, if the court submits such a case to them at all, instead of deciding it himself by a directed verdict, that the only duty for them to perform is to ascertain the damages, and let the defendant corporation see if it can get from under by its motion for new trial or upon writ of error. Practically little or no weight, too often, is given to the evidence of the defendant's employés whose personal conduct is in question in the case. It seems as if juries assume, as a matter of course, that such employés testify disingenuously, if not falsely, under compulsion and fear of losing their jobs, and that anyhow, if they had been the ones hurt, they, too, would be suing and expecting to recover damages. In short, it matters little how often the courts may charge the simple, sound legal proposition that the fact that an accident has occurred carries with it no presumption of liability, juries will, in most cases, repudiate it and feel that it would be cruel, on their part, to deny the victim something.

Under the common law, prudence and care were made a matter of personal concern. If the operating individual employé was so negligent as to cause the death of another, he was guilty of involuntary manslaughter, and prosecuted therefor; if such negligence of his resulted in injury only, he was held for the lesser misdemeanors of assault or trespass. Under modern conditions such prosecutions are almost unheard of; a modern jury that had amerced the employing corporation in damages, it cannot be doubted, would ordinarily promptly acquit the negligent employé from criminal liability. We are to-day, under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), apportioning damages incurred by negligent employés, when injured, according to the extent they were negligent compared with the negligence of their fellow employés. But, under all these advanced ideas, both human and divine law recognizes that the individual, if he be mentally sound, is charged with the primary responsibility of caring for and securing his own personal safety. If, by his own sole fault, he is negligent, and as a result is injured, our law as it exists to-day requires him to suffer the consequences; and if he charges his misfortune to another, he must prove affirmatively and by substantial evidence the negligence of the other, and not leave it "to conjecture, guess, or random judgment" (Sorenson v. Pulp Co., 56 Wis. 338, 14 N. W. 446) of a jury.

"Judges," as well said by Judge Brawley in Insurance Co. v. Selden, supra, "are no more free from weaknesses of human nature than are jurors; but where responsibility is diffused the obligation of duty seems to rest more lightly upon the individual than where it is concentrated, and the pleadings of sympathy or the promptings of prejudice or passion are ofttimes likely to produce that result on a jury which it is the special and highest duty of the judge to prevent."

[2-4] The case here involves an accident at a railroad crossing in which Dernberger lost his life. That the rule we have been considering applies in full force to this class of negligence cases is well established. Elliott v. C., M. & St. P. R. Co., 150 U. S. 245, 249, 14 Sup. Ct. 85, 37 L. Ed. 1068; C., R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. C., M. & St. P. R. Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. It was therefore clearly the duty of this court, upon the request of the defendant for an instructed verdict, to make a very close, careful, and, as far as possible, accurate, analysis of the evidence adduced by the plaintiff in support of her claim for damage, and ascertain thereby whether the undisputed facts shown, allowing the most favorable inferences to be drawn therefrom, warranted a recovery under the law; if so, then to require the case on the defendant's part to proceed, and submit it finally to the jury; but, if such recovery was not so warranted under the conditions of this rule, then, no matter how disagreeable from a sympathetic standpoint, it was its duty to direct a verdict for the defendant. And now, having upon the trial reached the latter conclusion, and having so directed the verdict, upon this motion of plaintiff to set aside this verdict and grant her a new trial, if, upon a more careful study and consideration of the law and the evidence, this court should conclude it erred in its ruling, then it should promptly grant the motion, otherwise overrule it.

In negligence cases it is frequently difficult to apply general legal principles, for almost every case presents its own peculiar facts. It may, however, be assumed that crossing cases present as little difficulty in this regard as any others, yet in these a very great diversity of conditions arise from (a) the nature and location of the crossing; (b) the number and location of the railroad tracks; and (c) the method of locomotion resorted to at the time by the person seeking to cross.

Some general legal principles are applicable in all these conditions. The rights and obligations of the railroad company and of the individual in the use of the crossing are recognized as reciprocal. The railroad company's right to use is admitted to be superior, subject to the limitation that such use shall be restricted to the extent of its necessities in the premises under prompt and prudent management. In most of the states, statutes exist requiring warnings to be given by trains approaching crossings. The statute in this state requires the railroad to maintain, under penalty of fine, signboards at each crossing, and, under a like penalty, to cause its fireman or engineer on every locomotive to ring a bell or blow a steam whistle at the distance of at least 60 rods from the place of crossing, for a time sufficient to give due notice of the approach of the train; and failure to do so makes the company liable to any person injured in consequence of such failure. This statute has been construed, as such statutes generally have been, not, however, to excuse a traveler on a highway, crossing a railroad track, from exercise of such reasonable care and caution as the law requires to ascertain whether a train is approaching the crossing. Beyel v. Newport News & M. V. R. Co., 34 W. Va. 538, 12 S. E. 532; Berkeley v. C. & O. Ry. Co., 43 W. Va. 11, 26 S. E. 349. On the other hand, it has been held that neither the Legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, and therefore the fact that a statute provides for these precautions will not relieve the company from adopting such other measures as public safety and common prudence dictate. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

The reason is apparent. When such crossings are situate in large cities, where population is congested and the crossing subjected to constant use, the precautionary measures to be taken by the company, in order to avoid accident, must necessarily be more stringent than at crossings in a small town or borough, where the use is not so great; and yet, under particular conditions, a crossing in such town or borough may require greater care and protection than a country road crossing, little used. In the first instance, that of city crossings, the requirement that the company use gates or station watchmen thereat becomes almost imperative; in small towns and villages, only rare and extraordinary conditions would require such burden to be assumed by the company; at a country roadside crossing, little used, such requirement would be unreasonable and oppressive. But as to the character and necessity of these extra precautions in each instance the company must be allowed to determine, for, in the language of the Supreme Court of Pennsylvania:

"In the operation of its road, and in the running of its cars, the judgment of the board of directors of a railroad company, in the absence of statutory provision, is supreme and exclusive. The public safety imperatively requires that there be no division of this great responsibility with others—not even with municipalities through whose limits railroads may run—for division of it would be the shifting of it in every case of accountability for failure to properly operate the road or run the cars. But, while this is true, corresponding duties of the highest order are imposed exclusively upon those having the control and management of railroads. One of these is to adopt and use adequate means to give notice of approaching trains at grade crossings, which are always more or less dangerous; and failure to perform this duty is negligence, for the consequences of which those are responsible upon whom the duty is imposed. What particular means, however, in the absence of statutory provision, shall be employed to protect the public when using streets or highways at railroad crossings is left to the company operating the road, the law merely demanding and requiring reasonable care in view of the circumstances." Pennsylvania Ry. Co.'s Appeal, 213 Pa. 373, 62 Atl. 986, 3 L. R. A. (N. S.) 140, 5 Ann. Cas. 299.

[5-7] As regards the duties and obligations of the traveler about to undertake to make the crossing, various and diverse conditions may arise in different cases. He may be afoot, on horseback, in a large, cumbersome vehicle, as, for example, a traction engine or a threshing machine, a road wagon making much noise, a light buggy, making little, or in an automobile, noisy or not. He may be hard of hearing or not; his vision may or may not be defective. He may have one, or he may have several, tracks to cross; the approach to the crossing may be clear, the track straight, and his vision for many rods unobstructed; on the other hand it may be obstructed, either by natural objects, such as trees, curves, embankments, and buildings, or by cars temporarily placed on side tracks by the company itself. Again, his hearing may be interfered with by noises of machinery, waterfalls, other than those created by the company or by those of engines, machinery, etc., operated in the vicinity by the company itself.

In all this diversity of conditions there are, however, some legal principles generally applicable. He must never be unmindful that he is primarily responsible for his own safety; that the railroad, at a crossing, has the right of way; that at a railroad crossing "the track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." Elliott v. Chicago, M. & St. P. Ry. Co., 150 U. S. 245, 248, 14 Sup. Ct. 85, 86 (37 L. Ed. 1068). The presence of noises or obstructions to view require a greater degree of caution to be exercised by him, and, if he fails to meet these requirements he is, under the law, as it now exists, held to be guilty of contributory negligence, which will bar any recovery for damages incurred, as against the railroad, whether the latter was negligent in the premises or not. Beyel v. Newport News & M. V. R. Co., 34 W. Va. 538, 12 S. E. 532; Berkeley v. C. & O. Ry. Co., 43 W. Va. 11, 16, 26 S. E. 349.

The only way the ordinary normal man can take these precautions is by control of his steps or the means he is using for locomotion, and the exercise of his senses of sight and hearing. Hence the rule to stop, look, and listen. In the state of Pennsylvania this rule is made absolute. He must stop, he must look, and he must listen. If he fails in any one, he cannot recover. Railroad Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753. This ruling, by the federal cases and those of this state, has been modified to a limited extent. This modification has been well stated by the Circuit Court of Appeals for the Eighth Circuit in Davis v. Chicago, R. I. & P. Ry. Co., 159 Fed. 10, 16, 88 C. C. A. 488, 494, 16 L. R. A. (N. S.) 424, in these words:

"The duty to stop is a relative one. It depends upon the situation of the particular case, the knowledge the traveler has of the situation, and the reliance he may reasonably place under the circumstances on his opportunities for seeing and hearing without taking the last precaution of stopping. The authorities are quite in accord on the proposition that if the view is unobstructed, so that an approaching train, before it reaches the crossing, can be seen, there is no occasion for the special exercise of the sense of hearing, listening; and therefore there is no reason why he should stop for that purpose. On the other hand, if the view is obstructed, interfering with the sense of sight, then he must bring into requisition the sense of listening carefully and attentively. And if there is any noise or confusion over which he has control, such as that of the noise of the horse's feet, or the grinding sound of the wheels, or the ordinary noise of the vehicle, interfering with the acuteness of the sense of hearing, it is his duty to stop such noise or interfering obstruction and listen for the train before going upon the track."

In support of this ruling, so clearly stated, and which so strongly appeals to reason and common sense, Judge Philips quotes strong excerpts from Judge Day's opinion in Shatto v. Erie Railroad Co., 121 Fed. 678, 682, 59 C. C. A. 1; from Chief Justice Doster in A., T. & S. F. Ry. Co. v. Willey, 60 Kan. 819, 825, 58 Pac. 472; from Mr. Chief Justice Alvey in Railroad Co. v. Hogeland, 66 Md. 149, 161, 7 Atl. 105, 59 Am. Rep. 159; from Chase v. Railroad, 167 Mass. 383, 45 N. E. 911; from Seefeld v. C., M. & St. P. R. Co., 70 Wis. 216, 222, 35 N. W. 278, 5 Am. St. Rep. 168; from Shufelt v. Flint & P. M. R. Co., 96 Mich. 327, 55 N. W. 1013; from Henze v. St. L., K. C. & N. Ry., 71 Mo. 640; from Stepp v. C., R. I. & P. Ry. Co., 85 Mo. 235; Merkle v. Railway Co., 49 N. J. Law, 473, 9 Atl. 680; and from Blackburn v. So. Pac. Ry. Co., 34 Or. 215, 55 Pac. 225–229.

This case has had large influence with me, for that it so well considers and reasons upon a state of facts very analogous to that I have here under review. It may be added that the Court of Appeals of Maryland, so recently as February last, in State, to use of Cullen, v. New York, P. & N. R. Co., 127 Md. 651, 96 Atl. 809, has again, in a strong opinion, affirmed the ruling that where the view is obstructed the traveler must stop, as well as look and listen. Other federal cases to this effect are N. Y. C. & H. R. R. Co. v. Maidment (C. C. A. 3d Ct.) 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; Chicago, B. & Q. R. Co. v. Munger (C. C. A. 8th Ct.) 168 Fed. 690, 94 C. C. A. 176; Brommer v. Pennsylvania R. Co. (C. C. A. 3d Ct.) 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; Shatto v. Erie R. Co. (C. C. A. 6th Ct.) 121 Fed. 678, 59 C. C. A. 1; C., M. & St. P. R. Co. v. Bennett (C. C. A. 8th Ct.) 181 Fed. 799, 104 C. C. A. 309; Northern Pacific R. Co. v. Alderson (C. C. A. 9th Ct.) 199 Fed. 735, 118 C. C. A. 173; N. Y. S. & W. R. Co. v. Thier (C. C. A. 2d Ct.) 209 Fed. 316, 126 C. C. A. 242; N. P. R. Co. v. Tripp (C. C. A. 8th Ct.) 220 Fed. 286, 136 C. C. A. 302; Delaware, L. & W. R. Co. v. Welshman (C. C. A. 3d Ct.) 229 Fed. 82, 143 C. C. A. 358. These authorities demonstrate that in the Second, Third, Eighth, and Ninth circuits the rule is established that, where the view is obstructed, it becomes the duty of the traveler in a conveyance liable to make noise calculated to interfere with effective hearing, it is his duty to stop, as well as to look and listen, and it is to be noted that these cases strongly emphasize, what common sense dictates should be so, that the stop must be made just before going on the track, and not so far before such approach as to run any risk of its being ineffective. A careful examination has failed to disclose any different ruling in the other federal circuits.

But what is more important to this court than all other authority, because it is binding upon it, is the case of Neininger v. Cowan, 101 Fed. 787, 42 C. C. A. 20, in which the Circuit Court of Appeals for this Circuit has clearly established the same principle and affirmed a directed verdict for the railroad company, itself clearly negligent in the premises, because the traveler did not stop, look, and listen. At 101 Fed. 791, 42 C. C. A. 24, Judge Simonton says:

"In the case before us, the plaintiff was no stranger to the city of Wheeling. He was in the habit of going into it frequently, and was perfectly familiar with the place of the accident. He knew that the railroad track crossed at that place. He knew that the depot was a very short distance from it, and that trains left it for the East in the early morning. The track at the crossing itself gave warning of danger. The absence of gates and the nonappearance of a flagman at that point gave significance to this warning. Entering Main street in his wagon, he trotted his horses towards the railroad crossing until he reached a point 50 or 60 feet from it. Then he slowed down to a walk, but kept going on. *His plain duty, approaching that crossing, was to stop, look, and listen.* Had he, instead of going on the west side of the street, gone on the opposite side, he could have looked upon the track, up and down, before he reached the crossing. Instead of this, he selected the other side, from which his opportunity of seeing was prevented by the buildings at the corner of the crossing, and his ability of hearing distinctly was diminished by the same cause. Under these circumstances, unable to see, as well as to hear, *it was all the more incumbent upon him to stop.* This he did not do. Something must have prevented him from hearing the train. One of his witnesses, who was on that train, whose attention was not specially called to the fact, stated that as they were approaching the crossing the engine was giving that loud, puffing noise, indicating that it was going upgrade. Plaintiff did not hear this. Whether from inattention, or because of the noise of his moving wagon, does not appear. He did not hear. *All the more was it his duty to stop. Ordinary caution would have compelled him to stop.* Had he done so before crossing the track, the accident could not have happened. He went on, got on the track, and was injured. He himself contributed to the injury."

I have taken the liberty of italicizing four sentences in this extract from Judge Simonton's opinion in order to indicate how important and necessary this binding authority upon me has held it to be for the traveler *to stop* before crossing, where obstructions and noises exist.

In this case these facts are undisputed. Dernberger, the deceased, was a substantial, middle-aged farmer, eminently respected, sound physically, who had lived on and owned land in near proximity to the crossing, where the accident occurred, for many years. His use of the crossing was very frequent. At the time he was approaching the crossing, he was driving a two-horse team attached to a low-wheeled farm wagon, and two friends were riding therein with him. He came to within 200 feet of the crossing, where the view was wholly obstructed, when one of the traces became detached. He stopped, got out, and fastened this trace. He then got back into the wagon, drove to within 150 feet of the track, where he slowed down to a speed of two miles per hour, until his horses' feet were substantially upon the railroad track, when he discovered for the first time that the train was coming, uttering the words, "My God, there is the fast line!" His horses lunged across the track. Anderson, one of the three men, jumped out of the rear end of the wagon. The engine struck the wagon and instantly killed Dernberger and the other man. Anderson testified that they were driving at a rapid rate until they reached 150 feet of the track, when they did not stop, but slowed down to a speed of 2 miles per hour. It was proved beyond all doubt that the view of the track was obstructed. Anderson stated that, at a point about 16 feet before reaching it, the track could be seen for a distance of 30 or 40 rods. He subsequently corrected this statement, and said for a distance of 30 or 40 yards. Young testified that from that point—16 feet before the team reached it—the track could be seen 360 feet. Recalling the fact that 5,280 feet constitute a mile, and 10,560 feet 2 miles, it is mathematically sure that Dernberger, driving at a speed of 2 miles per hour, would go 176 feet a minute, or $2^{14}/_{15}$ feet per second. He therefore drove this 16 feet from where he could see the track in a little over 5 seconds; had he stopped the noise of his wagon at that point for these few seconds, so as to be able to look and listen effectively, he would have saved his life. Nay more, admitting that the train was running 45 miles an hour, it was then covering 237,600 feet an hour, 3,960 feet a minute, or 66 feet a second. If Dernberger had stopped at the point 16 feet before reaching the crossing where he could see the track for a distance of 150 to 200 feet according to Anderson, 360 feet according to Young, for 2 seconds, the train would have beat him to the crossing. Such mathematical demonstrations must startle us into a realization of how necessary it was for Dernberger to have obeyed the legal obligation to stop, look, and listen.

I am constrained to reach the conclusion that in directing the verdict in this case I did not err, but was compelled to do so under the law. I must therefore overrule the motion for new trial, and direct final judgment to be entered for defendant.

WICHITA WATER CO. v. CITY OF WICHITA.

(District Court, D. Kansas, Second Division. March 31, 1916.)

No. 55-N.

1. MUNICIPAL CORPORATIONS ⟹271—CONTRACTS—GOVERNMENTAL FUNCTIONS.
   The enactment of an ordinance relating to the procurement by a city of a supply of water for its own use and for its inhabitants, together with the price to be paid, involves the exercise of proprietary and not governmental powers.

   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 726; Dec. Dig. ⟹271.]

2. MUNICIPAL CORPORATIONS ⟹271—POWERS—STATUTES.
   The power of a municipality to contract for the procurement of a water supply, must be found in the statute law of the state, either expressly or by implication conferring such power.

   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 726; Dec. Dig. ⟹271.]

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

3. WATERS AND WATER COURSES ⇐203(11)—PUBLIC SUPPLY—CONTRACTS—ACCEPTANCE OF ORDINANCE—RATES.
Where an ordinance authorizing construction of a water system for a city and the charging of fixed rates for a period of time was accepted by the grantee, the municipality cannot during the existence of the contract reduce the rates to be charged.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290, 292, 294; Dec. Dig. ⇐203(11).]

4. WATERS AND WATER COURSES ⇐200(2)—PUBLIC SUPPLY—CONTRACTS—RATIFICATION.
Where a municipality, possessing power to contract for the supplying of itself and its inhabitants with water, in entering into a contract defectively exercised its powers, the making of a subsequent contract modifying the original one is, where the municipality duly exercised its powers, a ratification of the original one.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200(2).]

5. WATERS AND WATER COURSES ⇐200(2)—PUBLIC SUPPLY—CONTRACTS—RATIFICATION.
Where a municipality was without authority to contract for the supplying of itself and its inhabitants with water, the subsequent execution of an agreement modifying the original one did not work a ratification, validating the original agreement.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200(2).]

6. WATERS AND WATER COURSES ⇐200(1)—PUBLIC SUPPLY—CONTRACT—VALIDITY.
Gen. St. Kan. 1889, § 7185, authorized cities of the first, second, and third classes to contract for and procure waterworks, to be constructed for the purpose of supplying the inhabitants of the city with water for domestic use, the extinguishment of fire, and other purposes. The statutes contained no limitation as to the duration of such contracts. A municipality entered into a contract for the construction of a waterworks system, fixing the rates which it should charge and agreeing that they should continue for 40 years. After the expiration of a little more than half that time the assignee of the grantee agreed to reduce the rates charged the municipality and such proposal was accepted. *Held*, that there was a valid contract for the supplying of water for the inhabitants for such period, and the municipality could not during the life of the contract reduce the rates.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. ⇐200(1).]

7. CONSTITUTIONAL LAW ⇐135—IMPAIRMENT OF OBLIGATION OF CONTRACT—STATUTES.
Where a municipality, under Gen. St. Kan. 1889, § 7185, contracted for supplying itself and inhabitants with water for 40 years at fixed rates, the municipality cannot subsequently reduce the rates before the expiration of the contract, in accordance with Gen. St. Kan. 1909, § 1031, and Laws Kan. 1911, c. 238, § 33, authorizing municipalities to fix rates, for such exercise of the power would work an impairment of the obligation of the contract.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380–387; Dec. Dig. ⇐135.]

In Equity. Bill by the Wichita Water Company against the City of Wichita. Decree for complainant, granting interlocutory injunction.

David Smyth and J. W. Smyth, both of Wichita, Kan., for complainant.

Dale, Amidon & Madalene, of Wichita, Kan., for defendant.

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

POLLOCK, District Judge. This case as now presented raises but a single question, namely, the power of the city, by ordinance, to regulate the rates charged by plaintiff for water service furnished by it in the city. If the city had bound itself by valid existing contracts to permit the water company to charge fixed and established rates, then of necessity it had no power during the life of such contracts to require the plaintiff to charge and receive less rates, and in consequence the ordinances attempting to establish rates less than the contract provides are beyond the power of the city to enact and void. If it had not, the right of the city to establish by ordinance any schedule of rates not confiscatory of the property rights of plaintiff must be conceded. The rights of the parties in this regard are found to reside in two instruments in writing:

First. An ordinance of the city, No. 266, published November 22, 1882, granting to J. A. Jones, his successors and assigns, the right to occupy the streets, alleys, and other public places of the city in the construction, operation, and maintenance of a system of waterworks to furnish the city and its inhabitants with water for a period of 40 years from said date, which ordinance was duly accepted by the grantee named therein, and the works were erected and since maintained and operated. Original Ordinance No. 266, omitting schedule rates, provides:

"An ordinance to provide for a system of waterworks for the city of Wichita, for domestic, sanitary and other purposes.

"Be it ordained by the mayor and councilmen of the city of Wichita:

"*Right of Way*. Section 1. That the right of way along the streets and alleys, and the privilege to construct, operate and maintain a system of waterworks in the corporate limits of the city of Wichita, for supplying the city and citizens with water for domestic and sanitary purposes, as well as for the better protection of the city against disaster from fires, be granted to J. A. Jones, of the city of St. Louis, and state of Missouri, his associates, successors, or assigns, for the term of forty years from the passage of this ordinance.

"*Term of Franchise*. Sec. 2. That the right of way as held by the city of Wichita, be granted to J. A. Jones, his associates, successors, or assigns, for the term of forty years, to lay pipes in any and all streets, lanes, alleys, roads, or other public places within the corporate limits and to extend the pipes, and to place, construct and erect hydrants, fountains, conduits, or such other useful or ornamental structures as may be necessary for the successful operation of the works: Provided, the same shall not interfere with the general use of said streets, alleys and lanes.

"*Requirement and Arrangement of Buildings and Machinery*. Sec. 3. That the general plan of the works shall be, an engine house built of either brick or stone, not less than forty by sixty feet, and divided into three apartments, to be known as pump, boiler and fuel rooms; two pumps capable of pumping 1,500,000 gallons of water every twenty-four hours, and so arranged that they can be run either separately, or together, two boilers so arranged that they can be fired either separately, or together, and of sufficient size to make with easy firing ample steam to supply the pumping machinery; the pipe system to be not less than eight miles of main and to vary in size from fourteen inches to six inches in diameter; the hydrants to be what is commonly known as six-inch post and two and one-half inch double discharge with frost jacket, with six-inch connection. (As amended by Ordinance 268 as amended by Ordinance 509, published January 24, 1888.)

"*Capacity of Works*. Sec. 4. The works, when completed, shall be capable of throwing six streams through fifty feet of two and one-half inch rubber hose and one-inch ring nozzle, eighty feet high, from any six hydrants the city council may elect.

"*Sixty Hydrants Rented by City.* Sec. 5. That, in consideration of the benefit that will accrue to the city of Wichita by the construction of a system of waterworks, the city agrees to rent, and does hereby rent, from the said J. A. Jones, or assigns, for and during the term of twenty-one years, sixty double discharge hydrants, at an annual rental of four thousand dollars per annum, payable quarterly, namely: January 1, April 1, July 1, and October 1, of each and every year, with legal rate of interest after maturity. That said hydrants be located at such places as the mayor and city council may determine.

"*Rental for Additional Hydrants.* Sec. 6. That the city shall have the right to rent, at any time during the term of this franchise, additional hydrants at the rate of fifty dollars each per annum; all hydrant rental payable as provided for in section 5 of this ordinance.

"*Use of Hydrants.* Sec. 7. That the hydrants, when erected, be used exclusively for the extinguishment of fires, necessary drill and practice of hose companies and the flushing and washing of the city sewers and gutters; but in all washing and flushing of city sewers and gutters there shall not be more than two hydrants opened at any one time, nor oftener than twice in any one week, nor longer than two hours at any one time, nor discharge through any orifice greater than one and one-half inches.

"*Pipe Extensions.* Sec. 8. That the said Jones, or assigns, shall extend the mains to any part of the city when requested so to do by resolution of the city council: Provided, however, that there shall be upon each street, lane, alley, road or other public places, six buildings for every six hundred feet of pipe extension, the occupants of which shall agree, in writing, to use and pay for water at established rates as soon as the pipes are laid, and the city to rent one hydrant for every six hundred feet of pipe extension; provided, that no pipe shall be smaller than six inches in diameter.

"*City to Have Right of Purchase—Valuation—Terms of Payment.* Sec. 9. That the city shall have the right to purchase the works ten years after completion, and failing to purchase at the expiration of ten years, then every five years thereafter, at appraised valuation of three disinterested parties, said appraisers to be selected in the following manner, namely: The city to select one, the said Jones, or assigns, to select one, and the two thus chosen to select a third. When these three shall be chosen, they shall be duly sworn, and they shall proceed to declare the valuation of the franchise, works and choses in action, by examining not exceeding three experts on behalf of each party, and when they, or a majority of them, have declared the valuation in writing, the city shall pay the same within three months thereafter; and in case there should be no hydrant rental existing at the time of purchase, then the number of hydrants erected shall be taken into consideration at the rates provided for in sections five and six, and the city in this purchase shall assume all the obligations of the water company, the lawful quittance for which shall be secured by said Jones, or assigns, as a part payment of the declared valuation, and the said Jones, or assigns, shall accept obligations of the city of Wichita, legally issued, at legal rates of interest, not exceeding twenty annual payments, for the balance due upon the declared valuation, after deducting the obligations of the water company.

"*Notice of Intention to Purchase.* Sec. 10. That the city shall give six months notice in writing of their intention to purchase.

"*Depth of Main.* Sec. 11. That all mains shall have an average of at least thirty inches of covering, and all the mains to be so laid as not to interfere with the present sewerage and drainage of the city.

"*Test of Pumps.* Sec. 12. That the works shall be submitted to a test when completed, said test to consist of the pumping capacity of the pumps, and the throwing of fire streams, as provided in section three of this ordinance; and upon this test being made, the city shall be obliged to pay hydrant rental from the time of said test; and it is further provided, that the test shall be made within ten days after the city has been notified in writing by said Jones, or assigns, that the works are completed and ready for test.

"*Maximum Charges.* Sec. 13. That the following maximum rates shall be annual, and become a part of this franchise: * * *

"*Forfeiture of Franchise.* Sec. 14. That, in the event said grantee, or his assigns, shall suffer a suspension of the supply of water exceeding ten days, then and in that case the said grantee, or his assigns, shall forfeit all franchises, unless the said suspension shall be unavoidable.

"*Acceptance and Commencement of Work.* Sec. 15. That this ordinance shall be a contract by and between the city of Wichita and the said J. A. Jones, or assigns, and shall be binding upon all parties with equal force and effect: Provided, the said Jones, or assigns, shall file with the city clerk, in writing his acceptance of this ordinance within ten days after its legal passage, and commence work within thirty days after filing said acceptance, and furnish fire protection for Main street and Douglas avenue within four months thereafter, and have the works tested within six months thereafter.

"*City to Protect Company's Property.* Sec. 16. That the city council shall pass all necessary ordinances, with penalties, for the protection of the property of the said works.

"*Streets to be Left in Good Condition.* Sec. 17. It is further agreed that all streets, lanes and alleys shall be left in as good condition as practicable.

"*Rates to be Submitted to Council.* Sec. 18. That the said Jones, or his assigns, shall submit to the city council, for their approval, all rates not provided for in this ordinance.

"*Location of Mains.* Sec. 19. That the location of the mains provided for in section three is herewith submitted, marked 'Plan A,' and adopted, said pipes not to exceed eight miles.

"*To Take Effect.* Sec. 20. That all ordinances and parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed, and this ordinance shall take effect and be in force from and after its publication once in the Wichita Beacon.

"Approved September 19, 1882. Wm. Greiffenstein, Mayor.

"Attest: A. A. Glenn, City Clerk pro tem.

"Accepted in writing, filed in city clerk's office September 29, 1882, by said J. A. Jones."

Second. A proposition submitted by the water company to the city December 18, 1908, making a reduction of 25 per cent. in the contract price of hydrant rentals to the city for the remainder of the contract period of 40 years, as stipulated in Ordinance No. 266, and also prescribing the rates to be paid by private consumers of water, and the manner of such use, which proposition was by resolution of the mayor and common council of the city duly accepted. This subsequent agreement, omitting the schedule of rates and meter rates thereby authorized to be charged consumers, provides as follows:

"Wichita, Kansas, Dec. 18, 1908.

"Honorable Mayor and Common Council, Wichita, Kansas—Gentlemen:

"We hereby submit for your approval the following schedules and changes in water rates and conditions, to be effective for water service for the balance of the contract period from January 1, 1909:

"A reduction of 25 per cent. in the hydrant rates as provided for in contract will be continued during the balance of the period, making the annual rental for the present 297 hydrants $11,887.50, instead of $15,850.

"The rental of each hydrant erected hereafter, when ordered in by the city in accordance with the contract, will be reduced 25 per cent., making each of such hydrants $37.50 per annum, instead of $50 as provided therein.

"Bills rendered to private consumers at the following schedules of 'Assessment Rates' and 'Meter Rates' will be subject to a discount of 10 per cent. if paid for on or before the 15th day of the month in which they are due at the company's office. * * *

"Any consumer shall have the privilege of taking water service at meter rates, instead of assessed rates. The water company reserves the right to charge for water service at meter rates, instead of assessed rates. For residence, the meter service shall be subject to a net monthly minimum amount of 75 cents for each ⅝-inch meter, and for business and other buildings a net monthly minimum of $1 for each ⅝-inch meter, and for larger meters a proportionate net minimum.

"Assessed rates are due and payable quarterly in advance; meter rates are due and payable on the 1st of each month for the previous month's use.

"Yours very truly, Wichita Water Company,
"Per G. E. Hoffmaster, President."

Thereafter, in September, 1915, the governing body of defendant city, conceiving itself to be not bound by the terms of the foregoing ordinance and subsequent agreement in regard to rates charged consumers of water, enacted various ordinances establishing other, different, and lower rates for service than were stipulated in the foregoing instruments; also providing punishments for those violating same by charging, collecting, or attempting to collect other or greater sums for service than permitted therein. Thereupon the water company instituted this suit to restrain the enforcement of the provisions of such ordinances.

The case stands argued and submitted for decision on the single question above stated, by stipulation of parties, which provides:

"Whereas, the plaintiff desires to present an application for a preliminary injunction in said cause, and have the same heard by the court in the above-entitled action in Kansas City, Kansas, on Friday, the 8th day of October, 1915, on the allegations of the plaintiff's bill alone that the ordinances set out therein are illegal, on the ground and for the reason that the same are violative of existing contract rights in force between the parties at the time said ordinances were passed, and now; and whereas, it is the desire of both parties the question of the reasonableness of the rates made by said ordinances shall not be discussed or considered by the court at the above mentioned time and place: It is therefore stipulated and agreed the same may be heard by the court at said time and said place solely upon the question as above stated, and no other question. This is done in the interest of saving expense to the parties litigant.

"It is further stipulated any other ordinance or ordinances which may be passed by the city of Wichita prior to the 8th day of October next may be considered at such hearing upon this stipulation, and that prior to said time and until the decision of said question by this court the said city of Wichita will refrain from attempting to enforce said ordinances, or any ordinances passed by the said city of Wichita prior to the 8th day of October, 1915.

"It is further stipulated, in the event the question to be presented, as above stated, shall be ruled in favor of the defendant city, then, in such event, the case may be brought on by the plaintiff on notice for temporary injunction on other grounds stated in the complaint."

In considering the matter there are certain propositions involved I shall assume to be conclusively settled and established:

[1] (1) The enactment of an ordinance such as the one above described, in so far as it relates to the procurement by the city of a supply of water for its own use, and the use of its inhabitants, and the price to be paid for the performance of such service, involves merely the exercise of the proprietary or business powers of the city, and not the exercise of its governmental functions. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Wood v. Waterworks Co., 33 Kan. 590, 597, 7 Pac. 233, 238; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725,

728, 23 Pac. 1068, 1069; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Columbus Waterworks Co. v. City of Columbus, 48 Kan. 99, 113, 28 Pac. 1097, 1102, 15 L. R. A. 354; Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. Law, 378, 6 Atl. 24; Fergus Falls Water Co. v. City of Fergus Falls (C. C.) 65 Fed. 586, 591; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913, 32 Am. St. Rep. 547; Walla Walla Water Co. v. City of Walla Walla (C. C.) 60 Fed. 957, 960; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 407; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 124, 125, 31 N. E. 573, 16 L. R. A. 485.

[2] (2) If the city possessed the power of private contract exercised by it in the passage of Ordinance No. 266, it must be found in statute law of the state conferring power for such purpose, either in express terms or by necessary implication.

[3] (3) If the power of private contract exercised in the passage of Ordinance No. 266 be found conferred on the city by the laws of the state in force at the time it was made, then the acceptance of the terms proposed therein by the grantee, and the construction of the works, and the performance of other obligations imposed upon the grantee and his successors operated to place beyond the power of the city to change or modify the terms of the contract by subsequent legislation establishing rates during the contract period of 40 years.

[4] (4) If the city possessed the power to contract in relation to its private or domestic affairs, as set forth in Ordinance No. 266, and any defect be found in the manner in which the power conferred on the city was attempted by it to be exercised, then the subsequent agreement of December 18, 1908, must have been intended by the parties to constitute a complete adoption and ratification of the original contract, based upon a valuable consideration moving to the city at the time it was entered into.

[5] (5) If the city possessed no power emanating from the state to bind itself by the terms of the original contract when made, and in consequence Ordinance No. 266 was absolutely null and void for want of power when passed, then the subsequent agreement continuing its provisions in force during the remainder of the contract period is likewise invalid and void unless it be found the law-making power of the state by enactment subsequent to the passage of the ordinance expressly authorized the city to make the attempted ratification made by the subsequent agreement, for that which is void for want of power when done cannot be otherwise ratified into a binding obligation.

[6] (6) As the question of the power of the city to bind itself by private contract in relation to its purely business or domestic affairs must depend upon the statutory law of the state in effect when the contract was entered into, as such statutory law was then construed by the settled rule of decision in the Supreme Court of the state, or, as since construed by federal court decisions controlling here, if such decisions be found, little will be gained by resort to decisions based upon the statute laws of other states as there construed.

On November 22, 1882, when Ordinance No. 266 was enacted, defendant city was a municipal corporation of this state of the second class. The statute law of the state then in effect, by which power was conferred on a second-class city to provide itself and its inhabitants with a supply of water, reads as follows:

"Cities of the first, second and third class, of the state of Kansas, are hereby granted full power and authority, on behalf of such cities, respectively, to contract for and procure waterworks, to be constructed for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires, and for manufacturing and other purposes." Gen. Stat. 1889, § 7185.

A glance discloses the language employed in this statute is quite broad and comprehensive in conferring power on cities of the class therein named. The power of cities of this state to bind themselves by contract for a supply of water extending over a period of years in pursuance of the above statute has often been upheld and has never been denied by the Supreme Court of this state, as will be seen by a reference to the adjudicated cases. Wood v. Waterworks Co., 33 Kan. 590, 7 Pac. 233; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Columbus Waterworks Co. v. City of Columbus, 46 Kan. 666, 26 Pac. 1046; Columbus Waterworks Co. v. City of Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354.

The Circuit Court of Appeals for this circuit, in Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, Judge Sanborn delivering the opinion, on a review of the many decisions from the Supreme Court of the state, says in reference to the statute above quoted:

"In any event, the Legislature made this grant, and it thereby vested in the mayor and council of the city the right to make such contracts for such terms as, in their discretion, they thought proper. There is nothing in this record to show that the mayor and city council of Arkansas City either exceeded their authority or abused the discretion which the Legislature gave them when they fixed the term of the contract in this case at 21 years. Ample power was granted to cities of the second class of the state of Kansas by section 7185, Gen. St. Kan. 1889, to grant the right to the use of their streets to lay water pipes and to pay hydrant rentals for reasonable terms longer than the year during which their mayors and councilmen held their offices, and there is nothing in this record to show that 21 years was an unreasonable time for the term of such a contract. Wood v. Waterworks Co., 33 Kan. 590, 597, 7 Pac. 233, 238; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725, 728, 23 Pac. 1068, 1069; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Columbus Waterworks Co. v. City of Columbus, 46 Kan. 666, 26 Pac. 1046; Columbus Waterworks Co. v. City of Columbus, 48 Kan. 99, 113, 28 Pac. 1097, 1102 [15 L. R. A. 354]; Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. Law, 378, 6 Atl. 24; Fergus Falls Water Co. v. City of Fergus Falls [C. C.] 65 Fed. 586, 591; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913 [32 Am. St. Rep. 547]; Walla Walla Water Co. v. City of Walla Walla [C. C.] 60 Fed. 957, 960; City of Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396, 407; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 124, 125, 31 N. E. 573 [16 L. R. A. 485]."

It is true, in none of the foregoing cases did the contract extend over a period of such length as that involved in this case, 40 years. However, there is nothing in the act above quoted, even by intimation, restricting the length of the period for which the city might bind itself. The language employed therein, "full power and authority to contract," in the absence of any intimation of fraud or collusion on the part of the city in the making of the contract, constitutes as ample warrant in law to contract for a period of 40 years as for a period of 25 years, for the duration of the contract, like the other terms on which it was made, was by the lawmaking power left to the good judgment and sound discretion of the officials of the city acting in its behalf, dependent upon the exigencies of the case, the benefits to be derived by the city in the making of the contract, and all the other influences tending to induce the making of the same. However, if it should be thought the statute above quoted conferred authority on the cities governed thereby, as was defendant city in this case, to make a binding contract for a supply of water for its municipal uses and for the use of its inhabitants for a period of 21 or 25 years, at fixed maximum rates of charge for the service to be performed, but did not confer authority on the city to bind itself by a like contract for a period of 40 years, as was attempted in this case, we are then confronted with this further fact:

On December 18, 1908, or some 26 years after the making of the original contract which the city had undoubted power under the statute above quoted to make for some fixed period of time, the subsequent agreement, for a valuable consideration moving to defendant city, was entered into, adopting and ratifying the rates charged private consumers and obligating the city to perform its terms and conditions so modified for the remainder of the contract period of about 14 years. And when but one-half of this period had expired the ordinances sought to be enjoined in this case were passed. To now hold, after the lapse of such a short period of time as had intervened since the subsequent ratification agreement was entered into, and the enactment of the ordinances of September, 1915, that the original contract was ultra vires and void, hence its formal subsequent ratification and adoption by the city was likewise void and of no effect, leaving the city to ordain such rates of charge as its governing body might deem proper, so long as the rates so adopted cannot be shown by the water company to be void because confiscatory of its property rights, and at a time when the city has in its possession and retains the fruits of the subsequent contract, shown by the record to amount to many thousands of dollars, would seem, to my mind, most inequitable and unjust.

I am therefore of the opinion the contract made by Ordinance No. 266, its acceptance by the grantee therein, and the construction, maintenance, and operation of the waterworks system thereunder by his successors, as modified by the subsequent agreement of December 18, 1908, constituted a valid and binding contract between the parties in the month of September, 1915, at the time the ordinances now sought to be restrained were passed by defendant city.

[7] This would seem to be the principal question of merit involved in the one controversy now submitted for decision under the stipulation of the parties above quoted. However, it appears from a reading of the brief and argument of defendant city to be thought, although the contract between the city and plaintiff as made by Ordinance No.

266 and the subsequent contract of December 18, 1908, should be upheld as valid and binding on the parties, yet the city under power conferred upon it since the making of the original contract, namely, by section 1031, Gen. Stat. 1909, and section 33, chapter 238, Laws 1911, possessed the authority to enact ordinances establishing rates to be charged for the performance of water service regardless of existing contract rights between the parties. In this regard, it may be said, there can be no doubt but that, in the absence of a binding contract between the parties authorizing the water company to establish, charge, and collect certain maximum rates for service performed under the contract, this contention of the city is undoubted. But the fallacy of this argument as applied to the present case appears when it is seen such subsequent legislation would operate to impair the binding force of the contract heretofore declared valid between the parties, for by section 13, Ordinance No. 266, it is provided as follows:

"That the following maximum rates shall be annual and become a part of this franchise."

And section 18 provides:

"That the said Jones, or his assigns, shall submit to the city council for their approval all rates not provided for in this ordinance."

From which it conclusively appears the parties to the contract knew and understood, at the time it was made, the maximum rates set forth therein were permanently settled during the life of the contract, and only those rates of charge for service not specified therein should be under the control of the officials of the city.

It follows, if the reliance of the defendant city in the enactment of the subsequent ordinances sought to be restrained in this suit be placed upon the legislative enactments referred to, it must fail, for such enactments are in contravention of the federal Constitution, because impairing the obligation of the contract existing between the parties.

It follows the temporary injunction sought by complainant must be, on the single ground here presented, sustained. An order to this effect will enter, on the giving by plaintiff of a bond in such penal sum and on such terms as may be prescribed by the court on application therefor.

It is so ordered.

GRANVILLE LUMBER CO. v. ATKINSON.

(District Court, E. D. North Carolina. July 25, 1916.)

No. 376.

1. LOGS AND LOGGING ⚷3(14)—SALES AND CONVEYANCES—DEED OF TIMBER.

In North Carolina a deed conveying timber trees, containing a fixed period within which the grantee shall cut and remove timber, operates as a conveyance of the timber, or an estate in the timber, upon condition that, if it be not cut and removed within the given time, the interest or estate so conveyed shall revest or revert to the grantor.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Dec. Dig. ⚷3(14).]

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

2. VENDOR AND PURCHASER ⚷239(5)—PAROL RESERVATION OF TIMBER—BONA FIDE PURCHASERS.

A parol reservation of timber, made by grantors of timber lands when they conveyed, is invalid as against the purchaser for value and without notice from their grantee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 590; Dec. Dig. ⚷239(5).]

3. VENDOR AND PURCHASER ⚷228(1)—RESERVATION—NOTICE.

No notice, other than the reservation of timber in the duly registered deed to timber lands, could affect a remote grantee's right to the timber, which was not cut and removed within the time fixed by the owner's former deed of the timber.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495, 496; Dec. Dig. ⚷228(1).]

4. LOGS AND LOGGING ⚷3(14)—SALES AND CONVEYANCES—CONSTRUCTION OF DEED.

Where the owners of timber lands conveyed the timber to a lumber company, to be cut and removed from the land at any time within 12 years, the deed providing for an extension of time for 5 years upon payment of $20 each year, the legal effect of the deed was to vest in the lumber company title to the timber to be cut within 12 years, title to so much as remained on the land at the expiration of that time reverting to or revesting in the grantors or their assigns, with the right in the lumber company to have an extension on the terms of the deed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Dec. Dig. ⚷3(14).]

5. LOGS AND LOGGING ⚷2—SALES AND CONVEYANCES—SUCCESSION IN RIGHTS.

Deed to timber lands from parties who had previously granted the timber vested in the grantees of the lands the right and title in respect to the timber which the grantors had relative to a reversion upon failure to remove the timber within 12 years.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1–5; Dec. Dig. ⚷2.]

6. LOGS AND LOGGING ⚷3(11)—SALES AND CONVEYANCES—EXERCISE OF OPTION FOR EXTENSION—TIME.

Where timber was conveyed, to be removed within 12 years, the grantees by the deed receiving a right to extend the time for 5 years by the payment of $20 yearly, the right to demand an extension, or to extend the title, with the privilege of cutting and removing, after the expiration of 12 years, was dependent on the tender by the grantee's successor in title to the grantors or their successors of the amount stipulated to be paid on or before the last day of the period.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. ⚷3(11).]

7. LOGS AND LOGGING ⚷3(11)—SALES AND CONVEYANCES—EQUITY.

When the terms of a contract for the sale of standing timber with time limit for cutting and removing are plain, a court of equity should not interfere with the contractual rights and obligations assumed by the parties.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. ⚷3(11).]

In Equity. Suit by the Granville Lumber Company against A. D. Atkinson. Bill dismissed.

R. N. Simms, of Raleigh, N. C., T. Lanier, of Oxford, N. C., and H. G. Connor, Jr., of Wilson, N. C., for complainant.

James H. Pou, of Raleigh, N. C., for defendant.

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

CONNOR, District Judge. Complainant is a Delaware corporation. Defendant is a citizen and resident of Johnston county, in the Eastern district of North Carolina. From the pleadings and proofs it appears that, prior to November 10, 1903, Monroe Bullock and his wife, Mattie, executed a deed, conveying, in consideration of two hundred dollars, to the Lucas Lumber Company, Incorporated, all of the standing and growing timber, of the dimensions named, on a tract of land situate in Johnston county, containing 57 acres, being the separate property of the said Mattie Bullock. The Lucas Lumber Company, or its assigns, were given the right to cut and remove the timber from the land, at any time within 12 years from the date of the deed. It was further provided that:

"If the said Lucas Lumber Company, or its assigns, do not enter upon said lands, or cut or remove said timber within the time above specified, then and in that event, if the said Lucas Lumber Company shall pay to the parties of the first part, their heirs or assigns, interest on the purchase money in advance, at the rate of 10 per cent. per annum, that the said time shall be extended for, and during, the period of 5 years thereafter."

This deed was registered in the office of the register of deeds of Johnston county November 12, 1903. Thereafter the Lucas Lumber Company conveyed the timber, with all rights as to time of cutting and extension thereof, to the Lucas Company. On the 14th day of August, 1909, the Lucas Company conveyed to the complainant, Granville Lumber Company, the same timber, together with all of the rights and privileges conveyed in said deed. This deed was registered in the registry of Johnston county January 31, 1910. On the 14th day of August, 1908, the said Monroe Bullock and wife conveyed the tract of land on which timber was standing to J. G. Raper and H. G. Whitehead. The consideration upon which this deed was made was the release of a debt, and cash, aggregating $550. It was recorded in the registry of Johnston county, on August 20, 1908. Whitehead later conveyed his interest in said land to Raper. On May 27, 1911, J. G. Raper, conveyed the same land to defendant, A. D. Atkinson, in consideration of $400. This deed was recorded in the registry of Johnston county, on June 5, 1911. At the date, November 10, 1915, upon which the right to cut and remove the timber expired, complainant had not entered upon said land, or cut or removed any part of timber. There was no settlement or clearing on the land, being entirely covered by the timber trees. Neither of the deeds conveying the land contain any reference to the sale of the timber or reservation thereof.

So far as material to the decision of the questions raised by the pleadings, I find the following facts, other than the record evidence: Mr. T. Lanier, residing at Oxford, N. C., was the regular attorney for the plaintiff company, and as such attorney was intrusted with the duty of looking after, and securing, extension of time for cutting and removing timber on the several tracts of land, to which the company held deeds or contracts. He was provided with the money necessary to pay for such extension. During the month of October, 1915, he went to Smithfield, Johnston county, where Bullock at one time resided, for the purpose of paying the interest, and securing the extension of the time for cutting the timber on the land in controversy. He knew that the period fixed in the deed expired during the month of November, 1915. He made inquiry of the sheriff, clerk of the court, register of deeds, and others in regard to the residence of Monroe Bullock. They were unable to give him the information, telling him that Bullock had moved to Wilson county, but that they did not know where he was. Thereupon Mr. Lanier advised Mr. Clark, the principal stockholder of plaintiff company, that he was unable to find Bullock, and "he had better have the matter attended to." Mr. Lanier was prepared to pay the interest required to secure the extension when he went to Smithfield.

Some time after November 10, 1915, Mr. Markham, with whom plaintiff had a contract for cutting the timber, entered upon the land for the purpose of placing a mill thereon, to cut the timber. Defendant forbade him from proceeding to place the mill, or cut or remove the timber. He notified Clark of the action of defendant. During the month, and near the middle of February, 1916, Clark, representing the plaintiff company, went to see defendant and offered to pay him the interest, $20, the amount named in the deed, which defendant refused to accept, whereupon he offered to pay defendant $100 for the purpose of securing the extension, which defendant also refused to accept. He then offered to pay defendant $1,000 for the extension, which he also refused to accept. This last offer Clark made, not as the representative of the plaintiff, but on his personal account, saying to defendant that he wished to avoid litigation. Clark inquired of defendant in regard to the residence of Monroe Bullock and was told that he did not know where Bullock lived, but understood that he lived somewhere in Wilson county. This statement was true. At the request of Clark, defendant showed him his deed for the land. A short time thereafter, and about the middle of February, 1916, Mr. Clark and Mr. Lanier, together, went to Bullock's residence in Wilson county, and paid to him the sum of $20, taking from him and his wife a receipt in the following words and figures:

"Received of the Granville Lumber Company twenty and oo/xx Dollars for extension on a certain tract of timber in Wilder's township, Johnston county, on land joining the lands of Ruffin Carroll, and others, and being lot No. 6 in the division of the lands of Henry H. Anderson, same being the timber sold to Lucas Lumber Company by deed dated November 10, 1903, and of record in Book L #8, office of register of deeds of Johnston county, at page 597, and containing 57 acres, and purchased by the Granville Lumber Company December 10, 1906. Said Bullock hereby agrees to and ratifies the extension of the time to cut said timber for a period of five years from November 10, 1915, upon the payment of $20.00 per year by said Granville Lumber Company, upon demand upon said company, through their attorney, T. Lanier, of Oxford, N. C.

"Witness my hand and seal this November 5, 1915.

"Monroe Bullock.
"Mattie Bullock."

"Witness: T. Lanier."

The money was paid, and the receipt given by Bullock and wife, about the middle of February, 1916. Bullock, at the suggestion and upon the request of Clark, signed the receipt as of November 5, 1915.

The value of the timber, at the date of the sale to Lucas Lumber Company, was about the amount paid for it. The deed from the Lucas Lumber Company to plaintiff company, conveying the timber in controversy, also conveyed the timber on a number of other tracts of land; the consideration being, for all of the tracts and timber, $30,000.

By reason of the growth of the timber trees, the construction of a railroad near the land, and the condition of the market, the value of the standing timber on the land was, on November 10, 1916, in excess of $3,000. At the hearing plaintiff offered to pay defendant the sum of $100 and demanded that an extension of 5 years be granted to it for cutting and removing the timber, and amended its bill in accordance with such offer. Defendant refused to accept the money or to grant the extension. Plaintiff alleges that, before the time for cutting and removing the timber had expired, Bullock went to see defendant in regard to the extension of time, and that defendant suggested to him that the fact that he had purchased the land be concealed from the owner of the timber, and that the time for cutting would expire on November 10, 1916; that neither of them knew, at that time, to whom the timber had been sold by the Lucas Lumber Company. I am unable to find that there was any suggestion on the part of defendant, or any agreement between Bullock and defendant, to conceal from plaintiff the name of the owner of the land, or that the time fixed in the deed for cutting the timber would expire on November 10, 1915. It is manifest from the evidence that neither Bullock nor defendant knew to whom the timber belonged. It is also manifest that neither of the parties interested knew to whom the interest or amount to be paid for the extension of time for cutting was due or payable. At the time plaintiff paid Bullock and wife the $20 and took their receipt therefor, they were uncertain whether the money for the extension was due to Bullock and wife, or defendant. At the time the tender was made by Clark to defendant, and refused, defendant was unwilling to release such right as he had, or to extend the time for cutting the timber. Neither Bullock nor defendant had, at the time of the tender of the money by Clark, nor the payment by him to Bullock, consulted counsel in regard to their right to the timber, or the money to be paid for extending the time for cutting and removing.

Plaintiff's bill is drawn upon the theory that, conceding that the interest to be paid for the extension at the expiration of period granted for cutting and removing the timber was due and payable to defendant, and that, therefore, the payment to Bullock and wife did not affect defendant's rights, a court of equity will relieve against the forfeiture, and compel defendant to accept the interest and grant the extension.

[1] Since the decision of the Supreme Court of this state in Bunch v. Lumber Co., 134 N. C. 116, 46 S. E. 24, in which the subject was given careful consideration, and the variant views and decisions of other courts discussed by Mr. Justice Walker, it has been uniformly held that a deed conveying timber trees, containing a fixed period within which the grantee should cut and remove them, operates as "a conveyance of the timber, or an interest or estate in the timber, upon condition that, if it is not cut and removed within a given time, the inter-

est or estate so conveyed shall revest in or revert to the grantor." The estate in the timber which vests in the grantee has sometimes been likened to a base or qualified fee. This case has been frequently cited, and uniformly followed, in this state. In Hawkins v. Lumber Co., 139 N. C. 161, 51 S. E. 855, Mr. Justice Hoke, citing with approval the decision in Bunch's Case, supra, says:

"The true construction of this instrument now before the court is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed."

And, quoting the language used in Bunch's Case, he says:

"At the expiration of that time the estate in so much of the timber as had not been cut and removed would revert to the vendor, or at least the timber would become his absolute property."

So, in Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278, Judge Hoke, quoting with approval the language of Judge Walker in Ives v. Railroad, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732, 9 Ann. Cas. 188, says:

"It may now be taken as settled that growing trees are a part of the realty, and a contract to sell and convey them, or any interest in or concerning them, must be reduced to writing. These authorities also establish that, on the expiration of the time stated in such a contract within which the timber may be removed, all right in the vendee shall cease and determine, and the estate in so much of the standing timber as has not by that time been severed shall revert to the vendor; and both positions are upheld in numerous and well-considered cases in other jurisdictions."

Following this line of decided cases, we find that, by reason of the expiration of the periods fixed in timber deeds for cutting and removing the timber, and the change of title to the land, the question arose whether the right to receive the price of the extension was in the original owner of the land or the one who owned it at the expiration of the time fixed in the deed for cutting the timber remaining on the land at that time. The court decided in Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171 (February 22, 1911), that when the owner of land who had sold and conveyed the standing timber, giving 4 years to cut it, afterwards conveyed the land by deed containing a reservation of the timber in these words:

"The pine and poplar timber having been previously sold, to the John L. Roper Lumber Company, and is excepted from this deed"

—the timber which had not been cut and removed, at the expiration of four years, belonged to the grantee.

In Carolina Timber Co. v. Wells (N. C.) 88 S. E. 327, Hoke, J., citing a number of decided cases, says:

"The cases on the subject are to the effect, further, that a stipulation of the kind now presented, providing for an extension of the time within which the timber must be cut, is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed, and working a forfeiture when not strictly complied with. * * * And from this it follows that when, in one of these timber deeds the time first provided and paid for has passed and it becomes necessary for the grantee to hold, by reason of the performance of the stipulations for an extension, that the estate or interest arises at the time the conditions are complied with, and in the absence of any conditions in his deed to the contrary the price paid belongs to him who then has the title, and from whose ownership the interest is then created. The extent of the option or privilege obtained, to the extent of the right conferred, is a contract attendant upon the title, and, as stated, unless otherwise specified in the deed conveying the title, the price for the interest arising on proper performance of the conditions will inure to the owner. It is from his estate that the interest passes, and he must receive the purchase price."

So it is held that the heir, and not the administrator, of the grantee of the timber is entitled to the price provided to be paid for an extension of the period fixed for cutting and removing the timber. Carolina Timber Co. v. Bryan, 88 S. E. 329.

[2-5] This was a logical conclusion, drawn from the construction given deeds for standing timber, with a time fixed in the deed for cutting and removing—that they conveyed all the timber which was cut and removed within such period. The law in regard to the right of defendant was declared in Hornthal's Case, four years prior to the expiration of the time allowed plaintiff to cut and remove the timber in controversy. I am not able to find, as suggested by plaintiff, that there was any parol reservation of the timber made by Bullock and wife when they conveyed to Raper and Whitehead. If there had been such reservation, it is clear that, at law, it would have been invalid as against their grantee. If they had an equity to enforce, as against Raper, such as a parol reservation, it could not affect defendant, who purchased the land for value and without notice. No notice, other than the reservation in a deed duly registered, could affect defendant's right to the timber which was not cut and removed within the time fixed by the deed under which plaintiff claims. Burwell v. Chapman, 159 N. C. 209, 74 S. E. 635.

It is clear that the legal effect of the deed by which Bullock and wife conveyed the timber to the Lucas Lumber Company was to vest in the grantee the title to the timber, to be cut within 12 years (that is, by November 10, 1915), and that the title to so much of such timber as remained on the land at that time reverted to, or revested in, Bullock and wife, or their assigns, with the right in the lumber company to pay $20 each year for 5 years, and to demand and have an extension for that period of time to cut and remove the timber. The deed from Bullock and wife to Raper and Whitehead vested in them the right and title, in respect to the timber, which their grantors had, and by their conveyance to defendant the same right and title vested in him. Bullock and wife, by the execution of the deed to Raper, were eliminated from the title and all of the rights and incidents attaching thereto. We may then lay to one side the transaction between plaintiff and Bullock and wife of February, 1916. It follows, therefore, that plaintiff, as the successor in title to the timber of the Lucas Lumber Company, had the right, on November 10, 1915, to tender to defendant $20 and demand an extension of the time for one year for cutting and removing the timber, and this he was entitled to repeat until the expiration of 5 years. Plaintiff failed to do either on the day fixed by the terms of the deed. The courts uniformly hold that the tender of the interest or amount required to be paid for the extension of time for cutting the timber must be made in strict conformity, in respect to time, with the terms of the contract.

In Davis v. Frazier, 150 N. C. 447, 64 S. E. 200, to the suggestion that the contract should, in respect to time of making the tender, be liberally construed to prevent a forfeiture, Judge Hoke said:

"If it be conceded that the clause in question is a condition subsequent, the position contended for by defendant is well recognized; but it is only a rule of interpretation, and does not obtain, when the meaning of the contract is so plain that no construction is permissible"

—quoting with approval the language of the Court of Appeals of Virginia:

"While courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute vesting of titles, * * * when the condition or defeasance is clear and explicit, they do not hesitate to give effect to the intention of the parties." Epperson v. Epperson, 108 Va. 471, 62 S. E. 344.

[6, 7] In Bateman v. Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615, referring to an extension clause in a timber deed, the same, in all essential respects, as the one with which we are now dealing, it is said:

"The provision in question, conferring as it does a privilege, and unilateral in its obligation, partakes to some extent of the nature of an option, in which time is ordinarily of the essence, and the accepted doctrine in reference to this and other instruments containing the same and similar language is that they should be strictly construed."

See Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479, in which the distinction between a bilateral contract, in which both parties are bound, and the vendor may compel the vendee to pay the purchase price and take the property, and a unilateral or optional privilege is given, the exercise of which is dependent upon compliance with its terms, is clearly pointed out. In the first, time is not of the essence of the contract; in the other, it is. It is by no means clear that compliance with the terms of an option or privilege given the purchaser of timber, with a time limit fixed in the deed within which it is to be cut and removed, is a condition either precedent or subsequent. The courts hold, at least the Supreme Court of this state, which is of controlling authority with this court in this case, that the title to the timber, which is not cut within the period fixed, ceases and determines, and this view brings the estate within Blackstone's definition of a base or qualified fee—as "one which has a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end." 2 Blk. 109, § 147 (Jones' Ed. 860). It is neither a condition precedent nor subsequent. Kilpatrick v. Graves, 51 Miss. 432. It is generally held that the equitable maxim that "time is not of the essence of the contract" does not apply to contracts of this character. The authorities upon this question are collected in Rexford v. Southern Woodland Co. (D. C.) 208 Fed. 295. The decree in that case was affirmed. 225 Fed. 1022, 140 C. C. A. 613.

The title to the timber, under the express terms of the deed from Bullock and wife to the Lucas Lumber Company, ceased and determined on November 10, 1915. The right to demand an extension, or to extend such title, with the privilege of cutting and removing it after that day, was dependent upon the tender by plaintiff of the amount stipulated to be paid on or before that day. This was a privilege or option to be exercised by plaintiff upon express terms. Time was made essential to its enforcement—of its essence. Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145, was a suit in equity, seeking a decree compelling conveyance, after the time fixed by the contract; complainant having failed to tender the amount on the day. It is said:

"The written contract gives him [the plaintiff] the privilege, or, as counsel calls it, an 'option,' to become equally interested in the land by paying one-half the purchase money, etc., within two years after its date. The contract of itself did not vest him with any interest or estate in the lands. It merely pointed out the mode in which he might acquire an interest, namely, by paying a certain sum of money within a certain time. He did not pay the money within the time limited by the contract, and has never paid it or any part of it."

The court reached the conclusion that:

"The plaintiff having failed to pay the money, or any part of it, within the time limited, the privilege accorded him by the contract was at an end, and all the rights under it ceased."

Mr. Pomeroy, after discussing the principles upon which equity relieves against forfeitures, says:

"It is well settled that, when the parties have so stipulated as to make time of payment of the essence of the contract, within the view of equity, as well as of law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt. The only difficulty is in determining when time has thus been made essential. It is also equally certain that the contract is made to depend upon a condition precedent; in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times, then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such conditions precedent." 11 Pom. Eq. § 455.

A failure to keep this distinction in mind, and to note the reason upon which it is based, sometimes leads to confusion of thought, and has brought about some discordant expressions in opinions of courts. It would be inequitable to hold one party bound beyond the time fixed for performance, and permit the other party, at his election, to postpone performance to suit his convenience or interest, with no obligation to perform at any time. This would be especially true in contracts relating to standing timber, the value of which is, as this record discloses, fluctuating—and, to a large extent, speculative. The timber is subject to destruction by forest fire, in which event the owner of the land would have no remedy for loss sustained by its destruction. Again, to permit the optionee to await his convenience to comply with the terms upon which his option depends burdens the owner with obligation to hold the land in its uncleared, nonproducing condition, he paying the tax thereon. If the time for payment fixed by the contract is not the measure of the rights and remedies of the parties, the question arises: What measure will be adopted by the court? To say that the tender may be made within a reasonable time is to insert something in the contract to which the parties have not assented, and this neither a court of law nor equity has the power to do.

Conceding that the plaintiff did not intend to abandon its right to call for the extension, the fact remains that, without any fault on the part of defendant, or any act of omission or commission by him, plaintiff failed to comply with the terms of the contract. Its intention cannot affect the right, or duty, of defendant. To the suggestion that defendant only paid $400 for the land with the timber, and that to permit him to hold both with the increased value is inequitable, it is sufficient to say that he purchased at a time when plaintiff had 4 years within which to cut the timber, with the privilege of extending it for 5 additional years, by paying the small sum of $20 a year. It is doubtful whether, with this burden imposed upon the land and its use, the price paid by defendant was not adequate. It was the sum which the owner, Mr. Raper, was willing to accept in a fair, open trade. While the very large increase in the value of the timber may present an interesting question in the domain of ethics, it is not one with which a court of equity can deal—otherwise than by adhering to well-settled principles. Probably no class of contracts have given the courts more anxious thought than those relating to the sale of standing timber with time limit for cutting and removing. Whether they have, in all cases, reached a satisfactory conclusion, in respect to the rights and remedies of the parties, may be open to doubt. When, however, as in this case, the terms of the contract are plain, it would seem that courts of equity should not interfere with the contractual rights and obligations assumed by the parties.

The bill will be dismissed, at the plaintiff's cost.

UNITED STATES v. ILLINOIS CENT. R. CO.

(District Court, N. D. Iowa, C. D. November 12, 1915.)

No. 50.

1. STATUTES ⚿219—CONSTRUCTION—HOURS OF SERVICE ACT—EFFECT OF INTERPRETATION BY INTERSTATE COMMERCE COMMISSION.

The interpretation of Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677-8680), by the Interstate Commerce Commission, as to the meaning of the words "towers, offices, places and stations" and the phrase "continuously operated night and day," though not controlling, is quite persuasive, entitled to weight, and may well be followed, unless it clearly appears from the plain language of the enactment to be erroneous.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ⚿219.]

2. MASTER AND SERVANT ⚿13—HOURS OF SERVICE FOR EMPLOYÉS—HOURS OF SERVICE ACT.

The test for the period that railroad employés handling train orders may be kept on duty during a 24-hour period without violating the Hours

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

of Service Act is the time during which the office, station, or place where the employé works is kept open for the performance of such duties during the 24-hour period, and is not the number or frequency of train orders that may be handled during a given period.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟹13.]

3. MASTER AND SERVANT ⟹13—HOURS OF SERVICE FOR EMPLOYÉS—HOURS OF SERVICE ACT.

Where the traffic of a carrier is such that it deems it necessary that train orders be transmitted or received by the use of the telegraph or telephone at certain stations during both the day and night, it must limit the hours of service of its employés who are to perform this service in interstate traffic at such stations to not exceed 9 hours in the aggregate in any 24-hour period.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟹13.]

4. MASTER AND SERVANT ⟹13—HOURS OF SERVICE FOR EMPLOYÉS—HOURS OF SERVICE ACT.

An employé of a railroad company, handling train orders in interstate traffic at a station operated both day and night, can be kept at work not more than 9 hours in the aggregate in any 24-hour period under Hours of Service Act, and the fact that the place where the employé is to perform this duty is in a station building, or above it, or a short distance from it, or in all of them at different times during the same period of service, is immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟹13.]

5. MASTER AND SERVANT ⟹13—HOURS OF SERVICE ACT—PENALTIES FOR REQUIRING EMPLOYÉS TO WORK MORE THAN NINE HOURS.

Where defendant required employés handling train orders in interstate traffic to remain on duty in excess of 9 hours in each 24-hour period at a station where the train orders in the daytime were handled in the depot, and during the nighttime at the tower a short distance from the depot, *held*, defendant was liable for the penalties prescribed by the Hours of Service Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟹13.]

6. MASTER AND SERVANT ⟹13—HOURS OF SERVICE—PENALTIES FOR VIOLATION OF HOURS OF SERVICE ACT—APPROVAL OF INTERSTATE COMMERCE COMMISSION.

The fact that the Interstate Commerce Commission approved defendant's operation of its railroad in requiring employés handling train orders to work more than 9 hours a day does not estop or preclude the government from recovering the penalties incurred by a violation of the Hours of Service Act, but may be considered in mitigation of such penalties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟹13.]

At Law. Action by the United States against the Illinois Central Railroad Company to recover penalties for violations of the Hours of Service Act. Judgment for plaintiff.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C.

Helsell & Helsell, of Ft. Dodge, Iowa, for defendant.

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

REED, District Judge. This suit is to recover from the defendant railroad company, a common carrier in interstate commerce, $7,500 for 15 alleged violations of the Hours of Service Act. The defendant denies any violation of the act. The cause is submitted upon the pleadings and an agreed statement of facts, which statement is on file with the clerk and is referred to as part hereof, and contained in a note attached hereto.[1]

The road of the defendant company in Iowa is crossed at Manson, Fonda, and Rockwell City by other railroads, and at each of these places an interlocking switch has been installed, which is operated by its employés from towers erected at short distances from the station or depot building at each place, which are necessary to the safe operation of its road at such stations and were not erected and are not used to evade the provisions of the Hours of Service Act. The applicable provisions of the Act of Congress approved March 4, 1907, effective one year thereafter (34 Stat. 1415), commonly called the Hours of Service Act, are as follows:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours: * * * Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime. * * *" Comp. St. 1913, § 8678.

For a violation of the foregoing provisions the carrier, or any officer or agent who requires or permits such violation, is liable to a penalty not exceeding $500 for each and every such violation.

[1] The language of the proviso fixing the time and place when the employés therein named may be kept on duty is not entirely clear, and the phrases "towers, offices, places and stations," and "continuously operated night and day" may admit of different interpretations; but the Interstate Commerce Commission, in its conference or administrative ruling No. 287 of March 16, 1908, said:

"(f) The phrase 'towers, offices, places and stations' is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for 9 hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and vice versa.

"(g) The phrase 'continuously operated night and day' is interpreted as applying to all offices, places, and stations operated during a portion of the day and a portion of the night a total of more than 13 hours; and the phrase 'operated only during the daytime' refers to stations which are operated not to exceed 13 hours in a 24-hour period, and is not considered as meaning that the operator thereat may be employed only during the daytime."

This interpretation of the proviso, though not controlling, is quite persuasive, is entitled to much weight, and may well be followed, unless it clearly appears from the plain language of the enactment to

[1] See note at end of case.

be erroneous. See United States v. Grand Rapids & Indiana Ry. Co., 224 Fed. 667, 140 C. C. A. 177, and cases there cited; also Chicago, Rock Island & Pacific R. R. Co. v. United States, 226 Fed. 27, 141 C. C. A. 135 and cases cited (C. C. A. 7th Circuit).

The purpose of the act, as indicated by its title, is "to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," and in Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, at page 619, 31 Sup. Ct. 621, at page 625, 55 L. Ed. 878, it is said:

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. * * *"

To accomplish this:

"It was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act."

[2, 3] The test, therefore, for the period that employés of the class named in the proviso may be kept on duty during a 24-hour period without violating this statute, is the time during which the office, station, or place where the employé is to perform such duties is kept open for the performance thereof during a 24-hour period. It is not the number or frequency of such train orders that may be transmitted or received during a given period that determines the time the employé may be kept on duty during the 24 hours; but it is the necessity of the transmission or receipt of such orders at specified stations where employés of this class may be on duty to properly perform this service during the day and night, and that is determined by the fact that the carrier requires that such orders be transmitted and received at such stations. If the traffic of the carrier is such that it deems it necessary that train orders be transmitted or received by the use of the telegraph or telephoné at certain stations during the day and night, it must limit the hours of service of its employés who are to perform this service in interstate traffic at such stations to not exceed 9 hours in the aggregate in any 24-hour period. This is the plain reading of the enactment, and is the interpretation thereof by the Interstate Commerce Commission.

[4] Whether the place where the employé is to perform this duty is in a station building, or above it, or a short distance from it, or in all of them at different times during the same period of service, is quite immaterial. That may be arranged to suit the convenience of the carrier, without making two separate and distinct places for the transmission and receipt of such orders; and, whatever the arrangement may be in this respect, the carrier who adopts this method of transmitting and receiving train orders for trains passing such a station may not lawfully permit or require the employé to be or remain on duty for a longer period than 9 hours in the aggregate during a 24-hour period, if the station is one continuously operated night and

day for the transmission and receipt of such orders, or 13 hours at all such places operated only during the day. It may be that in certain seasons of the year and in certain localities the place cannot be operated for 13 hours by the light of day only, nor 9 hours in what is commonly called the nighttime; but, dividing the day of 24 hours into periods of 12 hours each, from 6 a. m. to 6 p. m., and from 6 p. m. to 6 a. m. as is commonly done, there need be no difficulty in determining the daytime from the night within the contemplation of this enactment.

[5] It clearly appears from the agreed statement of facts that each of the stations where it is alleged in the several counts of the petition that the employés of the defendant were required to be and remain on duty in excess of 9 hours in a 24-hour period was a station and place continuously operated night and day for the transmission and receipt by telegraph or telephone of train orders affecting the movement of trains passing each of said stations, and that each of said employés was regularly engaged in that service at the station where he was so employed, and remained on duty in excess of 9 hours in each 24-hour period that he was on duty. It follows, therefore, that the defendant has incurred the penalty prescribed by the act upon each count of the petition.

It appears from the correspondence between the officials of the defendant company and the Interstate Commerce Commission in 1908, in regard to the defendant's telegraph service at Matteson, Ill. (made a part of the agreed statement of facts), that the Commission approved defendant's telegraph system at Matteson, which is similar to the systems of the defendant at Manson, Fonda, and Rockwell City, and in its closing letter in reference to the Matteson system the Commission said:

"The Commission approves the spirit in which your letter is written, and no further action will be taken in this case for the present, at least on our own motion. [Signed by the secretary of the Commission.]"

[6] Whatever the purpose of introducing this correspondence in this case, the defendant cannot successfully claim therefrom that the government is estopped or precluded from recovering the penalties incurred by it for a violation of the act at its stations in question in this proceeding. It may be that the approval by the Commission of defendant's system at Matteson led it to believe that it might lawfully continue the use of its telegraph systems at Manson, Fonda, and Rockwell City. It may therefore be considered in mitigation.

The judgment, therefore, is that the plaintiff recover $50 on each of the 15 counts of the petition, or $750 in all, with costs. It is accordingly so ordered. Defendant excepts.

NOTE.

Agreed Statement of Facts.

Paragraph 1. It is hereby stipulated and agreed by and between the parties to the above-entitled action that a jury is waived, and the cause shall be tried to the court upon the following statement of facts; each party reserving the right to object to any fact on the ground of its incompetency, irrelevancy, or immateriality, and to introduce further evidence by testimony of witnesses, and each party also reserving the right to except to the judgment of the court and prosecute writ of error:

Par. 2. It is stipulated and agreed that the defendant is, and was at all times, as alleged in plaintiff's petition, a corporation organized and doing business under the laws of the State of Illinois, and that its railroad extended through the cities of Manson, Fonda, and Rockwell City, in the state of Iowa; that it is a common carrier, and was at all times mentioned in plaintiff's petition engaged in interstate commerce by railroad in that state.

Par. 3. It is further agreed that in the said city of Rockwell City the defendant has, since the construction of its road, maintained a depot building, in which the business usually carried on in such a building is conducted; that said depot was built in 1905, and is equipped with a telegraph instrument, an Illinois Central dispatcher's telephone, and a city telephone; that the interlocking tower at Rockwell City was built in 1900.

Par. 4. That the employés named in each of the 15 counts of the plaintiff's petition were, at the times alleged, employés of the defendant, and worked during the hours alleged in said petition, to wit: Counts 1, 2, and 3—Enoch G. Voss at Rockwell City, from the hour of 7 a. m. to the hour of 7 p. m. on each of the three days, May 1, 2, and 4, 1914, with one hour off at noon for dinner. Counts 4 and 5—G. B. Litchkey at Rockwell City, Iowa, from the hour of 7 p. m. to the hour of 7 a. m. the succeeding day on each of the two days, May 1, and 2, 1914, with one hour off at midnight for lunch. Counts 6 to 8—Oxel E. Johnson at Manson, Iowa, from the hour of 7 a. m. to the hour of 7 p. m. on each of the three days, May 1, 2, and 4, 1914, with one hour off at noon for dinner. Counts 9 and 10—O. F. Spangler at Manson, Iowa, from the hour of 7 p. m. to the hour of 7 a. m. the succeeding day on each of the two days, May 1 and 2, 1914, with one hour off at midnight for lunch. Counts 11 to 13—E. Recknagel at Fonda, Iowa, from the hour of 7:10 a. m. to the hour of 8:20 p. m. on each of the three days, May 1, 2, and 4, 1914, with one hour off at noon for dinner. Counts 14 and 15—F. D. Mangold at Fonda, Iowa, from the hour of 7 p. m. to the hour of 7 a. m. the succeeding day on each of the two days, May 1 and 2, 1914, with one hour off at midnight for lunch.

Par. 5. That said employés, while on duty during said hours, by the use of the telegraph and telephone, reported, transmitted, received, and delivered orders pertaining to and affecting the movements of trains engaged in interstate commerce.

Par. 6. That said employés at Rockwell City worked as follows: Voss was what is termed an agent and operator, and worked at defendant's depot at Rockwell City from 7 a. m. to 7 p. m. At 7 p. m. Operator Litchkey reported for duty, taking charge of the train register and train order book at the depot, carrying the same to defendant's tower 750 feet east from said depot. That at 7 a. m. he returned to the depot with the train register and order book, turning them over to the operator for the defendant at such depot. That all orders and messages, received or sent by the use of the ordinary telegraph instrument or telephone, pertaining to train movements, received and delivered at Rockwell City between the hours of 7 a. m. and 7 p. m., were received and delivered at said depot. That all orders pertaining to the Illinois Central trains, received and delivered at Rockwell City between the hours of 7 p. m. and 7 a. m. the succeeding day, were received and delivered at said tower, the night tower man performing no work whatever at the depot, and the day operator performing no work whatever at the tower.

Par. 7. That said employés at Manson, Iowa, worked as follows: Johnson worked as agent and operator in defendant's depot at Manson from 7 a. m. to 7 p. m. That the operator leverman Spangler went on duty at 7 p. m., first getting mail at the post office and taking it to the depot. He then proceeded to defendant's telegraph office at the interlocking tower 900 feet west of the depot, arriving at 7:15 p. m. He remained at the tower until about 8:45 or 9 p. m., at which time he returned to the depot, taking charge of the cash on hand and clerical work connected with the station, about 15 minutes later again returning to the tower, and remaining until about 3:45 a. m. in the capacity of telegraph operator and leverman. At about 3:45 a. m. he again returned to the depot, meeting defendant's train 611, there selling tickets and checking baggage for a period of about 30 minutes. He by telegraph or telephone also reported the leaving of this train from the depot to the dispatcher at Cherokee, after which he took the mail to the post office, returning to the tower, then going to the depot at about 6:35 a. m. to sell tickets and check baggage for defendant's train 631, due at 7:05 a. m., selling tickets, checking baggage, etc., for about 25 minutes, being relieved by Johnson at 7 a. m.

Par. 8. That such employés worked at Fonda, Iowa, as follows: Recknagel worked as agent and operator in defendant's depot from 7:20 a. m. to 8:20 p. m. Operator F. D. Mangold began duty at defendant's telegraph tower 305 feet west of the depot at 7 p. m., remaining there until 8:20 p. m., at which hour, having notified the dispatcher, he went to the depot to get the cash and clerical work, returning about 15 minutes later to the tower, and there resuming the duties of operator, and remained at the tower until about 4:20 a. m., when he went to the depot to meet the defendant's train 611, due at Fonda at 4:50 a. m., selling tickets and checking baggage for said train 611, taking about 30 minutes for this work.

Par. 9. That said towers at Manson and Fonda were erected in the years 1901 and 1900, respectively, and the depots in the years 1893 and 1870, respectively. That the method of the performance of said work, as above described, was instituted prior to March 4, 1908, and subsequent to March 4, 1907.

Par. 10. That such operating towers are necessary to the proper operation of defendant's railroad, and were not erected for the purpose of evading the federal act under which this suit is brought.

Par. 11. It is further stipulated and agreed that the operator, train dispatcher, or other employé performing the work in the depot building at Rockwell City in each 24-hour period between the hours of 7 a. m. and 7 p. m. does not perform any duties whatsoever at said tower; and it is further stipulated that the operator, train dispatcher, or other employé at Rockwell City employed between the hours of 7 p. m. and 7 a. m. in the said tower does not work at said depot building during said period of employment, or at any other time.

Par. 12. It is further agreed that none of said employés was on duty performing work of any character whatsoever for a longer period than 13 hours on any of said days.

Par. 13. It is further stipulated and agreed that the interlocking towers at Rockwell City, Fonda, and Manson were used by the tower levermen in the operation of the levers during the daytime, and by other employés not named herein.

Par. 14. It is further agreed that the attached correspondence is an exact copy of the original, and is made a part of this stipulation.

F. A. O'Connor, United States Attorney.
Monroe C. List, Sp. Asst. U. S. Atty.
Helsell & Helsell, Attorneys for Defendant.

It is further agreed that the attached correspondence is an exact copy of the original and is hereby made a part of this stipulation.

"Interstate Commerce Commission.

"May 20, 1908.

"Mr. G. H. Groce, Supt. of Telegraph & Signals, Illinois Central Railroad Company, Chicago, Ills.—Dear Sir: The Commission is in receipt of information that at Matteson, Illinois, where you have a tower at the crossing of the Michigan Central Railroad, you are operating the station with two telegraphers, who work twelve hours each out of a period of twenty-four hours, and that these two offices are in very close proximity. It would appear that this arrangement is not in conformity with the so-called Hours of Service Law, nor with the Commission's administrative ruling and opinion thereon, copies of which are inclosed herewith. We trust that you will give this matter careful investigation, and, if the facts are as stated, rearrange the service.

"Very respectfully, [Signed] E. A. Moseley, Secretary."

"June 2, 1908.

"Mr. E. A. Moseley, Sec'y Interstate Commerce Commission, Washington, D. C.—Dear Sir: I have your letter of May 20th giving notice that the Commission has information to the effect that the telegraph operators employed by the Illinois Central Railroad Company at Matteson, Illinois, are being required to work in a manner not in conformity with the so-called 'Hours of Service Law' and the Commission's administrative ruling and opinion thereon.

"In order to set forth the situation at Matteson as clearly as possible you will find enclosed with this letter two blueprints marked respectively 'D' and 'E,' to which prints reference will be made in this letter.

"In the year 1889 there existed at Matteson, Ill., a depot building located in the southeast angle caused by the railroad crossing, and a telegraph office was operated in the depot building. In that year an interlocking plant was installed for the protection of the crossing of the Michigan Central and Illinois Central tracks, and the interlocking tower building was located in the northwest angle made by the crossing tracks. Telegraph operators were used as towermen, and telegraph service relating to the railroad company's business, including train order business, was handled in the tower. The tower was of course, a continuously operated office. The telegraph office in the depot building, located 40 feet from the tower building, was a day-only office. This condition of affairs existed on March 4, 1908, at which time the Hours of Service Law took effect. At that time the telegraph office in the tower was discontinued as a day train order office, and it has not been since used for the handling of train orders between the hours of 7 a. m. and 7 p. m. All train order work necessary at Matteson, Illinois, between the hours of 7 a. m. and 7 p. m., is handled in the telegraph office located in the depot building. The Illinois Central Railroad Company therefore considers that neither of these telegraph offices are continuously operated night and day for the purpose of dispatching, reporting, transmitting, receiving, or delivering orders by telegraph or telephone pertaining to or affecting train movements.

"Prior to March 4, 1908, the work of rebuilding complete the interlocking plant, which has been in service at Matteson, Ill., since 1889, was commenced, and this work was completed in April, 1908. In the reconstruction of the plant the tower was, for convenience in operation and construction, located in the northeast angle made by the crossing tracks, instead of the northwest angle. Beyond this there has been no change whatever made in the character of the work performed by the men located in the tower, and the office in the depot building, 35 feet from the tower building, has been maintained as a day office in precisely the same manner as the operation had been conducted previously.

"The legal department of our system was consulted by the transportation department when these problems came up just prior to the effectiveness of the Hours of Service Law, and it was the advice of that department that our arrangement to discontinue the tower as a day train order office would make it entirely within the terms of the law for the men employed in the tower to work 13 hours per day, if necessary. As a matter of fact, they are working 12 hours per day.

"This matter has been further referred to in our legal department upon receipt of your letter of May 20th. It is the opinion given by our legal department that this does not constitute a violation of the fifth paragraph of section 2 of the administrative ruling and opinion of the Interstate Commerce Commission on the Hours of Service Act. There was in this case no building erected for the purpose of changing in any manner the arrangement of the two offices at Matteson from the manner in which they had been worked for 19 years previously.

"Yours truly, Supt. Telegraph & Signals."

"Interstate Commerce Commission.

"June 10, 1908.

"Mr. G. H. Groce, Supt. Telegraph & Signals, Illinois Central Railroad Company, Chicago, Ills.—Dear Sir: We are in receipt of your communication of the 2d instant, in regard to the station at Matteson, Ill., in which you state that the telegraph office in the depot building, located 40 feet from the tower building, was a day office only, which condition of affairs existed on March 4, 1908, at which time the Hours of Service Law took effect. At that time the telegraph office in the tower was discontinued as a day train order office, and it has not been since used for the handling of train orders between the hours of 7 a. m. and 7 p. m. All train order work necessary at Matteson between the hours of 7 a. m. and 7 p. m. is handled in the telegraph office located in the depot building. You further state that the legal department of your system was consulted by the transportation department when these problems came up just prior to the effectiveness of the Hours of Service Law, and their advice was that it would not be a violation of the law to arrange the service in the manner as stated by you.

"Literally it may be true that this is not a continuously operated office. However, it would appear that at the time you made the change and sought the advice of the legal department you must have been somewhat in doubt, and it may be urged that it is an evasion of the law. The Commission, therefore, would be very much pleased if this service could be rearranged.

"Yours respectfully, [Signed] E. A. Moseley, Sec'y I. C. C."

"July 7, 1908.

"In re Putting a Third Man in the Interlocking Tower at Matteson.

"Mr. I. G. Rawn, Vice President—Dear Sir: I have yours of July 6, 1908, in the above matter, with inclosures which I herewith return. I have already given an opinion to the effect that there is nothing unlawful in the condition there. My opinion is unchanged. If I am correct as to the law, I see no reason why we should incur an additional expense simply to gratify the secretary of the Interstate Commerce Commission. That, however, is a matter for you to determine. Of course, it may turn out that I am mistaken, but I have given the matter careful consideration and have stated my opinion as to the law.

"By section 3 of the act it is provided that any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section thereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed. It does not say whether each day would be a recurrent offense; but, construing section 3 in connection with section 2, I am inclined to the opinion that such would be the case.

"Yours truly, J. M. D., General Counsel."

"Chicago, July 27, 1908.

"Hon. J. M. Dickinson, General Counsel—Dear Sir: I hand you herewith some correspondence relative to putting on a third man in the interlocking tower at Matteson. You are more or less familiar with this subject, inasmuch as it has previously been referred to you by the superintendent of telegraph and signals.

"Briefly, the conditions are in the year of 1889 there existed at Matteson a depot building located in the southeast angle of the railroad crossing and a telegraph office was operated in the depot building. In that year an interlocking tower was installed for the protection of the crossing of the Michigan Central and this company, and the interlocking tower building located in the northwest angle made by the crossing of the tracks. Telegraphers were installed in the tower, and telegraph service relating to the railroad company's business, including the handling of train orders, was handled in the tower; this service in the tower constituting what is known as a continuous office. The telegraph office in the depot, located 40 feet from the tower building, was a day office only. This condition existed on March 4, 1908, at which time the Hours of Service Law took effect. At the time the Hours of Service Law took effect, the telegraph office in the tower was discontinued as a day train order office, and has not since been used for the handling of train orders between the hours of 7 a. m. and 7 p. m. All train order work necessary between these hours is handled in the telegraph office located in the depot building. We have, therefore, considered that neither the telegraph office in the interlocking tower nor the depot proper are continuously operated night and day for the purpose of dispatching, recording, transmitting, receiving, or delivering orders by telegraph or telephone, pertaining to or affecting the movement of the trains.

"Prior to March 4th last we had contemplated rebuilding complete the interlocking plant, this work being completed in April, 1908. In the reconstruction of the plant, for convenience in operation and construction, the tower was located in the northeast angle, instead of the old location in the northwest angle. Beyond this there has been no change in the character of the work performed by the man located in the tower or in the office of the depot building.

"Kindly now note that the secretary of the Interstate Commerce Commission, in his letter of June 10th addressed to Mr. Groce, states, literally speaking, it may be true this is not a continuously operated office; that, however, it would appear at the time the change was made—i. e., discontinuing the day office in the interlocking tower—some doubt must have existed, and it may be urged that it is an evasion of the law. The Commission, therefore, suggested that the service be rearranged.

"Shall be very pleased to have your opinion whether we should comply with this suggestion.

"Yours truly, [Signed] I. G. Rawn, Vice President."

"August 5, 1908.

"Mr. E. A. Moseley, Secy. Interstate Commerce Commission, Washington, D. C.—Dear Sir: Referring to the correspondence which has passed between yourself and our Mr. Groce, Superintendent of Telegraph & Signals, in relation to the telegraph service at Matteson, Ill., the situation at that point being referred to in letter from you under date of May 20th and Mr. Groce's reply of June 2, 1908.

"The matter having been referred to me by Mr. Groce, beg to advise the railroad company is still unable to understand wherein the present arrangement at Matteson, as outlined to you by Mr. Groce in his letter of June 2d, is in any way a violation of the so-called Hours of Service Law, or of the administrative ruling and opinion issued by order of the Commission March 16, 1908.

"The attention that was given this matter by our law department as stated in the last paragraph of your letter, was not given on this specific point. The Illinois Central Railroad, in common with other companies, arranged for a meeting of their transportation and law departments just prior to the effectiveness of the Hours of Service Law, and all questions in general were discussed for the purpose of enlightening the men whose duties required them to see that the provisions of the law were obeyed.

"The managing officials of the Illinois Central Railroad have been careful to have it understood that there should be no attempt to install practices that might be termed evasions of the law. On the other hand, the interpretation of such points as might be considered not altogether clear has always been toward a liberal view. With this course in mind, we still do not feel that the present practices at Matteson, are in any way a violation of the law, or an evasion. You understand, of course, that the tower house was not erected to evade the law, but had been in use as a telegraph office a long time prior to the passage of the Hours of Service Law.

"Yours truly, General Manager."

"Interstate Commerce Commission.

"August 12, 1908.

"Mr. F. B. Harriman, General Manager, Illinois Central Railroad Company, Chicago, Illinois—Dear Sir: Receipt is acknowledged of your communication of the 5th instant, and we note your explanation of the arrangement of the service on your road at Matteson, Ills., and your statement that the tower house was not erected to evade the law, but had been in use for a long time prior to the passage of the Hours of Service Act, and that the managing officials of the Illinois Central have been careful to have it understood that there must be no attempt to install practices that might be termed evasions of the law. The Commission appreciates the spirit in which your letter is written, and no further action will be taken in this case for the present, at least not for our own motion.

"Yours truly, E. A. Moseley, Sec'y."

In re CONDEMNATION SUITS BY UNITED STATES.

(District Court, E. D. Tennessee, N. E. D. March 30, 1916.)

1. EMINENT DOMAIN ⟹181—PROCEEDINGS—PROCESS—VALIDITY.

In condemning land under Weeks Law March 1, 1911, the United States proceeded under Act Aug. 1, 1888, c. 728, 25 Stat. 357, providing that condemnation under judicial process may be had in the District Courts of the district wherein such real estate is located, and in section 2 that the practice, pleadings, forms, and modes of proceedings shall conform, as near as may be, to the practice, pleadings, forms, and proceedings in the state courts. The Tennessee statutes, in which state the land was located, provide for the commencement of condemnation proceedings by mere service of notice and publication as to nonresidents. Rev. St. U. S. § 911 (Comp. St. 1913, § 1534), provides that all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue and shall be signed by the clerk thereof. *Held*, that section 911 applies only to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the courts; hence, as condemnation proceedings may be instituted upon mere notice, such proceedings are valid, though the notices are not under seal of the court and signed by the clerk.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490–492; Dec. Dig. ⟹181.]

2. EMINENT DOMAIN ⟹166—CONDEMNATION—NATURE OF PROCEEDINGS.

Condemnation proceedings are essentially proceedings in rem.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 448–450, 456; Dec. Dig. ⟹166.]

3. EMINENT DOMAIN ⟹181—PROCEEDINGS—PROCESS.

In condemnation proceedings, it is only essential that the owner of the land have notice of the proceedings and an opportunity to appear and protect his rights.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490–492; Dec. Dig. ⟹181.]

4. EMINENT DOMAIN ⟹181—PROCEEDINGS—PROCESS.

Where notice of condemnation has been given, the owners are bound to take cognizance of all subsequent steps without notice.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490–492; Dec. Dig. ⟹181.]

5. EMINENT DOMAIN ⟹181—PROCEEDINGS—PROCESS.

Notice of condemnation proceedings is sufficient, in the absence of statutory requirements, where it contains the material facts of which the landowner is entitled to notice and is in substantial conformity with the petition.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490–492; Dec. Dig. ⟹181.]

6. EMINENT DOMAIN ⟹181—PROCEEDINGS—PROCESS.

Where the statute is silent as to who shall give notice of condemnation, it may be given by the party instituting the proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 488, 490–492; Dec. Dig. ⟹181.]

7. EMINENT DOMAIN ⟹182—PROCEEDINGS—PROCESS.

Personal notice of condemnation proceedings is not a constitutional prerequisite to its validity, but the Legislature can provide for constructive notice by publication.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 493–496; Dec. Dig. ⟹182.]

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

In the matter of condemnation suits by the United States. Process held valid.

Lewis M. Coleman, U. S. Atty., of Chattanooga, Tenn.

St. John & Gore, of Bristol, Tenn., for claimants.

SANFORD, District Judge. In several proceedings instituted by the United States and now pending in this court for condemnation of lands under the provisions of the Weeks Law of March 1, 1911, c. 186, 36 Stat. 961 (Comp. St. 1913, §§ 5174–5187), the United States Attorney and various counsel representing claimants to the land have informally requested the opinion of the court as to the validity of the proceedings, arising out of a doubt which has been suggested as to the jurisdiction of the court by reason of the fact that no summons have been issued and served upon the owners of the land, but they have been brought before the court, if at all, by mere service of notice and publication as to nonresidents, in accordance with the provisions of the general statutes of Tennessee in reference to condemnation proceedings.

[1] The Act of August 1, 1888, c. 728, 25 St. 357, authorizing the condemnation of land by the United States for public uses, by condemnation under judicial process in proceedings in the Circuit or District Courts of the district wherein such real estate is located, provided, in section 2, that:

"The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This provision as to conformity to the State practice is, it is to be noted, in substantially the same terms as the provisions of the general conformity statute, embodied in section 914 of the Revised Statutes (Comp. St. 1913, § 1537).

The general statute of Tennessee in reference to the condemnation of land for railroads and other works of internal improvement, provide that the party seeking to appropriate such land shall file a petition therefor in the circuit court of the county in which the land lies (Tenn. Code 1858, § 1326; Shan. § 1845); that notice of this petition shall be given to the owner of the land, or, if a nonresident of the county, to his agent, at least five days before its presentation (Code 1858, § 1327; Shan. § 1846); that if the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in the Code in similar cases in chancery (Code, § 1328; Shan. § 1847); and that "all parties having any interest in any way in such land may be made defendants, and the proceedings will only cover and affect the interest of those who are actually made parties" (Code, § 1329; Shan. § 1848). This statute makes no provision for bringing the owners of the land before the court in any other way than by notice and publication, as above set forth, and does not provide for the issuance of process against them in the ordinary sense, such proceedings being under the State law an exception, by necessary inference, to the general statutory provision that all civil actions at law in courts of record, except as otherwise provided, shall be commenced by summons. Tenn. Code, § 2813; Shan. § 4518. Thus in Camp v. Railroad, 11 Lea (Tenn.) 705, 706, it was held that condemnation proceedings based alone upon the statutory notice, without summons, were valid, and that the general Code provisions as to pleadings in actions at law did not apply to such statutory proceedings.

The doubt which has been suggested as to the validity of these proceedings arises from the fact that section 911 of the Revised Statutes (Comp. St. 1913, § 1534) provides that "all writs and process issued from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof"; the suggestion being that under this provision these proceedings should have been commenced by summons to the owners of the land, issued under the seal of the court and signed by the clerk.

I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the State courts, the general conformity statute not operating to waive this specific requirement as to the process in the Federal courts embodied in section 911 of the Revised Statutes. Martin v. Criscuola, 10 Blatchf. 211, 16 Fed. Cas. 892; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. 71; Dwight v. Merritt (C. C.) 4 Fed. 614, 615; Middleton Paper Co. v. Paper Co. (C. C.) 19 Fed. 252, 253.

After careful consideration, however, I conclude that the provisions of section 911 only apply to writs and process issuing from the courts themselves, and not to notices given by the parties, which are not process of the court and not embraced within its terms, and hence that in any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, the requirements of section 911 have no application. This is in accordance with the principle of Leas v. Merriman (C. C.) 132 Fed. 510, in which it was held that the provisions of sec. 911 did not apply to a notice given under the Virginia Code authorizing a judgment on a contract to be obtained on motion after notice to the defendant and the practice thereunder by which notice was served on the defendant by the plaintiff or his attorney, such notice not being a process from the court, and that under the general conformity statute an action might be instituted by such notice in the Federal court in Virginia in accordance with the State practice.

[**2-7**] Without determining to what extent the process of the court in the strict sense can be dispensed with in ordinary civil actions in which a personal judgment is sought against the defendant, I am of opinion, after careful consideration, that such process is not essential in condemnation suits instituted in pursuance of the delegated authority of the State under its power of eminent domain. Such condemnation proceedings are generally recognized as being essentially proceedings in rem. 15 Cyc. 805. It is also generally recognized that

in such proceedings it is only essential that the owner of the land have notice of the proceedings and an opportunity to appear and protect his rights (15 Cyc. 841); that where notice has been properly given, the owners are bound to take cognizance of all acts or steps thereafter taken in the proceedings and are not usually entitled to any further notice (15 Cyc. 843); that the form of the notice, when not prescribed by statute, is not essential, provided it contains the material facts of which the land owner is entitled to notice, and there is a substantial conformity between the notice and the petition for condemnation (15 Cyc. 845); that where the statute is silent as to who shall give the notice, it may be given by the party instituting the proceedings (15 Cyc. 847); and that personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, but the legislature may provide for constructive notice by publication (15 Cyc. 847).

In the light of these well settled general rules, I am of opinion that it is not essential to the validity of condemnation proceedings of this character that the owners of the land be brought before the court by summons or other process issued from the court itself, but that it is sufficient if the proceedings be instituted by petition in conformity to the State statute, after the giving of notice to the land owners by actual service of notice or publication as provided by the State statute; and that, such notice not being the process of the court, the requirements of section 911 of the Revised Statutes hence have no application. I therefore conclude that the validity of these proceedings is not affected by the fact that they were not commenced by summons or other process of the court issued under the seal of the court and signed by the clerk, in accordance with section 911 of the Revised Statutes.

UNITED STATES v. GRADWELL et al.

(District Court, D. Rhode Island. July 28, 1916.)

1. CONSPIRACY ⚷33—DEFRAUDING GOVERNMENT—CORRUPTING ELECTION.

Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), making it an offense to conspire "to defraud the United States in any manner or for any purpose," is not intended for protection against corruption of a state election at which a Representative in Congress is chosen, as well as for protection of operations of the organized government.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⚷33.]

2. INDICTMENT AND INFORMATION ⚷71—CERTAINTY.

Even if it be a crime, under Criminal Code, § 37, to conspire to corrupt a state election for Representative in Congress, *held*, the indictment was so vague, uncertain, insufficient, and duplicitous in its allegations as not to sufficiently apprise defendants of the nature of the charge for preparation of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⚷71.]

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

Criminal prosecution by the United States against Matthew T. Gradwell and others. Demurrers to indictment sustained.

See, also, 227 Fed. 243.

Harvey A. Baker, U. S. Atty., of Providence, R. I. (William H. Camfield, Asst. U. S. Atty., of Providence, R. I., on the brief), for the United States.

Barney, Lee & McCanna, of Providence, R. I., for defendants Gradwell, Mathewson, Warner, and Rathbun.

Charles A. Walsh, of Providence, R. I., for defendants Keach, Colvin, Kresge, and Whitman.

Wilson, Gardner & Churchill, of Providence, R. I., for defendants Dodge and Hudson.

James E. Dooley, of Johnston, R. I., for defendant Carpenter.

Wayne H. Whitman, of Providence, R. I., for defendants Carr and Franklin.

BROWN, District Judge. [1] This is an indictment under section 37 of the Criminal Code, charging a conspiracy to defraud the United States by corrupting a general election at which a Representative in Congress was voted for and elected.

The fundamental question is whether this conspiracy statute is to be so broadly construed as to comprehend a conspiracy of this character.

It is not contended that the conspiracy was to commit any offense against the United States, but the indictment rests upon the words "to defraud the United States in any manner or for any purpose." It is well settled that these words are broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the government. U. S. v. Barnow, 239 U. S. 74, 79, 36 Sup. Ct. 19, 60 L. Ed. 155; Haas v. Henkel, 216 U. S. 462, 479, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; U. S. v. Plyler, 222 U. S. 15, 32 Sup. Ct. 6, 56 L. Ed. 70; U. S. v. Curley (D. C.) 122 Fed. 738, Id., 130 Fed. 1, 64 C. C. A. 369. But these and all cases cited, except one, relate to functions of the organized government, and not to a step in the organization of the government.

But a single case has been cited in which the statute has been extended to include fraud in the election of a member of Congress. U. S. v. Aczel et al. (D. C.) 219 Fed. 917, 921, 923, 934, 938. The learned judge, after a consideration of U. S. v. Curley, 130 Fed. 1, 64 C. C. A. 369, Id. (C. C.) 122 Fed. 738, and Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, expressed the opinion that:

"If a conspiracy which is calculated to * * * destroy the value of the operations and reports of the Bureau of Statistics of the Department of Agriculture as fair, impartial, and reasonably accurate would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or department regulations, it is perfectly plain that a conspiracy which is calculated to obstruct and impair, corrupt, and debauch an election where Senators and Representatives in Congress are to be elected, would be to defraud the United States by depriving the government itself of its lawful right to have such Senators and Representatives elected fairly and in accordance with the law."

Apparently the opinion proceeds on the assumption of an analogy between the obstruction of operations of the constituted government and obstruction of an election by which the people of the state make their choice of Representatives in Congress. Whether such assumption is justified requires careful examination and further consideration.

Assuming that the United States has such an interest in the election of a Representative in Congress as gives it constitutional power to pass statutes safeguarding such an election, no such statute is involved, and in the present case we are not directly concerned with any other existing statute passed by Congress to this end. The question is whether section 37 of the Criminal Code, in its inclusion of conspiracies to defraud, was intended as a statute for the protection of elections for Representatives in Congress, as well as for the protection of operations of the organized government.

The existence of a constitutional power in Congress to legislate in respect to the conduct of those elections whereby the people of a particular state choose their Representatives in Congress is of slight assistance in determining whether, by this conspiracy statute, it was intended to do so.

For many years this power was reserved, and was not exercised.

In the dissenting opinion of Mr. Justice Lamar in U. S. v. Mosley, 238 U. S. 388, 35 Sup. Ct. 904, 59 L. Ed. 1355, is a reference to the legislation under this power, and to the report of the committee (House Report No. 18, 53d Congress, 1st Session) as to the policy of federal legislation concerning elections held under state laws. See, also, Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715.

The question of protecting the United States against the class of frauds which involve merely the relations of the offender and the United States, and the question of legislating respecting the conduct of the elections whereby the people of the respective states choose their Representatives in Congress are substantially distinct, so distinct in substance that it is highly improbable that it was intended to legislate on both together. The Curley Case (C. C.) 122 Fed. 738, and 130 Fed. 1, 64 C. C. A. 369; Hass v. Henkel, 216 U. S. 462, 479, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; and the cases other than the Aczel Case, involved no consideration of the relations between state and national governments, or of the political policy of exercising the constitutional power of Congress to legislate concerning the elections which are primarily the act of the people of the states in choosing their Representatives.

It is of course possible, by the use of abstract terms, to bring under a single classification things which are practically and substantially different. It is not enough, however, that the United States may be able to show that a violation of a constitutional right of the United States was contemplated by conspirators. We must find other than a verbal justification for giving to section 37 of the Criminal Code so broad a scope. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. Holy Trinity Church v. U. S., 143 U. S. 457, 459, 12 Sup. Ct. 511, 36 L. Ed. 226.

The right of the United States in respect to these elections is a constitutional right to legislate or not to legislate as is deemed expedient or necessary. With this right, or with its exercise, no interference is charged in the indictment. But it is said that there is also in the government a right to have its Senators and Representatives elected fairly and in accordance with law, even when Congress has not legislated to define the right. It is inaccurate to say that the indictment charges a conspiracy to defraud the government of this right, nor can it be said that it is charged that the United States is obstructed in the performance of any active function in respect to this right. It may be said that this theoretical right is violated by doing what is inconsistent with it, and that a violation of the right is in a sense a fraud upon the United States. But in the inquiry whether section 37 was intended to vindicate this right, or to afford protection against its violation, we may consider what protection is otherwise afforded.

In Ex parte Siebold, 100 U. S. 392, 25 L. Ed. 717, it was said:

"As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should as far as practicable be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application."

In the dissenting opinion in Ex parte Clarke, 100 U. S. 420, 25 L. Ed. 715, Mr. Justice Field emphasizes the interest of the states in maintaining the purity of such elections, and says:

"I do not think that any apprehension need be felt if the supervision of all elections in their respective states should also be left to them."

This is a statement of a political policy which seems generally to have prevailed over the opposite policy by the repeal of the statutes which were adopted in reconstruction times.

In considering whether section 37 was intended as an exercise of constitutional power to protect against fraud in state elections, it is proper to consider that the so-called right of the United States to have duly chosen Representatives in Congress is safeguarded by the primary interest of the people of the states in this respect, and by the laws of the states, and that for this reason congressional legislation on the subject generally has been regarded as unnecessary.

It cannot be said that Congress was under any positive duty to legislate for the protection of state elections for members of Congress, or that there is any presumption of an intent to do so. But the right of the United States to duly elected Congressmen is protected by the Constitution itself in a provision which indicates distinctly the policy of excluding questions of this character from the jurisdiction of the courts, as well as of avoiding conflict between state and national governments, even though the right of Congress to legislate, if necessary, is reserved.

The House of Representatives is made the final judge of the elections, returns, and qualifications of its own members. The Representatives of all the other states pass upon the question whether the Representative of a particular state has been duly elected. The apparent intent was to remove such questions from executive, judicial, or even legislative control, and to confide them to the Representatives directly chosen by the people. The United States cannot be defrauded by the payment of a salary to one whose right to a seat is formally established by the House.

The constitutional provision is the ultimate protection of the United States in its so-called right to have duly elected representatives.

It is urged that the conspiracy is to deceive and defraud the House of Representatives, a body made up of officers of the United States. In Lamar v. U. S., May 1, 1916, 241 U. S. 103, 36 Sup. Ct. 535, 60 L. Ed. 912, it was held by the Supreme Court that a member of the House was a legislative officer, and that section 32 of the Criminal Code was applicable to false personation of such an officer. But, as was said in the opinion, the issue in that case was not a constitutional one, but of statutory construction.

Nothing in that opinion serves to abolish the clear distinction pointed out in Burton v. U. S., 202 U. S. 344, 369, 370, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392, between offices created by or existing under the direct authority of the national government, as organized under the Constitution, and offices the appointments to which are made by the states, acting separately, albeit proceeding in respect to such appointments under the sanction of that instrument. It was said:

"While the Senate, as a branch of the legislative department, owes its existence to the Constitution, and participates in framing laws that concern the entire country, its members are chosen by state Legislatures, and cannot properly be said to hold their places 'under the government of the United States.'"

Primarily a fraud upon a state election for Representatives in Congress is a fraud upon the right, not of the United States government, but of the people of a particular state. It may be a fraud on the elective franchise and civil rights of citizens, and the extent to which Congress has exercised its constitutional right in that respect is defined in chapter 3 of the Criminal Code, which is not here invoked.

In chapter 4 "Offenses against the Operations of the Government" are treated as a distinct classification, though it may be said that the chapter includes also a section relating to federal elections, etc. Section 37, which is included in chapter 4, can be given full effect as a statute for the protection of the operations of the organized government. If we regard it as a statute relating to the first steps which are taken by the citizens of states in the choice of Representatives and in the organization of the government, we then may have the United States asserting in the courts the illegality of the action of the people of the state in the choice of Representatives, and this in spite of the constitutional provision that the ultimate decision of the question is not intrusted to any one of the departments of the government, either executive, judicial, or legislative, but to a special tribunal—the House itself.

It does not matter that the charge is only of conspiracy to elect illegally, and of overt acts in pursuance of that conspiracy. If bribery in state elections is not made a federal offense because of the primary interest of the states in protecting their own elections, and because of the provision of a special constitutional tribunal for the trial and settlement of such questions, the same reasons exist against trials for conspiracy to bribe. A charge of a conspiracy to bribe, with bribery as an overt act, may bring before the court substantially the same questions as if the statute were directly against bribery.

The political considerations of the relation between the people of the state and the national government are substantially the same in both cases.

If, for reasons of public policy, the constitutional power to legislate in the one case has been reserved, it seems inconsistent that it should have been exercised in the other.

Every completed bribery could be charged as a conspiracy to bribe, with overt act of bribery, and thus the courts might be required to adjudicate upon the same matters that are to come before the House, or upon which the House already has decided. The rule that the judicial tribunals must not hamper or embarrass the other departments by prejudging the questions which they will have to decide, or attempting to review the decisions already made (Black's Const. Law, p. 85), affords also a reason for adopting a construction restricting section 37 to frauds affecting the operations of government, and for not extending it to frauds affecting the action of the people of a particular state toward organizing the government by the election of Representatives.

The policy of leaving to the states themselves the control of elections for presidential electors, and of providing for frauds in such elections (see In re Green, 134 U. S. 377, 380, 10 Sup. Ct. 586, 33 L. Ed. 951), seems consistent with the same policy respecting Representatives in Congress.

Yet the argument of the United States as to the scope of section 37 would require that a conspiracy to commit fraud in the election of presidential electors should be included.

The right to "duly elected Congressmen" is of the same nature as the right to a duly elected President and Vice President, etc.

In fact, if a violation of a theoretical constitutional right of the government not declared by statute is to be deemed a fraud, the conspiracy statute will be so broadened as to expand it beyond the scope of legislative foresight. Repugnancy to a reserved constitutional power of Congress to enact law can hardly be a practical test of fraud. Inconsistency with what Congress has power to protect, but has not protected, by law, or with reasons why it might legislate if it saw fit, is not a satisfactory test of what shall constitute a defrauding of the United States under section 37.

As the defendants' brief points out, there is a sharp and clear distinction between a conspiracy to obstruct the administration of a law of the United States and a conspiracy which affects the constitution of one of the great departments of government. While there are two sides to the matter, one state and one national, the interest of the United States is so well protected otherwise that it cannot be presumed that the conspiracy statute was enacted with any thought of the application which the government now seeks to make. To so apply the statute takes it out of the definite sphere of protecting and assisting the operation of organized government into the distinct sphere of state action in performing what is peculiarly a state function, the choice of state Representatives in Congress. It also confers upon the courts an extensive jurisdiction in respect to political matters, with the risk of judicial decisions at variance with the decisions of the tribunal which has power of final decision. It might so affect a candidate for Representative, or a Representative-elect, or even a presidential elector, as to impose upon him the duty of appearing in court for vindication of his rights or his character, though the Constitution has provided another tribunal for that purpose, and though statutes have provided a procedure differing from that of the courts. It would impose upon the Executive and upon the Department of Justice the duty of enforcing the law, of making the necessary investigations, and would bring that one of the executive departments into the control of prosecutions affecting the Constitution of a branch of the legislative department.

Aside from the opportunity which would be afforded for making the courts an instrument for influencing political matters, we may consider that as a consequence we may have a conspiracy to corrupt a state election tried before the United States court of another district and in another state. Under the decision in Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, overt acts performed in one district by one of the conspirators give jurisdiction to the court of that district as to all the conspirators. This would give to the Department of Justice an opportunity to select a place of trial in some state remote from the actual place of conspiracy, or from the state in which the Representative was elected, because of the commission of some overt act, such as the writing of a letter by one of the conspirators in furtherance of the conspiracy.

It is impossible to believe that, in extending the conspiracy statute to embrace frauds other than those upon the revenue, it ever occurred to any members of Congress that they were legislating upon the subject of congressional or presidential elections, or that questions of public policy as to the relations between state and nation were involved. This subject is so important, and of such special character, that it would have been dealt with specifically, and not in an omnibus clause, had it been intended to deal with it at all.

The present indictment, in my opinion, is founded upon an undue extension of the conspiracy act, which carries it beyond its proper sphere and brings it into direct conflict with the policy of noninterference in state elections for Representatives in Congress—a policy evidenced by the general course of legislation or nonlegislation on the subject of the relations of state and national government in respect to bribery at congressional elections.

Because the subject-matter of the regularity of state elections for Representatives is so substantially different from that of any of the other cases of fraud which have been held to be within the conspiracy statute; because the rights of the United States in such an election are to be determined by the House of Representatives itself, and are to be protected by the states which have the primary interest, and a more direct interest than the government itself, in the choice of Representatives; because the questions are to such an extent political questions, and for other reasons above stated—I am of the opinion that section 37 cannot be so construed as to include the matters set forth in this indictment.

I am therefore of the opinion that the demurrers must be sustained on the fundamental ground.

[2] If we assume, however, that section 37 covers a conspiracy to corrupt a state election for Representatives in Congress by bribery of voters, there will remain the question whether this indictment properly charges such a conspiracy. The briefs deal with this matter at great length, but only a part of the arguments need be considered. It is charged that the defendants conspired "to defraud the United States by corrupting and debauching the general election held in the town of Coventry * * * the 3d day of November, 1914, at which said election a candidate for Representative in Congress was voted for, chosen and elected," etc., in manner following:

"Said defendants did devise a scheme to bribe, influence, corrupt, and debauch the voters of the town of Coventry on, to wit, the 3d day of November, 1914, at which time and place a general election was held for the election of state officers and for a Representative in Congress."

The indictment proceeds to charge "as a part of said conspiracy" various subconspiracies, so to speak, several of which have no apparent or direct relation to the election of a Representative in Congress, but relate to corruption of the so-called general election. One "part of said conspiracy" is to bribe and to vote qualified electors for Representative in Congress. Then follow as "parts of said conspiracy" charges of conspiracy to defraud by committing a "willful fraud" upon article 1, § 2, of the Constitution, section 2 of chapter 123, Gen. Laws R. I. 1909, relating to liquor licenses and other topics; section 3, c. 20, Gen. Laws R. I. 1909, respecting bribery at elections, and various other matters too numerous for brief statement. There follows an allegation that in pursuance of "said unlawful and felonious conspiracy," etc., and to effect the object of the same, certain acts were done. The overt acts are thus connected, not with any specific part of the conspiracy, but with the one main conspiracy; i. e., to corrupt the "general election."

It is impossible to tell from the indictment whether the overt acts relate to the election for Representative in Congress or to the election for state officers.

It is impossible to reject as surplusage those charges which are not connected with the election for Representative in Congress, or those charges which ambiguously refer to "a general election," comprehending the state officers as well as a Representative in Congress.

By thus confusing elections over which Congress has no control and elections over which it may constitutionally exercise control, and by referring the overt acts to an equivocal unit, the "general election," we have irrelevant and relevant matters so firmly entangled that it seems impossible to extricate them. The allegations which do not appear to have a connection with, or are only argumentatively connected with, the election of Representative, cannot be rejected; for, if this were done, it would be impossible to say whether in the opinion of the grand jury the overt acts were in pursuance of what was rejected or of what was retained.

Were this indictment to stand, it would be possible for the United States to introduce a large amount of evidence relating to the election of state officers, or to other state matters, or of so ambiguous a character that to what it did relate could only be guessed.

The decision in Re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274, which relates to returns covering both state and federal elections, affords not the slightest support for this indictment, or for the theory of a "general election" upon which it is drawn. On the contrary, it is essential that the indictment should be strictly confined to the election for Representatives, and should avoid all confusion with state elections. Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; U. S. v. Morrissey (C. C.) 32 Fed. 147, 152.

I am of the opinion, therefore, that the indictment is demurrable also on the ground that the indictment is so vague, uncertain, insufficient, and duplicitous in its allegations that the defendants are not sufficiently apprised of the nature of the charge against them to enable them to prepare their defense thereto. Even if it be a crime under section 37 to conspire to corrupt an election for a Representative in Congress, I am of the opinion that the defendants would be deprived of their right to be informed of the nature of the offense by putting them to trial upon this indictment.

I desire to acknowledge the great diligence, research, and ability shown alike by counsel for the United States and for the defendants in the preparation of the comprehensive briefs upon the important questions that are raised in this case.

For the reasons stated in the opinion the demurrers are sustained.

In re STRINGER.

(District Court, E. D. New York. July 15, 1916.)

1. PARTNERSHIP ⚷237—NEW FIRM—LIABILITIES.

Where a partner, on dissolution of an earlier firm, assuming all liabilities, took over the assets and formed a new firm, which later became bankrupt, and the old firm was not insolvent at the time of dissolution, debts due from the old firm can be proven against the property of the new firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 489, 490, 493, 494; Dec. Dig. ⚷237.]

2. BANKRUPTCY ⚷309—CLAIMS—RIGHT TO PROVE.

The right of one who advanced securities to assist a partnership, to prove the claim against the firm, is not affected by the fact that the loan was entered on the firm books as a loan to one of the partners and not to the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⚷309.]

3. BANKRUPTCY ⚷51—ADJUDICATION—EFFECT.

Where the surviving partner filed a petition in bankruptcy and was adjudicated a bankrupt, such adjudication carried with it the entire

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

rights and obligations of the firm as it existed before dissolution by the death of the other copartner.

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

4. BANKRUPTCY ⟹309—DEBTS—PROVABLE DEBTS.

Bankr. Act July 1, 1898, c. 541, § 5, subd. "f," 30 Stat. 547 (Comp. St. 1913, § 9589), provides that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts, while, if any surplus remains of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, while any surplus remaining after payment of partnership debts shall be added to the individual assets of a partner. A sister of a member of a firm made considerable advances to him, which moneys and securities he used in connection with the firm business, while at the request of such partner advances were made by her directly to the firm. *Held* that, notwithstanding that the advances made to the partner as an individual were used in connection with the firm business, the sister's claim for such advances must be proven first against the partner's individual estate, while as to the other advances they must be proven first against the firm estate, and in case of a surplus as to either estate the claims might be proven against such surplus.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⟹309.]

In Bankruptcy. In the matter of the bankruptcy of G. Franklin Stringer, individually and as the sole surviving partner of Stringer & Co. Proceeding to review the allowance by the referee of the claims of Mrs. Mary E. Lewis and others. Upheld as to some of the claims, reversed as to others.

See, also, 233 Fed. 799.

A. Gordon Murray, of New York City, for trustee.
Henry M. Stevenson, of New York City, for claimants.
Ward D. Williams, of New York City, for general creditor.

CHATFIELD, District Judge. The referee has found as a fact that certain items advanced by Mrs. Mary E. Lewis, by her son, H. Leroy Lewis, and by the H. J. Lewis Oyster Company, should be allowed as valid claims against the estate in bankruptcy of Stringer & Co., a copartnership having as its members, G. Franklin Stringer (a brother of Mrs. Lewis) and his son (G. Franklin Stringer, Jr.). This firm was in existence from May 23, 1912, to the death of G. Franklin Stringer, in January, 1915. The petition in bankruptcy immediately followed, being filed by G. Franklin Stringer, Sr., as an individual and as the sole surviving partner of Stringer & Co.

[1] The referee has in general made findings as to two issues presented upon the testimony. One of these is as to the obligations of Stringer & Co. with respect to the assets and liabilities of a firm known as Jewell & Stringer (or Jewell, Stringer & Co.) in which firm G. Franklin Stringer, Sr., was a partner. The other member of this firm held a Stock Exchange seat in his name, which was sold for the benefit of this firm when the firm was dissolved at G. Franklin Stringer's request. The proceeds of this stock including the seat were used in

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

liquidation of the partnership debts, which were all assumed by G. Franklin Stringer, who also took over the assets and who immediately formed the firm of Stringer & Co. with his son, putting into this new firm the assets of Jewell & Stringer, and assuming therewith the debts of that firm as a necessary accompaniment of taking over the assets. The firm of Jewell & Stringer was not insolvent. The referee has found, therefore, that the firm debts of Jewell & Stringer can be proven against the property of Stringer & Co.

It also appears that some of the securities upon which the claims are based have been used continuously as collateral since the formation of the firm of Stringer & Co., and were actually disposed of and applied to the account of Stringer & Co. when that firm's loans were finally closed out under the rule. As to these latter items there would seem to be no question that the firm of Stringer & Co. was properly held to have succeeded to the obligations successively of Jewell & Stringer and G. Franklin Stringer, Sr., in the same way that it would have been liable for these obligations if the original transactions had occurred since the formation of the firm of Stringer & Co. In other words, the finding of the referee that for the purposes of these claims Stringer & Co. was the successor and assumed the obligations of Jewell & Stringer, is correct.

[**2-4**] The second proposition, found by the referee as to all of the claims, presents a different situation. The claim of the H. J. Lewis Oyster Company, for the sum of $25,091.69, is based upon a check drawn to the order of Jewell & Stringer, for which a demand note, signed by Jewell & Stringer, was given.

The claim of H. Leroy Lewis is based upon 6 bonds, of the par value of $1,000 each, of the International Silver Company, which H. Leroy Lewis took from his own funds and *delivered to Jewell & Stringer* in order to make up a block of 15 of such bonds, which Mrs. Lewis requested her son to take out of her safe deposit box and deliver in response to a request therefor by her nephew, G. Franklin Stringer, Jr. But 9 of these bonds were found in the possession of Mrs. Lewis by her son, H. Leroy Lewis, and he therefore added the 6 bonds of his own and delivered them all to Jewell & Stringer, who proceeded to credit them in an account marked "G. Franklin Stringer, Sr., Special."

The subsequent treatment of these securities in this account was the same as that accorded to the other securities turned over at the dissolution of that firm to G. Franklin Stringer, as surviving partner, and by him to Stringer & Co. The manner of entering this loan upon the books of Jewell & Stringer would not affect the obligation incurred by that firm when it received the securities, and plainly the finding of the referee is correct when he holds that the firm of Stringer & Co. was indebted to H. Leroy Lewis for the 6 bonds in question, and to the H. J. Lewis Oyster Company for the $25,091.69 upon the demand note made by Jewell & Stringer therefor. But the referee has held also that certain securities advanced by Mrs. Lewis, including the 9 bonds just referred to, were also obligations of Jewell & Stringer, and hence valid as claims against Stringer & Co., when they found their way into the hands of Jewell & Stringer and were used by it for firm purposes.

Mrs. Lewis makes some point of the fact that no formal adjudication in bankruptcy has been entered against the firm of Stringer & Co. as a separate entity, but this does not affect the situation and is in fact incorrect. We have not in this case any question under section 5 of the bankruptcy statute, growing out of the rights or obligations of either a solvent partnership or a solvent partner. Both the individuals and the firm were insolvent. The surviving partner filed the petition in bankruptcy and represented at that time the entire entity of the partnership. As such surviving partner, he has been adjudicated a bankrupt, and this carries with it the entire rights and obligations of the firm as it existed before the death of G. Franklin Stringer, Jr.

It appears, as found by the referee, that a large amount of money, totaling several hundred thousand dollars, was advanced by Mrs. Lewis, at the request of her brother, and for use by him in his business. The greater part of these items were admittedly obligations of G. Franklin Stringer as an individual, and are not included in the claims sought to be proven against the partnership assets. The balance of this amount passed, after delivery to G. Franklin Stringer, immediately into the possession of Jewell & Stringer, being there entered in the G. Franklin Stringer, Sr., special account, and the referee has found that these were valid obligations of Jewell & Stringer to Mrs. Lewis. As to one item, namely, the sum of $5,000 cash and nine $1,000 bonds, the testimony shows that a request by the firm of Jewell & Stringer was made to Mrs. Lewis, during the absence of G. Franklin Stringer, Sr., on business in Mexico. This amount was received directly by the firm of Jewell & Stringer, and, while entered on its books in the G. Franklin Stringer, Sr., special account, was nevertheless plainly advanced for firm needs, and must be held to have been loaned upon the credit of that firm, and therefore provable against it as a firm debt to Mrs. Lewis. It would make no difference whether the motive by which Mrs. Lewis was actuated was a desire to help her brother, or to comply with his wishes. The firm of Jewell & Stringer was liable therefor to Mrs. Lewis, and upon the transfer of this obligation, with the assets of the firm of Jewell & Stringer, to G. Franklin Stringer as surviving partner, and with the immediate transfer by him of these assets to the firm of Stringer & Co., this item became a debt against the firm of Stringer & Co., and the allowance of the claim by the referee is correct.

As to the balance of the claim allowed by the referee, however, a different situation is presented. The referee has found as a fact that this sum was loaned by Mrs. Lewis, knowing that her brother was "the influential and controlling member of the firms of Jewell & Stringer and Stringer & Co." Of course the time of making these loans was long before the dissolution of the firm of Jewell & Stringer, and his connection with Stringer & Co. could not relate back so as to enter into her prior transactions. The referee has also found that Mrs. Lewis in her testimony speaks solely of him and his business without referring to his partners or partner, when the moneys were borrowed by him or paid to him directly. The referee finds that Stringer sought assistance from his sister. She asked no explanation, required no security, and had no written agreement or arrangement, only an oral understanding that it would be repaid out of his earnings or those of the firm. The referee finds that it stands out clearly from her testimony and that it was mutually understood that the funds and proceeds of all the loans were for "his business purposes." The referee finds that these funds actually were advanced "with the knowledge or understanding that they were intended to be used for the firm's business," and that Mrs. Lewis "relied upon the success of Stringer's firm for the repayment of her loans." In this connection he also finds that these advances to Mr. Stringer were not made for the purpose of furnishing a partner with funds with which to make his contribution to capital.

These last findings, however, seem to be immaterial and the conclusion of the referee that the claims of Mrs. Lewis were "direct liabilities in the first instance of the firm of Jewell & Stringer," is an incorrect conclusion of law based upon a finding of fact which is not supported at all by the evidence as to the funds given directly to Mr. Stringer. It appears plainly from the testimony that Mrs. Lewis made these loans to her brother, to help him in his business needs. She made the loans in order that he might have the benefit therefrom, and with the necessary understanding that they were subject to such use or such risks as he might apply them to. If the specific shares of stock had survived all of the risks to which they were subjected by G. Franklin Stringer, and had been returned into the possession of the trustee in bankruptcy, in whole or in part, in their original form, that is, in the shape of the original shares of stock, the matter would resemble the Hudson claim in the matter of In re McIntyre, 181 Fed. 955, 104 C. C. A. 419. But none of these securities have survived the uses to which they were put, and all of them were, in one form or another, turned over to the firm of Jewell & Stringer as the funds of G. Franklin Stringer, for the purpose of his business, and credited in the account of G. Franklin Stringer, Sr., special.

The testimony of Mrs. Lewis shows that she relied upon the obligation of her brother (whether operating as an individual or as a partner in the firm of Jewell & Stringer) to see that the loans were returned to her after his business needs had been met, or when his business conditions would allow such return. Under these circumstances, it cannot be held that the firm of Jewell & Stringer, or of Stringer & Co., was unjustly enriched by the property of another individual. The moneys received by the firm from the advances by Mrs. Lewis were applied to the firm's uses by G. Franklin Stringer, a partner. His individual creditors cannot follow his individual property and be paid dividends therefrom in bankruptcy until the firm creditors have been paid in full. Section 5, subdivision "f," of the Bankruptcy Law. If the debt is an individual debt, then it cannot be changed and treated as a partnership debt, merely from the fact that the funds obtained by the individual can be traced into the hands of the partnership and there commingled with the partnership funds. The very finding that the advances of Mrs. Lewis to her brother made him as an individual her debtor determines that the same debt could not be allowed as a claim against the partnership. His application of the moneys to the firm purposes was the use of his individual property, for which, of course, he was responsible to his own creditors. But after its use as his individual property it is available for the payment of firm creditors until the firm's debts are paid.

The allowance of the claim of the H. J. Lewis Oyster Company in the sum of $25,091.69, the claim of H. Leroy Lewis for $6,706.65, and the claim of Mary E. Lewis for $15,000 will be sustained. The allowance of the claim of Mary E. Lewis in the sum of $47,033.04 will be reversed, and this amount will be allowed her as a claim only against the individual estate of G. Franklin Stringer.

DU PONT v. DU PONT et al.

(District Court, D. Delaware. May 19, 1916.)

No. 340.

EQUITY ⟹140—BILL—INTERROGATORIES.

In a stockholder's suit against officers and directors of the corporation, alleging a conspiracy, in violation of their trust, to purchase certain outstanding stock for their own benefit and profit, instead of for the corporation which had the power under its charter and the available means to purchase the same, interrogatories propounded to defendant officers, calling for details of a multitude of business transactions involving also other concerns having no relation to the suit, *held* improper, where the ultimate material facts could be ascertained from the books.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 317, 318; Dec. Dig. ⟹140.]

In Equity. Suit by Philip F. Du Pont against Pierre S. Du Pont and others. On objection to complainant's interrogatories. Objections sustained.

John G. Johnson, William A. Glasgow, Jr., and Henry P. Brown, all of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for complainant.

Wm. S. Hilles and John P. Laffey, both of Wilmington, Del., George S. Graham, of Philadelphia, Pa., and William H. Button, of New York City, for defendants.

THOMPSON, District Judge. The interrogatories propounded to Pierre S. Du Pont as president, Alexis I. Du Pont, as secretary, and John J. Raskob, as treasurer, of the E. I. Du Pont de Nemours Powder Company, hereinafter called the Powder Company, and the E. I. Du Pont de Nemours & Co., hereinafter called Du Pont & Co., relate to three classes of facts, namely: (1) The number of contracts under which powder or other war munitions were, or were to be, manufactured or sold by the companies upon certain dates and during the entire period since December 1, 1914, and the aggregate amount of money agreed to be paid under such contracts. (2) The quantities of powder or other war munitions manufactured and sold daily by the companies since December 1, 1914. (3) The names of the banks, banking insti-

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

tutions, trust companies, banking firms, corporations, or persons which were depositories of the Powder Company on December 1, 1914, and of each company since that date; the daily balances on deposit with such depositories since December 1, 1914, and the dates when the deposit accounts were opened with each of the depositories.

The bill avers that, at the time of the transactions of which complaint is made, the Powder Company was authorized by the terms of its charter to purchase the shares of its own stock outstanding, was abundantly able to purchase all of the common and preferred stock, or any part thereof, held by T. Coleman Du Pont, and, with its assets, was abundantly able *to arrange* to purchase all of the stock.

It is averred that, at the time of the transactions, Pierre S. Du Pont, through his official relations with the Powder Company, was in possession of intimate knowledge of the financial condition of the company and its affairs, and knew that it had entered into, and was likely to enter into, contracts for the sale of large quantities of powder and other explosives with European nations at war through which the Powder Company would, within a short time, begin to realize large profits, and that large dividends would probably be paid thereon out of which Pierre S. Du Pont could pay to T. Coleman Du Pont the purchase price of his stock; that Pierre S. Du Pont fraudulently, and in violation of his trust as an officer, director, and confidential representative of the Powder Company, arranged to purchase the stock at a time when he knew he had misinformed T. Coleman Du Pont as to the feeling of the finance committee upon the question of the purchase, and that he sought out certain of the defendants, who were members of the board of directors, and informed them that he had purchased or could purchase the stock of T. Coleman Du Pont, and invited them to participate in a scheme to organize the Du Pont Securities Company for the purchase of the stock in its name, and in violation of their duty as directors of the Powder Company to defraud the latter through the purchase of the stock for their own private and personal advantage, instead of permitting, as was their duty, the Powder Company to purchase; that the other directors entered into the scheme and the Du Pont Securities Company was organized for that purpose; that Pierre S. Du Pont did not inform the board of directors that T. Coleman Du Pont would sell the shares of stock until the purchase for him and his associates had been consummated; that through the influence of Pierre S. Du Pont and his associates, and by reason of the fact held out to other members of the board of directors that they would be permitted to share in the purchase of the stock of T. Coleman Du Pont, they became parties to the alleged fraudulent scheme, and voted against a resolution offered in the board of directors that the Powder Company purchase the stock, and thereby the resolution was defeated; that, in order to pay for the stock, it was necessary for Pierre S. Du Pont and his associates to borrow approximately $8,500,000, and that they did not have either credit or marketable collateral, which would enable them to effect the loan, and that it was the intention of Pierre S. Du Pont and his associates to obtain the funds necessary to pay the obligations, in connection with the acquisition of the stock, from dividends which they had reason to believe from the existing contracts and those in prospect would enable them to meet the obligations; that, in arranging for the purchase and securing loans from banking institutions with which to make the cash payment required, Pierre S. Du Pont, by reason of his official connection with the Powder Company and by reason of the connection of his associates with the company, was in position to deposit with the banking institutions large sums of money which had been received and which the company expected to receive from the contracts for furnishing powder to the European nations at war.

It is averred that on September 4, 1915, the E. I. Du Pont de Nemours & Co. was incorporated with a capital stock of $240,000,000, and has purchased all of the assets and assumed all of the liabilities of the Powder Company, and has paid the Powder Company therefor part in cash, part in debenture stock and part in common stock; that all the common stock of Du Pont & Co. has been distributed two shares for one to the holders of the common stock of the Powder Company; that the board of directors and officers of Du Pont & Co. are the same as the board of directors of the Powder Company, and that the purpose and effect of the transfer of all the assets from the one company to the other was to increase the capitalization of the Powder Company without effecting a change in the ownership of any of its stock; that, in pursuance of the scheme to make use of the Powder Company and its assets to enable the defendants to pay for the stock purchased from T. Coleman Du Pont, the defendants, as directors of Du Pont & Co., and being the majority of the board, at a meeting on November 24, 1915, declared a dividend of 30 per cent., payable in cash on December 15, 1915, on the common stock of Du Pont & Co.; that the condition of the business of Du Pont & Co. made the payment of the dividend injudicious and contrary to the true interests of the company, and its payment may prevent the retention by the company of a sufficient amount of surplus and undivided profits to pay for the T. Coleman Du Pont stock, and that the defendants would not have voted in favor of the dividend except with the purpose of liquidating obligations for the purchase of the stock and of depriving the Powder Company and Du Pont & Co. of ability to pay for it out of surplus and undivided profits.

It is not denied by the individual defendants that, when the stock of T. Coleman Du Pont was purchased and during their negotiations, they had information that contracts were in existence, about to be entered into, and in process of negotiation, and were likely to be made within a short time, which would be exceedingly profitable and would largely enhance the value of the stock of the Powder Company.

If the number of contracts entered into or under negotiation during the period in question, and the aggregate amount of money agreed to be paid to the Powder Company under these contracts, are relied upon as facts to support the averment in the bill that, during the time Pierre S. Du Pont and his associates were negotiating for the purchase of the T. Coleman Du Pont stock, they had information upon which they based an opinion of a large increase in value of the stock which induced them to make the purchase, those facts would be material in support of plaintiff's cause. That averment, however, is admitted in the answers. The aggregate amount to be received under the contracts would be material as one of the constituent facts to prove another fact, namely, the amount of the assets of the company available for purchase of the T. Coleman Du Pont stock, but such a purchase under the averments of the bill must be from sums reserved out of working capital, or out of surplus or undivided profits. The amount to be received under the powder contracts would not show the sums which were or could be reserved by the company as working capital, nor the amount of the surplus and undivided profits of either the Powder Company or Du Pont & Co. The amount of money which would have been available to purchase the stock is not represented by the total amounts receivable from the powder contracts, and those amounts have no bearing upon it except in connection with all the costs of labor, material, and all other expenses incident to the cost of manufacture and sale. Without doubt the plaintiff would be entitled under the pleadings, in support of his cause, to a disclosure of the assets of the Powder Company out of which the latter would be able under its charter to purchase the stock, but I fail to see what lawful purpose can be served by compelling the defendants to place upon the record information which may disclose a mass of details relative to its business which is undoubtedly calculated to burden, oppress, and harass the corporation defendant, when that information of itself would be of no materiality, but could only be considered in connection with items of cost and expense in order to reach the really material fact. All of the information necessary to arrive at the material fact, namely, what assets were available which either company was able to apply to the purchase of the stock, can be obtained from the contracts themselves and from the books of the defendant companies. This information is entirely within the reach of the plaintiff under the provision of the fifty-eighth equity rule, which empowers the court or judge to make such orders as may be appropriate to effect the inspection or production of documents in possession of the other party, and containing evidence material to the cause of action. With this comprehensive remedy open to the plaintiff, from which the amount available to the Powder Company under the provisions of its charter for the purchase of the stock can be ascertained, he will suffer no deprivation of rights in the production of evidence if the court refuses to sanction the disclosure upon the record of what is but a constituent element in arriving at the essential fact to be ascertained. This reasoning applies to the interrogatories as to both companies and those relating to powder contracts, as well as to those relating to the quantity of powder and other war munitions manufactured and sold daily.

The remaining interrogatories, requiring the names of the depositories of the money of the companies and the daily balances on deposit since the 1st day of December, 1914, and the dates when each account was opened, are intended to support the averment in the bill that Pierre S. Du Pont, by reason of his official connection with the Powder Company, and by reason of the connection of his associates in the company, was in position to deposit large sums of money derived from the company's contracts with the banking institutions from which the money was borrowed through the Du Pont Securities Company to purchase the stock and thereby obtain, through the funds of the Powder Company, a credit necessary for procuring the loans. There is no averment in the bill that Pierre S. Du Pont, or his associates did deposit the moneys of the company with the banking institutions in question for that purpose, nor that they did obtain the credit necessary to obtain the loans through such deposits. It is averred that it was necessary for them to borrow; that they did not have either credit or marketable collateral which would enable them to effect a loan in the necessary amount. These averments, which are apparently intended to show that Pierre S. Du Pont and his associates had an opportunity to make a fraudulent use of the funds of the company for their own benefit, are not sufficient, in my opinion, to require answers to interrogatories of such broad scope in relation to the depositories of the funds of the companies, the balance on hand with each depository upon each day during the entire period covered, and the time when the deposit accounts were opened. The information asked for would, no doubt, involve a disclosure of the business and financial relations of the corporations with numerous banking institutions other than those from whom the plaintiff may be able to show that the loans in question were secured, and therefore would involve transactions and business, having no bearing upon or materiality to the cause, with institutions having no connection with the loans, and concerning which the plaintiff has no right to discovery. If the interrogatories were so framed as to obtain information only in relation to banking institutions connected in some way with the loan, the facts thus obtained would be material as part of the scheme charged to have been devised and carried out by Pierre S. Du Pont and his associates to show that they obtained for themselves a credit upon which to base the loans, and, by the advantage thus obtained, deprived the Powder Company of an opportunity to use its available assets to arrange for the purchase of the stock, but the interrogatories must be considered as they stand, and they are too broad and sweeping in their scope to require answers. All of the material facts under this class of interrogatories are, equally with those in relation to the powder contracts and the quantities of powder and other war munitions manufactured and sold, available to the plaintiff from the books and accounts of the defendant companies.

The bill is a stockholder's bill in which the plaintiff and the intervening plaintiffs are seeking to enforce against directors and other stockholders of the corporation the rights of the corporation itself, which it is alleged arise from wrongs done by the individual defendants in violation of their duties as trustees for the corporation, and it is averred in the bill that, by reason of the interest of the majority of the directors and their manifest purpose to serve their own interest rather than that of the Powder Company, any effort to persuade them to remedy the wrong through the corporation would be futile and unavailing. Standing, as they claim to do, in the shoes of the corporation itself, which they claim is by reason of the action of the individual defendants, unable to sue in its own behalf, they have the right, upon application to the court, to an order for the inspection of the corporations' books and documents for the purpose of establishing any fact material to the cause. The documents themselves are the best evidence of these facts.

To summarize: The gross receipts under the powder contracts and the quantities manufactured and sold would, at best, be only constituent facts inconclusive and ineffectual, standing alone, in arriving at any material fact. The names of all the depositories, the daily balances they have held for the companies during the entire period covered by the interrogatories, and the dates upon which the accounts were opened would cause the disclosure of a multitude of transactions not material or relevant to throw any light upon the averments in the bill and involving institutions in no way connected with the case. The situation is one which demands the exercise of a sound discretion by the court to protect not only the corporations, in which the plaintiffs are stockholders and in whose interests they sue, but banking institutions in no wise connected with the cause, from being unduly oppressed and harassed by unnecessarily disclosing their intimate business affairs when the plaintiffs have it in their power to obtain the facts, so far as they are material, through the inspection and production of the documents and books of the corporations.

The objections to the interrogatories are sustained.

OLD LEXINGTON CLUB DISTILLERY CO. v. KENTUCKY DISTILLERIES & WAREHOUSE CO.

(District Court, D. New Jersey. July 22, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⚷3(5), 9—GEOGRAPHICAL AND DESCRIPTIVE WORDS—OLD LEXINGTON CLUB.

   The words "Old Lexington Club," as applied to whisky, are the subject of trade-mark, as against objection that the word "Lexington" is geographical, and the word "Club" descriptive of quality; there being no evidence of the latter fact.

   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 7, 13; Dec. Dig. ⚷3(5), 9.]

2. TRADE-MARKS AND TRADE-NAMES ⚷43—RIGHT TO REGISTER—IDENTICAL NAMES.

   Plaintiff's trade-mark, "Old Lexington Club," and defendant's "Lexington Club," used in the same trade, will be considered identical as regards plaintiff's right to register his, over objection of defendant.

   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 48, 49; Dec. Dig. ⚷43.]

3. TRADE-MARKS AND TRADE-NAMES ⚷43—RIGHT TO REGISTER—ESTOPPEL.

   On the ground of estoppel, plaintiff will not be adjudged entitled to register his trade-mark, which he first adopted and used, where for 15 years he knew of, and took no steps to prevent, its use by defendant, there having been no actual fraud in defendant's adoption and use thereof, and it having in such time built up a business more extensive and wide than that

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

of plaintiff's; registration of a trade-mark under Trade-Mark Act Feb. 20, 1905, c. 592, § 16, 33 Stat. 728 (Comp. St. 1913, § 9501), being prima facie evidence of ownership, which would damage defendant, so entitling him under section 6 (section 9491) to oppose the registration.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 48, 49; Dec. Dig. ⟹43.]

In Equity. Bill by the Old Lexington Club Distillery Company against the Kentucky Distilleries & Warehouse Company to secure an adjudication that plaintiff is entitled to register the words "Old Lexington Club" as a trade-mark for whisky. On final hearing. Bill dismissed.

John M. Coit, of Washington, D. C., for plaintiff.

Hal C. Bangs, of Chicago, Ill., and Charles C. Deming, of New York City, for defendant.

HAIGHT, District Judge. The plaintiff, claiming to be the owner of a trade-mark for whisky, consisting of the words "Old Lexington Club," filed an application in the Patent Office for the registration thereof, pursuant to Act Feb. 20, 1905, 33 Stat. 724. The defendant opposed the registration upon the ground that it was the owner of a trade-mark for whisky consisting of the words "Lexington Club," and that a trade-mark so similar to it as "Old Lexington Club" would be likely to cause confusion or mistake in the mind of the public and thus injure the defendant. The examiner, to whom the question thus raised was referred, found priority in adoption and use in the plaintiff. The defendant thereupon appealed to the Commissioner, who affirmed the judgment of the examiner. Thereafter the defendant prosecuted an appeal to the Court of Appeals of the District of Columbia, which reversed the former judgments, upon the grounds (1) that the proposed trade-mark consisted merely of the name of the plaintiff corporation; and (2) that it was but a combination of words in ordinary use as descriptive adjectives—"Lexington" being geographical, and "Club" descriptive of quality or grade. Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223. About a year after that decision was rendered the plaintiff filed this bill; the authority for doing so being section 4915 of the Revised Statutes (Comp. St. 1913, § 9460), and section 9 of the Trade-Mark Act of 1905 (Comp. St. 1913, § 9494). Atkins v. Moore, 212 U. S. 285, 29 Sup. Ct. 390, 53 L. Ed. 515. A demurrer was interposed to the bill, but the same was overruled by the late Judge Cross. The defendant does not here urge the first of the grounds relied upon by the Court of Appeals of the District of Columbia, presumably both because Judge Cross held that the proposed trade-mark did not appear to consist merely of the name of a corporation, and because, subsequent to the decision of the Court of Appeals, the Trade-Mark Act was amended to provide that the registration of a trade-mark, otherwise registerable, should not be denied because of its being the name of an applicant or a portion thereof. Act Feb. 18, 1911, c. 113, 36 Stat. 918; Act Jan. 8, 1913, c. 7, 37 Stat. 649 [Comp. St. 1913, § 9490].

[1] The second ground relied upon by the Court of Appeals is, however, advanced in this case. Whatever may have been before that court, there is no evidence in the record here to justify the conclusion that the word "Club," as applied to liquors, is indicative of quality or grade, but, on the other hand, the only evidence is to the contrary. It does not appear, therefore, that this word has acquired in the liquor trade a generic meaning. While the word "Lexington," standing alone, might denote the geographical origin of a product, and hence not be the subject of exclusive appropriation as a trade-mark, it by no means follows that its use, in combination with other words, would denote simply the place of manufacture. As the word "Club" does not indicate the quality or grade, and as social clubs are not engaged in the manufacture of liquor, I fail to see how the words "Old Lexington Club" can, in any sense, be considered as signifying that the product so marked was manufactured at Lexington, Ky., or indicate its quality or characteristics, or be viewed as anything other than a fanciful designation, arbitrarily selected to designate the product of plaintiff and its predecessors. If the phrase were "Old Lexington Whisky," a different situation would probably be presented.

These views, I think, are in harmony with those expressed by Mr. Justice Pitney in the recent case of Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629. The words "Maryland Club," as applied to whisky, were evidently considered as a valid trade-mark by both Judge Hough and the Circuit Court of Appeals of the Second Circuit in Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin (C. C.) 171 Fed. 125; Thomas J. Carroll & Son Co. v. Same, 183 Fed. 22, 105 C. C. A. 314. To the same effect is Cahn v. Gottschalk, 2 N. Y. Supp. 13. See, also, Heublein v. Adams (C. C. Mass.), 125 Fed. 782. The case of Cahn v. Hoffman House, 7 Misc. Rep. 461, 28 N. Y. Supp. 388, relied upon by the Circuit Court of Appeals of the District of Columbia, is not persuasive in this case, because it does not here appear, as it did there (according to the opinion), that the word "Club," when applied to various kinds of liquor, has a special meaning indicating grade or quality.

[2, 3] In deciding the remaining questions in the case, the plaintiff's and defendant's respective trade-marks, because of their marked similarity, may well be considered as identical. It was found by the examiner, as well as the Commissioner, that the plaintiff and its predecessors have used the trade-mark, which is sought to be registered, on their products since the year 1874. In this respect their findings were evidently concurred in by the Court of Appeals of the District of Columbia. The record in this case also quite conclusively proves its adoption and use by plaintiff's predecessors in the year 1874 or 1875. In 1876 Reed, who originated it, registered one of the labels used by him in the Patent Office. Copies of newspapers published in Lexington, Ky., in 1876 and 1877, show advertisements of "Reed's Old Lexington Club Hand-Made Sour Mash" whisky. Admittedly the use by the defendant and its predecessors of the words "Lexington Club" does not antedate 1878. Undoubtedly, therefore, plaintiff's predeces-

sors were the first to adopt and to use the designation in question as a trade-mark for whisky.

Nor have I any doubt that the plaintiff has acquired title to the same. It was first adopted and used by J. H. Reed, who was in business by himself for a few months, and then with one Jackson, and later with one Warner. During all of this time it was used by these various firms. Subsequently Warner & Reed became financially embarrassed, and their business was taken over by one of their creditors, from whom the present plaintiff, in 1890, acquired, not only the distillery which formerly belonged to and was operated by Warner & Reed, but all of the latter's stock, trade-marks, etc. The name has been used by plaintiff continuously since that time, as it was likewise used during the time the business was operated by the creditors of Warner & Reed. It appears that in 1878 the words "Lexington Club" were adopted by Freiberg & Workum, who were engaged in the wholesale liquor business at Cincinnati, as a trade-name for certain whisky which was distilled by them at Petersburg, Ky. They operated that distillery and used the trade-mark on their products continuously until 1899, when both the distillery and the trade-mark were sold to the present defendant. Their sales of whisky so branded extended over a large territory and were of considerable volume. Originally Reed did not distill any of the whisky which he sold under the name of "Old Lexington Club," but purchased it. His sales were small and within a limited territory. The sales by Warner & Reed, while more extensive, were nothing like as great at any time as were those of Freiberg & Workum. At the most, they sold, outside of Lexington, Ky., only in New York, Chicago, St. Louis, and Cincinnati, while Freiberg & Workum's sales were made in practically every state in the Union.

Admittedly, the use by the latter of the words "Lexington Club" on whisky manufactured by them was known to the defendant as early as 1890, about the time the plaintiff corporation was formed. Reed knew of it some three or four years after he failed, which was in 1881, and although his knowledge may not be charged to the plaintiff or its predecessors, it is evidence of the fact that the use by Freiberg & Workum was generally known in the liquor trade, as the amount and extent of their sales would seem to clearly indicate that it must have been. Yet no steps were taken during all of the years intervening between then and 1905 to enjoin such use; nor was any remonstrance made against it. No excuse for the delay is advanced. In the last-mentioned year a suit was brought in the state courts of Ohio, but apparently was abandoned. During this time the defendant and its predecessors were building up a large business, greater and more extensive territorially than that of the plaintiff and its predecessors, and, necessarily, acquiring a reputation for the products which they manufactured and sold under the trade-name of "Lexington Club." The designation in question, therefore, has come to denote in the public mind the products of the defendant and its predecessors equally as well as, if not more so than, those of the plaintiff and its predecessors. In this sense it is equally the trade-mark of both.

It is urged by the defendant that under these circumstances the plaintiff should not be permitted to register its mark over the objection of the defendant. If the same principles are applicable to an action of this kind as would be applicable to a suit by the present plaintiff to enjoin the use by the defendant of the words "Lexington Club," I think that defendant's contention is sound. I cannot see that this phase of the case can be distinguished on principle from the decision of the Circuit Court of Appeals of this Circuit in Pflugh v. Eagle White Lead Co., 185 Fed. 769, 107 C. C. A. 659, nor from that of the Circuit Court of Appeals of the Second Circuit in Carroll & Son Co. v. McIlvaine, 183 Fed. 22, 105 C. C. A. 314. In the first of these cases it was said that the continued, persistent, and adverse use of the trade-mark by the defendant, to plaintiff's knowledge, during 14 years, showed an abandonment of an exclusive claim by the plaintiff, and on such abandonment new rights had, in the meanwhile, arisen on the part of the public. It was held that under such circumstances it would be inequitable to arrest, at that late date, the defendant's trade, which had, with the plaintiff's knowledge, been built up upon its trade-mark. In the latter case, although the plaintiff had established the prior use of the designation "Baltimore Club" as applied to whiskies, it was held that a delay of nearly 20 years, after knowledge of the use of the same designation by the defendant and its predecessors, to prevent such latter use, was laches, which would disentitle the plaintiff to an injunction against defendant's use, at least in the territory where the defendant had always used the trade-name and where the plaintiff had not competed with it. True, in each of these cases there were other circumstances mentioned in the opinions; but they in no way affected the decisions on the point in question. To the same effect is Valvoline Oil Co. v. Havoline Oil Co. (D. C. S. D. N. Y.) 211 Fed. 189, 194.

Although it was said by the Supreme Court in McLean v. Fleming, 96 U. S. 245, at page 253, 24 L. Ed. 828, that equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, and although this doctrine was expressly reaffirmed in Menendez v. Holt, 128 U. S. 514, 523, 524, 9 Sup. Ct. 143, 145 (32 L. Ed. 526), yet Mr. Chief Justice Fuller said, in the latter case:

> "At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand. But there is nothing here in the nature of an estoppel—nothing which renders it inequitable to arrest at this stage any further invasion of complainants' rights."

These remarks were considered by the Circuit Court of Appeals in the Eagle White Lead suit as a recognition of the doctrine that one will be held to be estopped to assert an exclusive right to a trademark when it would be inequitable to permit him to do so.

In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 37, 21 Sup. Ct. 7, 14 (45 L. Ed. 60), it was held that the failure of one for 20 years to seek to prevent others in this country, although such efforts had been made abroad, from using a trade-name, was such laches as prevented relief, although there was no proof of actual knowledge of infringements in this country, Mr. Justice Brown remarking:

"By 20 years of inaction she was permitted the use of the word by numerous other importers, and it is now too late to resuscitate her original title."

French Republic v. Saratoga Vichy Co., 191 U. S. 427, 436, 24 Sup. Ct. 145, 48 L. Ed. 247, is to the same effect.

It would, in my judgment, be most inequitable to interfere with the defendant's trade under the circumstances of this case. The plaintiff has known of the defendant's use of its trade-name, and has taken no steps whatsoever to prevent it for at least 15 years, during all of which time defendant has been building up its business, which is far greater and more extensive than that of the plaintiff. For one to permit another to build up a reputation for one's goods under a trade-name for a long period of time, and then to assert an exclusive right to that name, and thereby acquire the benefit of the reputation and trade which the other has built up, when it lay in the power of the former at any time to have arrested the use of the trade-name by the latter, seems to me most inequitable, because, if the right had been asserted before the reputation was acquired, the infringer could have adopted another name and built his reputation on it. It would also tend to further deception upon the public, one of the results which injunctive relief in trade-mark cases seeks to prevent. Of course, if one knowingly and willfully adopts a name which has been used by another, a different situation might be presented. Such a case would exhibit actual fraud, and such, I think, is the distinguishing feature between cases such as this and Menendez v. Holt, supra. See Saxlehner v. Eisner & Mendelson, supra, 179 U. S. 39, 21 Sup. Ct. 7, 45 L. Ed. 60. But nothing of that kind appears in this case.

It remains, therefore, to consider whether such a defense is applicable to this kind of a suit. The statute provides that the registration of a trade-mark "shall be prima facie evidence of ownership." Section 16. Section 6 permits any one who believes he would be damaged by the registration of a trade-mark to oppose the same. This latter section has been construed to mean, and I think properly so, that the objector must show such interest in the proposed trade-mark that damage may be inferred. Battle Creek v. Fuller, 30 App. D. C. 411; Underwood v. Dick, 36 App. D. C. 175.

It is urged by the plaintiff that as it has shown a prior adoption and use of the mark, and as the registration thereof would be only prima facie evidence of ownership, the defendant could not be damaged by the registration, because it would have the same right to assert the defense, which it now urges, in any suit which might be brought for an infringement of the trade-mark so registered, as if it were not registered. There are, I think, several answers to this contention. In the first place I think that the principle under which relief is denied in the cases before mentioned is that the one asserting the exclusive right, although he had such a right at one time, no longer has it, either on the theory that the right has been lost, or that he is estopped from asserting it, or from denying that it has been abandoned. The latter was considered by the Circuit Court of Appeals of the Eighth Circuit in Layton Pure Food Co. v. Church & Dwight, 182 Fed. 35, 41, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274, and apparently by the Circuit Court of Appeals of this Circuit in the Eagle White Lead suit, supra, to be the principle underlying such cases.

Under any of these theories the defendant would be damaged by the registration of the trade-mark, because it would confer upon the plaintiff a right to which it is not entitled, and which it could assert against the defendant, namely, a prima facie title. Further, it would seem to be ridiculous for a court to direct the registration of a trade-mark over the opposition of another, when, under the facts presented, it would not permit the owner of the trade-mark the exclusive right to use the same as against the other. In addition, I can readily see that damage would result to the defendant if the plaintiff were permitted to register this trade-mark, because in any suit hereafter brought against the defendant for infringement thereof the burden of disproving the plaintiff's title to the trade-mark as against the defendant would be cast upon the latter. Finally, the trade-mark in question, because of its similarity to that of the defendant and the circumstances before mentioned, is as much the defendant's trade-mark as it is the plaintiff's. This view, I think, is in harmony with that line of cases which hold that one may have a trade-mark in one section and another the same mark in a different section. Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. 513, 125 C. C. A. 515 (C. C. A. 7th Cir.); Carroll v. McIlvaine, supra; Levy v. Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190 (C. C. A. 1st Cir.)

It follows, therefore, that plaintiff is not entitled to have this trade-mark registered, and hence that the bill should be dismissed, with costs.

In re KRUSE.

(District Court, N. D. Iowa, C. D. August 5, 1916.)

No. 1052.

1. BANKRUPTCY ⚷184(2)—TITLE OF TRUSTEE—POSSESSION UNDER CONDITIONAL SALE CONTRACT.

Under Bankruptcy 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), clothing trustees in bankruptcy, as to all property in the custody or coming into the custody of the bankruptcy court, with all the rights, remedies, and powers of a creditor holding a lien thereon, the right of a trustee is prior to claim of vendor of property in possession of bankrupt under conditional sale contract not filed or recorded as required by Code Iowa 1897, § 2905, providing that no such sale or contract shall be valid against a creditor or purchaser of vendee in actual possession obtained in pursuance thereof, without notice, unless it is recorded the same as chattel mortgages.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⚷184(2).]

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

2. BANKRUPTCY ⚷184(2)—TITLE OF TRUSTEE—POSSESSION UNDER AGENCY CONTRACT.

As to property in bankrupt's possession under contract of agency to sell for his principal, the bankrupt to receive a specified commission therefor and hold the property as agent until sold, returning on demand any property not sold during the agency, the principal, as owner of the property, could show his title and right thereto to defeat the lien of the trustee under said amendment of June 25, 1910, to section 47a (2) of the Bankruptcy Act, notwithstanding the contract was not filed or recorded under said Code Iowa 1897, § 2905; the contract on its face being neither an absolute nor a conditional sale of the property, but a contract of bailment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⚷184(2).]

3. BANKRUPTCY ⚷228—ADMINISTRATION—REFEREE—REVIEW OF PROCEEDINGS BY JUDGE—TIME.

A local rule requires that petitions for review of orders of referees be taken within ten days from the date of the order sought to be reviewed, and the petition to review in this case was filed within such time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⚷228.]

In the matter of John A. Kruse, bankrupt. From an order of the referee, allowing the claim of Western Rock Island Plow Company to certain property in the possession of the trustee, the trustee appeals; and from orders of the referee, denying the respective claims of International Harvester Company and Acme Harvesting Machine Company to certain property in the possession of the trustee, these claimants, respectively, appeal. Claim of Western Rock Island Plow Company denied, and order reversed; claim of International Harvester Company denied and order approved; and claim of Acme Harvesting Machine Company allowed and order reversed.

Submitted on the separate petitions of:

First. H. W. Bailey, trustee in bankruptcy of said estate, for review of an order of the referee allowing the petition or application of the Western Rock Island Plow Company, a corporation, for the return to said company of certain farm implements, viz., 5 No. 40 Great Western spreaders; 3 2 H. P. Rock Island portable engines; 1 3 H. P. Rock Island portable engine—all sold and shipped to the bankrupt in July, 1915, the total wholesale price of which implements amounted to $625, sold upon written contracts of sale upon condition that the title to and ownership of said property should remain in said Western Rock Island Plow Company until the purchase price thereof should be fully paid, and which it is alleged has never been paid.

Second. On petition of the International Harvester Company of America, a corporation, for review of an order of the referee, denying its claim for the return to it of certain farm implements and property, or its value if sold, to wit: 1 International Harvester Company 8-foot binder and transport; 3 Osborne disc harrows; 3 fore carriages for discs; 1 10–26 self-dump rake; 1,500 pounds of binder twine—which it is alleged: (1) Were acquired by the bankrupt from said International Harvester Company because of certain false and fraudulent representations as to his financial condition made by the bankrupt to said company for the purpose of inducing it, and which did induce it, to sell and deliver said property to said bankrupt; and (2) because such property was sold by the International Harvester Company to said bankrupt upon the express written agreement or contract, whereby the title to and ownership of said property should remain in said International Harvester Company until the purchase price thereof should be paid in full; and which, it is alleged, said purchase price has never been paid.

Third. The petition of the Acme Harvesting Machine Company, a West Virginia corporation, for review of an order of the referee denying its claim for the return to it of certain farm implements, to wit: 1 8-foot Acme binder; 1 tongue truck; 1 transport truck, of the alleged value of $128; also commission repairs, or repair parts as per inventory $29.50—which property it is alleged was delivered to the bankrupt under an agency contract in writing dated September 24, 1914, whereby the bankrupt was to receive said property from said Acme Company and sell the same as its agent during the season ending December 31, 1915, for cash or approved notes drawn in favor of the company upon blanks furnished by it therefor, upon a specified commission to be paid by the Acme Company to the bankrupt for receiving, caring for, and selling said property, and to hold said property as its agent during said term, and until sold by the bankrupt as such agent, a copy of which agency contract is attached to the petition or application of the Acme Company as a part thereof.

Upon the hearing of said several petitions the referee granted (1) the application of the Western Rock Island Plow Company for the property claimed by it, and ordered the trustee to return said property to the plow company, from which order the trustee petitions for review.

Upon the petition of the International Harvester Company and the petition of the Acme Harvesting Machine Company, the referee denied the petition or application of each of said petitioners, and directed the trustee to hold the property, or the proceeds thereof claimed by each if sold, until the further order of the referee in the premises, which order has never been vacated or modified; and each of said petitioners petition for a review of said orders respectively.

Frank Maher, of Ft. Dodge, Iowa, for Trustee Bailey in the first of above petitions.

Burnquist & Joyce, of Ft. Dodge, Iowa, for Western Rock Island Plow Co.

Robert Healy, of Ft. Dodge, Iowa, for International Harvester Co. of America.

Helsell & Helsell, of Ft. Dodge, Iowa, for Acme Harvesting Mach. Co.

Frank Maher, of Ft. Dodge, Iowa, for trustee in each of the second and third of such petitions.

REED, District Judge (after stating the facts as above). [1] The contract of conditional sale under which the Western Rock Island Plow Company claims its right to the property was not filed or recorded as required by section 2905 of the Code of Iowa (1897); and the order of the referee, allowing its claim to the property, is based upon the decision of this court in Re Hager, 166 Fed. 972, and the cases there cited. That case, however, arose and was decided prior to the amendment of June 25, 1910, to the Bankruptcy Act, and upon the authority of York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and Dunlop v. Mercer, 156 Fed. 545, 86 C. C. A. 435, in which it is held that the trustee in bankruptcy under such contracts of conditional sale is vested only with the title and interest of the bankrupt in the property acquired by him under such contract; but the amendment of 1910 to section 47a (2) of the Bankruptcy Act was for the purpose of avoiding the construction of the Bankruptcy Act by York Manufacturing Co. v. Cassell above, and to clothe the trustee as to all property in the custody of or coming into the custody of the bankruptcy court since that amendment, with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings upon such property so coming into the custody of the court of bankruptcy. Under this amendment, therefore, the trustee no longer stands simply in the shoes of the bankrupt; but as to all property acquired by the bankrupt since the amendment and so coming into the custody of the court of bankruptcy, the trustee is entitled to all the rights of a creditor holding a lien by legal or equitable proceedings upon such property at the date of the bankruptcy; and the prior decisions holding that he has no other rights than the bankrupt had at the time of the bankruptcy are no longer controlling. Collier on Bankruptcy (10th Ed. [1914]) § 47a (2), as amended, and notes thereto upon pages 659 et seq. Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, in which the Hager Case ([D. C.] 166 Fed. 972) is approved, was decided by the Court of Appeals in February, 1912. That case also arose prior to the amendment of 1910, though the opinion does not so show, but the record does.

As the property claimed by the Western Rock Island Plow Company was purchased by the bankrupt since the amendment of 1910, and has come into the custody of the court of bankruptcy through its trustee, it follows that the referee erred in awarding that property or its proceeds, if sold by the trustee, to the Western Rock Island Plow Company, and the order of the referee must be reversed, and the claim of the Western Rock Island Plow Company to such property denied; and it is so ordered.

In the matter of the petition of the International Harvester Company of America, the facts show that the property claimed by it is claimed under a conditional contract of sale made with the bankrupt in 1915, which contract was never filed or recorded as required by section 2905 of the Iowa Code, and is identical with the claim of the Western Rock Island Plow Company, and under the amendment of 1910, the right of the trustee to that property is prior to the claim of the International Harvester Company, and the order of the referee, denying the claim of that company under its conditional contract of sale, is correct.

The referee found against the claim of this petitioner to the property because of the alleged fraud of the bankrupt in procuring the same, and this finding has ample support in the testimony. The order of the referee as to this property is therefore approved.

[2] In the matter of the petition of the Acme Harvesting Machine Company the claim of that company stands upon a different basis from either of the other claimants. In this case the Acme Harvesting Machine Company entered into a written contract with the bankrupt September 24, 1914, in which it was to deliver to the bankrupt the property in controversy under a contract wherein the bankrupt was to receive the property as the agent of the Acme Company, sell the same for that company during the season ending December 31, 1915, for cash, or approved notes drawn in favor of the company upon blanks furnished by it therefor, and for which the bankrupt was to receive a specified commission from the Acme Company, and to hold the property so received as agent for the Acme Company until sold, and to return to that company on demand any of the property not sold during the term of the agency. Under this contract the bankrupt acquired

no right, title, or interest in the property; and it remained the property of the Acme Company until it was sold. The contract upon its face is neither an absolute sale of the property, nor a conditional sale thereof, but is one of bailment only, which is not required to be filed or recorded under section 2905 above of the Iowa Code. Conable v. Lynch, 45 Iowa, 84; Thompson & Co. v. Barnum & Co., 49 Iowa, 392; Ludvigh v. American Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Ellet-Kendall Shoe Co. v. Martin, Trustee, 222 Fed. 851, 138 C. C. A. 277 (this circuit); McElwain-Barton Shoe Co. v. Bassett, Trustee, 231 Fed. 889, — C. C. A. — (this circuit); Thomas v. Field Brundage Co., 215 Fed. 891, 132 C. C. A. 231 (this circuit); John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422 (this circuit); In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611 (this circuit).

Under the Iowa statute, and the above-cited decisions of the Iowa Supreme Court, a creditor, levying an execution upon the property claimed by the Acme Company, would acquire no interest therein as against the Acme Company, and under the authorities cited the Acme Company, as owner of the property, may show its title and right thereto to defeat the lien of the trustee under the amendment of 1910.

[3] The trustee raises the question that the petition for review (called appeal) was not taken in time, and moves to dismiss the petition for that reason. General order in bankruptcy 27 (89 Fed. xi, 32 C. C. A. xxvii) does not fix the time within which petitions for review of the orders of referees shall be taken, but a local rule requires that they be taken within ten days from the date of the order sought to be reviewed. In this case the order of the referee was made on February 8, 1916, and the petition for review was filed with the referee and allowed by him on February 10, 1916. There is no merit, therefore, in the motion of the trustee to dismiss the petition for review, and the motion is denied.

It follows that the referee erred in denying the claim of the Acme Company to the property claimed by it, and his order must be, and is hereby, reversed, and said property or its proceeds, if sold by the trustee, is awarded to the Acme Company.

The clerk will certify to the referee a copy of this opinion, who will award the property in each case as herein indicated.

It is ordered accordingly.

COHEN v. LOWE, Collector of Internal Revenue.

(District Court, S. D. New York. July 18, 1916.)

1. INTERNAL REVENUE ⚷38—INCOME TAXES—ALLOWANCE FOR DEPRECIATION—BURDEN OF PROOF.

To recover income taxes paid under protest, on the ground that an insufficient amount was allowed for depreciation of the income-producing property, plaintiff has the burden of showing that the amount allowed was too small.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⚷38.]

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

2. INTERNAL REVENUE ⚿7—INCOME TAXES—DEPRECIATION.

In computing, for assessment of income taxes, the amount of depreciation of property held for rental purposes, the depreciation to be allowed is for the wear and tear suffered by the building during the tax year, assuming that it is kept in good repair, and no allowance can be made for change in neighborhood or diminished rental value because of the erection of more modern buildings.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. ⚿7.]

3. INTERNAL REVENUE ⚿7—INCOME TAXES—ASSESSMENT.

The fiscal year for a firm of which plaintiff was a member began before the Income Tax Law went into effect. There was no showing that during that part of the year before the law went into effect any profits were earned. *Held* that, without such showing, plaintiff could not object that income taxes were assessed on the entire profits earned, on the ground that part of the taxes were based on income earned before the law went into effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. ⚿7.]

4. INTERNAL REVENUE ⚿7—INCOME TAXES—EXEMPTIONS.

The Income Tax Law allows exemption of $3,000 or $4,000, depending on whether the one taxed is single or married, and provides for a tax of 1 per cent. on all other income. Other provisions impose a tax of an additional 1 per cent. upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000. *Held* that, in assessing the additional tax on the excess of the net income over $20,000, the exemption of $3,000 or $4,000, which is to be deducted in assessing the normal income tax cannot be made.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8-10; Dec. Dig. ⚿7.]

At Law. Action by Hyman Cohen against John Z. Lowe, Jr., Collector of Internal Revenue, etc. Judgment for defendant.

Benj. M. Kaye, of New York City, for plaintiff.

Ben A. Matthews, Asst. U. S. Atty., of New York City, for defendant.

GRUBB, District Judge. This is an action brought by the plaintiff to recover from the defendant, as Collector of Internal Revenue for the Second District of New York, an amount which he paid to the defendant, under protest, on account of his income tax for the year 1913, and which he claims was in excess of the amount legally due therefor.

The excess is claimed to exist in three respects: First, the amount allowed for depreciation on a building owned by plaintiff is claimed to have been too small; second, in that the amount of earnings of the firm of Cohen, Goldman & Co., of which he was a member, for the tax year of 1913, was fixed as the amount earned by said partnership during its fiscal year ending November 15, 1913, and part of this year was not within the period during which the law was effective; third, in the assessment of the additional tax on the amount of the net income of the plaintiff in excess of $20,000, without allowing a deduction for any exemption therefrom.

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

[1, 2] 1. The plaintiff was allowed 3 per cent. for depreciation on an apartment house owned by him. The burden is on him to show that the depreciation so allowed was too small. This allowance is for the wear and tear suffered by the building during the tax year, which means the physical deterioration that the building suffered during that period. It does not take into account depreciation in value due to a loss in rental value because of the construction of more modern buildings with improved facilities, or due to a change in the neighborhood. It is to be based upon the life of the building, in the sense of the number of years the building would remain in a condition to be habitable for the uses for which it was constructed and used, and which was in the instant case for an apartment house, and not merely the number of years it would stand without being condemned and torn down. The annual depreciation would be an amount represented by a fraction having one, the tax year, for the numerator and the number of years, representing the ascertained life of the building, as the denominator. This assumes that there would be an average deterioration suffered each year during the life of the building, and that the plaintiff would keep the building in good repair during the life of it. This the law exacts of him. Upon these assumptions, and giving this meaning to the words of the statute, "a reasonable allowance for the exhaustion, wear, and tear of the property arising out of its use or employment in the business," the amount of the deduction allowed by the government to the plaintiff on this account is deemed to be reasonable.

[3] 2. Complaint is made that the plaintiff is charged upon the basis of profits received by him or credited to him as a member of the firm of Cohen, Goldman & Co. for the year ending November 15, 1913, which was the fiscal year of the firm, a part of that year antedating the taking effect of the law. Whether profits earned by the firm prior to March 1, 1913, though not credited or paid to the individual partners till the end of its fiscal year in November, 1913, are taxable to the individual members, need not be decided in this case. The plaintiff, suing to recover a tax claimed to be excessive, has the burden of showing its illegality, and in this case must show that profits were earned by the partnership prior to March 1, 1913, and in what sum. It is conceded that the plaintiff has not and cannot sustain this burden.

The plaintiff contends that the equitable method would be to proportion the profits for the fiscal year of the firm in equal monthly installments, and allot to the period preceding March 1, 1913, its proper proportion, and that the method of average apportionment has been adopted by the Treasury Department in like cases, and is one to which it is therefore committed. There is no specific regulation of the Treasury Department governing this matter. In the absence of one, however equitable the method of apportionment may be, and though it is one adopted in analogous cases by the department, it could only be adopted by the court in this case by stipulation of the parties, which is wanting. It may well have been that no profits accrued to the partnership till after March 1, 1913, and that none were taxed accordingly, except such as were properly subject to the tax. In the absence of a showing to the contrary, the court must assume that the tax was legally collected; the burden being on the plaintiff to establish its illegality.

[4] 3. The plaintiff also contends that, before assessing the additional tax on the excess of net income over $20,000, he should have been allowed an exemption of $3,000, as in the case of the normal tax. The law seems to have created two separate taxes—the normal tax and the additional tax. It is true they are created by the same act, and their incidence is in part identical, and they are by the terms of the act to be regulated, except where inconsistency would result from so doing, by the same provisions. In many respects, however, they are essentially distinct taxes.

The basis of the assessment of each is net income, and net income is to be ascertained for the purposes of each in the same way. After ascertainment, the normal tax is to be assessed on the net income, after deducting the exemptions allowed the single or married taxpayer as the case may be. The additional tax is to be assessed on the excess of net income over and above $20,000 at varying and progressive rates. The variation in rate, however, does not serve to create more than a single additional tax. No express direction to allow a deduction from the excess, for exemptions, before assessing the additional tax, is contained in the act. It must be derived from the general conformity provision of the act, if it is to be found there at all.

The purpose of the exemption was to exclude a class deemed unable to pay the tax. In the interest of equality, it was necessary to make the exemption apply generally to all subject to the normal tax. Otherwise the person whose income was but a dollar in excess of the exemption would be required to pay the tax on his entire income. This would have defeated the purpose intended. It was therefore necessary, in order to accomplish the purpose intended, to provide that the exemptions should apply equally to all who were subject to the normal tax. The purpose to protect by exemption those deemed unable to pay a normal tax could not have been held to apply in favor of those who were subject to the additional tax, since their supposed ability to pay an increased tax was the justification for its imposition.

The law, in effect, provides that the normal tax shall be collected as to single men on the excess of net income over $3,000, and as to married men upon the excess of net income over $4,000. The exemption of these amounts in favor of all persons subject to the normal tax is the equivalent of taxing only the excess above those amounts. The law also provides that the additional tax shall be assessed on the excess of net income over and above $20,000. If the exemptions that apply in favor of the normal tax, are extended also to the sur-tax, the result would follow that the excess taxed would be that over and above a net income of $20,000 plus the respective exemptions in favor of single or married persons as the case might be. This is in conflict with the language imposing the additional tax, and does not seem to have been necessary to the purpose of Congress in creating the exemptions. It is not elsewhere expressly so provided in the act, and its language does not impliedly require such a construction.

For the reasons assigned, a judgment for the defendant, with costs, will be ordered entered.

GORMLEY v. THOMPSON-LOCKHART CO.

(District Court, E. D. Pennsylvania. June 6, 1916.)

No. 41 of 1915.

1. TOWAGE ⚷11(1)—TUG UNDER CHARTER—RESPONSIBILITY FOR ACTS OF MASTER AND CREW.
The owner of a tug who charters its use for towing furnishing the master and crew is responsible for their acts within the scope of their employment.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⚷11(1).]

2. TOWAGE ⚷11(1)—TUG UNDER CHARTER—INJURY TO TOW.
Libelant chartered the services of his tug to tow respondent's lighters. The master was in charge of its management, and was given directions by respondent only as to the destination of the lighters and general orders to take them in tow only when he thought it safe. Having been directed to tow a lighter to a certain place, he started in the morning when there was thin ice on the river, but instead of following the usual custom in such cases and towing the lighter astern to avoid danger from the ice, he towed it alongside. The seams were cut by the ice, and he ran it ashore, where it rested on the bottom. Respondent was obliged to remove the cargo, raise the lighter, and have it docked and repaired. *Held*, that all such expense resulted proximately from the master's negligence, and that libelant was liable therefor.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⚷11(1).]

3. TOWAGE ⚷4—INJURY TO TOW—CARE REQUIRED OF TUG.
That the lighter was old and not sheathed did not relieve the master from responsibility, but rather required him to exercise the greater care.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. ⚷4.]

In Admiralty. Suit by George W. Gormley against the Thompson-Lockhart Company. Decree for libelant, less amount of set-off.

Willard M. Harris, of Philadelphia, Pa., for libelant.

George Quintard Horwitz, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The libelant sues to recover a balance of $577.86, with interest from June 17, 1915, under a parol charter party with the respondent for the charter of the tug Helen made on December 31, 1914, to tow respondent's barges on the Schuylkill river.

The answer does not deny that the balance claimed for services of the Helen is correct and was earned, but claims a set-off for damage to the respondent's Lighter No. 6 alleged to have been caused by the negligence of the master of the Helen. There was a dispute between the parties as to the terms of the charter party, the respondent claiming, and the libelant denying, that they were fixed by a letter to the libelant, proposing terms accepted and acted upon by him for the year 1913, and that the same terms were continued during 1914. The letter in question contained the following condition:

"You are to be held liable for any damages or accidents to person or property (without regard to ownership) caused by your negligence or the negligence of your men during the fulfillment of this contract."

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

I think it is immaterial whether the agreement for the year 1913 in the letter was continued for the year 1914 or not. A charter party may be by parol. James v. Brophy, 71 Fed. 310, 18 C. C. A. 49.

[1] In the present case the libelant, who is the owner, did not charter his bare tug leaving the charterer to furnish the crew, but he chartered the use of his tug, furnishing the crew himself, the respondent advancing in part the wages of the crew and cost of the coal, which were deducted from the charter money. The tug was operated by the libelant's crew and in charge of a master employed by him. The master and crew, being employed by the libelant, were his agents, and he is responsible for their acts within the scope of their employment. The Nicaragua (D. C.) 71 Fed. 723; Bramble v. Culmer, 78 Fed. 497, 24 C. C. A. 182.

[2] The respondent took no responsibility for the management of the tug, merely giving orders for the destination to which its lighters were to be towed.

On the morning of December 16, 1914, there had been an overnight freeze on the Schuylkill river, causing a coating of thin ice, which the witnesses described as "window-glass" ice. The night before, the master of the Helen had orders from the respondent to take Lighter No. 6 down the Schuylkill river from Fairmount to Penrose Ferry. The master was under general directions from the respondent only to take its lighters in tow when he thought it was safe. There is no evidence that on the 16th of December the master of the tug notified the respondent of any danger to navigation, or that the frozen condition of the river was known to it. From the testimony, it appears that "window-glass" ice, such as coated the river upon that day, causes danger to a lighter, in that the thin ice is likely to get into the seams between the planking and cut out the caulking. The tug was run down the river to about Market street bridge, breaking the ice, and then was brought back after the lighter. It was lashed to the port side of the tug, and the tug and her tow proceeded down the river. When the Walnut Street bridge was reached, it was discovered that the lighter was listing to port and taking in water rapidly. The master of the tug beached her on the east side of the river, and, after some time, began pumping her out, but did not succeed in keeping her afloat or preventing her lying on the bank and bottom of the river. It was found that the ice had cut through the seams, and, in order to have the lighter repaired, it was necessary for the respondent to engage the services of a hoister to move and take away the cargo. She was then taken down the river and towed to a shipyard, where it was found that it was necessary to repair the planking, where it had been cut and where it had been strained by the weight of the water and cargo while beached, and to recaulk the bottom and sides.

The respondent claims as a set-off the costs of unloading, raising, and repairing the lighter, the expense of a watchman, the towage for pulling her off shore, docking her, and towing her to the shipyard for repairs, and demurrage covering 22 days at $6 a day. It is established from the testimony that in towing through window-glass ice, it is customary and usual, in order to avoid the danger of the ice cutting through the seams, to tow a lighter astern instead of alongside. The injury caused to the barge was clearly due to the negligence of the master of the tug in towing the lighter through the thin ice contrary to the custom which is a rule of safety. If, upon finding the lighter in a sinking condition, prompt measures had been taken with proper pumping equipment, no doubt the heavy expense to the respondent could have been avoided. When the boat was beached, however, the master of the tug did not take any action to lighten her by pumping out the water until she was resting upon the bottom, and his pump and siphon did not effectually accomplish the work. His negligent act in his manner of towage was the proximate cause of the sinking of the lighter and the straining of her seams, which rendered necessary the general expense of caulking both sides and bottom. It does not appear that any unnecessary expense was incurred to put the lighter in navigable condition, and the libelant must bear the burden of the want of reasonable skill and care on the part of the master, which subjected the lighter to the hazard of the thin ice. The Britannia (D. C.) 148 Fed. 495; The R. C. Townsend (D. C.) 140 Fed. 217; Farrell v. Port Johnson Towing Co. (D. C.) 156 Fed. 871.

[3] The master was not relieved of his duty to exercise ordinary care, but rather required to exercise additional caution by reason of the fact that the lighter was, to his knowldge, old and unsheathed, and therefore more liable to damage from the ice. The Syracuse (D. C.) 18 Fed. 828.

The owner of the tug is liable for the cost of unloading, raising, and repairing the lighter, and for demurrage, if properly proved. O'Hare v. The Brilliant (D. C.) 3 Fed. 719; Leech v. Steamboat Miner, 1 Phila. (Pa.) 144.

The respondent has not established by sufficient proof any damage justifying the item claimed for demurrage for 22 days' detention at $6 a day, amounting to $132. There is no evidence showing the usual earnings of the vessel per diem, nor what it would have cost to employ a substitute during the detention, nor that there was employment for the vessel during that time.

There are numerous other items, such as pay for a ship's carpenter, a watchman, "expense sundries" and towing, which are not shown by any legal evidence to have been incurred by reason of the sinking of the lighter. The libelant testified in rebuttal that the towage was done by his boat, and that his lighter took the place of respondent's Lighter No. 6. The only items as to which proper proof was offered were the items for unloading, amounting to $43.75, and repairs, $300.26.

Under the condition of the proofs, therefore, the respondent will be allowed as a set-off the expenses of repairs, $300.26, and of unloading, $43.75, making a total of $344.01.

A decree will be entered in favor of the libelant for the amount of his claim, $577.86, less the amount of respondent's set-off allowed, $344.01, leaving a balance of $233.85, with interest from June 18, 1915, the date of the last item of account between the parties under the charter party.

MURRAY et al. v. THIRD NAT. BANK OF ST. LOUIS.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1916.)

No. 2771.

1. JOINT ADVENTURES ⟹5(2)—VERDICT—CONJECTURE.

A verdict, depending on a finding that defendants made a joint purchase of stock, cannot be supported, where based on a conjecture.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. ⟹5(2).]

2. BILLS AND NOTES ⟹394—INDORSERS—PERSONS PRIMARILY LIABLE.

The Ohio Negotiable Instruments Act (Gen. Code Ohio, §§ 8175, 8185) declares that presentment for payment is not necessary to charge the person primarily liable on the instrument, although necessary to charge the drawer and indorsers, and that presentment for payment is not required to charge an indorser, when the instrument was made or accepted for his accommodation, and he has no reason to expect that it will be paid, if presented. A bank, desiring to increase its capital stock, offered part of the issue to its shareholders at $150 per share, and the rest to the public at $275 per share. The shareholders took their respective allotments of new stock, but of that offered to the public 200 shares were unsubscribed for, and to effect the stock issue the president subscribed therefor, giving a demand note, indorsed by the directors of the bank. *Held*, that as, under the statute, a negotiable instrument is not deemed to have been made or accepted for the accommodation of the indorser unless he is primarily liable thereon, the note cannot be treated as one for the accommodation of the indorsers, on the theory that their indorsement benefited them by carrying out the stock issue which enabled them to acquire shares worth $275 for $150, for such excess in value was represented by the book value of the old shares, of which they already owned a proportionate part, and so such indorsers were entitled to demand presentment for payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996–1050; Dec. Dig. ⟹394.]

3. BILLS AND NOTES ⟹243—INDORSERS—WHO ARE.

Under the Ohio Negotiable Instruments Act (Gen. Code Ohio, § 8168), declaring that a person placing his acknowledgment on an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, one who signs in form as an indorser cannot be held liable as a primary debtor, unless he has in appropriate language indicated an intention to be bound in some other capacity; so the directors, who signed the president's note as indorsers, cannot be treated as primarily liable on the theory that the purchase was for the benefit of the entire directorate, that fact not appearing on the face of the note, nor shown by substantial testimony.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553; Dec. Dig. ⟹243.]

4. APPEAL AND ERROR ⟹1062(1)—REVIEW—HARMLESS ERROR.

Where it is impossible to determine whether a verdict was based on a ground of liability improperly submitted, the submission of such ground of liability is prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. ⟹1062(1).]

5. BILLS AND NOTES ⟹537(7)—DEMAND NOTES—PRESENTMENT.

Under the Ohio Negotiable Instruments Act (Gen. Code, Ohio, §§ 8176, 8297), declaring that, when an instrument is payable on demand, present-

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

ment must be made within a reasonable time after its issue, and what is a reasonable time depends on the nature of the instrument, or the usage of trade, the question whether a demand note is presented within a reasonable time is one of fact for the jury, or a mixed one of fact and law for their determination, unless the ultimate facts are undisputed, and are such that reasonable men cannot draw different conclusions.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1882–1884, 1887–1890; Dec. Dig. ⊂⇒537(7).]

6. Bills and Notes ⊂⇒404(1)—Demand Note—Interest.

That a demand note bears interest does not make it any the less a demand note, but may be considered in determining whether the parties expected an immediate or early demand.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091–1094, 1099, 1101–1103; Dec. Dig. ⊂⇒404(1).]

7. Evidence ⊂⇒130—Admissibility—Declarations.

Where the president of a bank subscribed to those shares of stock of a new issue unsubscribed for by the public, and the vice president induced directors to sign a note executed by the president to raise funds to pay his subscription, statements by the vice president to some directors, in the absence of the others, as to the purpose of the note, are not admissible against those not present.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. ⊂⇒130.]

8. Bills and Notes ⊂⇒537(7)—Actions—Jury Question.

In an action on a demand note, the question whether it was presented within a reasonable time *held*, in view of the circumstances, properly submitted to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1882–1884, 1887–1890; Dec. Dig. ⊂⇒537(7).]

9. Bills and Notes ⊂⇒510—Actions—Evidence.

In an action on a demand note, executed by the president of a bank and indorsed by the directors thereof, which was negotiated with plaintiff, a letter written by the vice president of the bank, who negotiated the instrument, stating its purpose, is admissible on the question of whether demand was made in a reasonable time.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1746–1759; Dec. Dig. ⊂⇒510.]

10. Notice ⊂⇒3—Bank Directors—Books of Bank.

Directors of a bank are not bound, as a matter of law, to know the contents of the books of the bank, including the accounts therein.

[Ed. Note.—For other cases, see Notice, Dec. Dig. ⊂⇒3.]

11. Appeal and Error ⊂⇒843(2)—Determination—Matters Presented for Review.

Where the evidence may differ on retrial, there being other errors necessitating reversal, the appellate court need not determine whether an instruction, correct in law, was justified by the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⊂⇒843(2).]

12. Witnesses ⊂⇒140(3)—Competency—Deceased Persons—Adverse Parties.

In an action on a note, executed by one and indorsed by another, neither the maker nor other indorsers, who were made parties defendant, can be deemed adverse parties, within Gen. Code Ohio, § 11495, declaring that a party shall not testify when the adverse party is an executor, etc., as against the representatives of a deceased indorser; the maker not denying his primary liability, and the interests of the indorsers being presumptively the same.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 600; Dec. Dig. ⊂⇒140(3).]

13. WITNESSES ⚷380(6)—EXAMINATION—IMPEACHMENT.

Gen. Code, Ohio, § 11497, permits the examination of an adverse party as if under cross-examination, and provides that the party calling for such examination shall not be concluded, but may rebut by counter testimony. In an action on a note, the ostensible maker, who made no defense, was called as a witness by plaintiff, and plaintiff was permitted, against objection, to show that the maker had made statements to its counsel contradictory to his evidence on trial and favorable to plaintiff. *Held* that, as a party calling a witness may, in case of surprise, question the witness as to inconsistent statements previously made by him, for the purpose of refreshing his recollection and inducing him to correct his testimony, but cannot discredit the testimony of his own witness, plaintiff was not entitled to prove the maker's contradictory statements, but could only rebut his testimony by showing the facts to be otherwise than as stated by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1215, 1219; Dec. Dig. ⚷380(6).]

14. WITNESSES ⚷380(5)—EXAMINATION—IMPEACHMENT.

One calling a witness cannot impeach him by proof of previous contradictory declarations, though he may call such declarations to the mind of the witness in case of surprise, for the purpose of inducing him to correct his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219; Dec. Dig. ⚷380(5).]

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

Action by the Third National Bank of St. Louis against Samuel J. Murray and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

A. C. Cassatt and Miller Outcalt, both of Cincinnati, Ohio, for plaintiffs in error.

Jos. S. Graydon and S. T. McPherson, both of Cincinnati, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. This is a suit brought by the Third National Bank of St. Louis against the maker and indorsers of a promissory note growing out of this situation:

Previous to February, 1909, the Second National Bank of Cincinnati was capitalized at $500,000; steps were taken to increase the capital stock to $1,000,000; $300,000 of the new stock was offered to existing stockholders at $150 per share, the remaining $200,000 to the public at $275 per share; all the stockholders took their respective allotments of new stock at 150. There remained unsubscribed of the stock offered the public $20,000 par value. Davis, the president of the Second National Bank, took this stock in his name. It was paid for in this way: Davis signed a demand note for $55,000 (the price of the stock), payable to himself, or order, with interest (rate not stated); the note was indorsed upon the back by Davis and by each of the directors. This note, accompanied by the stock as collateral, was negotiated at its face with the plaintiff bank by Galbreath, who was vice president and

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

one of the directors of the Second National Bank, and the proceeds turned into the capital stock account of the latter bank. Three per cent. quarter-yearly dividends were regularly paid upon the stock on the 1st days of May, August, November and February of each year, including February 1, 1912; the checks therefor being turned into an account carried on the books of the Second National Bank in the arbitrary name of "Williams, Guardian"—Williams being the bank's cashier. From this account quarter-yearly interest to December 31, 1911, at 5 per cent. per annum, was regularly paid to the plaintiff bank through the officials or employés of the Second National Bank. According to this practice the next installment of interest would be due March 31, 1912. The Comptroller of the Currency took charge of the Second National Bank on April 10, 1912, up to which time the directors had remained the same as when the note was indorsed, except that Kennedy had died August 23, 1910. The note was presented and payment demanded May 16, 1912. The pledged stock was afterwards sold, realizing less than $2,000 net. Suit was brought against all the parties to the note, Kennedy being represented by his executrix.

The amended complaint set up substantially the facts already stated, with the further allegation that all the defendants had agreed among themselves to purchase the stock and take title to it in Davis' name, with the intention of holding it until they could sell it at a profit, and that the note was to be paid out of the proceeds of the sale.

Davis and Galbreath made no defense. Brooks died after beginning of suit, which was dismissed as against his administrators as improperly revived. John F. Robinson compromised his liability under sections 8079–8084 of the General Code of Ohio. The remaining defendants other than Davis contended that they were mere indorsers for his accommodation and without consideration, that presentment for payment was not made within a reasonable time, and that they were thereby prejudiced in the fact that, had presentment been so made, the note would have been paid and the indorser saved harmless, either through Davis' personal responsibility or the sale of the stock. Motion by defendants for directed verdict, made at the close of the testimony, was overruled. The jury was instructed that, if the defendants other than Davis were indorsers for their own accommodation, no demand was necessary; otherwise, they would be liable or not according as demand of payment was or was not made within a reasonable time—both questions of fact being left to the jury. The verdict was for the amount of the note with accrued interest, less the amount realized on sale of the stock and less the amount paid by Robinson.

[1] 1. The jury was instructed that plaintiff had withdrawn its claim that defendants intended by the transaction in question to make for themselves a profit on the 200 shares of stock taken in Davis' name. Whether or not such action by plaintiff clearly appears, the question was properly withdrawn from the jury's consideration. There was no evidence to support the claim. Davis testified that the purchase was his individually; the indorsers Omwake, Albert, and Murray testified to the same effect. There was not only no direct testimony to the contrary, but no circumstances from which a contrary inference could properly be drawn. A finding of joint purchase could only rest

upon conjecture, which of course is an insufficient basis for a verdict. Smith v. Ill. Central R. R. Co. (C. C. A. 6) 200 Fed. 555, 556, 119 C. C. A. 33; Toledo, St. L. & W. R. Co. v. Howe (C. C. A. 6) 191 Fed. 776, 782, 112 C. C. A. 262.

[2] The Ohio Negotiable Instruments Act (G. C. § 8175) provides, however, that "presentment for payment is not necessary in order to charge the person primarily liable on the instrument," although, "except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers"; and by section 8185 "presentment for payment is not required in order to charge an indorser when the instrument was made or accepted for his accommodation, and he has no reason to expect that it will be paid if presented."

The concrete proposition in this regard, asserted by plaintiff, and submitted to the jury, is that the indorsing directors were interested in or benefited by Davis' purchase of the stock, in that the capital increase was thereby carried through and the indorsing directors thus enabled to obtain a large profit by "getting new stock at 150 which was selling in the market at about 275"; and plaintiff contends that the instrument was thus made for the accommodation of the indorsers within the meaning of the statute, and that the proceeds of the note thus really went to the indorsing directors as well as to Davis.

The generally accepted construction of provisions in negotiable instruments acts, similar to section 8185, is that they apply only to cases where the indorser is the primary debtor, the reason for the rule being that no one is bound to indemnify the primary debtor, and he is thus no more entitled to presentment, demand, or notice than if his true character had appeared on the paper. Bunker on Negotiable Instruments, p. 142. We think section 8185 must be construed as at least limited to cases where the indorser is a primary debtor; that is to say, one who intended to assume the capacity of either a sole or a joint maker.

[3] But by section 8168 a "person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Similar provisions have been construed as requiring that the words indicating such intention appear on the instrument itself. Milling Co. v. Farmers' Co., 130 La. 950, 58 South. 825; Hopkins v. Commercial Bank, 64 Fla. 310, 60 South. 183; First National Bank v. Bickel, 143 Ky. 754, 137 S. W. 790; Id., 154 Ky. 11, 156 S. W. 856. See, also, Rockfield v. Bank, 77 Ohio St. 311, 327, 328, 83 N. E. 392, 14 L. R. A. (N. S.) 842. But there is authority to the contrary. Bank v. Busby, 120 Tenn. 652, 660, et seq., 113 S. W. 300. But were we to assume that the "appropriate words" indicating the intention to be bound otherwise than as indorser need not appear upon the instrument itself, we think it clear that under section 8168 one who signs in form as an indorser cannot be held liable as primary debtor, either sole or joint, unless he has "in appropriate language, used for that express purpose, indicated an intention to be bound in some other capacity," and that such intention is "not to be inferred from conduct or from language that is equivocal, much less from that which is con-

sistent with an intent to assume only the secondary liability of an indorser, and not the primary liability of a maker." McDonald v. Luckenbach (C. C. A. 3) 170 Fed. 434, 437, 95 C. C. A. 60.

Tested by that rule, we think there is a total absence of substantial testimony tending to show that the indorsing directors intended to assume the primary obligation of joint makers with Davis. As already said, there is no evidence that they were directly interested in the purchase of the stock in question. The proceeds of the note were not, in any proper sense, paid to them; and we find no substantial evidence that the maker and indorsers regarded themselves as ultimately jointly liable as between themselves. While the dividends did not quite take care of the interest, there is no evidence that the indorsers helped make it up. The only testimony having even a plausible tendency to show that the indorsers were primary makers is the statement in Galbreath's letter inclosing the note to the plaintiff bank, referring to the stock as "some stock we are holding and which we desire to place where it will bring business to us"; but this statement (assuming its competency as evidence) falls short of an assertion that the directors had the interest mentioned. It is at least as consistent with the idea that Davis was holding the stock, or even that it was being held by the bank.

Moreover, assuming, as we should, that the capital increase was regarded as for the bank's benefit and that of stockholders, the record fails to show that the directors were interested therein except to the extent and in the same way as were all the stockholders and the bank itself. The new stock allotted to the old stockholders was all taken at the same price of 150 and in proportionate allotments, and new stock could not intrinsically or by the bank's books be worth more than was paid for it, unless the old stock was worth more than that amount, and except as the value of the old stock was decreased by the apportionment of the original assets among the larger number of shares. To be specific, measuring by intrinsic or by book values of assets, and taking into account the amount paid in under the increase, the new stock could not be worth 275 unless the old stock was worth 350; and in the larger capitalization, whether affecting bank profits or stock market values, all interested in the bank profited in proportion to their stock holdings; and had the increase fallen through, whatever disadvantage resulted would have been ratably suffered by all. The situation bears thus a strong analogy to cases of indorsement of corporate paper by directors, who are usually held not to be primary makers or disentitled to presentment and demand by the mere fact of their interest in the corporation. McDonald v. Luckenbach, supra, at page 437 et seq.; Phipps v. Harding (C. C. A. 7) 70 Fed. 468, 478, 17 C. C. A. 203, 30 L. R. A. 513; Houser v. Fayssoux, 168 N. C. 1, 83 S. E. 804.

[4] Taking all these considerations into account, we think the learned trial judge erred in submitting to the jury the question whether the note was made for the accommodation of the indorsers; and as it is impossible to know whether the basis of the verdict was the lack of the indorsers' right to presentment and demand, or a demand in due season, the judgment must be reversed.

[5] 2. The question of presentment: Section 8176 of the General Code of Ohio provides that, "when the instrument * * * is payable on demand, presentment must be made within a reasonable time after its issue"; and section 8297 declares that "in determining what is a 'reasonable' time or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

Defendants contend that what is a reasonable time is a question of law for the court, that a delay such as was had here is plainly unreasonable as matter of law, and that it was thus error to submit to the jury the question of reasonable time.

In International Corporation v. Stadler, 212 Fed. 378, 381, 129 C. C. A. 54, 58, we held it to be properly deducible from the authorities that what is reasonable time is a question of law only when the ultimate facts are undisputed, and that if the evidence or probative facts are such that reasonable men might draw different inferences therefrom the question must be submitted to the jury; that between certain maximum and minimum limits "there is a field where the unreasonableness of the delay is either a question of fact or a mixed question of law and fact, so that its determination falls within the province of the jury." In Marmet Coal Co. v. People's Coal Co., 226 Fed. 646. 651, 141 C. C. A. 402, we expressly reaffirmed the rule as stated in the Stadler Case. While neither of these cases was under a Negotiable Instruments Act, yet we think the proposition there declared peculiarly applicable to section 8297, which makes the question of reasonable time depend upon the facts of the particular case. Bacon's Adm'r v. Bacon's Trustees, 94 Va. 686, 27 S. E. 576. The question has in several cases, under similar provisions of Negotiable Instruments Acts, been held to be one of fact. See German-Amer. Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142; Becker v. Horowitz, 114 N. Y. Supp. 161; Hampton v. Miller, 78 Conn. 267, 61 Atl. 952; in which latter case demand was made more than six years after the date of the note.

[6-8] The question of reasonableness or unreasonableness of demand was properly made by the court to depend largely upon the intention of the parties as to whether the loan represented by the note and the pledged stock was intended to be a continuing investment, without any definite time being agreed upon, and, if so, the probable time within the intention of the parties that should elapse before demand should be made.

We think there was testimony tending to show, either directly or inferentially, that the parties intended the loan to continue more or less indefinitely upon periodical payment of interest. It was undisputed that the object of Davis' purchase and the directors' indorsement was to enable the carrying through of the stock increase; that the indorsers understood that the $55,000 was to be borrowed on the indorsed note, and with the stock collateral; that the loan was to draw interest, and that no time was fixed for its payment. While the mere fact that the note drew interest did not make it the less a demand note (Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020), yet, notwithstanding the holder had the right to demand immediate payment, the fact that the note was given for a loan rather than for a debt in the current business tended to show that the parties did not expect immediate or early demand. Yates v. Goodwin, 96 Me. 90, 94, 95, 51 Atl. 804. We think there was testimony tending to show that the indorsers expected that Davis would carry the stock until he had opportunity to sell it where it would benefit the bank, in the way of bringing deposits or otherwise, and that the loan would meanwhile be carried. Each of the three indorsers who testified said that he signed at Galbreath's request and on his presentation of the note. The director who last indorsed testified that Galbreath told him he could arrange to get the money from the plaintiff bank, and that he thought he could sell the stock without any trouble, and with the proceeds would take up the note. Another said that Galbreath explained the situation to him when he indorsed and promised that the "whole thing would be cleaned up in a short while and be paid off." Galbreath did not testify, and appears to have been thought mentally incompetent to do so.[1] As Galbreath personally negotiated the loan and himself sent the note to the plaintiff, we think it fairly open to inference that the other directors were similarly requested by Galbreath to sign, although the statements made by him to individual directors, in the absence of the others, were not competent evidence as to such others unless in some way brought home to them.[2]

Again, continuing bank loans are often made on demand paper, with or without indorsement, and upon periodical payments of interest. This practice was recognized in Byles on Bills (Sharswood's Ed.) p. 338, the paragraph below being quoted with approval in 1 Daniel on Negotiable Instruments, § 610.[3] The periodical payments of interest tended to show an understanding that the loan was regarded as more or less continuing in character. See Hampton v. Miller, supra. The custom of carrying continuing bank loans on demand paper on periodical payment of interest was proven in Bacon's Adm'r v. Bacon's Trus-

[1] Robinson did not attend the trial, and his testimony was not taken. Kennedy had died. Plaintiffs in error are thus all accounted for.

[2] Defendants in their reply brief say (although in another connection): "Davis was willing to buy the 200 shares, so as to complete the stock increase and permit the bank to obtain its new capital. The indorsers, being the directors of the bank and having the interest of the bank at heart, were willing to assist Davis in this matter to the extent of enabling him, by their indorsement of his note, to borrow the necessary funds"; and elsewhere in the brief that "it is quite reasonable to assume that he [Davis] intended to sell it [the stock] when he had a good opportunity and where it would do the bank some good, in the way of bringing deposits or otherwise."

[3] "But a common promissory note payable on demand is very often originally intended as a continuing security, and afterward indorsed as such. Indeed, it is not uncommon for the payee, and afterward the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be that, though the holder may demand payment immediately, yet he is not bound to do so. It is therefore conceived that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received in order to charge the indorser; and when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether, under all the circumstances, the delay of presentment was or was not unreasonable."

tees, 94 Va. 686, 27 S. E. 576, Yates v. Goodwin, supra, and Bank v. Kennedy, 145 App. Div. 669, 130 N. Y. Supp. 412. True, there was in the instant case no evidence of such practice, but in view of the relations of the indorsers to the bank and to the loan, as well as their interest in Davis' disposition of the stock, we think their knowledge that the note was unpaid and their acquiescence in the carrying of it was open to reasonable inference. "A note presented according to the request or assent of the indorser is as to him presented in a reasonable time." Oley v. Miller, 74 Conn. 304, 308, 50 Atl. 744, 746.

It may be assumed that were there no facts and circumstances beyond the bare fact of delay in presenting an ordinary demand note, such delay as was had here would be unreasonable as matter of law; yet in view of the facts shown, and as the propriety of the inferences mentioned, and thus the ultimate facts, were not conceded, the question of reasonable demand was for the jury, even in the absence of proof of the custom referred to.

The refusal to direct verdict was thus not error, at least as against the indorsers other than Kennedy. While, as against him and his estate, the evidence of continued consent and acquiescence is not as forceful as against the other indorsers—by reason of his absence from home on account of illness for periods aggregating the greater portion of the time between the giving of the note and his death—yet in view of the evidence tending to show his original knowledge of the object of the stock purchase and the intended continuance of the loan, and his consent and acquiescence in its treatment and the delay up to the time of his death, together with an absence of proof that plaintiff knew of his death, we should be inclined to hold, if necessary to decide the question now, that the refusal to direct verdict in his favor was not error. But as the evidence on a new trial may differ materially from that presented by this record, we shall not now definitely decide that question. The criticism that the court left the question of reasonable demand to the jury without instructions as to the principles of law controlling does not impress us. True, the court might have gone into greater detail, but the issue and the substantial considerations affecting it were stated.

[9] 3. Galbreath's letter to plaintiff's president, inclosing the note and collateral, contained this statement:

> "In accordance with my talk with you, I inclose note of S. H. Davis for $55,000 and indorsed by the different directors of the bank. This, as I explained to you, is some stock we are holding and which we desire to place where it will bring business to us. I do not think it will be long before it is taken up."

In view of the conclusion reached that the directors were merely indorsers, the question of the competency of this letter as showing a different situation is out of the case. Its application to the question of reasonable time alone is now important. We see no valid criticism of the charge respecting the inferences to be drawn from the letter, provided there was evidence tending to show that Galbreath was authorized to speak for the other indorsers. His statements in the letter are of course insufficient proof of such authority; and we assume that the mere fact that he was entrusted with the transmission of the note would be insufficient proof of agency to bind the indorsers. That, however, is not the entire situation. For present purposes it may be assumed that Galbreath had before its making personally negotiated the placing of the note; that he had had charge of the procuring of all the indorsers and the forwarding of the note in accordance with his previous negotiations. He was himself one of the indorsers, and equally liable with the others. When the trial was had plaintiff's president, who conducted the negotiations, was dead. Galbreath was unable to testify. We think the letter was admissible as bearing, in connection with the interest payments, upon the reasonableness of plaintiff's delay, viewed from its standpoint, in presenting the note for payment. Upon that subject the question is not alone what the indorsers did know and intend, but includes what plaintiff was justified in concluding they knew and intended, and is not so much what Galbreath had the right to say as what plaintiff had the right to suppose was the extent of Galbreath's representation of the other indorsers. In this view, and for the purposes and to the extent stated, we think the letter competent evidence.

[**10, 11**] 4. The jury was correctly instructed (as requested by defendants) that the directors were not bound, as matter of law, to know the contents of the books of the bank, including the accounts therein. Worden v. United States, 204 Fed. 1, 122 C. C. A. 315. We find no exception to the further instruction permitting the jury to determine, from all the evidence, whether defendants knew the method in which the note transactions, including the payment of interest and dividends, were handled in the bank. Indeed, the instruction would be unexceptionable unless for lack of evidence to base it on. That question we need not consider, as the evidence may not be the same on a new trial.

[**12**] 5. Objection was made by Kennedy's executrix to the competency of the evidence of Davis and Albert, as in violation of section 11495 of the General Code of Ohio, which declares that "a party shall not testify when the adverse party is * * * an executor," etc. The statute was intended "to guard the assets of decedents against the setting up of fraudulent defenses, and the establishment against them of fraudulent claims, or unfounded causes of action." It seems to be grounded on the principle that, "when one of the parties to a contract cannot give his version of it, the other party thereto should not be permitted to testify in his own favor." Roberts v. Briscoe, 44 Ohio St. 596, 601, 602, 10 N. E. 61. The adversary nature of the parties does not necessarily depend upon whether they are arranged upon the same or opposite sides of the case. We think, however, that neither Davis nor Albert were adversary parties within the meaning of the statute. Davis' interests certainly did not conflict with those of the indorsers; his ultimate liability would be the same, whether or not the indorsers were held. As between themselves, the interests of the indorsers were presumably the same. Had Albert testified in his own behalf, the objection of incompetency would surely not have been good. It is difficult to see how the result is changed by the fact that he was called for the plaintiff.

[**13, 14**] 6. Plaintiff called Davis as a witness and was permitted, against objection, to show that he had made to plaintiff's counsel statements contradictory of his evidence on the trial and favorable to plaintiff. This impeaching evidence was limited by the charge to its effect upon the credibility of the witness, with express instructions that it could not be regarded "as establishing the facts." The prominent basis of the criticism is that plaintiff should not be permitted to impeach the credibility of its own witness.

Plaintiff relies upon section 11497 of the Ohio Code, which permits the examination of an adverse party "as if under cross-examination," and provides that "the party calling for such examination shall not thereby be concluded, but may rebut by counter testimony."

The rule recognized by the Supreme Court of the United States (so far as seems applicable here) is that in the absence of statute, while a party calling a witness may be permitted, in case of surprise, to question the witness as to inconsistent statements previously made by him, for the purpose of refreshing his recollection and inducing him to correct his testimony, it was not permitted at common law to discredit the testimony of one's own witness by showing his contradictory statements. Hickory v. United States, 151 U. S. 303, 308, 309, 14 Sup. Ct. 334, 38 L. Ed. 170; Putnam v. United States, 162 U. S. 687, 691, et seq., 16 Sup. Ct. 923, 40 L. Ed. 1118. Such is the rule asserted by the Supreme Court of Ohio. Hurley v. State, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161. The Ohio statute does not in terms give the right to discredit by proof of contradictory statements, but only to "rebut by counter testimony." This was permissible, even as to one's own witness, without the statute. Hurley v. State, supra; Hickory v. United States, supra; Putnam v. United States, supra. We are cited to no decision of the Ohio courts construing the statutory expression "may rebut by counter testimony"; and in the absence of such construction we are disposed to think that it gives the right only to rebut the testimony of the witness by showing the facts to be otherwise than stated by him, but not to discredit him by proof of his own contradictory statements.

We thus find it unnecessary to determine whether Davis was an adverse party within the meaning of the statute, or whether the statute is binding upon the federal courts.

The judgment of the District Court is reversed, with costs, and the record remanded to that court, with directions to award a new trial.

NORTHWESTERN TERRA COTTA CO. v. CALDWELL et al.

(Circuit Court of Appeals, Eighth Circuit. June 19, 1916.)

No. 4521.

1. CONTRACTS ⚿284(1)—BUILDING CONTRACT—SUBMISSION TO ARCHITECT—DECISION.

The fact that the architect for a courthouse would have decided that the coping should be of the same material as the lintels is not equivalent to the submission of the question to him and his actual decision upon it,

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

as called for by the contract between the general contractors and the contractor for the terra cotta work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1303; Dec. Dig. ⚷284(1).]

2. BONDS ⚷135—ENFORCEMENT.

Bonds, other than penal, providing for a fixed liability upon condition, on breach thereof will be enforced, not according to their literal interpretation, but for the amount of actual damages,

[Ed. Notes.—For other cases, see Bonds, Cent. Dig. §§ 241, 243, 259; Dec. Dig. ⚷135.]

3. MORTGAGES ⚷137—ENFORCEMENT.

Mortgages, in form conveyances of property upon condition, are not enforced to the letter, but simply as security for the amount due.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270-276; Dec. Dig. ⚷137.]

4. DAMAGES ⚷78(2)—LIQUIDATED DAMAGES—PENALTY.

The mere use of the terms "penalty," "forfeiture," "liquidated damages," or "stipulated damages" is not conclusive as to whether a contract provides for liquidated damages or a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 157; Dec. Dig. ⚷78(2).]

5. COURTS ⚷92—OPINION—GENERAL EXPRESSIONS—DICTA.

General expressions in every judicial opinion are to be taken in connection with the case in which they are used, and, if they go beyond, may be respected, but should not control the judgment in a subsequent suit when the very point is presented for decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. ⚷92.]

6. SALES ⚷55—CONSTRUCTION OF CONTRACTS—LAW GOVERNING.

A contract, expressly providing that it was not a building contract, but for the furnishing of materials to be used in performing a building contract, and that the same should be furnished and delivered f. o. b. the cars in Chicago, will be construed according to the laws of Illinois.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. ⚷55.]

7. COURTS ⚷365—FEDERAL COURTS—FORCE OF STATE DECISIONS.

In construing a contract for the furnishing of building materials to general contractors for a courthouse, decisions of the state courts, though not conclusive, will be persuasive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 950; Dec. Dig. ⚷365.]

8. DAMAGES ⚷78(7)—LIQUIDATED DAMAGES—PENALTY.

The provision that should the contract be uncompleted at a fixed date, the contractor should pay $50 liquidated damages for each day's delay, but should it be completed before such date, should receive $50 per day bonus, was not for liquidated damages, but for a penalty, in a contract to furnish, according to detailed plans, $13,000 worth of ornamental terra cotta which had to be manufactured specially for the purpose, to the general contractors for a courthouse.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 163; Dec. Dig. ⚷78(7).]

9. CONTRACTS ⚷294—CONTRACT TO FURNISH MATERIAL—SUBSTANTIAL COMPLIANCE.

Where a contractor to furnish terra cotta to the general contractors for a courthouse performed 99⅔ per cent. of the agreement, failing only to

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

furnish the lintels, as to which there was a dispute regarding the material, there was a substantial compliance with the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1352, 1357–1361; Dec. Dig. ⚷294.]

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska, Thos. C. Munger, Judge.

Suit by the Northwestern Terra Cotta Company against George W. Caldwell and others. To review a judgment for defendants, plaintiff brings error. Case reversed and remanded, with directions to set aside the verdict and grant new trial.

E. H. Scott, of Omaha, Neb. (L. F. Crofoot and W. C. Fraser, both of Omaha, Neb., on the brief), for plaintiff in error.

J. A. C. Kennedy, of Omaha, Neb. (T. J. Mahoney, of Omaha, Neb., on the brief), for defendants in error.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. George W. Caldwell and Lester Drake, as copartners under the name of Caldwell & Drake, entered into a contract for the construction of a new courthouse at Omaha, Neb., and gave a bond to the county dated April 10, 1909, with the Fidelity & Deposit Company of Maryland as surety which provided:

"Now the condition of this obligation is such that if the above bounden Caldwell & Drake shall pay off and discharge all debts due to subcontractors, laborers and mechanics and all debts of every nature due for labor and material used in and about said building in the performance of said contract * * * then the above obligation to be void, otherwise to be and remain in full force and effect."

The building was to be of stone, with certain terra cotta trimming, and Caldwell & Drake let the contract to furnish the terra cotta to plaintiff for $13,000, and the Fidelity & Deposit Company of Maryland signed as surety a separate bond to the Northwestern Terra Cotta Company for the payment of the amount of said contract by Caldwell & Drake. The contract between the plaintiff and the defendants Caldwell & Drake for the terra cotta work stipulated that the plaintiff should be designated as the contractor, and Caldwell & Drake should be designated as the owners and contained the following provisions:

"Article I. The contractors shall and will provide all the materials and perform all the work for the furnishing and delivering f. o. b. cars Chicago, with allowance of freight to Omaha, for the architectural terra cotta for the Douglas county courthouse to be erected at Omaha, Neb., as shown on the drawings and described in the specifications prepared by John Latenser, architect, which drawings and specifications become hereby a part of this contract.

"Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architects and that their decision as to the true construction and meaning of the drawings and specifications shall be final. * * *

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

"Art. VI. The contractors shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: They shall begin delivery on cars Chicago of the first material required for the building on or before October 10, 1910, and shall follow up with further shipments so as to complete the entire work on or before October 25, 1910.

"Should the contractor fail to complete said work by and at said time, he shall pay to the owner liquidated damages of fifty [—] ($50.00) for each and every day after October 25th, 1910, and the owner shall pay to the contractor a bonus of fifty dollars ($50.00) for each and every day the said work is completed prior to October 25th, 1910.

"Art. VII. Should the contractors be delayed in the prosecution or completion of the work by the act, neglect or default of the owners, of the architects, or of any other contractors employed by the owners upon the work, or by any damage caused by fire or other casualty for which the contractors are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractors, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architects; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within forty eight hours of the occurrence of such delay.

"Art. VIII. The owners agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractors, agree that they will reimburse the contractors for such loss; and the contractors agree that if they shall delay the progress of the work so as to cause loss for which the owners shall become liable, then they shall reimburse the owners for such loss.

"Should the owners and contractors fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in article XII of this contract."

"Art. XII. In case the owners and contractors fail to agree in relation to matters of payment, allowances or loss referred to in Articles III or VIII of this contract, or should either of them dissent from the decision of the architects referred to in Article VII of this contract, which dissent shall have been filed in writing with the architects within ten days of the announcement of such decision, then the matter shall be referred to a board of arbitration to consist of one person selected by the owners, and one person selected by the contractors, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference."

The contract contained no special designation of the amount of terra cotta to be furnished except by reference to the plans and specifications. A controversy arose between Caldwell & Drake and the Northwestern Terra Cotta Company as to just what terra cotta was to be furnished under the contract. The parties agreed that it called for sufficient for the cornice below the coping, and Caldwell & Drake claimed it included the coping and certain lintels upon the tower. The Northwestern Terra Cotta Company claimed that neither the coping nor lintels was embraced in the contract. The property which both sides agreed was covered by the contract was all manufactured and ready to be shipped and cars ordered by October 25, 1910. Caldwell & Drake, after the making of the contract, requested that shipments be made over the Chicago Great Western Railroad. The Northwestern Terra Cotta factory was on the line of the Chicago & Northwestern Railway, and compliance with the request of Caldwell & Drake to ship over the Chicago Great Western caused the slight delay beyond the date mentioned in the contract. The shipments were in five cars, and were actually made, two cars on October 26th, one on October 27th, one on October 29th, and one on November 2d, and all reached Omaha before they were needed in the construction of the building. There was some confusion in the plans and specifications as to what material the coping and lintels were to be of. One of the plans, Exhibit 4, shows the lintels of brick and the coping of stone. Another of the plans, Exhibit 5, does the same. Another plan, Exhibit 6, shows the coping as terra cotta, but indicates nothing as to the lintels. A fourth plan, Exhibit 7, shows the lintels in terra cotta, and shows nothing as to the coping. It appears to be agreed that the question as to the lintels was submitted to the architect as provided in article II of the contract, and he held that they were of terra cotta, but permission was given to use stone, and by agreement of the parties stone was used by Caldwell & Drake. This was done at a cost of $41.06. No question was ever submitted to the architect, as provided in the contract, as to the coping, but he testified:

"I did not make a decision whether or not the coping should be of terra cotta or of stone, but if the matter had been presented to me, my position would have been the same as on the lintels."

The coping of the cornice was put on of stone at a cost of $294.10.

[1] The District Court decided the case entirely on the failure to furnish the lintels, and there seems to be no doubt this was correct, as the fact that the architect would have decided the question in a particular way is not equivalent to its submission to him and his actual decision upon the question. It is agreed that Caldwell & Drake were entitled to credit for cash paid either as freight or direct to the Northwestern Terra Cotta Company for $9,920.74. They were further entitled to credit for $7.20 for recutting some of the terra cotta. Stone cost more than terra cotta, but in the bill the Northwestern Terra Cotta Company gave Caldwell & Drake credit on account of the lintels for $50. This makes the total credit upon the purchase price of $13,000 amount to $9,977.94, and leaves a balance of $3,022.06, with interest according to the terms of the contract, due

the Northwestern Terra Cotta Company. Caldwell & Drake and the Fidelity & Deposit Company of Maryland filed counterclaims under the article VI of the agreement for $50 per day as liquidated damages from October 25, 1910, to January 12, 1911, when it was conceded the liability terminated by a fire at the works of the Northwestern Terra Cotta Company. The District Court found they were not entitled to recover such damages under the rule laid down in 25 Am. & Eng. Enc. of Law (2d Ed.) 524, that:

"It is also a generally prevailing rule that where there are two or more defendants jointly sued by the plaintiff, one or more of such defendants less than all cannot set off a debt due from the plaintiff to him or them only"

—and the citation in the same connection that in such cases one defendant cannot recover affirmatively upon a counterclaim, and held that, although there was due Caldwell & Drake upon the counterclaim $3,950 as liquidated damages, they could not recover the difference between this sum and $3,022.06, but sustained a motion to direct a verdict for the defendants, and the jury was accordingly directed to find for the defendants, and returned a verdict as directed, and judgment was rendered upon the verdict, and the original plaintiff sued out this writ of error.

The decision of the District Court was based largely upon Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, but before considering and analyzing that case, it is well to refer to a few earlier cases in the Supreme Court on the subject.

[2, 3] There are numerous cases in which the law does not enforce contracts according to their literal interpretation. This is true generally of bonds, other than penal ones, which usually provide for a fixed liability upon condition, but upon condition broken the law enforces, not the contract according to its literal interpretation, but for the amount of the actual damages. The same is true of mortgages which in form are conveyances of the property upon condition, but which are not enforced in modern times to the letter, but simply as the security for the amount due. In reference to statutes it is said:

"A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And 'construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.' Lieber, 56." United States v. Farenholt, 206 U. S. 226, 229, 27 Sup. Ct. 629, 631 [51 L. Ed. 1036].

[4] If this be applicable to contracts, then the rules as to other than penal bonds and as to mortgages involve construction rather than interpretation, and the same is true of contracts which it is claimed contained latent ambiguities as to whether they provided for liquidated damages or a penalty. It is settled by abundant authorities that the mere use of the terms "penalty," "forfeiture," "liquidated damages," or "stipulated damages," is not conclusive as to the true construction. United States v. Bethlehem Steel Co., 205 U. S. 105, 120, 27 Sup. Ct. 450, 51 L. Ed. 731; 5 Words and Phrases, 4179; 3 Words and Phrases (2d Series) 150.

In Tayloe v. Sandiford, 7 Wheat. 13, 15, 5 L. Ed. 384, Chief Justice Marshall said:

"Is the sum of $1,000 mentioned in the agreement of the 13th of May, to be considered as a penalty, or as stipulated damages? The words of the reservation are, 'The said house to be completely finished on or before the 24th day of December next, under the penalty of $1,000 in case of failure.' In general, a sum of money, in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn, on great deliberation; and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed."

In Van Buren v. Digges, 11 How. 461, 13 L. Ed. 771, it was held that if a contract for the construction of a house provided that if the house was not finished by a certain day a deduction of 10 per cent. from the price should be made, the contract provided for a penalty, and evidence offered to prove that this forfeiture was intended as liquidated damages was properly rejected. See Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780.

In Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, the plaintiff shipped five horses and other property from Jersey City to St. Louis. The bill of lading recited:

"That the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules not exceeding two hundred dollars each."

The court held this was a contract for stipulated damages, and no more could be recovered. The Congress (Act March 4, 1915, c. 176, 38 Stats. 1197) declared all such contracts void. It may not be amiss to say that a number of states have by statute, with various limitations or modifications, declared liquidated damage contracts void.

In Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406, by a charter party it was stipulated.

"To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel, freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight."

The estimated amount of freight was $20,872.50. It was held clearly not a stipulation for liquidated damages.

In Bignall v. Gould, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491, a bond was given in the penal sum of $10,000 liquidated damages, conditioned that if said parties should, within a year, acquit, release, and discharge the said Moses C. Bignall of all and singular the debts and claims aforesaid by a good and sufficient release in writing, then this obligation to be void; otherwise it shall remain in full force and virtue. The court affirmed a judgment for 1 cent upon the bond saying:

"By the rules now established, at law as well as in equity, the sum of $10,000, named in this bond, is a penalty only, and not liquidated damages."

We come now to Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. In that case a yacht had been chartered by the managing editor of the Sun for the purpose of collecting news in the vicinity of Cuba during the war with Spain. The first contract was made on April 1, 1898, and was for two months, but by a new contract this was extended to six months. Early in September, 1898, the yacht was wrecked, becoming a total loss. Mr. Justice White, now Chief Justice, delivered the opinion of the court. The agreement contained these provisions:

That the hirer should keep

"said yacht in repair and to pay all its running expenses, and to surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent * * * in as good condition as at the start, fair wear and tear from reasonable and proper use alone excepted"

—and that the hirer

"shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like."

"That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00)."

"That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention."

The court held the first two provisions imposed upon the hirer, not a liability for negligence, but an absolute liability to return the yacht in good order, and of course with that we have nothing to do. It then held that the parties had agreed on the value of the yacht, and of course, in the absence of fraud or the like, that fixed the amount of the liability of the hirer.

[5] In all this there is nothing throwing any light upon the question now under consideration, but certain language is used by Mr. Justice White in his very able opinion, which it is claimed applies to the case at bar. In view of the learning displayed in the opinion it is with some hesitancy that we call attention to the fact that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. Cohens v. Virginia, 6 Wheat. 264, 398, 5 L. Ed. 257; King v. Pomeroy, 58 C. C. A. 209, 216, 121 Fed. 287, 294; Traer v. Fowler, 75 C. C. A. 540, 547, 144 Fed. 810, 817; Mason City & Ft. D. R. Co. v. Wolf, 78 C. C. A. 589, 596, 148 Fed. 961, 967; Schaap v. United States, 127 C. C. A. 415, 210 Fed. 853; Joplin Mercantile Co. v. United States, 131 C. C. A. 160, 213 Fed. 926.

In the case under consideration, Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, if suit had been delayed for substantially 10 years, the usual period of limitations on written contracts, and the owner of the yacht had then brought suit for $500 a day, or for $1,750,000, under the demurrage clause noticed, and the court had held that he was entitled to recover in that amount for the use of a yacht worth $75,000, the case would have been quite in point, but that question was not raised.

In United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731, it was held that where a contract was let by the government to construct gun carriages it was admissible to show that before the contract was made negotiations had taken place between the government and the steel company with reference to the speed at which the carriages would be furnished for prospective use in the Spanish war. The government had advertised for propositions for six disappearing gun carriages. The company had put in four distinct bids, one at $31,000 each to be delivered within six months, a second at $33,000 each, the first to be delivered in five months, and one every month thereafter, the third at $35,000 each, the first to be delivered within four months, the second within five months, the remainder at the rate of three every two months thereafter, the fourth at $36,000 each, the first in four months, the second in five months, and the remainder at the rate of two every month thereafter. The contract was let substantially on the fourth proposition at the highest price named. It provided that if any carriage was not delivered at the time specified, there should be deducted in the discretion of the Chief of Ordnance $35 per day from the price to be paid therefor for each day of delay in delivering each carriage. This was based upon an averaging of the increased cost for speed. The provision in the contract was not upon its face ambiguous, but the court approved the taking of all this evidence as to prior negotiations to determine whether the contract was for liquidated damages or a penalty. See United States v. United Engineering Co., 234 U. S. 236, 34 Sup. Ct. 843, 58 L. Ed. 1294; Stone, Sand & Gravel Co. v. United States, 234 U. S. 270, 34 Sup. Ct. 865, 58 L. Ed. 1308; and Maryland Dredging & Contracting Co. v. United States, 241 U. S. 184, 36 Sup. Ct. 545, 60 L. Ed. 945. These being substantially all the decisions by the Supreme Court, we turn to the decisions of this court.

In Brooks v. City of Wichita, 52 C. C. A. 209, 114 Fed. 297, the Wichita Railway, Light & Power Company entered into a contract with the city of Wichita by which it agreed to furnish the city with 150 2,000 candle power, lights and have the same in operation by April 1, 1899, and then provided:

"And it is further agreed that in the event that the said first party shall fail to furnish and put in operation for the use of the said city the one hundred and fifty (150) arc lights before referred to by the first day of April, 1899, then it is agreed that the said first party is to forfeit and pay to said second party, as liquidated damages, and not as a penalty, the sum of ten thousand ($10,000) dollars now on deposit with the city treasurer of the city of Wichita. It is further agreed that the ten thousand dollars ($10,000) is to be treated as liquidated damages in case of a breach of this contract, for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately estimated or computed."

It was held this was a contract for liquidated damages and it was enforced accordingly.

In Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 121 Fed. 609, this court held that a contract for the furnishing of 400 steel hopper ore cars and for the payment by the vendor of $5 a day for each car not delivered by the time specified could be enforced as a contract for liquidated damages and not a penalty, and held the steel company was not liable for any time that its delay was excusable under the contract.

In Manhattan Life Insurance Company v. Wright, 61 C. C. A. 138, 126 Fed. 82, it was held that where one borrowed money upon his life insurance upon the security of a policy having a large paid-up value, and his note contained a stipulation that:

"If this note is not paid when due the said policy is void and the Manhattan Life Insurance Company is hereby expressly released from any liability, claim or demand"

—an action to redeem would lie long after the maturity of the note, and that the provision for forfeiting the policy was void. See United Shoe Machinery Co. v. Abbott, 86 C. C. A. 118, 158 Fed. 762; Turner v. City of Fremont, 95 C. C. A. 455, 170 Fed. 259.

In McCall v. Deuchler, 98 C. C. A. 169, 174 Fed. 133, this court, composed of three judges, all of whom are now judges of the court, held that a clause in the contract for the sale of fashion sheets, that:

"If either of us shall intentionally break this contract, or shall refuse or fail promptly to perform the same after two weeks' notice in writing given by the other, then the other of us shall have the right to exercise the option of being released from all future obligations under it, and to recover and receive as liquidated damages, and not as a penalty, a sum equal to the agreed charge for fashion sheets during the entire term of this contract. Failure to require compliance with the strict letter of this contract order shall not forfeit nor prejudice any right thereunder, nor constitute a waiver thereof"

—did not provide for liquidated damages, and the court called attention to the fact that Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, was a case of an agreed valuation of property. See Union Pacific R. Co. v. Mitchell-Crittenden Tie Co., 111 C. C. A. 396, 190 Fed. 544.

In C., B. & Q. Ry. Co. v. Dockery, 115 C. C. A. 173, 195 Fed. 221, we held that where there were several agreements in a contract the damages for nonperformance of some of which are readily ascertainable and for others not, and one sum is named as damages for breach of any of them, the sum will be regarded as a penalty for the breach of any single stipulation. See Bankers' Surety Co. v. Elkhorn River Drainage Dist., 130 C. C. A. 650, 214 Fed. 342. These are substantially all the decisions of this court, and, not finding any cases on all fours with this one, we turn to the decisions in other circuits for those cases most nearly in point.

The case of Gay Manufacturing Co. v. Camp, 13 C. C. A. 137, 65 Fed. 794; Id., 68 Fed. 67, 15 C. C. A. 226, was declared by the Supreme Court in Sun Printing & Publishing Ass'n v. Moore, supra, to be wrong in principle, and not sustained by the authorities. It therefore requires no further consideration.

The same is true of Chicago House Wrecking Co. v. United States, 45 C. C. A. 343, 106 Fed. 385, 53 L. R. A. 122.

The case of East Moline Co. v. Weir Plow Co., 37 C. C. A. 62, 95 Fed. 250, announced the same rule subsequently announced by this court in C., B. & Q. Ry. Co. v. Dockery, 115 C. C. A. 173, 195 Fed. 221.

In Wood et al. v. Niagara Falls Paper Co., 58 C. C. A. 256, 121 Fed. 818, turbines were to be furnished and an agreement made that the contractor would pay $50 a day after October 1, 1896, for each day's delay in delivering each turbine. This was a contract for liquidated damages, and it was held the same could be recovered entirely independent of actual damages. It will be noticed that while the contract was for two turbines, the stipulation was in effect separate as to each, so that the damages were proper only upon a total failure to deliver each turbine. A somewhat different question would have arisen if the stipulation was that until the final completion of the entire contract, and while using one of the turbines, the sum of $100 a day could be recovered, thus making the damages the same for the total failure to furnish any turbines and of the failure to furnish one.

Stephens v. Phœnix Bridge Co., 71 C. C. A. 374, 139 Fed. 248, was a suit under a contract by the Phœnix Bridge Company to furnish material for the construction of a viaduct in the city of New York by a specified time, which had been let to Stephens. By this contract the bridge company stipulated that it was "to be subject to a penalty of one hundred dollars per day for any time beyond that day." This was held not a contract for liquidated damages.

In Davis v. Alpha Portland Cement Co., 73 C. C. A. 388, 142 Fed. 74, the cement company had contracted to sell 200,000 barrels of cement to Davis and further that: "We will pay you 15c per barrel as liquidated damages for each and every barrel short of the two hundred thousand barrels." This was not only held to be a contract for liquidated damages, but exclusive of all other damages. It will be observed that this was an agreement to pay 15 cents upon each barrel not delivered, not an agreement to pay a large sum per day for an indefinite time upon the failure to deliver any small portion of the cement.

In Stephens v. Essex County Park Commission, 75 C. C. A. 60, 143 Fed. 844, Stephens had contracted to construct two subways for the defendant, and by another contract had agreed to construct three shelters and one public lavatory. There was a stipulated damage clause for the payment of $25 for each day after the stipulated time for completion of the work. This claim was enforced.

In Chapman Decorative Co. v. Security Mutual Life Ins. Co., 79 C. C. A. 137, 149 Fed. 189, in the same court, the plaintiff brought suit for decorative work done for defendant in an office building in the main entrance and on the eighth floor. There was a provision in the contract that there should be due and payable by the plaintiff to the defendant as liquidated damages $50 a day for each and every day after March 15, 1905, that the same remains unfinished and incomplete. The plaintiff was held liable for the stipulated sum.

While we have the highest regard for the judges who rendered these decisions, we think the holdings were in conflict with our holding in C., B. & Q. Ry. Co. v. Dockery, 115 C. C. A. 173, 195 Fed. 221, and East Moline Co. v. Weir Plow Co., 37 C. C. A. 62, 95 Fed. 250, and O'Brien v. Illinois Surety Co., 121 C. C. A. 546, 203 Fed. 436, and consequently we could not follow them.

In Blodget v. Columbia Live Stock Co., 90 C. C. A. 237, 164 Fed. 305, the lessee in an oil and gas lease agreed that if he failed to sink a well he would forfeit $1,500 as liquidated damages. It was properly held he became liable for that sum when he sunk no well at all. This was clearly within the rule announced in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, and United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731. See Jefferson Hotel Co. v. Brumbaugh, 94 C. C. A. 279, 168 Fed. 867; Rasmussen v. Home Industry Iron Works, 117 C. C. A. 666, 199 Fed. 990, affirming The Colombia (D. C.) 197 Fed. 661.

In O'Brien v. Illinois Surety Co., 121 C. C. A. 546, 203 Fed. 436, the lessee gave a bond of $5,000 that he would erect during the first year a brick building of fireproof construction, substantial and modern in all respects, not less than two stories in height, having a frontage of not less than 60 feet and a depth of not less than 50 feet, the front to be of pressed brick, with stone trimmings. The bond also provided that all building laws would be observed, and no mechanics' or material liens should exist against the building. The lessee did nothing, and suit was brought for the penalty of the bond. The court announced the same rule promulgated by this court in C., B. & Q. R. Co. v. Dockery, 115 C. C. A. 173, 195 Fed. 221, and in East Moline Cc. v. Weir Plow Co., 37 C. C. A. 62, 95 Fed. 250. Judge Denison, speaking for the court, said:

"The first condition, the erection of the building, permitted a great variety of breaches, which might have ranged from the total absence of any building all the way down to some slight deficiency in form or size or trimmings. It is not to be supposed that the parties contemplated the payment of $5,000 if the builder used plain brick, instead of pressed brick, on the front, and the payment of the same amount if there was no building at all. The sum named in the bond was clearly a penalty, intended to indemnify O'Brien against such damages as the law might declare owing to him for any breach of any condition of the bond."

See Coal & Iron Ry. Co. v. Reherd, 123 C. C. A. 155, 204 Fed. 859.

In Bedford v. Miller, 129 C. C. A. 44, 212 Fed. 368, it was held that where a subcontractor gave a bond with a $50 a day liquidated damage clause, and it appeared that the contractor had given a similar contract to the government, and the condition in the subcontractor's bond was in part to protect him on his bond to the United States, and the government released him from his liability, no recovery could be had as liquidated damages, but only actual damages.

See Board of Commerce of Ann Arbor v. Security Trust Co., 140 C. C. A. 486, 225 Fed. 454; Atlantic City v. Warren Bros. Co. et al., 141 C. C. A. 202, 226 Fed. 372; Fleischman v. Rahmstorf, 141 C. C. A. 273, 226 Fed. 443. None of the authorities cited seem to be conclusive of the case at bar.

[6] The contract in question expressly provided it was not a building contract, but for the furnishing of materials to be used in performing a building contract, and that the same should be furnished and delivered f. o. b. the cars in Chicago. Under such a contract it would be construed according to the laws of Illinois. Cox v. United States, 6 Pet. 170, 203, 8 L. Ed. 359; Boyle v. Zacharie, 6 Pet. 635, 644, 8 L. Ed. 527; United States v. Daniel, 12 Pet. 30, 54, 9 L. Ed. 989; Andrews v. Pond, 13 Pet. 64, 77, 10 L. Ed. 61; Musson v. Lake, 4 How. 262, 277, 11 L. Ed. 967; Cook v. Moffat, 5 How. 295, 307, 12 L. Ed. 159; Brabston v. Gibson, 9 How. 262, 277, 13 L. Ed. 131; Miller v. Tiffany, 1 Wall. 298, 310, 17 L. Ed. 540; Scudder v. Union National Bank, 91 U. S. 406, 412, 23 L. Ed. 245; Supervisors v. Galbraith, 99 U. S. 214, 218, 25 L. Ed. 410; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Washington Central Bank v. Hume, 128 U. S. 195, 207, 9 Sup. Ct. 41, 32 L. Ed. 370; Coghlan v. South Carolina Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; Hall v. Cordell, 142 U. S. 116, 120, 12 Sup. Ct. 154, 35 L. Ed. 956; London Assurance v. Companhia De Moagens, 167 U. S. 149, 160, 17 Sup. Ct. 785, 42 L. Ed. 113; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 338, 20 Sup. Ct. 906, 44 L. Ed. 1088; Bedford v. Eastern Building & Loan Ass'n, 181 U. S. 227, 242, 21 Sup. Ct. 597, 45 L. Ed. 834. While the contract must therefore be construed according to the laws of Illinois, what laws? The statutes or the decisions of the court of last resort?

In Swift v. Tyson, 16 Pet. 1, 17, 10 L. Ed. 865, Story, Justice, delivering the opinion of the court, said:

"But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of Judiciary Act 1789, c. 20 [Comp. St. 1913, § 1538], furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold, that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited 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. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

To the same effect are Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Baltimore & Ohio Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Gardner v. Michigan Central Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228; Independent School Dist. v. Rew, 49 C. C. A. 198, 208, 111 Fed. 1, 11, 55 L. R. A. 364; Guernsey v. Imperial Bank of Canada, 110 C. C. A. 278, 280, 188 Fed. 300, 302, 40 L. R. A. (N. S.) 377; and Colorado Yule Marble Co. v. Collins, — C. C. A. —, 230 Fed. 78. With these cases in mind we have examined but have been unable to find any statutes of Illinois governing the construction of such a contract. Consequently we conclude that the decisions of Illinois are not conclusive, but the Supreme Court of the United States in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 24, 46 L. Ed. 366, said:

"The character of the stipulation under consideration renders it unnecessary to review in detail the decisions of the state courts. There is in them much contrariety of opinion on some phases of the doctrine, but our attention has not been called to any case which sustains the contention that a valuation clause, such as that we are considering, contained in a contract made under circumstances like those which existed when this contract was executed, must be disregarded despite the evident intention of the parties to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht."

[7] The decisions of no state can be conclusive on this court under the circumstances, but such decisions will be persuasive. There are many hundreds, if not thousands, of state court decisions upon the question of whether a contract shall be construed as providing for liquidated damages or a penalty, and we cannot therefore review them all, but must decide this case from our knowledge of the decisions cited and our general knowledge of the decisions of other English and American authorities and we hold:

[8] First, that the contract in question did not provide for liquidated damages. We do this by analogy to the rule announced in C., B. & Q. R. Co. v. Dockery, 115 C. C. A. 173, 195 Fed. 221, in this court, and East Moline Co. v. Weir Plow Co. (Seventh Circuit) 37 C. C. A. 62, 95 Fed. 250, and O'Brien v. Illinois Surety Co. (Sixth Circuit) 121

C. C. A. 546, 203 Fed. 436, and the following state authorities: Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135, 137; Gower v. Saltmarsh, 11 Mo. 271; Long v. Towle, 42 Mo. 545, 550, 97 Am. Dec. 355; Boulware v. Crohn, 122 Mo. App. 571, 99 S. W. 796, 800; Wilkinson v. Colley, 164 Pa. 41, 30 Atl. 286, 26 L. R. A. 114; Emery v. Boyle, 200 Pa. 249, 49 Atl. 779, 780; Keeble v. Keeble, 85 Ala. 552, 5 South. 149; Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, 166, 34 L. R. A. (N. S.) 1, and cases there cited. That is, when the contract was to furnish almost innumerable articles, and not to build a building, it cannot be assumed that the parties meant to stipulate for the same damages for total failure to deliver any part of the goods and for a failure to deliver a single one of the innumerable articles to be delivered. To hold otherwise would be to hold that the plaintiff was fortunate in having the fire when it did, as Caldwell & Drake have already received $3,022.06 by the directed verdict below, but as their failure to recover more was upon a technical question of pleading, they would yet be entitled, for ought we know, to recover $927.94, but this is wholly due to the fire. From the evidence it was not until about February 17, 1911, that Caldwell & Drake obtained the stone lintels, and but for the fire the recovery would have been for $1,800 more, or a total of $5,750 for what? For the failure to deliver some lintels worth in stone $41.06 and far less in terra cotta. If the coping was included, the damages would have been $8,000 for a trifling deficiency.

[9] Second, the contract was in fact substantially complied with. We should hold, but for the architect's decision which was conclusive, that the contract was literally wholly complied with, but in any event it was complied with except as to the lintels which were in dispute. We must again impress that the plaintiff was a mere material contractor. It was not to install any of the property. Suppose the contract was to furnish 10,000,000 brick, and the plaintiff had substantially furnished that number, but through inadvertence the delivery was 2 or 3 bricks short of the 10,000,000. Would that subject the plaintiff to $50 a day for an indefinite time? The contract here in question was 99⅔ per cent. performed, and as between holding that such was a substantial compliance with the contract and holding that for an absence of one-third of 1 per cent. in the materials furnished the plaintiff became liable for thousands of dollars, we would have no hesitancy, and would hold there was substantial compliance with the contract.

Some reliance is placed upon the reciprocal character of the provision in question upon the fact that Caldwell & Drake agreed to pay the contractors a bonus of $50 for each and every day the work was completed prior to October 25, 1910. The contract was made on the 10th day of August, 1910. It provided for furnishing $13,000 worth of ornamental terra cotta according to detailed plans. This had to be manufactured specially for the job, and the contract provided for a bonus of $50 a day for each day the delivery was completed prior to October 25th. It is manifest that such a contract could not be performed in much less time than that reserved, and there was an absolute limit on how far the $50 a day clause could run, namely to October 25th. As applicable here the word "bonus" is defined by Webster as: "3. Money paid in addition to a stated compensation." How can it be claimed that the agreement to pay a possible "bonus" for speed with a fixed time for the bonus to cease throws any light upon an agreement to pay compensation for delay with no time for it to cease? Both sides rely upon this provision in the contract, but we are not able to see how the agreement to pay a bonus throws any light upon whether another claim is for liquidated damages or a penalty where a bonus is nowhere referred to.

It has been seen how one of the decisions of the Supreme Court has been nullified by legislation, and how several states have prohibited liquidated damage claims except under statutory limitations or with statutory modifications. To affirm this judgment would but increase the demand for additional legislation of the same character. This is simply to be considered in passing upon questions not determined by the Supreme Court.

Thinking that this decision in no way conflicts with any such decisions it would be unwise to extend any existing decisions to this case, and thereby work a revolting injustice, the case is reversed and remanded, with directions to set aside the verdict and grant a new trial.

HOOK, Circuit Judge (dissenting). The facts in this case are few, and I think the controlling principle of law has been definitely settled by the Supreme Court in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, and United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731.

Caldwell & Drake had a contract to construct a public building. The Terra Cotta Company contracted to furnish them by a specified date all the architectural terra cotta as described in drawings and specifications. They failed to do so. The subcontract provided that the Terra Cotta Company should have a bonus of $50 for each day they completed their undertaking before the day specified, and, on the other hand, should pay as liquidated damages $50 for each day's default thereafter. It is this clause which my Brothers hold is not a contract for liquidated damages. The circumstances confronting the parties at the time—and they are determinative—seem to me to put the question beyond doubt. Default by the Terra Cotta Company might well have entailed such serious consequences to the progress of the larger work that the case was essentially one for an agreed measure. It was not like a contract for a small amount of common material which might be bought any day in the market. The express provision for bonus for earlier fulfillment shows how important both parties regarded time, and no doubt the Terra Cotta Company would have been quick to claim the bonus had they earned it. The principle governing such cases was so definitely defined by the Supreme Court that I do not think we should decline to apply it as beyond the needs of the cases in which it was announced, if indeed we should feel free to do so in a case of greater doubt.

GILMAN v. LAMSON CO.

LAMSON CO. v. GILMAN.

(Circuit Court of Appeals, First Circuit. June 1, 1916.)

Nos. 1141, 1142.

1. CORPORATIONS ⊂⇒456—CONTRACT FOR ATTORNEY'S SERVICES—RIGHT TO TERMINATE.

A contract by a corporation for the services of an attorney for a fixed term, but providing that it might be terminated by the corporation at any time if the services were "not satisfactory to the board of directors" by a vote of the board, which vote, however, should not be taken until the employé has an opportunity to be heard at a meeting "upon the cause or reason of such termination," required some substantial cause as a ground for its termination, and the fact that the directors voted to terminate it was not conclusive of their right, and did not foreclose inquiry as to whether their action was taken in good faith because of dissatisfaction with the services, or for other reasons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1806; Dec. Dig. ⊂⇒456.]

2. TRIAL ⊂⇒251(4)—INSTRUCTIONS—ACTION FOR BREACH OF CONTRACT.

In an action by the attorney for damages for wrongful termination of such contract, it was not error to refuse to instruct that if a majority of the directors acted in good faith it was sufficient to validate their action, where it was a question in issue whether certain of the directors did not act without personal knowledge or belief as to the matters involved and vote as they did, not because of any dissatisfaction on their part, but because of misrepresentations made by others.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 591; Dec. Dig. ⊂⇒ 251(4).]

3. CORPORATIONS ⊂⇒521—ACTIONS FOR SERVICES—INSTRUCTIONS—BURDEN OF PROOF.

In such action the defense was the termination of the contract by a vote of the directors, but on the trial the case turned upon the subordinate question whether the directors so voted in good faith because they were honestly dissatisfied with the services or for other reasons, and that was the only issue submitted to the jury. *Held*, that the court properly instructed that the burden of proving that the contract was terminated in accordance with its terms rested on defendant, but that, having so instructed, it was error to refuse to clearly instruct that the burden upon the issue of good faith was on plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094–2098; Dec. Dig. ⊂⇒521.]

4. CORPORATIONS ⊂⇒519(2)—ACTION FOR SERVICES—EVIDENCE—PERFORMANCE BY PLAINTIFF.

The contract in suit being a renewal of a prior five-year contract, it was competent for plaintiff to introduce evidence, as bearing on the issue of good faith in terminating the contract, to show that the standard of performance of services was the same under the new as under the old contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088; Dec. Dig. ⊂⇒519(2).]

5. COURTS ⊂⇒352—OBJECTION TO EVIDENCE—STATEMENT OF GROUNDS.

In the federal courts it is not sufficient to state that objection is made to the admission of evidence without at the same time, stating specifically the ground of the objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. ⊂⇒352.]

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

6. COURTS ⚷367—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

Where, at the time of the making of a contract, to be performed in the state where made, there is a settled rule of decision in that state as to the damages recoverable for its breach, such rule governs in an action for its breach in a federal court.

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

7. DAMAGES ⚷124(1)—BREACH OF CONTRACT.

On recovery against a corporation for the wrongful termination of a contract by which plaintiff agreed to act as counsel for defendant for a term of five years for an annual fee, which contract had been partly performed, plaintiff was entitled to recover the present value of what would have become due under the contract if it had been fully performed.

[Ed. Note.—For other cases, see Damages, Cent Dig. §§ 326–329; Dec. Dig. ⚷124(1).]

8. CORPORATIONS ⚷521—TERMINATION OF CONTRACT.

It was error for the judge to refuse to instruct a jury that the burden is on the plaintiff to prove that the termination was invalid by reason of bad faith on the part of the directors in voting to terminate it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094–2098; Dec. Dig. ⚷521.]

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Action at law by Edwin C. Gilman against the Lamson Company. Judgment for plaintiff, and both parties bring error. Reversed on defendant's writ of error.

Herbert Parker, of Boston, Mass. (H. Ware Barnum, Charles F. Rowley, and Elder, Whitman & Barnum, all of Boston, Mass., on the brief), for E. C. Gilman.

Boyd B. Jones, of Boston, Mass. (William H. Brown, of Boston, Mass., on the brief), for Lamson Company.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This was a suit at common law in which there was a verdict for Gilman, reduced on a motion for a new trial from $24,000, by the sum of $2,209.76. Suit was brought in the District Court for the District of Massachusetts by writ dated on the 19th day of August, 1914, and variously amended; but we have no occasion to elaborate the original declaration or the various amendments. The verdict was returned on the 12th day of March, 1915, and judgment was entered for the plaintiff on the 26th day of July, 1915, for $21,792.24, which, of course, included some interest from the date of the verdict.

There was also a special verdict entered on the same day as the general verdict, as follows:

"Was the action of the board of directors in terminating the contract taken in good faith, because the plaintiff's services were not satisfactory to it?"

The jury answered, "No."

The motion for new trial was based upon two alleged grounds: One was that the verdict was against the law, the evidence, and the

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

weight of the evidence; the other was that the damages were excessive.

No objection was taken to the finding of the special verdict, and there were no exceptions arising therefrom either as to the form or the substance of the verdict, or in any way whatever, so the fact that a special verdict was taken in the form we stated raises no issue in the case.

The action was based upon the breach of contract appearing by the agreement, of which the following is a copy:

"Boston, Mass., July 17, 1908.

"Edwin C. Gilman, Esq.,

"6 Beacon Street, Boston, Mass.

"Dear Sir:—We hereby agree in behalf and representing the Lamson Consolidated Store Service Company, to employ you as counsel for this company from July 1, 1908, at a yearly stipend of seven thousand dollars for the term of five years, to act in matters that may be referred to you by the undersigned, or by the said Lamson Consolidated Store Service Company.

"Provided, however, that this contract may be terminated at any time, if your services are not satisfactory to the board of directors, by a vote of the board of directors, which vote, however, shall not be taken until you, if you so desire, shall have had an opportunity to be heard by said board of directors at a meeting upon the cause and reason of such termination. In case this contract is terminated as above provided, you are to receive payment for your services to the time of termination of the contract. The amount to be a proportionate part of the yearly stipend as above provided.

"In witness whereof, we hereby subscribe ourselves

"Yours very truly, [Signed] Oakes Ames,

"[Signed] Gilmer Clapp,"

"Special Committee of the Executive Committee of the Lamson Consolidated Store Service Company."

"Boston, July 21, 1913.

"This contract is hereby extended for the term of five years from July 1st, 1913, upon the same terms and conditions.

"[Signed] The Lamson Company,

"By Gilmer Clapp, Treasurer."

It will be noted that the suit was brought soon after the renewal of the contract was made, but during its currency, when it still had about four years to run; and it appears from the amount of damages awarded that the verdict was allowed to be taken, based upon the present value of the contract, computing to the time of its expiration by its terms. In that respect, the rule adopted by the Supreme Court of the United States was applied, and the full value of the plaintiff's services, in accordance with the terms of the contract, was allowed for and estimated in the verdict. As we will explain hereafter, it is claimed that this is not the rule of the local courts of Massachusetts, where the contract was made and was to be executed.

The brief for Gilman states the issues as follows:

"The decisive issues between the parties were whether the board of directors of the defendant company, in terminating its contract with the plaintiff, had acted in good faith, and whether, in truth, the contract was so terminated because the plaintiff's services were in fact 'not satisfactory to the board of directors.'"

[1] The first question we have to consider is the refusal to give the following instructions, per the eighteenth assignment of error:

"The vote set up in the defendant's answer, if passed by the board of directors, is conclusive evidence that the plaintiff's services were not satisfactory to the board of directors. The contract authorized the termination of the contract if the plaintiff's services were not satisfactory to the board of directors, and it is not for other persons to question the grounds of propriety of their decision."

The basis for this exception by the Lamson Company was the rule stated as follows:

"The personal thread which runs through agreements relating to matters of fancy, taste, or judgment has caused a uniformity of judicial opinion that here at least a promisee is practically debarred from questioning the grounds 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, 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 prejudice as the case may be."

This rule in the form in which the Lamson Company seeks to apply it is stated in Barnett v. Beggs, 208 Fed. 255, 125 C. C. A. 455, decided by the Circuit Court of Appeals for the Eighth Circuit, in October, 1913. The efficient expression in that opinion is found on page 259 of 208 Fed., on page 459 of 125 C. C. A., as follows:

"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."

Then comes the quotation which we have already cited, and it is enough to say that all the cases relied on by the Lamson Company are in the same line as what is shown by the extract we have given from the Circuit Court of Appeals, in the case referred to. It is not necessary for us to go further into details in that direction.

The difficulty with this proposition as put by the Lamson Company is the peculiar phraseology of the contract in this particular case. It contains some expressions of a very specific and substantial character, differentiating it entirely from all the cases relied upon by the Lamson Company. It provides for a hearing of Gilman by the board of directors of the Lamson Company after notice. It provides also that the hearing should be "upon the cause and reason of such termination." This in no way characterized a contract which could be determined by the "taste" or the "fancy" of the corporation, but positively indicated some substantial "cause," which, of course, was far remote from "taste" or "fancy." This positively agreed for an investigation of the merits of some matter involved in the proposed termination of the contract and a hearing in reference thereto, and, of course, an adjudication by the directors in reference to the same, with all the facts brought to the surface bearing upon any such "cause," or any such "reason" for discharging Gilman from the service in which he was engaged. It is possible that by going through the details of all that was said and done something might have appeared which was beyond the proper scope of investigation, but the case at this point was not put upon any discrimination in that direction, for the objection on the part of the Lamson Company covered the whole topic, and the whole stands or falls together.

For the reasons we have given, it is plain that this assignment of error is not well sustained.

[2] We will now follow through the case in the order pointed out by the brief for the Lamson Company. The next proposition is that indicated as "2," as follows:

"2. It was error for the judge to refuse to instruct the jury that, if Keasbey, Mink, Loring, and Webster acted in good faith in voting to terminate the contract, the board acted in good faith."

The gentlemen thus named constituted a majority of the board of directors of the Lamson Company. Nevertheless, it cannot be said categorically that the court erroneously refused to instruct the jury substantially in the manner alleged by this assignment; but if we merely left the case there, without explaining what the court said in fact, we would omit considering the question which the court sought to consider, and which it did consider, namely, that Gilman alleged that the hostility on the part of two directors, Ames and Clapp, led up wrongfully to the result reached by the corporation.

Action was taken at a meeting of the board of directors at which a quorum of six directors was present; and the original good faith of the four directors named in this assignment of error, constituting a majority of the quorum, was expressly admitted. Therefore, if this assignment alleged all there was in the case, some difficulties would have been presented of a serious character, but it does not. The court enlarged considerably on this topic, covering several printed pages of the record. It started with the proposition that the jury must consider the question from what the action of the board of directors proceeded, whether it was from honest motives and views, or whether from dishonest motives and dishonest views. The court further said that the mere fact that a majority of the board was ignorant of the dishonesty practiced upon them by their associates does not save the defendant corporation, but that if the action of the board was procured by the representations of two of its members who were acting fraudulently and dishonestly, then there was not a proper termination of the contract. The court fully enlarged on these propositions. This was done with some interruptions by counsel; but these only tended to bring out the views of the court more clearly. Finally, the court said that, if there was any doubt about the matter, it would restate it; but we think there was no doubt about it as it was put, and that the court fairly explained the effect of the fact that some members of the board might have started out with honest motives, but might have been persuaded from them. Under the circumstances, if either party desired any correction of the instructions in detail, or any fuller explanation in reference thereto, it was its duty to ask the court specifically in reference to the point, and not rely on a categorical objection such as we are considering. Texas & Pacific Railway Company v. Volk, 151 U. S. 73, 77, 78, 14 Sup. Ct. 239, 38 L. Ed. 78. In the manner in which this topic is left, so general an exception does not lie under the rule cited, as the treatment of the topic was generally correct, if not in all particulars absolutely so.

The position of the parties is illustrated, perhaps, by the testimony of Mr. Webster, one of the directors, who says that the discussion on the day when the contract was terminated lasted from half an hour to an hour; that he had been brought in contact with Mr. Gilman but very little; that he voted for terminating the contract with him, although he had no personal knowledge in reference to the matters involved. He denied that he was influenced by certain special matters, as, for instance, the length of the contract, etc. Thereupon, the counsel for Gilman stated to the court openly that he made no contention that any of the four gentlemen we are referring to was animated by any bad faith; that in substance the action of each was influenced by his belief that the statements at that meeting were true, with some details in the statement which we need not refer to. The witness Webster continued on cross-examination:

"I never had occasion to discuss with Mr. Gilman any of the matters that were within his province as counsel for the company, and I never for myself had any personal knowledge of any matter that led me to entertain any personal dissatisfaction with his services. I knew nothing of my own knowledge of any service that was not satisfactory. My action was due entirely to the representations and statements made at the meeting, and, accepting them as being true, I acted upon information, not upon personal knowledge."

This illustrates the position taken by the court to which we have referred, and shows its correctness.

[3] We next take up the subject-matter marked "3" in the brief for the Lamson Company, as follows:

"It was error for the judge to refuse to instruct the jury that the burden is on the plaintiff to prove that the termination was invalid by reason of bad faith on the part of the directors in voting to terminate it."

This appears as the seventeenth alleged error assigned, and is given without any explanation in the assignment of errors. In discussing it, the defendant in error, Gilman, relies entirely on the following extract from the charge given in his brief:

"'As the contract is a contract to employ him for a period of five years, that is the agreement, unless terminated within that time, as is stated in the proviso; and, as the defendant here relies upon a termination of the contract in accordance with the terms of the proviso, it devolves upon the defendant to satisfy you that the five-year term of employment contemplated and agreed upon in the contract itself has been shortened by a termination of the contract in accordance with the terms of the proviso. In other words, and to put it shortly, the burden of proof is upon the defendant to satisfy you, by a fair preponderance of the evidence that this contract was terminated by vote of the board of directors because the services were not satisfactory, and that the vote was taken after opportunity to be heard as provided in the contract.'

"The question raised is where the burden of proof rests in support of a termination alleged to have been made in accordance with contract terms. The issue is obviously an affirmative one, and, in accordance with the universal rule, the burden is upon the party asserting such affirmative."

This is undoubtedly correct so far as it goes. It related to the case as a whole, while the request of the Lamson Company, to which we refer, related to a special topic, which was developed in the course of the trial. The issue was made directly, but subordinately, that the action of the board of directors was rendered invalid by reason of bad faith on their part. There is no question that, for some reason or other, some directors became dissatisfied; but the proposition was made by Gilman, and the trial turned on it mainly, if not entirely, that the dissatisfaction was not an honest one, and was brought about by the insistency of two of the directors, who, for some reason not clearly shown by the record, took a dislike to Gilman, and pursued him until they secured his discharge. On this proposition, according to the well-settled rule of law and judicial practice, the case split, and the burden which was generally on the Lamson Company then rested specifically upon Gilman; and what we have extracted from his brief, and from the charge as given by that brief, does not meet this specific question, as is easily developed by the application of Texas & Pacific Railroad Company v. Volk, 151 U. S. 73, 77, 78, 14 Sup. Ct. 239, 38 L. Ed. 78, already cited.

The question is whether in fact the court did, in substance give this request. There are many expressions in the charge which assume that the court understood the law to be as thus requested, and many parts of the charge, standing alone, might be accepted as the equivalent thereof; but the case evidently stood mainly on this, perhaps, incidental and subordinate question, and the case was so strongly urged in reference thereto, pro and con, that it became the principal question, as the one on which the case evidently turned; and the Lamson Company was entitled to a clear and positive instruction, substantially as asked for by it, which could not be misunderstood or be subordinated by other portions of the charge.

If rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii) of this court had been strictly complied with, what occurred in this connection would have come out plainly to us; but, as the briefs were made and the case argued, it is not clear that we apprehend plainly all that occurred, especially as the references to the pages of the record are defective. It is impossible for us to ascertain, except by turning over the leaves page by page, what was said by the court on this specific question. It seems to us that the court gave confused rules on this important point, and therefore needed to be corrected. In order that we may be sure that we are right, we will reiterate.

The court commenced the early part of its charge by giving the general rule covering the case as a whole, which has been cited by Gilman, and which we have already stated; but during the progress of the trial the case had shifted. This incidental issue, as often occurs in the progress of a trial, became the substantial matter on which the jury was to pass, and which crowded out the more general propositions to which the court referred in that part of the charge we have already quoted.

The real issue on which the case ultimately turned, and which was the only issue ultimately passed on by the jury, was correctly presented by the court in the course of its charge, as follows:

"Now, the directors endeavored to terminate, and the defendant says that they did terminate, that contract in accordance with its terms; and they say that you should be satisfied that the board of directors, by a vote properly taken, adjudged that his services were not satisfactory, and terminated the contract, and that that vote was taken, with the formalities and with the opportunity to be heard, as prescribed in the contract. And the crucial question here is not, it seems to me, whether there was adequate formal action, because I am of the opinion, and I instruct you, that as far as the formal action of the board was taken, that was sufficient. Although, as a matter of law, there may be some doubt upon the point, nevertheless, as a matter of law, I am inclined to think that those votes were sufficient, and I so instruct you."

The above made out the case so far as the burden rested on the Lamson Company; that is, so far as the burden rested on the Lamson Company, "the crucial question" was ultimately held by the court to be determined in favor of the Lamson Company, leaving, of course, the Court of Appeals to determine whether or not he was right in this conclusion. Then the court proceeded to what was the real subordinate issue to be determined by the jury, as follows:

"The question, therefore, comes, not upon the form of the termination, but upon whether the termination was exercised in good faith or not, because it was not sufficient under this contract that the board of directors should get together and adjudge that that contract was unsatisfactory, after the notice and other formalities called for—that was not sufficient; it was not the intention of that contract to put into the hands of the Lamson Company the right to terminate at its option; it was to be terminated only upon a judgment of the board of directors upon the unsatisfactory character of the services, made in good faith, good faith towards the company, and good faith towards Mr. Gilman; and the crucial question here is whether the alleged termination was or was not made in good faith. Did it proceed from the real dissatisfaction with his services, or did it proceed from other motives, from personal hostility, from personal dislike, from a view adverse to long-term contracts, from other reasons than those affecting the character of his services? If so, the termination was wrong. The termination should be validly exercised only upon a judgment of the services themselves."

Then follows a thorough discussion of many matters involved, pro and con, and the termination of this part of the discussion in the charge is as follows:

"So that, without attempting to discuss the facts with you, as I have already said to you, the defendants say that Turner and these other younger men did not like Gilman, could not get on with him, and they were the active force in there, and they came to Clapp and suggested to Clapp that they did not like Gilman, and thereupon these proceedings were instituted."

In this connection, the court further instructed the jury that, if this were a question relating to the installation of machinery, and the question arose whether or not there was dissatisfaction with it, the dissatisfaction would have to be "a reasonable dissatisfaction, a dissatisfaction which you as jurymen would say was reasonably well founded and justified. But this case," the court continued, "is not of that character"; and it proceeded:

"I instruct you that you need not concern yourselves with whether the dissatisfaction expressed by the directors in their vote was reasonably well grounded, or was not reasonably well grounded."

The court continued:

"It is sufficient to warrant the termination of the contract if the directors were in good faith honestly dissatisfied with the services, although the grounds of the dissatisfaction may have been trivial and unreasonable."

It further continued:

"The test is whether this termination of the contract proceeded from honest dissatisfaction, or whether it proceeded from other and illegitimate motives."

These, therefore, were the issues merged in the main issue on which the jury was to pass; that is, whether, for example, certain younger men did not like Gilman, could not get along with him, and were the active force in there, etc.; and, also, whether the grounds for dissatisfaction were not merely unreasonable, though in good faith; and also that the test was whether the termination of the contract proceeded from other than honest dissatisfaction or from illegitimate motives. All such things as these represent and illustrate a defense of a fraudulent or dishonest character, and represent matters not to be proved except by assuming the burden; and they come clearly within the illustrations of the rule of convenience explained by Greenleaf's work on Evidence, at section 74. Therefore they not only at the outset throw the burden on the party alleging them, in accordance with the usual and common statements of the text-writers and other authorities, but they come within the rule that parties alleging fraud or dishonesty must strictly prove it, and also emphatically within the rules of convenience which are applied in seeking out the practical determination of questions of the burden of proof. We can see no escape from the proposition that the instruction asked for by the Lamson Company, in accordance with paragraph 3 of the brief which we have cited, should have been given in the clear and efficient manner which we have pointed out.

The directors were not called on to specify in advance the reasons for this dissatisfaction, or to justify themselves in reference thereto. It rested on them to determine that Gilman's services were not satisfactory, after an opportunity to be heard, as provided in the contract; and no doubt the burden of proof in the case was with the Lamson Company to that extent. From what we have already said, it appears that the court so instructed the jury in the early part of its charge, and that that burden was assumed by the Lamson Company and satisfied; so the only question is whether, with reference to this new and subordinate issue, which became the main issue in the case, the court performed its duty in the manner we have pointed out. As to this, we have said that the Lamson Company was entitled to have the jury clearly and positively instructed in the manner requested by it, or in the substance thereof, and this put in such a manner that the position of the court in reference thereto would clearly and forcibly impress itself on the minds of the jury, without being thrown into the shadow by other elements, which, perhaps, under other circumstances, would have been fully justified.

The special verdict of the jury finding in favor of Gilman in this respect fails to meet the difficulty, because the error lies back of the verdict, so that, except for this error, this special verdict would not have been rendered.

Coming now to the question of whether or not the court performed its duty in reference to the requested instruction covered by this point 3 of the brief of the Lamson Company, we have not even occasion to rely on the rules we have cited from Texas & Pacific Railway Company v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78, because, not only was there no mere omission of which complaint could be made, but positive misdirection. Further along in the charge, the court said:

"As to the opportunity to be heard, which is saved to the plaintiff by the terms of the contract, I am of the opinion that, if you accept the evidence—and I see no reason why you should not—as to what took place at the meeting, and, indeed, I do not know that there is any dispute upon that point, I am of the opinion that the proper formalities were observed."

The court continued:

"I think that there was such an opportunity afforded to be heard as the strict letter of the contract required."

Then follows some discussion as to the meaning of the contract, which it is not necessary to repeat; and the court concludes as follows:

"And so the question always comes back to the services which he rendered and to the judgment of the directors, honestly exercised upon it, with reference to their satisfaction or dissatisfaction."

Then the court expresses the views we have already referred to with regard to four of the six directors, "whose honesty of purpose is not really attacked." Then follows a discussion by the court of the question of good faith on the part of the two directors, Ames and Clapp. So far as this discussion was concerned, it was all well enough; it took nothing from the jury which they were entitled to consider. It wound up with what we have already said in part, as follows:

"So that, without attempting to discuss the facts with you, as I have already said to you, the defendants say that Turner and these other younger men did not like Gilman, could not get on with him, and they were the active force in there, and they came to Clapp and suggested to Clapp that they did not like Gilman, and thereupon these proceedings were instituted. Well, now, if, upon the whole, the defendant has satisfied you that the termination of the contract was made honestly and in good faith, then you should return a verdict for the defendant. If, on the whole, the defendant has not satisfied you the termination on this contract was made in good faith, then, as far as that part of it goes, the contract was still subsisting; the attempted termination, if made in bad faith, was nugatory; it left the Lamson Company bound to the plaintiff just the same as before."

It is of the sentences commencing, "Well, now, if, upon the whole," that the Lamson Company now complains. As we understand it, this amounts, not merely to an omission to give the instruction requested, but to a denial of it and giving the reverse of it. These sentences put the burden of proof plainly on the Lamson Company, when, under the circumstances, it belonged, on that issue, plainly to Gilman; and the error is an essential one which affects the whole case by expressions as clear as the English language can make them. For the reasons we have stated the error is a fatal one, although there are some expressions which indicate to us, when reading in cold type everything said to the jury, that the views of the court on this topic were not absolutely such as explained by us. Of course, the word "defendant" in these extracts means the Lamson Company, as the defendant in the trial court.

[4] We now come to questions relating to the admission of evidence. As many of these questions relate to the application to this case of Barnett v. Beggs, 208 Fed. 255, 125 C. C. A. 455, and Crawford v. Publishing Company, 163 N. Y. 404, 57 N. E. 616, and as we have shown that the field for investigation in this case is for this purpose broader than that to which either of those decisions relates, it is very probable that some of the questions thus raised by the Lamson Company will drop out on any further investigation; and therefore we will refer to them only so far as we deem it necessary with regard to the lines of investigation which the case, as we understand it, seems to have opened.

These questions of evidence are opened up under that portion of the brief of the Lamson Company marked "IV." Some of them make no distinction as to the period before the extended contract was signed, and the later period. The court ruled that the contract in suit was a renewal of the prior contract, and therefore it ruled that it understood that Gilman was setting up a certain standard of performance of legal work during the existence of the prior contract, to be followed up by showing that the same standard was maintained under the renewed contract, as bearing on the question of good faith; and the court concluded that it would let in this evidence on that question. We are not prepared to say that, on the whole, evidence of this character was not admissible. Perhaps we might find some portions that should have been excluded. The issue was a broad one, and its result was to be determined largely by circumstances, which, like all questions of fraud, might well involve circumstances, some of which would ordinarily be regarded as remote.

We do not mean by our ruling on this point, or on any point of the case, to hold that all positions taken by the court on the effect of bad faith or good faith, as proved or offered to be proved, were correct or complete. This has not been brought to us specifically; and we leave it for consideration when it has been so brought to us, if ever. We will repeat that we are seeking here to correct only what would probably arise on further proceedings in the case; and we leave for future determination the details of everything which, on a new trial, would probably be set right in view of what we are required to dispose of in the present stage of the litigation. We do not, however, intend to determine that this class of evidence is admissible only because it may have gone so far as to fix a certain standard of performance by Mr. Gilman; but we regard it as admissible to a certain extent from a general point of view, easily understood. This we do, although we comprehend that this particular class of evidence may, in any event, be ineffectual unless analyzed and illustrated by the court, or, indeed, may be misleading without such analysis or illustration.

[5, 6] The force of the objection marked "5," on page 33 of the brief of the Lamson Company, is not made clear to us, and we do not understand it without more examination of the record than we are required to give. The same observation applies to point 6 on the same page. The rule of the federal courts applies to both of these objections, that ordinarily it is not sufficient for the federal courts to state that objection is made, without also at the same time stating specifical-

ly the ground of the objection. The reference to Barnett v. Beggs, 208 Fed. 255, 125 C. C. A. 455, at this point, leads to the additional suggestion that this is one of the difficulties possible with reference to a new trial which will disappear after understanding the grounds on which some portions of this opinion rest, as already stated.

On pages 35, and sequence, of the brief for the Lamson Company, we find a number of alleged errors indicated by the letter "b." These seem to refer to a string of objections scattered along from pages 35 to 39. It is very difficult to make sure that we understand them correctly. We find many points of evidence brought to our attention by the briefs, and apparently other considerations as to which our decision is asked. Some of them are merely conversational, or conjectural, and others are lacking in the specific statements which we have said are necessary in order to lay the proper basis for an exception. We are of the opinion that many of them will drop out on further consideration of the case in the light of this opinion, as we have already said; and that may be the fact with reference to all those we have not discussed, except the following remaining one, which, quite likely, is the most important one of all those submitted to us. That was intended to be covered by the proposition of the Lamson Company numbered V, as follows:

"The plaintiff is not entitled to recover in his suit for moneys becoming due under the terms of the contract after the date of his writ."

The jury awarded what, for convenience, we call the substantial present value of the entire $7,000 per annum, covered by the whole period of the contracted term of five years from July 1, 1913, although, by the action of the Lamson Company, the contract was terminated in August, 1914.

Gilman had continued to serve under the extended contract from July, 1913, until on or about the alleged termination in August, 1914; and an amended verdict was awarded for $21,790.24, with interest from the date of the verdict, this interest amounting to $493.91. This verdict and judgment was in accordance with the rule of the Supreme Court of the United States, which, it was said by the Lamson Company, had never been adopted in the state of Massachusetts. It is sufficient for us to say that the rule on which the verdict and judgment were entered appears well illustrated in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

We start with the proposition that, if the law as applied in Massachusetts had been settled as now claimed by the Lamson Company at the date of the renewal contract in litigation, and certainly at the date of the original contract in 1908, it would have affected the question of right, and not of mere practice or procedure; and, therefore, in this case, which arose in Massachusetts, and was between citizens and residents of that state, it would have controlled the District Court of the United States, and would have prevailed over the rule of Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, already cited, which was applied by the trial court. We need not load up the opinion with authorities on this point. But it was not so settled; and, as the rule of the federal courts is an exceedingly practical one, and not unjust, the District Court was justified in following it.

[7] Roehm v. Horst, at its outset, makes a distinction, which has always been made by the Supreme Judicial Court of Massachusetts, and which leaves this case outside the rule as determined by that court. In Roehm v. Horst, execution of the contract at the time it was repudiated had been commenced, because while in fact there were in form several concurring and analogous contracts, the delivery of the goods stipulated for by the contracts had been commenced, the contracts were partly performed, as the various contracts, though in form independent of each other, were treated for the questions involved as but one contract. The court (page 7 of 178 U. S., page 783 of 20 Sup. Ct. [44 L. Ed. 953]) observed that:

"While as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived."

Then the opinion proceeds:

"The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance, and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once."

The opinion then proceeds:

"Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them."

The court then continued:

"It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

That disposed of one branch of the case. Then the court took up a mere question of anticipatory breach of an executory contract, which is not the case at bar, because here there was only one contract, and it had been partly performed before the attempt was made to terminate it. On the question of mere anticipatory breach, the court adopted what it regarded as the settled law of England. On this point we find that the Supreme Judicial Court of Massachusetts has departed from the line adopted by the Supreme Court of the United States; but, so far as the case at bar is concerned, the Supreme Judicial Court of Massachusetts has not adopted a different rule by any settled line of decisions, but has apparently proceeded on the ancient theory that there can be only one breach for one promise, or one contract, a rule which may be of great importance, not only here, but with reference to the statute of limitations, and with reference to other questions which can be suggested. At any rate, the distinction between the two different classes of cases so clearly made in Roehm v. Horst, has never been disavowed, notwithstanding the practical result in each of these two different classes of cases has been the same, so far as the Supreme Court of the United States is concerned, as is shown by a line of decisions which we need not refer to further.

There is no doubt that in Massachusetts, the settled rule with reference to a merely executory contract is as stated by the Supreme Court of the United States independently of the English practice; but we find no settled rule there with reference to cases of the class at bar. On the other hand, we find that the courts of Massachusetts have recognized, always, the distinction to which we have referred, and never have applied the rule of the Supreme Court of the United States to a case where there has been only one contract, with one actual breach, as to which it may ordinarily be said that there is only one remedy, which must cover all damages which have exhibited themselves, or which may afterwards exhibit themselves. This affords a common illustration in the practice of the courts where there has been only one promise, independently of the question whether or not there may be later remedies by scire facias or otherwise, as is customary with reference to a bond for a penal amount intended to protect various breaches at various dates.

What seems to be referred to as a leading case in Massachusetts is Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, decided in 1874. The opinion contains a long discussion, with the result that the suit could not be maintained, and therefore is far from settling any practice in the state of Massachusetts as claimed now by the Lamson Company. This was a suit of a purely executory contract on an agreement to purchase land, brought before the expiration of the time given for the purchase. It is not necessary to say anything further about it at length. It cites Hochster v. De la Tour, 2 E. & B. 678 (1853), which case is understood to have settled the English practice. The opinion delivered by Mr. Justice Wells for the court was a long and thorough discussion; but it finally said on page 541 of 114 Mass. (19 Am. Rep. 384):

> "We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be ingrafted upon the contract in the present case."

All we need say about it is that it does not accept the law as covering a class of cases where there was merely an anticipatory breach, as described in Roehm v. Horst as within the decisions of the English courts. The views on this point of the Lamson Company are apparently based on certain expressions found in Daniels v. Newton, which have never been adopted as establishing what could be held to be a rule of law in Massachusetts. We believe we have examined every case referred to on this topic.

We think the next case was Parker v. Russell, 133 Mass. 74, decided in June, 1882. The opinion, delivered by Mr. Justice Field, afterwards Chief Justice, contained a review of the Massachusetts decisions to the date of its announcement. Suit was brought on a contract for support for life. In that case the consideration for the contract had been fully paid by the conveyance of land, and there was an ordinary agreement of that kind, it appearing that the defendant had accepted the conveyance and occupied and used the land, the sustenance having been afforded until the house involved was destroyed by fire, so that the contract was in full performance on both sides. In accordance with the usual rule, damages were assessed for the full value of the contract, as though there could be only one breach, which was regarded as a total breach of the entire contract. In this case, at page 76, of 133 Mass., Daniels v. Newton was reviewed, and the court said that it did decide that an absolute refusal to perform a contract before the performance was due is not a present breach; but it does not say that it ever did decide that any refusal to perform a contract at the time and under the conditions like those in which Gilman was entitled to require performance might not be a continuous breach. It also declared that the Massachusetts cases then cited were not inconsistent with those views. That must be regarded as establishing the law in Massachusetts at that time in the way in which we understand it, leaving it in the form which it was said in Roehm v. Horst was not disputed. Only two Massachusetts cases were cited, namely, Amos v. Oakley, 131 Mass. 413, and Mullaly v. Austin, 97 Mass. 30. The former case was merely a contract for support, with full consideration paid, as in Parker v. Russell, and the other was for the employment of a minor son, who had been in fact employed in labor a part of the time covered by the contract.

Tufts v. Atlantic Telegraph Company, 151 Mass. 269, 23 N. E. 844, decided in February, 1890, was only the usual case of a discharge, contrary to the contract of the parties after the duties of the position in which the plaintiff was employed had been commenced, and largely prosecuted.

In Paige v. Barrett, 151 Mass. 67, 23 N. E. 725, decided in February, 1890, there was a contract for employment for a brief time which had been entered on, with a wrongful discharge after the services were commenced. Some questions of pleading were involved. The court held that the plaintiff was entitled to only one action, and only one cause of action, and damages must be assessed once for all. There was nothing in either of these cases in 151 Mass. which throws any light on the case at bar. They were both only ordinary cases of employment, in fact commenced, with a wrongful discharge during the terms of the employment.

Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010, decided February 27, 1895, was only an ordinary case of the same class as those reported in 151 Mass. 67, 23 N. E. 725. Cases of this class are so common that it is difficult to understand why they are enlarged on at all in the Reports. In this last case, the court again restates that the plaintiff's cause of action accrued, and he was wrongfully discharged, and it was for damages for breach of his contract by the defendant, and that "for this breach he can have but one action."

In Speirs v. Forge Company, 174 Mass. 175, 54 N. E. 497, the right of action was sustained, and we find nothing in it affecting any question we have before us. The same case was before the court in 180 Mass. 87, 61 N. E. 825, but it contains nothing which helps or hurts anything we are considering in this suit, unless it was the suggestion of Mr. Justice Knowlton that everything involved was covered by "a single, entire contract, for the breach of which entire damages are to be assessed once for all." It is difficult to understand how, applying this common and trite rule, it could be otherwise than an award covering the entire agreed period, provided the contract was anything more than a merely executory contract, and was ripe for litigation.

Edwards v. Slate, 184 Mass. 317, 68 N. E. 342, decided in October, 1903, is the ordinary case of a wrongful discharge, as to which the court merely said that it was a simple case of a breach of contract, where the general rule applies that the action may be brought as soon as the breach occurs. The last case cited to us on this topic is Tebbets v. Rollins, 192 Mass. 169, 78 N. E. 299, which throws no light on it which we can discover.

We fail to find that there has been established in Massachusetts a rule or practice relative to the assessment of damages different from that applied by the District Court in this case.

[8] The result is that, for the erroneous ruling on the question of the burden of proof, which we have so fully discussed, we are compelled to order a new trial.

In view of the result reached on the writ of error brought by the Lamson Company, the writ of error by Gilman becomes unimportant, and needs no notice.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the Lamson Company recovers its costs of appeal.

HANLEY v. PACIFIC LIVE STOCK CO.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2722.

1. COURTS ⚷405(1)—CIRCUIT COURT OF APPEAL—APPEAL OR WRIT OF ERROR.
The appeal of a defendant in a water rights suit, from a decree finding him guilty of contempt in violating the injunction of a prior final decree of the District Court in such suit, can be reviewed in the Circuit Court of Appeals by appeal, the judgment not being primarily punitive in its nature, but being a judgment in a civil and remedial proceeding instituted to protect and enforce private rights.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1097; Dec. Dig. ⚷405(1); Appeal and Error, Cent. Dig. § 3302.]

2. JUDGMENT ⚷736—ESTOPPEL BY DECREE.
In a suit to determine water rights, where the bill called on a defendant to make full disclosure and discovery of his rights "for diverting

the water from your orator's said land, and obstructing its flow therein, as is hereinabove charged," and to make answer "to the matters hereinabove stated and charged," which were confined to defendant's rights on the east fork of a river, defendant was not estopped by the decree as to his water rights in a section of land on the west fork of the river.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. ⚷736.]

3. JUDGMENT ⚷707—RES JUDICATA—TRANSFER OF RIGHTS.

Where complainant in a suit to determine water rights omitted to bring in a landowner as a defendant, or to put his rights to the water in issue, and took a decree without determining such rights, he cannot complain that a party, to whom the land owner transferred his rights, continues to exercise them as the landowner might have exercised them both before and after the decree, whether a defendant in the suit or a third party acquired such rights.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⚷707.]

4. JUDGMENT ⚷704—RIGHTS DETERMINED.

In a suit to determine water rights, a defendant's right to the use of a dam in a section of land on the west fork of a river was unaffected by the provision of the decree limiting and defining another defendant's right to the use of such dam.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229; Dec. Dig. ⚷704.]

5. JUDGMENT ⚷682(1)—EFFECT ON SUCCESSORS IN TITLE.

Where the right of the owner of two sections of land to the use of the waters of a river for irrigation was involved in and determined by a water rights suit, and it was determined that the owner had no right to divert water, corporations which acquired the sections from the owner had no such right, and their manager was guilty of contempt if he exercised such right.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. ⚷682(1).]

6. INJUNCTION ⚷230(1)—CONTEMPT PROCEEDINGS—QUESTION TRIABLE.

In a contempt proceeding against a defendant in a water rights suit for violation of the final decree therein, the question whether a party not a defendant to the suit, who transferred to defendant his right to irrigate, had no such right, so that defendant, his successor, received none, could not be tried.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–506, 509–513; Dec. Dig. ⚷230(1).]

7. INJUNCTION ⚷223(1)—VIOLATION OF WATER RIGHTS DECREE.

Where the river on which the lands of parties to a water rights suit were situated had overflowed through depressions in the bank from time immemorial, a defendant, for permitting the water of the river to flow as it was wont, or for draining his land by a ditch when it needed draining, so long as he did not use the ditch for irrigation, could not be held in contempt for violation of a decree enjoining him from impeding the flow of any water of the river upon complainant's lands as it had been wont to flow when not interfered with.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448–473; Dec. Dig. ⚷223(1).]

8. INJUNCTION ⚷223(1)—VIOLATION OF WATER RIGHTS DECREE.

Where the decree in a water rights suit provided that a defendant should have the use of so much water as might run out of a river through overflow of its banks without obstruction, defendant was not guilty of contempt for permitting the overflow of water upon his lands through depressions in the bank of the stream, an overflow which he did no act to induce, but diligently endeavored to prevent by closing gaps in the bank.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448–473; Dec. Dig. ⚷223(1).]

9. INJUNCTION ⚷223(1)—VIOLATION OF WATER RIGHTS DECREE—NEGLIGENCE.

Where a defendant in a water rights suit, enjoined from obstructing the flow of a river, as soon as he received notice that it was claimed that the flow at his upper dam was obstructed by a small board and willow brush, caused the brush to be removed, though he was negligent in permitting the obstructions to remain in the river for three weeks, his negligence was not such as to amount to a willful contempt of court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448–473; Dec. Dig. ⚷223(1).]

10. CONTEMPT ⚷60(3)—EVIDENCE.

In a contempt proceeding to enforce civil rights, the evidence of contempt must be convincing to justify a decree finding defendant in contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 185–187; Dec. Dig. ⚷60(3).]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit by the Pacific Live Stock Company against William Hanley and others. From a decree adjudging plaintiff guilty of contempt in violating a prior decree of the court, defendant Hanley appeals. Judgment reversed, and cause remanded, with instruction to dismiss the proceeding.

The appellant appeals from a decree of the District Court adjudging him guilty of contempt of that court in violating its prior decree rendered on December 10, 1901, in a suit brought by the appellee the Pacific Live Stock Company, a corporation, against the appellant herein, and other defendants, to determine the rights of the parties to the suit to the use of the waters of the Silvies river and the forks thereof. At the time of the commencement of the suit, and the decree therein, the appellant owned sections 21, 23, 27, 25, and 35, the W. ½ of 26, and nearly all of 22, in township 23 south, range 31 east, and said land was irrigated by the waters of the east fork of Silvies river. He owned no land on the west fork of that river, and had no interest in the water of that fork, except that he held section 31 under a lease from Charles Altschul. Altschul was not a party to the suit. The bill of complaint brought in question the rights of the appellant as to his dams and ditch systems on the east fork of the river, but it made no mention of section 31 on the west fork, and it called upon the appellant to make disclosure only of his rights and claims as to the waters of the east fork. He answered the bill, and set up the rights which he claimed to those waters. He made no mention of his right as lessee of section 31. The decree, which was entered upon the stipulation of the parties, gave to the appellant: First, the right to maintain his upper dam on the east fork of Silvies river in section 21, and his ditches leading therefrom, "as the same are now constructed and built, from the 5th day of May each year until the 1st day of July each year," and to divert so much of the water thereof as may be necessary to irrigate the said sections of land which he owned on and adjacent to the east fork; second, it provided that he might maintain his drain ditch on the south half of section 27, but commanded that he maintain it only for the purpose of draining water from the surface of his land, and not for irrigation; third, it decreed that the appellant be perpetually enjoined from diverting "any of the waters of Silvies river, and any of the water from the east fork of Silvies river, and any of the water from the west fork of Silvies river, from the channels of said

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

rivers, and from the channels of each of said rivers," and from impeding the flow of any of said waters to and upon the lands of the complainant, and the appellant was required to remove all dams which he then had in the channels of Silvies river or in the channels of the east fork or in the channels of the west fork save and except as permitted in the decree. Subsequent to the decree, the lands of the appellant were transferred to a corporation known as the William Hanley Company, and that company purchased, not from the appellant, but from the owner, the Altschul Section 31 on the west fork.

On April 29, 1915, the superintendent of the appellee herein filed in the court below an affidavit, charging the appellant with violations of the decree. It first accused him of various acts injurious to the rights of the appellee, in conspiring with and inducing others to violate the terms of the decree. All those charges were found by the court below to be without foundation, but the court found the appellant guilty of contempt, in that he used the dam in section 31 on the west fork, thereby divérting water from that fork; second, that he maintained a dam known as the Young dam on section 19 on the west fork of said river, for the purpose of irrigating sections 29 and 5; third, that he operated his drain ditch on section 29 on the east fork at times when it was not necessary to drain the surface of his land; fourth, that he obstructed the flow of the river through his dam in section 21 on the east fork by permitting one board and some brush to remain in the dam; fifth, that he failed to repair the breaks in the bank of the east fork in section 27.

C. E. S. Wood, Lionel R. Webster, and Erskine Wood, all of Portland, Or. (M. M. Matthiesen, of Portland, Or., on the brief), for appellant.

Edward F. Treadwell, of San Francisco, Cal., and Wirt Minor, of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellee moves to dismiss the appeal on the ground that the order adjudging the appellant guilty of contempt, being punitive and not compensatory, cannot be reviewed in this court by appeal, but must be brought here by writ of error. We find no merit in the motion. The judgment is not primarily punitive in its nature, but it is a judgment in a civil and remedial proceeding, instituted to protect and enforce private rights, and to that end to compel obedience of the decree of the court. It is brought for the violation of the injunction of a final decree, and under all the decisions it is properly reviewable on appeal. Matter of Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853; Heller v. National Waistband Co., 168 Fed. 249, 93 C. C. A. 551; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897.

[2-4] We are unable to see that the rights of the appellant as lessee of Altschul of section 31 on the west fork were in any way involved in the original suit. The appellant's dams and ditches on the east fork were all described in the bill. The complainant must have known of the existence of the dam in section 31 on the west fork, and that the property was claimed by Altschul. For some reason not disclosed by the complainant, Altschul was omitted from the litigation. His right to maintain the dam and use the water was left unaffected by the decree. After the conclusion of that litigation, as before, Alt-

schul was free to sell or lease his right to the appellant or to any one. But it is said that the appellant is estopped by that decree as to all water rights in section 31, by the fact that the bill called upon him to make full disclosure of all his rights at all places on the river or its forks. But the bill was not so broad in its scope. It called upon the appellant to make full disclosure and discovery of his rights "for diverting the water from your orator's said land, and obstructing its flow therein, as is hereinabove charged," and to make answer "to the matters hereinabove stated and charged." The matters so stated and charged were confined, so far as the appellant was concerned, to his rights on the east fork of the river. He was not charged with diverting the water of the west fork. The provision of the decree which enjoined him from diverting or impeding the flow of waters in the west fork must be interpreted in the light of the issues in the case. If the complainant in that suit omitted to bring in Altschul as a party defendant, or to put in issue Altschul's rights to the water, and took a decree without determining those rights, he cannot complain that another to whom Altschul has transferred his rights continues to exercise them as Altschul might have exercised them both before and after the decree, and it can make no difference in the present case whether the appellant or another acquired those rights. Josslyn v. Daly, 15 Idaho, 137, 96 Pac. 568. The appellee cites State ex rel. Stevens v. Catlin, 21 Wash. 423, 58 Pac. 206, in which the court held that where a decree of a court has adjudicated all the rights of the parties before it to the waters of a certain stream, and enjoined a party from using more than a certain quantity, he is guilty of contempt if he uses more water than he is allowed to use under the terms of the decree when he asserts title under a deed from one who was not a party to the decree, but fails to show any right in his grantor. It is said that the decision is applicable here for the reason that the appellant shows no actual right in Altschul or any predecessor in interest to use the water. The distinction to be observed between the case so cited and the case at bar is that the judgment in the former was premised upon a decree "by the terms of which all of the rights to the waters of the stream were adjudicated and determined." In the present case it affirmatively appears that the rights of the owners of the Altschul lands to the use of the water of the west fork were not adjudicated.

[5] Nor do we see that the appellant's right to the use of the dam in section 31 is affected by the provision of the decree which limits and defines Caspar Luig's right to the use of that dam. That decree went no further than to define the status and to limit the use of that dam as to Caspar Luig. The bill alleged that he had a dam, and the decree provided that he might maintain it from the 15th day of May to the 1st day of July each year "in the manner and form as the same is now constructed," for the purpose of irrigating his lands in section 6, a section which lay directly south of 31. The decree affects only the rights of Luig, and his successors in interest. It has no relation to the right of the appellant.

[6, 7] As to the appellant's contempt in maintaining the Young dam

on the west fork, the facts are as follows: In the original decree Young, who was a party to the suit, was allowed to maintain his dam on the west fork for the irrigation of his land in the northeast quarter of section 30. In 1907 his dam was washed out, and thereafter he and the appellant together built a new dam a short distance up the stream from the site of the old dam, and very near the section line between sections 19 and 30. The intention was that Young should use this dam in the place of his old one; that the William Hanley Company should use it for the irrigation of section 29, which lies directly east of 30, and for the irrigation of section 19, which belongs to the Harney Valley Improvement Company, of which the appellant is a stockholder. In 1912, at the instance of the appellee herein, Young was held in contempt on account of his use of the new dam. Thereafter he ceased using any water from that dam, and the William Hanley Company purposed to use it for the irrigation of sections 29 and 19. At the time of the original suit, those sections were a portion of the Altschul land, and neither those lands nor the question of the right to irrigate the same from the water of the west fork were involved in the suit, further than that Levens, who then held a lease of section 19, was decreed the right to water that section during the term of his lease. The charge against the appellant with reference to the Young dam as made in the affidavit for the present contempt proceedings is that he encouraged Young and two others to build the dam, and to divert water thereby in the year 1915. That charge was not sustained. The appellant answered it, and claimed that the ownership of the dam was in the William Hanley Company and the Harney Valley Improvement Company. The court below held that the appellant violated the decree when he attempted to use any water through the Young dam, held him in contempt therefor, and enjoined him from further using the dam. The appellant's claim to the right to use the Young dam was based wholly on his contention that Altschul had the right to irrigate sections 29 and 19, and that his right to the water therefor had not been involved or determined in the original suit; that the William Hanley Company and the Harney Valley Improvement Company stood in Altschul's shoes, and that neither of those corporations nor the appellant claimed any authority to divert the water through the Young dam by virtue of that portion of the decree which established Young's right therein, but that they claimed it as an original right appurtenant to the Altschul lands. If the right of the owner of those two sections of land was involved in and determined by the original suit, and it was determined that the owner thereof had no right to divert water from Silvies river for their irrigation, then necessarily it follows that the corporations which acquired those sections from the owner have no such right, and the appellant is guilty of contempt if, as manager of those corporations, he has exercised rights which were denied to the former owner of the land.

But it does not follow from the fact that the court adjudicated the respective rights of all the parties to that litigation that others who were not parties to the suit have no right to use the waters of the Silvies river for irrigation. It is evident that Altschul, if he were still the owner of sections 29 and 19, and he had constructed this dam and ditch for the irrigation thereof, could not be held in contempt for violation of the terms of the decree, since neither he nor his lands were bound by the decree. It follows, of course, that Altschul's successor in interest cannot be held for contempt for those acts. It may be that Altschul never had the right to irrigate those lands, and that his successors in interest have no such right, but that is a question which, as we have seen, must be determined in an original suit. It cannot be tried in the present contempt proceeding. Hamlin v. New York, etc., Railroad, 170 Mass. 548, 49 N. E. 922; Baldwin v. Circuit Judge, 101 Mich. 119, 135, 59 N. W. 432, 25 L. R. A. 739; Ex parte Hollis, 59 Cal. 405; California Paving Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618, 28 L. Ed. 1106; Rogers Manufacturing Co. v. Rogers, 38 Conn. 121; Castleman v. State, 94 Miss. 609, 47 South. 647; In the Matter of Day, 34 Wis. 638. It appears from the record that the rights of all persons on the Silvies river are now in process of determination in a court of the state of Oregon, under the provisions of the law of that state known as the Water Code. To that tribunal and to the provisions of that Code, all questions of original rights raised in these proceedings for contempt should be relegated.

[8] The court below found the appellant in contempt for using his drain ditch in violation of the decree. The charge was that the appellant, during March and April, at a time when it was unnecessary to drain water from the surface of his land, had the head of his drain ditch open, and used the same for the purpose of irrigation. The appellant pleaded the necessity for opening the drain ditch to rid his land of flood waters. The court below did not find that the appellant had used the drain ditch for the purpose of irrigation, and did not find that he had violated the express provisions of the decree as the same were construed in the decisions of this court in Pacific Live Stock Co. v. Hanley, 200 Fed. 468, 484, 118 C. C. A. 494, 510, where it was said that the appellant had no right—

"to divert any water from the river when its waters are not so high as to make it necessary or proper by means of the drain ditch to drain surface water from the lands."

But the court below reached the conclusion that the appellant had allowed the ditch to remain open, contrary to the spirit of the decree, for the reason that the appellant was responsible for the overflow of his own lands. The court said: "He should have kept the breaks and gaps in the banks of the stream closed." To that as a legal conclusion we cannot assent. The only limitation placed upon the appellant's right to use the drain ditch by the terms of the decree is that he shall use it only for the purpose of draining water from the surface of his land, and not for irrigation. The evidence does not show that the presence of the water which made it necessary to use the drain ditch in order to relieve the appellant's land was caused by the appellant's own acts further than that through dam 21 water may have come upon the appellant's land, which was thereafter drained from the surface thereof through the drain ditch. If so, the water came through the Hanley upper ditch, strictly in accordance with the provisions of the decree, and it was drained from the surface of the appellant's lands through the drain ditch likewise in accordance with the provisions of the decree. There is nothing in the case to show that the appellant purposely flooded his land in order that he might have an excuse for opening his drain ditch. There is no evidence that he used the ditch for irrigation. The original complaint was brought by the appellee as proprietor of lands on the river below the lands of the defendants in the suit, and the burden of its complaint was that the defendants had obstructed the natural flow of the water to the complainant's lands. Its prayer was that they be compelled to take out their dams and refrain from diverting or impeding the flow of the water—

"down to and upon your orator's said lands as said water has heretofore been wont to flow therein when not interfered with by the defendants."

The decree defined the rights of each of the defendants to obstruct the flow or diversion of water, and it provided that:

"Except as thus permitted, the defendants are perpetually enjoined and restrained * * * from impeding the flow of any of said water to and upon the lands of the complainant hereinbefore described, as said water has heretofore been wont to flow thereon when not interfered with by the defendants."

In view of the history of the river, and the evidence of the overflow of its waters through depressions in the bank from time immemorial, the appellant cannot be held in contempt for permitting the water of the river to flow as it was wont to flow, or from draining his land by the drain ditch when it needed draining, so long as he did not use the ditch for irrigation.

[9] As to the appellant's contempt, as found by the court below, in permitting cuts in the river bank of the east fork of the river, whereby water was diverted from the stream, the record shows the following: The original decree enjoined the appellant from obstructing the channel of the east fork of Silvies river prior to May 5th of each year, and from diverting any water therefrom except such as would naturally flow through his ditches at the 21 dam. The affidavit which charges contempt alleges that the appellant diverted the water by means of cuts in the bank of the river on his land in section 27. The appellant's answer was that the cuts were natural depressions in the bank, not created or permitted by him, and he testified that he had endeavored to the best of his ability to mend such breaks and prevent the outflow of the water through the same. The record shows the fact to be that the banks of the east fork as that stream flows through sections 27 and 34 are higher than the adjacent land, and that in times of flood water has always poured through certain natural depressions in the bank, with the result that the openings in the bank have there been cut deeper, until gaps were made through which the water flowed in considerable quantities. The court below, while not finding that Hanley had made or permitted others to make such openings in the banks, held that he was in contempt, in that he had failed to close the same. The court said:

"He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him. He is only given the flood waters to May 5th, and waters pouring through rents in the bank cannot be termed 'flood waters.' "

In the original decree no mention whatever was made of these breaks in the bank, although the evidence now is that they had existed long prior thereto. The decree by its terms provided:

"If at any time, and while the dam of the said W. D. Hanley is open, so that it does not obstruct the flow of the water in said river, and from natural causes the waters of the said east fork of Silvies river shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid, and during such times as the same may run thereon from natural causes, and without any obstruction of the channel of said river."

Assuming, as it was found by the court below, as and as the evidence clearly shows, that the breaks in the bank were natural depressions, and that water flowing therethrough ran upon the appellant's land "from natural causes," and that the appellant was not by the decree required to prevent or obstruct the same, we are unable to see how, as a matter of law, he can be justly held in contempt for the situation as it exists during the overflow of water through depressions in the bank, the evidence being clear that the appellant did no act to induce such overflow, but, on the contrary, with a view to protect the appellee, and to prevent friction and litigation, diligently endeavored to close the gaps, and to prevent such overflow.

[10, 11] The appellant was found in contempt, in that in March and April, 1915, he maintained a small board a portion of the way across the 21 dam, and permitted brush and débris to accumulate above the dam so as to obstruct the flow of the water and raise it, and thereby he diverted water into his upper ditch. The 21 dam is a dam across the whole channel of the river, and it is used to divert water into the appellant's ditches, one on either side of the east fork. The total width of the dam is 16 feet, and it has four openings. When the boards are removed the water flows through all the openings. The decree allowed the appellant to close the dam and divert water from the river into his two ditches from May 5th to July 1st each year, and to take any water at any time of the year that naturally flowed into his ditches while his dam was open so as not to obstruct the flow of the river. The evidence as to the obstruction of the dam is that in April, 1915, one board 4 feet long and 6 inches wide was found across one of the openings of the dam, and that some willow brush had lodged against the posts of the dam. There is no evidence that any one placed these obstructions in the dam, or that the appellant knew that they were there. On the contrary, the evidence indicates that he knew nothing whatever of their presence. Some of the willow brush bore marks of having been cut with a hatchet, and it is not improbable that it was cut and fell into the stream in connection with a survey which the appellee had been making on the upper reaches of the river, and that it floated down and lodged against the posts of the dam. Whether the board floated into the position where it was or had been

carelessly left there when the boards of the dam were removed the year before there is no information. Whether or not the brush caused a perceptible obstruction to the water is uncertain, the evidence being conflicting, but it was shown that the board was on the side of the dam where the water was slack, and that it could not have affected the flow of the water to any appreciable degree.

That there was little or no obstruction from either cause seems to be indicated by the testimony of the appellee's engineer, who testified that he visited the premises at intervals, and found that the dam was obstructed from the first part of April until the 25th of that month. He testified that he made measurements of the water which was diverted into the appellant's upper ditch, the first measurements being on April 3d, and the last on May 3d, and that during the whole of that period the same amount of water was running into that ditch, and that the quantity was nearly 40 second feet. It was not disputed that the obstructions were removed about the 24th or 25th of April. The court below found that if the appellant did not know of the condition of the dam, he ought to have known it, and that he was guilty of inexcusable neglect. The evidence is without dispute that as soon as the appellant received notice that it was claimed that the flow of the water at his upper dam was obstructed, he caused the obstructing brush to be removed, and that this was done by drawing out one of the pieces of willow, whereupon the remainder parted and floated down the stream. Assuming it to be true, as it was found by the court below, that the appellant was negligent in permitting the obstructions to remain in the river for a period of three weeks, we think the conclusion that his negligence was such as to amount to a willful contempt of court is wholly unwarranted in law. Although it has not been held by the Supreme Court that in a procedure of a civil nature such as the one here before us, the defendant is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt (Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), the trend of all the decisions is that the evidence of contempt must be convincing. In California Paving Co. v. Molitor, 113 U. S. 609, 618, 5 Sup. Ct. 618, 622 (28 L. Ed. 1106), Mr. Justice Bradley said:

"Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct."

In Accumulator Co. v. Consolidated Electric Storage Co. (C. C.) 53 Fed. 793, in a proceeding for contempt for violation of an injunction, the court said:

"This proceeding is criminal in its nature and character, and the same rules should govern as in the trial of indictments. The burden of proof of establishing violation of the injunction is upon the complainant, and the defendants are entitled to the benefit of any reasonable doubt."

So in General Electric Co. v. McLaren (C. C.) 140 Fed. 876, the court held that the burden of proof to establish the violation of an injunction rests upon the complainant, and that the defendant is entitled to the benefit of every reasonable doubt.

This proceeding is one of a series of contempt proceedings that have kept the parties hereto in litigation a large portion of the time since the original decree was rendered. The situation of the appellee on the river is obviously a difficult one. In dry seasons it suffers for want of water for its stock and for irrigation. It is natural that under the circumstances it should be diligent in protecting its rights. We cannot but feel, however, that in this instance, as in some that have preceded it, it has gone further than justice permitted, and that it has magnified little things beyond their true proportions. The charge which the appellee principally relied upon, and which evidently was the inspiration of the present proceeding, was that the appellant had conspired with Luig, Young, Hotchkiss, Thornberg, Dalton, Hudspeth, and Smith to obstruct and divert the waters of the west fork. That charge wholly failed of proof, and it seems probable that, had the appellee known that its suspicion of conspiracy was unfounded, the other charges would not have been brought. The appellee's attorney practically admitted that but for the necessity of bringing the proceedings on account of the alleged conspiracies to divert the water of the west fork, the breaks in the bank of the east fork would have been overlooked.

The judgment is reversed, and the cause is remanded to the court below, with instruction to dismiss the proceeding.

WATERS et al. v. GUILE.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1916.)

No. 2784.

1. COMMERCE ⚷27—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.

A brakeman on a train containing cars loaded with interstate freight is engaged in "interstate commerce," within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, amended by Act April 5, 1910, c. 143, 36 Stat. 291 [Comp. St. 1913, §§ 8657-8665]), though the train runs only between intrastate points.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⚷27.

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

2. COMMERCE ⚷8—INJURIES TO SERVANT—APPLICATION OF STATE LAWS.

Despite the Michigan Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), the remedy of a brakeman engaged in interstate commerce for injuries occasioned by the negligence of the railroad company is under the federal Employers' Liability Act, though his train ran only between intrastate points.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⚷8.]

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

3. COMMERCE ⚷8—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.
Where a railroad company operating a line in Michigan elected to come under the Michigan Workmen's Compensation Act, the fact that an employé engaged in intrastate as well as interstate commerce did not give notice of his nonassent does not bring him within the Michigan Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⚷8.]

4. MASTER AND SERVANT ⚷351—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION TO COME UNDER.
An employé of the defendant railroad company, which had elected to come under the Michigan Workmen's Compensation Act, injured while engaged in interstate commerce, gave notice of injury to the railroad company and the Industrial Board in conformity with the local compensation act, but settlement under the act was not had, there being a disagreement as to the average wages of the employé. The employé's right of action was governed by the federal Employers' Act, the injuries being occasioned by negligence. *Held* that, notwithstanding part 6, § 1, of the Michigan act, providing that, if an employé of any employer subject to the act files any claim with or accepts any payment from such employer, such action shall constitute a release of all demands at law, the injured employé might sue under the federal Employers' Liability Act, for the section referred to was intended to apply only to those subject to the state act, nor could the state Legislature thus restrict the remedy afforded by the federal act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚷351.]

5. MASTER AND SERVANT ⚷351—REMEDIES FOR INJURIES—ESTOPPEL.
In such case the fact that the employé's medical expenses for the first three weeks were paid by the company in accordance with the Michigan Act (part 2, § 4) does not work any estoppel, for, had the employé paid such expenses, he might have recovered them as damages.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⚷351.]

6. ESTOPPEL ⚷88(1)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.
That a brakeman, injured while engaged in interstate commerce, signed an account stating that no one was to blame for the accident, does not estop him from subsequently suing under the federal Employers' Liability Act, on the ground that the injuries were not the result of negligence, for such statement merely affected his credibility.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235-238, 240; Dec. Dig. ⚷88(1).]

7. APPEAL AND ERROR ⚷994(2)—REVIEW—JURY QUESTIONS.
The credibility of witnesses is for the jury, and cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3902, 3903; Dec. Dig. ⚷994(2).]

8. PLEADING ⚷398—PROOF—VARIANCE.
A variance between pleading and proof is immaterial, unless such as to mislead the opposite party.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1338; Dec. Dig. ⚷398.]

9. PLEADING ⚷236(5)—AMENDMENT—ALLOWANCE—DISCRETION OF COURT.
In an action by plaintiff, a brakeman, injured by a sudden or emergency stop of the train, which threw him from the car on which he was riding, the declaration as originally filed charged that the engineer was at fault in making an emergency stop in response to a service stop signal. The head brakeman, to whom plaintiff transmitted signals, testified that he received an emergency stop signal after the service stop signal. *Held*

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that, as an amendment to meet the proofs is within the sound discretion of the trial judge, it was not an abuse of discretion to allow plaintiff to amend by alleging negligence in the head brakeman in giving an emergency stop signal, which plaintiff testified he had not given, for that could not have surprised defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ⊂⇒236(5).]

10. MASTER AND SERVANT ⊂⇒289(32)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

The brakeman testified that he was standing near the center of the car when the sudden stop was made, and the conductor, who testified as to the suddenness of the stop, stated that as the train was stopped he did not believe he could have staid on the car. *Held* that, in view of the testimony of the necessity of the brakeman standing where he could observe the last car, the court could not charge as a matter of law that he was guilty of negligence in standing where he did, and a charge in effect so declaring was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1124; Dec. Dig. ⊂⇒289(32).]

11. TRIAL ⊂⇒255(11)—INSTRUCTIONS—REQUESTS.

In such case an instruction presenting the question whether plaintiff was standing as he testified, and allowing the jury to find that if he was so standing he was not negligent, but if he was standing at the end of the car he was negligent, not having been requested, it was not reversible error for the court to fail to so instruct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. ⊂⇒255(11).]

12. TRIAL ⊂⇒253(9)—INSTRUCTIONS—REFUSAL OF REQUEST.

In a railroad accident case, where there was testimony that no emergency existed, a requested instruction that if, after the engineer began to obey the service stop signal, such signal was continued, it was not negligence for him to throw on the air suddenly, was properly refused, as omitting the feature that no emergency existed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 620; Dec. Dig. ⊂⇒253(9).]

13. APPEAL AND ERROR ⊂⇒1050(1)—REVIEW—HARMLESS ERROR.

The erroneous admission of evidence is harmless, where similar evidence of more forcible character is admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊂⇒1050(1).]

14. APPEAL AND ERROR ⊂⇒1048(1)—REVIEW—HARMLESS ERROR.

A nonresponsive answer of a witness is not prejudicial, where merely cumulative of other testimony to the same general effect, received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140, 4144; Dec. Dig. ⊂⇒1048(1).]

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

Action by Merlin E. Guile against Dudley E. Waters and others, receivers of the Pere Marquette Railroad Company. There was a judgment for plaintiff, and defendants bring error. Affirmed.

T. S. Parker, of Detroit, Mich., and C. E. Ward, of Grand Rapids, Mich., for plaintiffs in error.

S. A. Anderson, of St. Paul, Minn., for defendant in error.

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

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

KNAPPEN, Circuit Judge. The Pere Marquette Railroad Company is a railway carrier engaged in interstate and intrastate commerce, its railroad being operated by plaintiffs in error as receivers. While in the latter's employ as rear brakeman on a freight train running between Plymouth, Mich., and Grand Ledge, Mich., which train carried both intrastate and interstate freight, defendant in error (whom we shall hereafter call plaintiff) received, in the course of switching operations, serious injuries alleged to be due to the negligence of another member of the train crew, and on account of these injuries recovered verdict and judgment under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, amended April 5, 1910 [36 Stat. 291, c. 143]).

Plaintiffs in error (hereafter called defendants) not only assign error with respect to proceedings upon the trial, but insist here, as they did in the court below, that plaintiff's right of action under the federal Employers' Liability Act is taken away by the Michigan Workmen's Compensation Act (Act No. 10, P. A. Mich. [Ex. Session] 1912) and the proceedings had thereunder before this suit was begun.

[1-3] In our opinion in Grand Trunk Railway Co. v. Knapp, 233 Fed. 950, —— C. C. A. ——, decided June 30th last, the question of the relation of the Michigan statute to the federal Employers' Liability Act, and the applicability of the Michigan act to injuries suffered by employés of interstate railroad carriers received careful consideration and discussion; and we there reached and announced the conclusion that, in view of the paramount jurisdiction of Congress over interstate commerce, and thus over remedies against employers therein for injuries sustained by employés while in such commerce, the federal Employers' Liability Act provides the exclusive remedy for at least negligent injuries to employés of interstate railroad carriers while actually engaged in interstate commerce. We found it unnecessary to decide, and intimated no opinion on, the question whether the state act would apply had the injuries occurred without the employer's negligence. We held that Knapp's injuries were suffered while employed in interstate commerce, and affirmed recovery therefor. We refer to our opinion in the Knapp Case for a statement of the reasons for the conclusions there reached, as well as for a synopsis of the important features of the Michigan statute. The defendants here previous to the accident filed their election to come under the act. Plaintiff, however, had never previous to the accident accepted the act, unless by his failure to give written notice of his nonassent. As the train on which plaintiff was working contained cars loaded with interstate freight, plaintiff was engaged in interstate commerce within the meaning of the federal Employers' Liability Act, notwithstanding the train in question ran only between points in the same state. N. Y. C. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298. The views announced in the Knapp Case, and the reasoning on which those views are based, require us to hold that the federal act provided

the exclusive remedy for plaintiff's injuries at the time they were suffered, if occasioned by defendant's negligence, and that the Michigan act was not made applicable thereto by plaintiff's failure to give notice of his nonassent to the act.

[4] The instant case contains, however, a feature not found in the Knapp Case: Two days after the accident plaintiff's wife applied at the office of the State Industrial Accident Board, where the Michigan Compensation Act was explained to her, and where she signed a claim expressed to be under the act, and later notices addressed to the railroad company, claiming compensation under the act, were, at her request, made out ready for signature. Both copies of the notices were signed by plaintiff. One copy was sent to defendants; the other was returned to the Industrial Accident Board. Defendants took up the matter through their representative and prepared a proposed agreement for settlement, upon the basis of the section of the act applicable to plaintiff's claim as drawn. (The claim in fact did not state the full extent of plaintiff's injuries.) Plaintiff knew, at least from what defendants wrote him, that the Michigan Compensation Act fixed compensation on the basis of average weekly wages for a stipulated number of weeks, and that defendants wished, or at least were willing, to settle with him under that law and on that basis. His failure to settle was due to a dispute as to the amount of compensation to which plaintiff was entitled—the point of disagreement, at least in the first place, being the amount of average wages. Because of this dispute as to the amount of compensation plaintiff brought this suit. We assume, for the purposes at least of this review, that plaintiff knew he had applied for compensation under the state act. No settlement was in fact carried out, or even agreed upon, nor was arbitration asked for. Defendants insist that by this action plaintiff elected to come under the Michigan Compensation Act, and that the transaction amounted to an agreement to adjust all liability under the provisions of that statute, which provides for arbitration in case of disagreement between employer and employé, with right of review by the Industrial Accident Board of the arbitrator's findings.

As between two inconsistent remedies, the deliberate choice of one ordinarily constitutes an election as against the right to claim under the other; and we assume that, had plaintiff the option of proceeding under either the Michigan Compensation Act or the federal Employers' Liability Act, what he did amounted to an election which would bar suit under the federal act. Bomgardner v. Zilch, 19 Ohio Cir. Ct. R. (N. S.) 438. But election presupposes a choice of remedies, and where there is but one remedy available there can be no choice of remedies, and an unsuccessful pursuit of an inapplicable remedy would not bar resort to a remedy that is applicable. Brown v. Fletcher, 182 Fed. 963, 105 C. C. A. 425.

It is established by the verdict that plaintiff's injuries were occasioned by defendants' negligence, and the trial court properly held that those injuries were suffered during plaintiff's employment in interstate railroad transportation. The federal act thus provided plaintiff's sole and exclusive remedy for his injuries.[1] His mere claim under the Michigan act, not prosecuted to recovery, was thus not an effective election as against a remedy under the federal act. In reaching this conclusion we lay out of account the suggestion of plaintiff's counsel that the record does not affirmatively show that when plaintiff filed the claim for compensation he knew that the train on which he was working carried interstate freight, and that it does not affirmatively appear that he knew he had a right of action under the federal act.

We have no doubt that it was competent for the parties to make a settlement, after the accident, upon the basis provided by the Michigan Compensation Act. Indeed, such adjustment, as eliminating the question of defendants' negligence might well have been regarded by both parties as desirable. The question comes, we think, to this: Whether what was done after the accident amounted to a settlement which would bar proceeding under the federal statute.

No settlement was in fact reached. The proceeding in legal effect amounted, at the most, to an implied agreement (in case adjustment should not be reached between the parties) to arbitrate their differences, employing for the purpose the machinery of the act. But such voluntary agreement to arbitrate, not carried into effect, did not amount to a settlement, nor did it bar resort to applicable remedy at law, unless by what was done plaintiff is estopped therefrom.

[5] There is, we think, no room for estoppel, unless in the fact that defendants provided "medical and hospital services and medicines" for plaintiff during the first three weeks after the injury, which defendants were by section 4, part 2, of the act required to do. But while defendants showed that payments for such purposes (aggregating nearly $300) were made under approval of the legal department, by reason of plaintiff's claim for compensation under the act (which claim reached that department about a month after the accident), yet it does not appear that defendants have been legally prejudiced by the payment; for not only is it not shown that defendants were not already directly obligated to the persons furnishing such services and medicines, but had plaintiff paid the bills in question defendants' liability for his injuries, as found by the verdict, would naturally include the payments in question (plaintiff was in the hospital six weeks in all) and theoretically plaintiff's recovery has been lessened by the amount thereof.

1 Section 1, part 6, of the Michigan act provides that if an "employé * * * of any employer subject to the provisions of this act files any claim with or accepts any payment from such employer, * * * such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury." Aside from the consideration that the Legislature could not thus restrict the remedy afforded by the federal act, we think the section referred to manifestly intended to apply only to employés who are, by the terms of the act, made subject to it. It also seems clear that plaintiff has not become bound under section 4, part 6, of the act, quoted in our opinion in the Knapp Case, as that section requires actual agreement between employer and employé and approval thereof by the Industrial Accident Board, and such agreement was never actually reached, nor was such approval had.

[6] We do not overlook the fact that plaintiff's signed account of the accident given defendants' representative six days later expressed the opinion that no one was to blame for the accident, and that the negligence alleged in his letter refusing defendants' offered adjustment was not that asserted here. But while these statements seriously discredit plaintiff's testimony, as to the fact of the asserted negligence, they do not, we think, legally estop him from such assertion—even assuming (which we do not decide) that the Michigan act would apply to plaintiff's injuries if nonnegligent. It cannot be that an untrue assertion of fact necessary to jurisdiction of the remedy sought legally estops one from invoking a different remedy, which under the actual facts is exclusive.

[7] The question of plaintiff's credibility was addressed to the jury, and its conclusion in that respect is not reviewable here.

We therefore think plaintiff was not, by what was done under the Michigan act, barred, as matter of law, from asserting a right of action under the federal act.

Turning to the proceedings on the trial:

[8, 9] The train on which plaintiff was working at the time of the accident contained 32 cars; the engine being at the west end, the caboose at the east end, of the train, which was equipped with air brakes. The accident happened in connection with the kicking of the caboose onto another track. The conductor was on the west platform of the caboose, prepared to pull the pin when sufficient momentum should be obtained. Plaintiff, as rear brakeman, was on the top of the box car next to the caboose, for the purpose of giving signals to the engineer. As the train was on a curve the engineer could not see plaintiff's signals, and accordingly the head brakeman stood upon the top of a car near the front end of the train for the purpose of repeating plaintiff's signals. Plaintiff alleged that during the rearward movement of the train he continued the kicking signal by moving his lantern slowly crosswise of the car, and when the proper point was reached gave the signal for the "service" or gradual stop, but that the engineer instead made the "emergency" or sudden and violent stop, by which plaintiff was thrown from the car and under the train. The conductor's testimony tended to corroborate that of plaintiff. The declaration as originally filed charged in effect that the engineer was at fault in making an emergency stop in response to a service stop signal. The head brakeman and the engineer testified on defendants' behalf, the former that he received from plaintiff first the signal for the service stop and soon afterwards the emergency stop signal, and that he transmitted both to the engineer, who testified to having received both from the head brakeman. At the conclusion of the testimony plaintiff asked, and was permitted, to amend his declaration by alleging negligence in the head brakeman in giving the engineer a signal not received from plaintiff. Error is assigned upon this action. The amendment filed was by way of a second count to the effect stated.

The rule is well settled that an amendment to meet the proofs is within the sound discretion of the trial judge. Hernan v. American

Bridge Co. (C. C. A. 6) 167 Fed. 930, 934, 93 C. C. A. 330; Mitchell v. Toledo, etc., R. R. Co. (C. C. A. 6) 197 Fed. 528, 534, 117 C. C. A. 24. And this discretion should not be disturbed unless plainly abused. We think no abuse of discretion is shown. Defendants could not have been misled by the amendment, for it was made to meet proofs which they themselves had submitted; and even a variance between pleading and proofs is immaterial unless such as to mislead the opposite party. Pennsylvania Co. v. Whitney (C. C. A. 6) 169 Fed. 572, 578, 95 C. C. A. 70; Erie R. R. Co. v. Kennedy (C. C. A. 6) 191 Fed. 332, 335, 112 C. C. A. 76; Pennsylvania Co. v. Cole (C. C. A. 6) 214 Fed. 948, 950, 131 C. C. A. 244; Southern Ry. Co. v. Gadd (C. C. A. 6) 207 Fed. 277, 279, 125 C. C. A. 21.

True, plaintiff had testified that the head brakeman repeated the signals given by plaintiff and gave no others, and his testimony in that regard was inconsistent with the claim, added by way of amendment, that the head brakeman did give the engineer a signal not communicated by plaintiff; but it was competent for the jury to believe that plaintiff told the truth as to the signals he gave, that the engineer and the head brakeman told the truth as to the giving by the latter of two different signals, and to have found plaintiff mistaken, or even untruthful, in his testimony that the head brakeman gave only the signals plaintiff had given. The verdict is at least consistent with such view. The fact that the transaction occurred in the nighttime, and that the service signal differs from the emergency signal only in the rapidity with which the lantern is swung, may in some measure account for the confusion. The situation is essentially the same as if the declaration had originally contained two counts, one addressed to the negligence of the engineer, the other to that of the head brakeman. Plaintiff's testimony upon one theory would not bar recovery upon the other, provided there was testimony sustaining such other theory; for upon either theory (and thus upon either count) "the parties were the same, the occurrence was the same, the injury and the damages were the same, and in both cases the negligence charged was that of the company." [2] The Brown Case referred to below is more or less analogous to the instant case, in that the injury there complained of occurred in a movement of the same general nature as that here involved, and there was in that case a question as to which member of defendant's switching crew was negligent. In that case the controversy centered about the allowance of an amendment to the petition charging the negligent act to be that of a different employé than charged in the original declaration; the amendment was sustained against the objection that it introduced a new cause of action, and so was barred by the statute of limitations. As there said by Judge Severens:

"In both cases the negligence charged was that of the company. It was not an action by the plaintiff against either the conductor or the engineer."

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[2] Language of Judge Severens in Brown v. Erie R. R. Co., 176 Fed. 544, 545, 100 C. C. A. 132.

And, later, that:

"In an action against the principal, the negligence of the servant is not of itself a substantive factor, except as it is contemplated as the negligence of the principal."

The contentions that plaintiff is shown to have occupied a dangerous position on the car, that his testimony is unworthy of credence, and that two applications of the brakes fairly appear, presented questions of fact, whose existence did not forbid the exercise of discretion in favor of the amendment. The fact that in the instant case the right of action was not at the time the amendment was allowed barred by the statute of limitations, and thus if the instant suit had been dismissed a new suit could have been maintained upon the declaration as amended, seems to us not without force as affecting the exercise of discretion by the trial judge.

[10, 11] There was testimony that plaintiff's proper and safe position on top of the car was about the middle of the running board, facing in the direction the train was moving, and that he was not in such position at the time of the accident. Defendants offered two requests on this subject, Nos. 6 and 7, which are printed in the margin,[8] and error is assigned upon their refusal. It will be noted that in neither request is the question whether plaintiff's position was in fact negligent left to the jury. The sixth, in substance, is to the effect that if plaintiff's position on the car contributed to his injury he must be found to be negligent; and the gist of the seventh requested instruction is that plaintiff knew his proper position was in the middle of the car, facing east, and there was no evidence of any occasion for him to take any other position, and that as it conclusively appears that he could have properly performed his work in the position stated, then if by standing nearer the end and by facing otherwise than in the direction the car was going his injury was contributed to, he was negligent. The jury was thus instructed:

"Was this plaintiff guilty of negligence? The defendants claim that he was. The defendants claim that he was negligent in the manner of standing upon the car, in the place upon the top of the car where he was standing. Defendants claim that he was standing too near the rear end of the car for safety. Defendants also claim that he was not standing in the proper position upon the car for safety at that time, and that his own carelessness in that regard contributed to or caused his injury. That is for you to say, taking into consideration all the circumstances and conditions surrounding

[8] "(6) If the position of the plaintiff upon the freight car at the time of the accident contributed to his injury, then it is your duty to find that his own want of care did contribute to his injury and he would be chargeable with contributory negligence."

"(7) It is conceded by the plaintiff that he knew the proper position for him upon the freight car was in the middle of it, facing east. There is no evidence of any occasion for him to take any other position. It conclusively appears he could properly have performed his work in that position, and if by standing nearer the rear end of this car than he would be if standing in the middle of it or by not facing east in the direction the car was going he, by reason of either or both of these facts, contributed to his own injury, then he is chargeable with contributory negligence within the meaning of the law and it will be your duty to so find."

this plaintiff at the time of his injury, and taking into consideration all of the evidence in the case."

The court thus clearly submitted to the jury the questions whether plaintiff was negligent either in the manner in which he stood on the top of the car and in the location, as being too near the end. No exception was taken in any respect to the charge as given.

In view of this charge, no error was committed in refusing the requested instructions unless the undisputed evidence as to plaintiff's position and attitude was such that the jury was permitted to find a position concededly negligent in fact to be not negligent in law; for, except in that contingency, the giving of the instructions in question would have amounted to a charge that plaintiff was guilty of contributory negligence in standing in the location and in the position he claims to have occupied. Plaintiff testified:

"I should think the proper place for a brakeman when he is obliged to ride on top of a freight car is near the middle of the car, to avoid the possibility of any sudden jolt and throwing him from the end of the car. I was within five or six feet or three or four feet from the middle."

He also testified that just before the fall he was—

"standing lengthwise of the car, my left hand towards the engineer—my left side. I did not turn around just before I fell. I did not turn around facing more to the engineer so the head brakeman could see my lantern. I don't recall turning around that way. I didn't want to get so far from the end of the car but what I could see when the caboose got far enough out so as to swing him down. The brakeman gets in the middle of a freight car when riding it, so he will stand a show to catch his balance if they misuse him with the air. The reason for that is, if he falls, he won't get over the end of the car."

While plaintiff testified that he did not have much control of his balance "in the way that train stopped," he expressly stated, "I was in a position to have control of my balance." And while the conductor testified that the proper place for plaintiff would have been in the middle of the car, and facing the way the train was going, because in case of a sudden stop he is thereby "apt to fall on the top of the car and catch himself," he qualified that by saying that there would be no danger in his standing on the running board within four or five feet from the end of the car (in which position the conductor thought plaintiff was standing the last time he saw him) "if the engineer handles his train in an ordinary and customary manner"; adding that:

"When an emergency stop is made a train running at the speed this train was, and stopped as I observed the manner of stopping this train, I do not believe if I stood in the middle of the car I would stay on."

The jury was thus at liberty to find that plaintiff was within three or four feet of the center of the car, that he was not facing the engineer, but was standing with one foot in each direction. We are not prepared to say that such position was negligent as matter of law, under undisputed testimony. We find nothing in the charge warranting the interpretation that the jury was permitted under it to find plaintiff free from negligence if he was actually standing four or five feet from the end of the car. But no request for instruction upon that specific question was presented, and in the absence of such request we think there was no reversible error in failing to instruct upon it.

[12] Error is also assigned upon the refusal to give defendants' eighth request, which we print in the margin.[4] It will be seen that the pith of this requested instruction is that if after the service application of the brakes, which slowed up the train and permitted the way car to run beyond the rest of the train, the plaintiff gave and continued the stop signal while the train was moving a stated distance, it was not negligent for the engineer to apply the remaining air suddenly. There was testimony that the air remaining after its partial exhaustion by making a service application was not enough to make a strictly emergency application. But if we assume that plaintiff's testimony did not deny that both the service and emergency applications were made, in the face of testimony later referred to, yet the record is not such as to conclusively establish that the making of a stop so sudden and violent as to throw plaintiff from the car was a necessary and prudent application, in view of the testimony on plaintiff's part; for the conductor testified that "there was no emergency of any kind requiring the stopping of the train," meaning presumably the emergency stop, also that he should "call the stop that was made at that time an emergency stop"; and it will be seen that the requested charge, if given, if not amounting to an instruction to that effect, would at least be improper as overlooking the feature referred to. We think it was not error to refuse this request.

We have discussed at length only what seem to us the more important questions arising out of the proceedings on the trial. We have, however, carefully considered all the remaining assignments, and are of opinion that there was at least no prejudicial error in respect to the matters at which the several assignments are aimed.

[13] We think the criticized limitation of the purpose for which Exhibit V was admitted was at least nonprejudicial, in view of the later admission, without limitation, of Exhibit W, which was more forceful evidence than Exhibit V. We also think that prejudice from the criticized remark of counsel as to Exhibit W is too improbable to afford basis for reversal; it not appearing in what connection the remark was made, or that it was open to suggestion that defendants had anything to do with plaintiff's application to the relief association.

[14] We also think that the nonresponsive answer of the conductor could not well have been prejudicial, as it was merely cumulative of

[4] "(8) If the plaintiff, after giving the 'kick' signal, so called, and while the train was being moved backward in response to that signal, and just before the way car separated from the freight car on which plaintiff was riding, plaintiff gave the stop signal and in response to that signal, or for any other reason, there was a service application of the air brakes which retarded the speed of the train and allowed the way car to run away from the rest of the train, and while the brakes were in that condition the plaintiff gave a stop signal and continued to give it while the train moved one and a half car lengths, it would not be negligence under the undisputed testimony in the case, for the engineer to supply the remaining air suddenly; and if you find that this is what was done by the plaintiff and the engineer, I instruct you that this was not negligence on the part of the engineer and your duty is to render a verdict of no cause of action."

testimony to the same general effect, from the same witness, received without objection.

The judgment of the District Court is accordingly affirmed, with costs.

LINN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916. Rehearing Denied May 25, 1916.)

No. 2081.

1. POST OFFICE ⚷35—OFFENSES—ESSENTIALS.

To constitute the offense denounced by Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), declaring that whoever shall use the mails in connection with any scheme to defraud shall be guilty of an offense, it is not essential that the scheme meet with success, or result in gain to the perpetrator or loss to another.

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

2. INDICTMENT AND INFORMATION ⚷71—SUFFICIENCY OF INFORMATION.

A count of an indictment, which advised defendant with reasonable certainty of the nature of the accusation he had to meet, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⚷71.]

3. INDICTMENT AND INFORMATION ⚷99—COUNTS—SUFFICIENCY.

In a prosecution under Criminal Code, § 215, for using the mails in connection with a scheme to defraud, subsequent counts in an indictment may refer to a previous count for the scheme.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. ⚷99.]

4. CRIMINAL LAW ⚷371(1)—EVIDENCE—OTHER OFFENSES—USING MAILS TO DEFRAUD.

In a prosecution under Criminal Code, § 215, for using the mails in connection with a scheme to defraud by selling worthless mining stock, evidence of the mailing of letters other than those contained in the indictment in connection with the scheme is admissible to establish accused's intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⚷371(1).]

5. CRIMINAL LAW ⚷394—EVIDENCE—UNLAWFUL SEIZURES—WHAT CONSTITUTES.

In a prosecution for using the mails in connection with a scheme to defraud, where accused consented that a witness might have certain letters, he cannot complain of the admission of such letters on the ground that they were seized in violation of the constitutional inhibitions against unreasonable searches and seizures.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. ⚷394.]

6. POST OFFICE ⚷50—OFFENSES—JURY QUESTION.

In a prosecution for using the mails in connection with a scheme to defraud, the question whether accused mailed certain letters in connection with his project to dispose of worthless mining stock *held* for the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⚷50.]

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7. POST OFFICE ⚷49—OFFENSES—EVIDENCE—ADMISSIBILITY.

Accused secured a contract for the purchase of a mine, organized a corporation, and sold stock, though he knew of the existence of a mortgage, its foreclosure, and that his vendor could not give possession. *Held* that, in a prosecution for using the mails in disposing of the worthless stock, evidence of a transcript of the record of the foreclosure of the mortgage on the mine was not error.

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

8. POST OFFICE ⚷49—OFFENSES—EVIDENCE—ADMISSIBILITY.

In a prosecution under Criminal Code, § 215, for using the mails in connection with a scheme to defraud by disposing of worthless mining stock, evidence *held* to warrant conviction.

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

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Robert Linn was convicted of violating Criminal Code, § 215, by using the mails in connection with a scheme to defraud, and he brings error. Affirmed.

The indictment under which plaintiff in error was convicted has three counts.

The first charges him with devising a scheme or artifice to defraud Bailey, Reynolds, and Brockius, and a large class of other persons desirous of purchasing shares of stock in gold mines; that Linn was president and fiscal agent of the New Comstock Gold Mining Company, an Arizona corporation, with $10,000,000 capital stock, and that he exercised control and direction of the sale of the corporation's stock and of the money derived therefrom; that the scheme and artifice to defraud was to enter into correspondence through the post office establishment with the various persons to be defrauded, to induce them to buy shares of stock in said corporation at prices ranging from 10 to 25 cents per share, and to defraud them out of whatever purchase price they so paid for such shares.

It is charged that in order to induce such persons to purchase such shares of stock, Linn was falsely to represent to such persons so intended to be defrauded that said corporation owned certain mining property in the state of Nevada, and that the title to such property was perfect; that a man had offered said corporation $5,000,000 for said property; that Linn thought the stock which he was offering at various prices ranging from 15 cents to 20 cents per share would be worth $5 per share within two years; that the assets of the corporation consisted of building, mining tools and equipment, and electrical machinery, and that only a little of the stock was being offered at such low prices in order to make the necessary improvements in the mine; that the company was equipping its mines with electrical machinery, and that in the mines there was approximately $25,000,000 of gold ore; whereas the indictment charges that each and all of such representations were then untrue, false, and fraudulent, and were known so to be by Linn, and it is charged that in attempting to execute such scheme and artifice to defraud, so devised or intended to be devised, Linn placed in the post office at Chicago, for sending through the mail, a letter, dated March 4, 1910, addressed to Bailey, which letter the count sets forth.

The second count charges that, for the purpose of executing the same scheme and artifice to defraud as is set forth in the first count, Linn mailed at Chicago a letter to Reynolds, as in the second count set forth. And the third count charges that pursuant to the same scheme and artifice to defraud, and to execute same, Linn deposited in the mail at Chicago a letter, set forth in said third count, to Brockius.

In the second and third counts the reference to the scheme or artifice to defraud, as set forth in the first count, is in the following language: "So having devised the said scheme and artifice to defraud described and set forth in the first count of this indictment, as in that count described and set forth, for the purpose of executing the same, and for the purpose of defrauding by and through that scheme and artifice," etc. It is not charged in the indictment that in and by the scheme any one of the persons referred to sustained any loss, or that Linn realized any profit.

The indictment was found under section 215 of the Criminal Code, which is directed against use of the mails to promote frauds. Demurrer interposed to the indictment was overruled. At the conclusion of the government's case, and again after all the evidence, peremptory motions were made on behalf of Linn to instruct the jury to find him not guilty. These were denied. The jury found him guilty, motion for new trial and in arrest of judgment were overruled, and judgment given on verdict, sentencing Linn to six months' imprisonment in the House of Correction and to pay a fine of $250. Further facts are stated in the opinion.

Fred B. Silsbee, of Chicago, Ill., for plaintiff in error.

H. R. Harris, Jr., of Chicago, Ill., for the United States.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] On behalf of plaintiff in error, Linn, it is contended that his demurrer to the indictment should have been sustained as to the first count because it is not therein alleged that any of the stock was in fact sold, nor that by and through the fraud and artifice charged any one actually paid anything to Linn, nor that any one was in fact defrauded, nor that Linn thereby realized any profit.

In order to constitute the offense defined by section 215 it is not essential that the alleged fraudulent scheme or artifice met with success, or that gain or advantage accrued to the perpetrator, or loss to another. The offense is committed if, in the execution or furtherance of any such scheme or artifice to defraud, the post office establishment of the United States is employed as defined in said section 215. Grey v. United States, 172 Fed. 101, 96 C. C. A. 415; Stockton v. United States, 205 Fed. 462, 123 C. C. A. 530, 46 L. R. A. (N. S.) 936; United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548; Weeber v. United States (C. C.) 62 Fed. 740.

[2] Without commenting on the contention that the count fails to specify various other essentials of a valid indictment under section 215, we will say that the count advised the defendant with reasonable certainty of the nature of the accusation he had to meet, and this being sufficient, the count is good.

[3] It was insisted, particularly on oral argument, that as to the second and third counts the demurrer should have been sustained because the alleged scheme to defraud is not set forth in these counts. It is well settled that it is not necessary in each count of an indictment to restate the scheme or artifice to defraud, which has been duly set forth in another count, but that apt reference in the counts (such as is here found in counts 2 and 3) to the scheme as it is so set forth in another count, is sufficient and proper. Foster v. United States, 178

Fed. 165, 101 C. C. A. 485; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725.

The case of United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, which is relied on as holding contrary, is not in point. There, in an indictment for using the mails to defraud, the count merely stated that the defendant, having devised a scheme to defraud, did in the execution of the scheme receive through the Post Office a certain letter which is as set forth in the indictment. There was no further statement of the fraudulent scheme, and no reference to any other count of the indictment which did set it forth, if indeed there was any such count. The count was very properly held bad for failure to state what was the fraudulent scheme.

We find no error in overruling the demurrer to the indictment.

[4] On the trial a number of letters purporting to have been written by Linn, other than the letters set forth in the indictment, were offered in evidence on behalf of the government, and, against objection, were admitted. It is claimed that because these letters were not set forth or referred to in the indictment they were not competent evidence, and that the admission of them was error. That such letters are admissible in evidence as bearing upon the intent or state of mind of the defendant with reference to the alleged fraudulent scheme is well established by the decisions. Packer v. United States, 106 Fed. 906, 46 C. C. A. 35; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; Rumble v. United States, 143 Fed. 772, 75 C. C. A. 30; Walsh v. United States, 174 Fed. 615, 98 C. C. A. 461.

Without here setting forth or analyzing the letters so admitted, it seems clear to us that upon the question of Linn's intent and of his state of mind with reference to the alleged fraudulent scheme, they had a decided bearing, and were competent as evidence thereon.

[5] It is also urged against the admissibility of some of these letters that they were taken from plaintiff in error by a federal post office inspector without Linn's consent, and in violation of his right of protection against unlawful search and seizure. It appears from the uncontradicted testimony of witness Clarahan that he showed these letters to Linn and asked him if he (Clarahan) might have them, and that Linn said he might. Under these circumstances no question of improper search and seizure can be said to arise.

[6] It is also contended that the record does not show the indictment letters to have been deposited in the post office or sent through the mail. Clarahan testified that Linn told him that he had mailed these letters in Chicago. Linn did not deny saying this to Clarahan, but in his testimony said that he told Clarahan that he supposed he had sent them through the mail, although he testified that if he so stated he must have been mistaken, since these particular letters were delivered by him in person to those to whom they appear to be addressed. Witness Brockius testified to receiving one of these letters by mail. Out of the many letters as to which Linn testified, most of them having been admittedly mailed, it might seem strange that he would remember these indictment letters, not differing materially from

many others, to have been personally delivered. The jury was the proper judge of the weight of the evidence, and was warranted in concluding that the letters were in fact mailed.

[7] The error alleged in the admission in evidence of the transcript of record of the foreclosure proceedings in the Nevada court, of the mining property in question, is without merit. The fact that neither Linn nor his company were parties to these proceedings is not material. Before making the alleged false representations as to title, control, and operation of the property, Linn, as will be seen, had definite knowledge of the adverse possession of the property under court proceedings. The transcript merely identified the proceedings out of which arose the adverse possession which was well known to Linn.

[8] This brings us to what seems to be the main contention on behalf of Linn, and the one most earnestly pressed, viz., that the evidence does not warrant the conclusion of Linn's guilt, and that the District Court erred in overruling the peremptory motions made on his behalf. In considering this proposition reference will be made to the more salient facts bearing thereon.

The Equitable Mining Company was the owner of certain gold mining property in Nevada, upon which was located a mine, in the development whereof many years before approximately $300,000 had been expended. The mine had for many years been abandoned, or rather it remained unworked, and its deep shaft and workings had become almost filled with water.

Linn began negotiations for securing the property, and under date of August 4, 1909, entered into an agreement with the Equitable Company, which in substance provided that upon payment to the Equitable Company of $150,000 it would convey to Linn the property, and it would, on acceptance of the property by Linn, execute a deed of the property in escrow, to be delivered to Linn or his assignee when the said payment was fully made; that as part of the purchase price Linn agreed to pay or cause to be paid, within 30 days after his acceptance of the property, $6,000 of the Equitable Company's floating indebtedness then due, and to pay $6,000 of the Equitable Company's bonded indebtedness due April 10, 1910, and the balance of $138,000 of the purchase price to be paid by and out of 15 per cent. of the gross value of ores mined by Linn from the premises, such 15 per cent. to be paid each month from September 10, 1910, and the mine to be operated so actively that after six months from date of instrument the 15 per cent. shall average not less than $1,350 per month; that the Equitable Company shall within 15 days from date deliver abstract showing good title to property; that within 20 days from date Linn shall visit and inspect the property and satisfy himself that the property, so far as can be ascertained without unwatering the mine, is substantially as stated in a report on the property of April 25, 1905, by D. H. Jackson, and that immediately after examination and approval of the property and title Linn shall be placed in full possession of the property to mine and remove and sell ore therefrom, and he shall forthwith and without delay begin the work of operating the mine with as large a force of men as can be used to advantage and to continue working the same in workmanlike manner, and that such work shall be begun by September 10, 1909. There are clauses regarding accounts to be kept, and statements to be made, and that until full payment the title shall remain in the Equitable Company, and the usual clause of forfeiture by Linn in case of his nonfulfillment of the contract, and a clause against his assigning without the consent of the company.

Under date of August 5, 1909, there appears an assignment by Linn to the New Comstock Gold Mining Company, consented to by the Equitable Company. The New Comstock Gold Mining Company was organized with a capital stock of $10,000,000, substantially all of which stock was taken by Linn as president, in consideration for the assignment of his said contract with the Equitable, for which Linn had paid nothing. Linn turned back into the company's treasury about half of the stock as treasury stock, retaining the other half.

Linn was living in Chicago, and in the latter part of August, 1909, he sent to Nevada, to inspect the property, one Felt, who had experience in gold mining, and whom he had interested in the proposition. On reaching the property he found that one Leonard was in possession under certain court proceedings in Nevada for foreclosure of a mortgage on the property, and would not permit Felt to go on to the property. Felt at once communicated with Linn, advising him of this fact. Linn thus knew early that, until the adverse claimant in possession would be removed, the Equitable Company could not comply with its undertaking to deliver him the immediate possession of the property, and he could not comply with his agreement in respect to working the mine. Felt remained there for a number of months, but never got possession of the property, and Linn testified that he himself never saw the property, and that neither he nor the New Comstock Company ever obtained physical possession or control of it, or were to his knowledge ever in situation where they could control or work the mine, or make any improvements upon it.

To meet this situation, under date of January 25, 1910, a supplemental agreement was made between the two companies wherein it was recited that the Equitable Company has been unable to admit the representative of the Comstock Company into actual occupancy and possession of the property described, "for the purpose of making examination as the contract provides preliminary to its purchase," notwithstanding the Comstock Company "had a representative on the ground for the purpose of such examination since the 8th day of September, 1909," who "has been excluded and prevented from such examination by reason of the property being in adverse custody under appointment of the court," and agreeing that the time fixed by the contract within which the Comstock Company was to enter upon and make examination of the property be extended until a reasonable number of days after the Equitable Company "shall have procured the termination or removal of the adverse custody of the property under the order of court and have admitted the representative of the party of the second part (the Comstock Company) into full occupancy for the purpose of examination and acceptance," and the time of performance by the second party of the other terms of the contract was correspondingly extended. Linn signed the supplemental agreement as president of the Comstock Company.

It thus appears that the original contract, bond, or option never ripened into even a definite contract of purchase, because of the fact that Linn and his assignee had not been given opportunity for making examination of the property, as the result of which they might accept or reject it, and under the said extension the time when the Equitable Company might be required to deliver over possession was thus indefinitely postponed.

But, notwithstanding Linn and his company thus did not have even a definite option, but only one that was predicated upon the ability of the Equitable Company to give possession at some indefinite future time, there were sent out by Linn letters and circulars from which it is plain he intended the recipients to conclude that his company had absolute title, and that, coupled with such title, there was control of the property, and possession thereof, and that improvements thereon were going forward, and that a small amount of the company's stock would be sold for the purpose only of prosecuting the improvements, providing appliances, and increasing the output of the mine. The record abounds in such representations. In the indictment letter to Bailey, he says:

"$20,000 will enable us to ship 100 tons of ore per day, which will yield a profit to the company of $700 a day. All this can be done probably within 90 days. Within six months one-half of the net proceeds from the shipment of this ore can be returned to the investors. By the use of $20,000 the stock will be made worth par and when it yields 500 tons per day the stock will be worth $5 per share. It is absolutely safe and absolutely certain of results. It is not a mining proposition, but simply to provide facilities for handling the ore now in sight."

And in that to Reynolds, of May 23, 1910, he explains that for the money to be raised by these stock shares the purchaser of stock will have a first lien on half of the net proceeds of the product of the mine. He describes the assets of the company and states:

"We have more than a million and a half tons of ore." "We require an electrical drill, electric hoist, and electric apparatus to handle the ore, together with an air-compressing system by which we can readily drill and produce ore at a small cost."

The printed prospectus circulated to induce stock sales is headed, "Statement of Property Owned and Controlled by the New Comstock Mining Company." It begins, "This company owns the Flowery and North Bananza mining claims," etc., and states that the company is engaged in repairing the shaft, ready to unwater the mine; that most of the amount necessary has been provided for, but that the company did not think it wise to be short of funds, and so has decided to offer a limited amount of stock at 15 cents a share.

It is true the prospectus also states that there is a balance yet due of $150,000, and that payment must be made in about seven years, and makes mention of the deed in escrow which is to be delivered when payment is made. But this was only part of the truth, well calculated to divert intending stock purchasers from knowing of the further encumbrance of an adverse possession, and the yet further condition of the practical nullification of the option contract through the inability of the Equitable Company to permit Linn to make even a preliminary examination of the property, the outcome of which situation, and its ultimate effect upon the transaction, being well expressed by Linn himself, who testified, "We never got possession to work it; we never got physical control." Indeed, as the evidence shows, the foreclosure proceedings in due time ripened into a sale and sheriff's deed, under which the title of the Equitable Company was extinguished.

Employing language which would be consistent only with present possession and control of the property, he wrote Mulligan:

"We are equipping this property with an electrical outfit to pump water, hoist ore, and do all things necessary by electrical power."

And to Dennis in December, 1909:

"A letter just received from Mr. Felt states that $4,500 will enable us to begin shipment of ore."

How could this be true unless they could control and operate the mine? Again, he wrote Mrs. Dennis in December, 1909:

"We are now within less than $5,000 of being able to ship 100 tons of ore per day."

To Gieselman he wrote:

"We have an electric pump on the ground, paid for, but there are other things in the way of electrical drills, electric hoist, tools, supplies, timber, lumber, iron girders, track and labor to pay for before we can get any returns from the shipment of ores."

In a letter to Ransom, as late as June 16, 1910, he stated:

"We have a very well developed mine; we are equipping our mines with electrical machinery," to "enable us to make necessary improvements in the way of drills, hoisting apparatus, electric pump," etc.

Writing to Mr. Hewitt, December 2, 1909, he said:

"We have an electric pump connected with the mine. I have been working for control of this mine for over two years. I have it now in control and with a paltry few thousand dollars will be able to ship 100 tons per day that will net the company at a low value $700 per day. The title to this property is perfect. $15,000 will place the property in a producing condition. Had I $15,000 in the bank to-day, I could assure 100 tons daily shipment within 12 weeks."

It was nowhere intimated that any of the money from stock sales was to be used for other than equipment and development purposes, nor that any of it would be applied to obtain possession and control of the mine. Indeed, in a letter of December 11, 1909, he said definitely that the stock was being offered for sale—

"to bring a developed mine to a shipping condition," and "we are selling stock to equip the mine with an electric hoist, drills, pumps, retimbering the shaft, and to procure all the necessary facilities for handling and shipment of 100 tons per day and to increase that product to 500 tons per day."

And in another letter, April 18, 1910, to Brockius, after he stated that "it requires only a few dollars to make it produce a hundred tons per day," added in a postscript:

"The $10,000 you propose investing will be used solely for the purpose of producing ore and supplying facilities to handle and market the same. Not one dollar will be used in any other channel."

Indeed, all the correspondence, far from suggesting the fact that he had not theretofore even had opportunity for examining the mine to determine whether he would accept the option, was calculated to make prospective stock purchasers believe that his company had purchased and was in possession and control of it, and actually doing work on it.

Linn's state of mind with respect to his intended effect of such representations is well shown in his explanation of what may be termed the Jones letter. Under date of November 12, 1909, after Linn had learned of the adverse possession under the court proceedings, he wrote Felt, who was still in Nevada:

"You are likely to get a message instructing you to show the mine to J. J. Jones, and do the best you can not to let him know about any trouble, if possible."

In his testimony concerning this letter Linn said:

"Felt wrote me Mr. Kennedy would not give him possession of the property. Jones was at Eureka and was superintendent of a large mine there, and Mr. Smith of Chicago wanted him to go down to look at the property with a view of putting in a large sum of money. Mr. Smith, as I learned by inquiry, was a stockyards man and had made a large amount of money in the gold fields, and at one time owned a mine in Eureka, of which Mr. Jones was superintendent. I wanted to show Mr. Jones the best we could the mine under the conditions that might exist when he arrived there. * * * I made the statement *because if Mr. Jones had found out about any trouble it might have had a bad effect on Mr. Smith investing.*"

Is it reasonable to believe that Linn was any less considerate of Smith, to whom he intended through suppression of the facts to sell stock, than he was of Bailey, Reynolds, Brockius, and the others, named and unnamed, to whom he was likewise trying to sell stock?

With respect to the charge in the indictment as to the false representations of a $5,000,000 offer for the property, in a letter from Linn to Hewitt, December 2, 1909, he said:

"I saw a man a few days ago who offered us $5,000,000 for this property, and he said he remembered the time when 1,000 shares of stock in the old Comstock was sold in London, England, for $1,400,000."

In explanation of this, Linn at first testified a man by the name of Parker was going to give him $5,000,000 for the mine. A little later he testified:

"He said he studied the reports, and studied all that he could find out about it, and said, if it was unwatered and they could get into it, they would be willing to take that on an option of $5,000,000. In mining, an option of purchase is considered a purchase. He said, if they could get the mine, if there was no water on it, he would take an option on it for $5,000,000 for the property, and have a certain time to pay for it. We were not in position to do that, because the mine was under water. The proposition was that we had first to unwater the mine before we could get the $5,000,000. He would not pay without examining it. Parker professed to represent a syndicate. I said it was not for sale, but they kept saying they would pay $5,000,000 as quick as we would unwater the mine and let them in and they could examine it and find the ore present. If the water was out, and they could go down and found $1,500,000 blocked out and $5,000,000 in sight, they would pay $5,000,000."

Linn thus gradually minimized the proposition from an unqualified offer of $5,000,000, as stated in the Hewitt letter, to an offer to take an option at that price, conditioned on Linn's removing the water, and an examination showing $1,500,000 of ore blocked out and $5,000,000 more in sight. Linn's testimony does not justify his representation that an unqualified offer of $5,000,000 for the property had been made.

The fact that Linn had the abstract of title of the property examined and had legal advice thereon does not alter the situation. The evidence shows that his lawyer advised him that title was good in the Equitable Company, subject to a mortgage or trust deed to secure a bond issue. It does not appear that any lawyer advised him he might with impunity undertake to sell stock to intending purchasers through knowingly false representations of present title, control, possession, and operation of the property, and of a fabulous offer for it, and employ the post office establishment to help carry out such a scheme. And it is plain that such advice, if given, could afford him no protection.

The insistence that Linn honestly believed this property had great possibilities, and that, if he could get hold of it and work it, large profits would speedily come to himself and to those whom he might induce to purchase shares of the stock, may be conceded. But when, in order to raise money, he devises a scheme to represent to intending stock purchasers that his company had present title, possession, control, and operation of property, and a vast offer for it, when all this, to his certain knowledge, was false, then these constitute the scheme or artifice to defraud these intending purchasers into making purchases they would not otherwise make, and is to be considered wholly apart from the faith which Linn might have, that if, in this manner, he might raise sufficient funds, he would then get hold of the property, and make vast profits for these same intended investors.

He has been described as an enthusiast or optimist, with unbounded faith in the ultimate outcome of his prospect. While men may not be convicted for acts done in good faith, nevertheless schemes and devices to induce the making of stock investments which plainly would not otherwise be made, by the knowingly false representation of material facts and conditions, show a culpability which enthusiasm cannot justify, nor optimism excuse.

Finding as we do that there is evidence to sustain the verdict, there was no error in overruling the peremptory motions to instruct the jury.

The judgment of the District Court is affirmed.

PACIFIC POWER CO. v. SHEAFF. *

(Circuit Court of Appeals, Ninth Circuit. August 14, 1916.)

No. 2603.

1. MASTER AND SERVANT ⟹234(3)—CONTRIBUTORY NEGLIGENCE—HIGH-TENSION WIRES—PRESUMPTION OF KNOWLEDGE OF DANGER.

The law imputes no such knowledge of electricity to an electrician's helper that he is barred by contributory negligence from recovering for injury from high-tension electricity jumping to him from its conductor which he had nearly approached but had not touched.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 709; Dec. Dig. ⟹234(3).]

2. MASTER AND SERVANT ⟹119—MACHINERY AND PLACE TO WORK—ELECTRICAL APPARATUS.

Because of the tremendous potency and danger of electricity, an employer is held to extraordinary precaution for the safety of employés in the construction of machinery and appliances for its transmission.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. ⟹119.]

3. MASTER AND SERVANT ⟹280, 281(5)—ACTION BY SERVANT INJURED BY ELECTRICITY—EVIDENCE.

In action by employé for injuries from electric shock from defectively constructed lightning arrester near which he was put to work without warning, evidence that he had some electrical experience, but that, although he knew of danger of direct contact with a live wire, he did not know of danger that high-tension current would jump to a person approaching near it, that the lightning arrester was charged with a high current of electricity and its arms extended to within about 5 feet 9 inches of the ground, and that this height was improper and unsafe construction, supported verdict for plaintiff, as against claim of his assumption of risk and contributory negligence; a live wire not disclosing, by its appearance, its dangerous nature.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986, 989; Dec. Dig. ⟹280, 281(5).]

In Error to the District Court of the United States for the District of Nevada; E. S. Farrington, Judge.

Action by P. R. Sheaff against the Pacific Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Metson, Drew & MacKenzie, William M. Abbott, and William M. Cannon, all of San Francisco, Cal., and George A. Bartlett, of Reno, Nev., for plaintiff in error.

B. F. Curler, of Elko, Nev., for defendant in error.

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

ROSS, Circuit Judge. At the times in question the plaintiff in error, defendant below, was engaged in generating, selling, and distributing electricity in the state of Nevada and elsewhere, for power, light, and heat purposes, and the defendant in error, plaintiff below, was in its employ. While so employed the plaintiff received very serious injuries, for which he sued the company, recovering in the trial

*Rehearing denied October 16, 1916.

court a verdict and judgment. The case is brought here by the defendant, the contentions on its part being that the complaint does not state a cause of action, that the evidence does not sustain its material allegations, and that consequently the court below erred in denying its motions to direct a verdict in its behalf, and, further, that the plaintiff assumed the risks resulting in his injuries, and was also guilty of contributory negligence. Error is also assigned to the refusal of the court to give to the jury certain requested instructions.

After alleging the jurisdictional facts and stating the business in which the defendant company was engaged, the complaint alleges, in substance, that on a certain named day and for a period immediately prior and subsequent thereto, at its Nevada Hills substation near Fairview in Churchill county, Nev., the defendant negligently and recklessly, and without regard to the personal safety of its employés, including the plaintiff, constructed and maintained a certain electrical structure and equipment called a lightning arrester, to which were attached high potential primary wires, carrying electrical current in highly dangerous amount, to wit, about 60,000 volts on each of said primary wires, all of which was built and maintained in a defective manner and condition "in that high potential primary wires, and the wires, runs, arms and appliances, carrying and transmitting electrical currents and energy of high and dangerous amount and voltage, were not erected, built, and maintained at a safe and sufficient height and distance from the ground, but were built and maintained too near the ground and in too close proximity to the Nevada Hills station house or transformer station"; that on the day named the plaintiff was in the employ of the defendant as a laborer and electrician's helper, and was unfamiliar with the work of a journeyman lineman and electrician, and was unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician upon or near wires or apparatus carrying electrical current of high voltage and potential energy; that on the day named the plaintiff was ordered to work in and around and near said lightning arrester and said Nevada Hills transformer house and substation, which place was a dangerous one in which to work by reason of the defects alleged, and by reason of the fact that the live arms of said lightning arrester were so near the ground and in so close proximity to said substation building, which dangers and dangerous condition were wholly unknown to the plaintiff; that on the day named the plaintiff, while working near and around said lightning arrester, as ordered by the defendant, "came either in such close proximity to or in contact with one of the said arms of said lightning arrester, whereupon a large amount of electrical current, to wit, 60,000 volts, passed through the body of plaintiff to the ground, thereby inflicting upon plaintiff a violent electrical shock and severe and dangerous injuries," which injuries are specifically described in the complaint, and are alleged to have resulted in grievous pain and anguish and expense to him.

A demurrer filed by the defendant to the complaint being overruled, an answer was filed which, among other things, put in issue the allegations of the complaint in respect to the defective construction and maintenance of the lightning arrester, and alleging that it was constructed and maintained in the proper and usual manner, and with due regard to the safety of the employés of the defendant, including the plaintiff, and was free from any defects as a whole or in any of its parts. The answer denied that the plaintiff was in the employ of the defendant as a laborer, but admitted that he was employed as an electrician's helper; it denied that the plaintiff was unfamiliar with the work of a journeyman lineman or electrician, and denied that he was ignorant of the dangers incident to the work of such an employé upon or near wires or apparatus carrying electrical current of high voltage or potential energy; it denied that the place where the plaintiff was set to work by the defendant was a dangerous place "excepting the ordinary danger surrounding all electrical apparatus or appliances," and denied that the plaintiff was ignorant of the dangers alleged in the complaint.

As affirmative defenses the defendant set up that the injuries received by the plaintiff were caused by his own carelessness and negligence in failing to exercise his natural faculties in a reasonable way to avoid injury, and that:

"All of the conditions surrounding the plaintiff at the time of the accident alleged in plaintiff's complaint, and all of the dangers and risks incident thereto, were open and explained to, and understood by, the plaintiff, and plaintiff had full knowledge thereof, and such dangers and risks were assumed by him as a part of his employment."

[1] We see no merit in the contention that the complaint does not state facts sufficient to constitute a cause of action. The action is based upon the ground that the place where the plaintiff was put to work was not a safe place, for the alleged reason that the lightning arrester was defectively constructed and maintained by the defendant in the particulars set out in the complaint, and as constructed and maintained was dangerous, of which dangers the plaintiff did not know and was not warned, and that in the course of his employment, in passing the live arms of the arrester, an electric current therefrom of tremendous voltage inflicted upon him the injuries for which he sued. It is difficult to see what more was necessary to constitute a cause of action. To sustain the argument of the plaintiff in error against the sufficiency of the complaint would be, in effect, to hold that "an electrician's helper" is bound to know as a matter of law that a high-power current of electricity is liable to jump from its conductor and pass through one who approaches too close to the conductor. We think it very clear that the law imputes no such knowledge to the "helper" of an electrician.

[2] Contributory negligence and assumption of risks are affirmative defenses, and they were set up by the defendant in its answer, as has been seen. Even in cases where the machinery and appliances about which an employé is put to work are of the ordinary kind, the employer is bound to use all reasonable care and prudence for the safety of those in his service, by providing machinery reasonably safe and suitable, and for failure in that precaution and care the employer is responsible for any injury which may happen through such defect,

which was or ought to have been known to him, and was unknown to the employé. Washington, etc., R. R. Co. v. McDade, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235, and the numerous cases there cited. Manifestly far greater should be the precaution and care by the employer in the construction and maintenance of machinery and appliances for the transmission of a power of such tremendous potency and danger as electricity.

[3] It is also urged by the plaintiff in error that the evidence failed to prove the material allegations of the complaint, and therefore that the court should have granted the defendant's motion for a directed verdict in its behalf. It appears from the evidence that the plaintiff had been in the employ of the defendant company for several months prior to his injuries, digging holes and other such work part of the time, at the wage of $4 per day, part of the time as an electrician's helper at the same rate of pay, and part of the time as a lineman at $4.50 per day. The plaintiff in his testimony gave his trade as "steam stationary engineer," but he admitted that he had theretofore been employed in various occupations—at times running engines, operating steam boilers, electric dynamos and motors, blasting with dynamite, working in the construction of power lines and in the installation of transformers, etc. From his own testimony there can be no doubt that he knew better than to knowingly come in direct contact with a live wire or other conductor of electricity; but that fact by no means sustains the contention of the plaintiff in error that the court should have taken the case from the jury by directing a verdict in favor of the defendant.

The evidence shows that Fairview substation, where the accident happened, is on a hill near a mine to which the plaintiff in error furnished power, and that the latter at the same time had another substation some 16 or 17 miles distant, called Wonder station, where the plaintiff had worked under the company's electrician, Mr. Halpenny, who had charge of both stations. That in question consisted of a small building in which were three transformers and the switchboard, and on the outside of which was the lightning arrester, consisting of frame work so constructed that its three north arms, which were made of small pipe, were attached one to each of the three high-tensioned feed wires running into the transformer house, and consequently, when so attached, each of these three arms was charged with electricity whenever the feed wires were carrying a current. The lower end, or horn, as it is called in the record, of each live arm, came within about 5 feet 9 inches of the ground and 3½ feet from the transformer house. On the south side of the arrester were three dead arms or pipes, corresponding to the three live arms on the opposite side. The dead arms nowhere came in contact with the live arms or near them, except at the gap where they were about 3¼ inches apart; the purpose of the lightning arrester being to receive and carry into the ground any excess of electricity on the high-tension wires that might occur from any cause.

At the time in question this lightning arrester had not been completed; the dead arms not being connected in any way with the ground. Nevertheless, connection with the high-tension feed wires had been made, and in consequence the arrester, though incapable of performing its functions, was charged with the full voltage of electricity then on the high-tension wires, amounting to about 55,000 volts. It was to prepare for connecting the dead arms on the opposite side of the transformer building with the ground that the plaintiff was sent by Halpenny to the Fairview substation to dig a hole under each of the dead arms, into each of which holes he was to put a cement block that he took with him. To the blocks iron clamps were subsequently to be attached, and the dead arms then connected by wire with the ground, all of which work was, according to the evidence, to be done by Halpenny.

The testimony of the plaintiff tended to show, among other things, that he was ignorant of the dangers attending working around or in the vicinity of live wires, and did not know and was not told that there was any danger of an electric current jumping from the live arms of the arrester in question if approached too close, and in this respect his testimony finds some corroboration in the testimony of Mr. Halpenny, the company's electrician who sent him there. After testifying quite fully in regard to the work that the plaintiff did under him, both in respect to the building of the power lines and of the substations at Wonder and Fairview, including the placing of wires, he testified, among other things, as follows:

"When Mr. Sheaff was going toward a wire that was exposed I would say to him, 'Look out, Mr. Sheaff, that is hot,' or something like that. When he would be working in the neighborhood of any wire which he could not see, or when he appeared to forget the existence of, I would say, 'Look out, Bill, don't go too close,' or something of that nature. I had warned him on several occasions against different wires that were in the building. They were hot. He seemed to understand the situation that those wires were hot after the first warning. Before that, I would not say that he did not seem to know that the wires were hot. He seemed rather to forget that those wires were there, and that was the reason I warned him. During all the time Mr. Sheaff was working under me, I did all the directing and supervision. I told Mr. Sheaff what to do and what not to do. The day that I sent him to Fairview, I told him that day just what to do. I told him to dig those holes and set those blocks. He dug the holes, and that was part of what I told him to do. Even up to that time I had directed him and supervised all the work that he had done; and up to that time he had continually been under my immediate supervision. He had been away from me to do work by himself. He built the line himself. That was something like three-eighths of a mile from me, I believe. That was working absolutely on dead wires. I at that time considered him an electrician's helper. This was not the first time that Mr. Sheaff was sent out by me from where I was to work in the vicinity of live wires. He had been sent to each of the two stations, Fairview and Wonder. That is the first time I ever sent him 12 miles away, as far as that. Before that, I had never sent him any great distance to work around live wires. We never had anything to do with the wires when they were alive at that high voltage. We worked around the lower voltage wires—6,600 volts. I knew the dangers attending this apparatus at Fairview before I sent Mr. Sheaff there. I knew what would happen to him if he came in contact with one of those live arms. I instructed him before I sent him to keep away from those. I told him not to touch any of the connections, or make any changes. By 'touch the connections' I meant not to touch any of the parts of the arrester itself. That meant he was not to touch any of the live parts or connections, and the parts on the arrester, meaning by that the horns. By 'touching the connections' I meant not to touch any of the live parts.

"Mr. Gedney: Q. Why did you say, 'Don't touch any of those live parts,' or, 'Don't touch any of those other parts'? A. Well, I will explain it in this way: That at the time of sending a man to do a piece of work, after he has done similar pieces of work, and worked in the vicinity of wires, you naturally make an assumption that he knows by previous experience what he should do in the way of safeguarding himself.

"Witness (continuing): I assumed that he knew the danger there, and that was the reason I didn't instruct him. I knew what experience Mr. Sheaff had had under me dealing with live wires at the time I sent him over there. I knew how this machine could become dangerous. I know how high those arms were off the ground, and I knew if a man came in contact with them what the result would be. I didn't have him make those connections because I wanted to attend to that myself. It wasn't because Mr. Sheaff wasn't competent to do it in my estimation. The reason I did not instruct Mr. Sheaff to do it was because I wished to wait until I got over there, and make arrangements for a shutdown long enough to work on this. * * * I didn't know 24 hours before Mr. Sheaff went over there that he was going over there to make that connection, or do that work. It took him about half a day to make those blocks for that Fairview substation. That was some time before the day he went over there. We knew we were going some time. I think it is not a fact that Mr. Sheaff and I were going together over there that morning. The reason I remained was because I was waiting for some bushings and tape that come in that night. That was the night Mr. Sheaff left there in the morning. It was not my intention to go over there that morning, with Mr. Sheaff. The opportunity presented itself for him to go that night, or early in the morning, because of the coming over of an extra wagon, as I remember, a stage running—this was not the regular stage, as I recall it now; it was an extra trip the stage driver had made; and since the material arrived that night, the material that I was waiting to use myself, and the opportunity for sending these blocks over presented itself, I sent the blocks over, and sent Mr. Sheaff over to put them in, thinking that it would hasten matters that much. I first informed Mr. Sheaff that evening that he was going over to Fairview that morning. There had not been any talk about it that I remember before that time."

The plaintiff testified, among other things, that when he got to Fairview substation, he got the key to the building from a man at the mine, opened the door, and took out a pick and shovel with which to dig the holes, went around to the southerly side of the structure (on which side were the dead arms), loosened the wires of the wire fence that had been built to surround it, dug the three holes under the three dead arms of the arrester, and then started around to the north side of the building to get the cement blocks to put in the holes. When passing one of the live arms the high-power voltage of electricity left it and passed through his body, inflicting the terrible injuries upon him described in the complaint. There was evidence tending to show that he did not actually touch the live arm, but in the nature of things he must have passed sufficiently close to it to attract the current; and there was positive testimony that such a voltage would jump at least 1¾ inches from its conveyor. The evidence is that the plaintiff was a little over 6 feet 3 inches in height, and that the arms of the arrester at the Fairview substation extended down to within about 5 feet 9 inches of the ground. There is evidence in the record tending to show that such a construction of a lightning arrester is proper, but there is also evidence tending to show the contrary, and that it is highly dangerous, as is shown very clearly by the injury inflicted in this instance. For example, the witness Scrugham, sworn on behalf of the plaintiff, and who testified that he is an electrical engineer and professor of electrical engineering in the University of the State of Nevada, a graduate in that profession of the University of Michigan, and of many years' experience as technical expert for a number of named companies, testified, among other things:

"If the Pacific Power Company was carrying 55,000 volts of electricity, I would say it was a high-tension power line. Anything over 550 volts is considered a high-tension power line. We would call this, perhaps, an extra high-tension line. The usual and ordinary practice in high-tension construction with reference to the height that the live ends connected with that construction are from the ground should be well out of reach of a man working underneath it; that would be 10 feet approximately. The usual practice is to have it—a 60,000 volt line, approximately is about 4-foot clearance. If the amount of voltage between two of the high-tension wires of the Pacific Power line on July 18, 1911, was approximately 55,000 volts, if the system were a ground neutral system, as described by Mr. Halpenny, there would be approximately 32,000 or 33,000 volts. The voltage on a line is the pressure, the electricity corresponding to the pressure of a water pipe line or head of water. The amperes is the electrical current flowing in the line, corresponding to cubic feet of water per second, or gallons of water per second. Electricity would jump, say, from a point on the live arm of the arrester, No. 1, to a person, under normal conditions, on a line carrying 55,000 volts; if it is a grounded neutral, the same condition as prevailed on the Pacific Power Company line, it would jump about an inch and three-quarters under normal conditions. From this point (indicating on model) the amount of voltage between that and the ground would be from 32,000 to 33,000 volts. This inch and three-quarters is based on a voltage, not of 55,000, but of 33,000, volts between that point on the arrester and the ground. I am familiar with lightning arresters. I have measured this model. I am familiar with what is known as the horn-type arrester. Nearly all of the lightning arresters are based more or less on the horn-gap principle; at least a large part of them in use in the West. We use something similar in the Elka plant; something similar in use in the Truckee River plant, may not be the same in form, but some qualification of the horn gap; that is, on the high-tension side. I have seen almost exactly this arrester at Tonopah. The usual and customary height that the live arms of the arrester are put from the ground is at least 9 or 10 feet. They are put that height from the ground for the purpose of safety to human life.

"Mr. Curler: Q. Basing your answer upon your technical knowledge and experience, state whether or not a lightning arrester within 5 feet 9 inches of the ground is a safe construction. * * * A. I do not regard it as a safe construction."

The record contains much more testimony on this subject; and, while it is decidedly conflicting, it is hardly necessary to say that all such conflicts were for the determination of the jury. Enough has been stated to show that the jury was clearly justified in concluding that the arrester in question was constructed in a defective and dangerous manner, in that it reached to within about 5 feet 9 inches of the ground, and that the defendant was guilty of negligence in so constructing and maintaining it. We must therefore affirm the judgment unless we can properly hold that the further findings, necessarily involved in the verdict, that the plaintiff did not assume the risks to which the defendant's negligence subjected him, and was not guilty of such contributory negligence as precluded his recovery, were not justified by the evidence, or unless there was reversible error in the matter of the instructions of the court given or refused.

The testimony of the plaintiff and of the defendant's witness Halpenny is, we think, amply sufficient to sustain the conclusion of the jury that the plaintiff did not assume the risks to which he was subjected, for not only did the plaintiff testify that he did not know and never was told that a current of electricity would jump from its wire or other conductor to and pass through a man who approached it too closely, but the jury might well have concluded from Halpenny's testimony above quoted that the plaintiff had no such knowledge, and was by no means familiar with the dangers attending work around or about high-tension wires or pipes, extending so near the ground as to admit the current of electricity leaving them and passing to and through a human being who should touch or approach too close to the conveyor; for in that portion of Halpenny's testimony he expressly says:

"I knew the dangers attending this apparatus at Fairview before I sent Mr. Sheaff there. I knew what would happen to him if he came in contact with one of those live arms. I instructed him before I sent him to keep away from those. I told him not to touch any of the connections or make any changes. By 'touch the connections' I meant not to touch any of the parts of the arrester itself. That meant he was not to touch any of the live parts or connections, and the parts on the arrester, meaning by that the horns. By 'touching the connections' I meant not to touch any of the live parts.

"Mr. Gedney: Q. Why did you say, 'Don't touch any of those live parts,' or, 'Don't touch any of those other parts'? A. Well, I will explain it in this way: That at the time of sending a man to do a piece of work, after he has done similar pieces of work, and worked in the vicinity of wires, you naturally make an assumption that he knows by previous experience what he should do in the way of safeguarding himself. I assumed that he knew the danger there, and that was the reason I didn't instruct him. I knew what experience Mr. Sheaff had had under me dealing with live wires at the time I sent him over there. I knew how this machine could become dangerous. I know how high those arms were off the ground, and I knew if a man came in contact with them, what the result would be. I didn't have him make those connections because I wanted to attend to that myself. It wasn't because Mr. Sheaff wasn't competent to do it in my estimation. The reason I did not instruct Mr. Sheaff to do it was because I wished to wait until I got over there, and make arrangements for a shutdown long enough to work on this."

Not only does the foregoing testimony of Halpenny strongly tend, in our opinion, to corroborate the testimony of the plaintiff to the effect that he did not know the dangers to which he was subjected in carrying out his instructions, but nowhere in Halpenny's testimony does he state that he ever told the plaintiff that it was dangerous to pass close to the live arms of the arrester even if he did not touch them. Moreover, the witness Campbell, who appears to have had much experience with electricity and helped build the arrester in question, testified that he called Halpenny's attention to the great danger attending the extension of the arms of the arrester so close to the ground, and there is also testimony tending to show an admission of Halpenny to the effect that after sending the plaintiff to do the work in question, he thought he ought not to have done so. While it is undoubtedly well settled that an employé assumes the ordinary risks incident to his employment and also such extraordinary dangers as he knows and appreciates, and, knowing and appreciating them, yet undertakes the work for an agreed compensation, we think it is too plain for discussion that the evidence in this case was not insufficient to support the verdict of the jury to the effect that the plaintiff did not assume the risks to which the evidence shows that he was subjected.

We think it also clear that we would not be justified in holding the evidence insufficient to support the finding of the jury that the plaintiff was not guilty of contributory negligence. It is true that it appears that he had helped Halpenny in the construction of the Wonder substation, including the digging of holes under its dead arms and the placing in them of similar cement blocks; but the evidence shows that the arms of that arrester were placed several feet higher from the ground than those at the Fairview substation, and besides it does not appear that the arrester at the Wonder station was connected with the high-tension wires at any time prior to the digging of the holes. The evidence shows that just the reverse occurred in the present case. Here, as has been pointed out, the arms of the arrester were extended so close to the ground as to make the live arms highly dangerous, according to the testimony of at least one expert witness, and they were connected with the high-power lines before and at the time the plaintiff was sent to do the work referred to. It is true that a danger sign was posted on the door of the transformer building, and it seems that a similar notice was posted on a post of the structure, but it is not pretended that either sign contained any notice that there was any danger of the current of electricity jumping from a live arm to a person only passing it, even if very close. There is nothing in the evidence indicating that the plaintiff voluntarily, or even carelessly, came into actual contact with either of the live arms; on the contrary, the bubble shown by the evidence on the lower end of the arm from which the plaintiff received the shock indicates that the current leaped to him, and, as said by the trial court, the nature and location of the injuries on the plaintiff's person, as shown by the evidence, tended to corroborate that theory.

We also agree with the court below that:

"Cases of this kind differ from those which have been cited where the danger was open and apparent to one in the exercise of his ordinary senses. A live wire or a live pipe, such as we have in this case, is not like an opening in a floor or a rapidly revolving wheel, which people may see and avoid. A live wire is quite as innocent in appearance as a dead one; it gives no warning before it deals the fatal shock."

We have examined the charge of the court with care, and are of the opinion that it was quite as favorable to the defendant as it should have been, and that such portions of the instructions requested and refused as stated the law were sufficiently covered by the charge. Indeed, in the concluding portion of the reply brief of the plaintiff in error it is said:

"Although we consider that in the particulars mentioned in our opening brief the court erred in its instructions to the jury, we nevertheless feel that if the jury had followed the court's instructions, even as given, the verdict must have been for the plaintiff in error."

The judgment is affirmed.

CHICAGO, M. & ST. P. RY. CO. v. IRVING.*

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

No. 2664.

1. CARRIERS ⟹316(5)—INJURIES TO PASSENGERS—ACTIONS—PROOF—RES IPSA LOQUITUR.

Where a passenger on a regular passenger train shows that the train was derailed, causing injuries to her, she has, without further proof, offered sufficient evidence of the carrier's duty and of its neglect, a prima facie case being made, under the maxim "res ipsa loquitur," so as to throw on the carrier the burden of proving absence of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1288; Dec. Dig. ⟹316(5).]

2. CARRIERS ⟹316(5)—INJURIES TO PASSENGERS—ACTIONS—PROOF—RES IPSA LOQUITUR—QUESTIONS FOR JURY.

Where a passenger makes a prima facie case by showing that there was a derailment which caused her injuries, and the carrier produces circumstantial evidence tending to show that the derailment was not due to its negligence in track inspection but to vandalism, the question of negligence is wholly for the jury, and is properly submitted by an instruction, requiring plaintiff to show negligence by a preponderance of the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1288; Dec. Dig. ⟹316(5).]

3. CARRIERS ⟹320(12)—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

The jury need not accept as a fact that inspection of four tracks nearly two miles long in a period of two hours by one workman, and inspection by roadmaster from rear of fast-moving train, is sufficient to have discovered a defect such as caused the accident in which plaintiff passenger was injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1179, 1190; Dec. Dig. ⟹320(12).]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by Sarah J. Irving against the Chicago, Milwaukee & St. Paul Railway Company. On writ of error to review judgment for plaintiff. Affirmed.

George W. Korte, of Seattle, Wash., and Cullen, Lee & Matthews, of Spokane, Wash., for plaintiff in error.

Danson, Williams & Danson, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Sarah J. Irving, defendant in error here (we will call her plaintiff), brought action for damages for injuries against the Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error here (called defendant). She was a passenger upon a regular train operated by the appellant company between Chicago and Seattle, and as the train was leaving Chicago, and while running between Western avenue and Pacific junction in that city, the engine

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

*Rehearing denied October 9, 1916.

and part of the train were derailed. The railroad company pleaded, in substance, that it was not responsible for the derailment of its train, but that it was caused by the removal of spikes and angle bars and the displacement of the rail at the point of derailment, and was the work of trespassers or others unknown to it who designed to wreck the train.

Reducing what the testimony tended to show to the briefest possible form, the substance of it may be stated as follows:

Plaintiff said that she left Chicago at 10:15 in the night of March 21, 1914; that in 15 or 20 minutes, as they were leaving the city of Chicago, and while she was washing in a toilet room of the tourist car, the train was suddenly thrown backwards and forwards, and she was hurt; that when it stopped, she followed other passengers who left the train, and that she saw the engine lying over on the side of the track; that her train was on the outside track, and that she noticed a rail standing up off the ground and turned around; that part of the track was torn out behind the engine, and the front end of the car in which she was was off the rails.

For the defendant the section foreman testified that at the point where the train was derailed there were four tracks; that his duty was to keep the four about the place of the wreck in repair, tighten the bolts, keep rails straight, and do work like that; that he had three men working under him; that he inspected the four tracks every morning; that he walked and observed the tracks the morning of the accident to see if spikes were out or any bolts broken, and found everything on track 1, where the derailment occurred, in good condition; that the rails were bolted together with angle bars 24 inches long, with nuts and spikes all in place, and that there was bond wire for the signals; that he arrived at the wreck about an hour and a half after it occurred; that at the place of the accident the tracks have a curve, with some elevation to one rail; that the track, which is elevated some 14 feet, is fenced on both sides in that vicinity, but that by climbing up there was a way to get from the street to the track elevation; that in his inspection, which occupied from an hour and a half to two hours, he did not look at every rail end, but that he walked in the middle of the track and looked at every joint, and could tell if a spike was out or anything wrong; and that after the accident he found the engine lying across the tracks, headed west, and next to the engine the baggage car, down the bank.

The trainmaster of the railroad company said he first saw the situation about an hour after the derailment; that he observed that one rail had been disjointed from another, and that both angle bars were missing, the outside spikes on the south rail for some distance back were missing, and that the receiving rail was out of line about 2 inches, the end of it showing deep marks where it had been struck by the flanges of the forward wheels of the engine; that he found among the weeds 3 or 4 feet away from the joint some angle bars, bolts, and spikes, and that the next morning he found a clawbar and a track wrench concealed on the abutment of the viaduct over a nearby street about a block away; that he found the articles described as having been found in the weeds on the east side of the east rail of track No. 1, almost directly opposite the point of the derailment, or where the rails were disjointed; that the bolts he found did not show any evidence of having been broken off.

The superintendent of terminals for the railroad company, who arrived at the wreck 30 or 35 minutes after it occurred, says that he found the engine crossways of the four main tracks and the two day coaches and the forward truck of the tourist car off the track, the balance of the train being still on the rails; that he found where the joints had been opened and an angle bar placed between those, or in the opening; and that the company had no track walkers at night.

The assistant superintendent of terminals for the company said that he arrived 40 minutes after the wreck, and noticed that the angle bars from the receiving rail were gone and the spikes were out of the ties on the inside of the receiving rail for six or eight ties; that the receiving rail was moved over so that the flange of the engine wheel had struck close to the outer edge of the ball of the rail, and that a large number of trains, which witness described in detail, had gone safely over the track during the five hours preceding the time that the train in question was derailed; and that the bonding wires were not broken except where the rails were bent up after the accident.

The roadmaster for the defendant company said that he arrived after the wreck; that the curve where the accident happened was a slight one, a one-degree curve; that from the hind end of a caboose he had observed the track the evening of the derailment; and that it was in good condition. This witness explained to the jury how the track was laid and spiked and how the bonding wire was attached to the receiving rail. Witness explained that the train ran on a track above the street, the track being erected on concrete abutments about 14 feet above the street, and that the bottom of the bridge is iron plate, with a girder for the rails, with steel girders between each track and on the outside of each track. He explained angle bars and their function, and said that he observed that five spikes had been removed on the inner rail, on the inner side of the receiving rail; that spikes were lying about there; that from marks on the tie he thought that a bar had been used to get around the spike near the joint, and that from the position in which the rails were he thought the flange of the engine wheel had struck the receiving rail about 1¾ inches from one of the sides; that when the wheel hit, the engine jumped up and got outside and crossed the rail and bent it; that the outer rail, where the rail was found open, was all right; that he found another place where bolts had been taken out from the rail joint farther south on the same track, 1,000 feet east of where the accident occurred; that there was no defect previously existing in the track or ties at the point of derailment, and nothing to indicate that there was any defect which might have caused the wreck, other than the opening of the rails; that the bond wires were not broken, and if they had been, the signal system would have been put at danger; that the night was raw, with a little snow falling; that there are lights in the subway under the tracks.

A special agent of the defendant company said that he observed nothing wrong with the track when he went along it in the evening at about 6 or 6:15 o'clock; that he was the first man at the scene of the wreck after it occurred; that he observed one rail was shoved in and a piece of the angle bar was lying on the side of the outer rail on No. 1 track, the east rail; that upon the receiving rail there were some spikes "pulled" and the bolts taken out, and that he found bolts and spikes and angle bars at the foot of the embankment, and that the spikes and one of the angle bars found there were not broken; that he found these things about 30 feet away in the weeds; that the nuts were off the bolts; that the next morning he found a small track wrench and crowbar about 200 feet on the prairie opposite the point away from the foot of the embankment.

The engineer of the wrecked train said that he reached the point where the train was derailed about 10:30 o'clock; that he had observed nothing before the occurrence; that he was running about 35 miles an hour; that the first thing he knew he was on the ground, as though he had been right off the end of the rail; and that he did not look at the track ahead of him as he went along.

At the close of all of the evidence in the case, the defendant moved for a directed verdict for the reason that the evidence was insufficient to support any verdict, and that there was no evidence of negligence on the part of the railroad company. The court overruled the motion, and instructed the jury in part as follows:

"Taking into consideration all of the testimony introduced before you, and presumptions of fact to which I have referred, if you can say that you are satisfied from a preponderance of the testimony here that the defendant company was negligent, plaintiff is entitled to recover; but, if the jury is not satisfied of the fact by the preponderance of the testimony, your verdict must be for the defendant."

The jury found for the plaintiff. Judgment was entered, and the railroad company sued out writ of error.

[1] Appellant concedes that the case was one for the application of the doctrine of res ipsa loquitur, but contends that the plaintiff below, although she had the legal right to compel the defendant to assume the burden of explaining the cause of the accident, could not rely for a recovery upon what appellant calls the "bare presumption" which it says arises from the mere fact of the accident which resulted in her injury; and, furthermore, it contends that, inasmuch as the defendant established that the derailment was caused by "vandalism," and not by any agency under the control of the defendant, there being no evidence offered tending to disprove any item of appellant's evidence as to the physical facts found to exist immediately after the derailment of the train, the facts as established by the defendant must stand as admitted, and no conclusion was reasonably possible other than the one contended for by the appellant.

The position taken by the plaintiff is that the derailment of the train was in itself such evidence of negligence that it gave rise to a conflict of evidence when controverted, and that it became a matter for the jury to determine whether or not the evidence of the railroad company counterbalanced that offered by the plaintiff.

The concession made by appellant carries with it the recognition that, this being a case between a passenger and a carrier, the contract being to carry safely, proof of the derailment and injury made a prima facie case which the carrier had to meet and overcome. Nitro-glycerine Case, 82 U. S. (15 Wall.) 524, 21 L. Ed. 206.

Res ipsa loquitur was tersely defined by Judge Holmes for the Supreme Court of Massachusetts in Graham v. Badger et al., 164 Mass. 42, 41 N. E. 61. He said:

"Res ipsa loquitur, which is merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence."

Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115, seems to have been the earliest case in which the doctrine of res ipsa loquitur was considered by the Supreme Court. That was an action against the proprietor of a stagecoach. The trial court instructed that the plaintiff, having been a passenger on the stagecoach, the facts that the carriage was upset and plaintiff injured were prima facie evidence that there was carelessness or negligence or want of skill, and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault. The court held that the law was correctly stated.

Stokes v. Saltonstall, supra, was approvingly cited in Railroad Company v. Pollard, 89 U. S. (22 Wall.) 341, 22 L. Ed. 877. The facts there were that a woman was traveling in a Pullman car, and by the bumping of one car against another she was thrown against the arm of the seat in which she had been sitting and injured. The charge to the jury, which was affirmed by the Supreme Court, was to the effect that, while the plaintiff was bound to satisfy the jury that the injury was caused by the negligence of the railroad company, and that she was exercising reasonable care—

"this would be prima facie or presumptive evidence of the defendants' liability, and that the plaintiff would not be required to show by what particular acts of misconduct or negligence on the part of the defendants the injury was occasioned."

But the court also told the jury to be careful not to consider any presumption against the defendant until they were satisfied by affirmative proof on the part of the plaintiff that she was in the exercise of reasonable care and action when the injury was sustained. This charge was regarded as authorized by the decision in Stokes v. Saltonstall, supra.

In Gleeson v. Virginia Midland Railroad Company, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, where a railway postal clerk making the run from Washington to Danville, Va., was injured by a derailment of the train by a landslide, the trial court charged the jury that the burden of proof was on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury. The plaintiff's counsel objected, and asked the court to modify the instruction by adding that the injury to the plaintiff upon the car, if the plaintiff was in the exercise of ordinary care, was "prima facie evidence" of the company's liability. The court refused to make the modification, and a verdict was rendered for the defendant company. Judgment on the verdict was affirmed, and the case was then taken to the Supreme Court. The Supreme Court cited the case of Kearney v. London, etc., Railway, L. R. 6 Q. B. 759, and Stokes v. Saltonstall, supra, and Railroad Company v. Pollard, supra, for holding that the happening of an injurious accident in passenger cases is prima facie evidence of negligence on the part of the carrier, and that, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The conclusion of the court was that the trial court erred in refusing to modify the instructions as requested by the plaintiff.

"The law is," said the court, "that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the prima facie case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant."

In San Juan Light Company v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680, the court, in sustaining a charge upon negligence, defined the doctrine of res ipsa loquitur in this way:

"* * * When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905, the court held that the rule of res ipsa loquitur does not have the effect of shifting the burden of proof, but that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. The court said that the doctrine seems to have been erroneously confused with the question of burden of proof, and expressed its opinion as follows:

> "Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

This view is regarded as that generally taken in well-considered judicial opinions, a large number of which are referred to by Justice Pitney for the court.

From these discussions and decisions it can be said that where a passenger on a regular passenger train shows that the train has been derailed, and that because of being thrown against the side of the car when the derailment occurred she was injured, she has, without further proof, offered sufficient evidence of the carrier's duty and of its neglect to perform its duty. It is not the injury to her, but the circumstances connected with the injury, which warrant the application of the maxim and the inference of negligence. So a prima facie case is made, and whether we say that it is based upon the presumption or inference of negligence arising from the facts, it is none the less evidentiary, and calls upon the carrier to meet the facts and inferences by showing that it was not guilty of negligence. In Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the Court of Appeals of New York, referring to res ipsa loquitur, said:

> "If a passenger in a car is injured by striking the seat in front of him, that, of itself, authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The res, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined, either in civil or criminal actions." Nebraska Bridge Supply & Lumber Company v. Jeffery, 169 Fed. 609, 95 C. C. A. 137.

[2, 3] The defendant carrier offered its evidence. Whether it met or made a stronger case than plaintiff made was for the jury to say under proper instructions by the court. The whole charge of the court is not in the record, but in that portion which is included, and which we have quoted in the statement of the case, the court pro-

ceeded upon the theory that the plaintiff, in order to recover, had to sustain the allegations of negligence by a preponderance of the evidence, and that unless she succeeded, she could not recover. The defense relied upon evidence largely circumstantial, tending to show that some person unknown to it had deliberately pulled some spikes, removed angle bars, and displaced a rail. This may have been a correct way of accounting for the derailment, but the reasonableness of such a conclusion was evidently not clear to the jury and to the District Judge and, as we read the testimony, is by no means a satisfactory explanation to us. The testimony of the method and times of inspection showed that the duty of the inspector was to inspect four tracks, each one being between 1½ and 2 miles in length, and that he devoted two hours daily to the work. The jury were not obliged to accept it as a fact that in such an inspection the one making it could and would detect the joints and bolts on the rails of the several tracks; nor were they obliged to believe that the roadmaster's inspection made on a fast-moving car was a sufficiently vigilant method to have discovered such a defect as the jury found must have existed. The whole question of whether there was negligence became one for determination by the jury. Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492. They saw the principal witnesses and heard them give their testimony; and it was for the jury to say whether the defendant rebutted the prima facie case of the plaintiff. Volkmar v. Manhattan Railway Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678; Turner v. Southern Power Co. et al., 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848; Brown v. Louisiana & M. Railroad Company, 256 Mo. 522, 165 S. W. 1060; Midland Valley Railroad Company v. Hilliard (Okl.) 148 Pac. 1001; Spear v. Philadelphia, W. & B. Railroad Company et al., 119 Pa. 61, 12 Atl. 824; Chaperon v. Portland General Electric Company, 41 Or. 39, 67 Pac. 928; Snediker et al. v. Everingham, 27 N. J. Law, 143; Newark Electric Light & Power Company v. Ruddy, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624; New York, C. & St. L. Railroad Company v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Trenton Passenger Railway Company, Consolidated, v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; Boyd v. Portland Electric Company, 41 Or. 336, 68 Pac. 810; Cincinnati, N. O. & T. P. Railway Company v. South Fork Coal Company, 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; Carroll v. Boston Elevated Railway Company, 200 Mass. 527, 86 N. E. 793; Waller v. Ross, 100 Minn. 7, 110 N. W. 252, 12 L. R. A. (N. S.) 721, 117 Am. St. Rep. 661, 10 Ann. Cas. 715; Cooley on Torts (Vol. 2, 3d Ed.), p. 1424; Shearman & Redfield on Negligence, §§ 58a and 58b (6th Ed.); Wigmore on Evidence, § 2509 (1905 Ed.); Texas & Pacific Railway Company v. Mosley (Tex. Civ. App.) 124 S. W. 485; Thompson on Negligence (vol. 8, White's Supplement, 1914 Ed.), §§ 2774, 7635.

The judgment is affirmed.

GLEASON v. THAW.

(Circuit Court of Appeals, Second Circuit. June 23, 1916.)

No. 301.

1. TRIAL ⟹165—DISMISSAL AT TRIAL—EVIDENCE.
Where the complaint was dismissed at the close of plaintiff's case, plaintiff's evidence must be accepted as true.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⟹165.]

2. APPEAL AND ERROR ⟹1099(1)—DECISIONS OF APPEAL—EFFECT.
In an action at law, previous decisions of an appellate court are not findings of fact, nor are conclusions used for the purpose of argument in directing the formulation of pleadings equivalent to a decision upon the meaning of statements to be included in the pleadings.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370, 4374; Dec. Dig. ⟹1099(1).]

3. FRAUD ⟹17—ACTIONS—MISREPRESENTATIONS.
Where counsel for defendant's son made inquiries of defendant concerning the son's resources and rights in his father's estate, for the purpose of determining whether he would require security for his fees, defendant, in so far as she was speaking of existing facts, was bound to state those facts fully and truly, and a failure rendered her liable.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15; Dec. Dig. ⟹17.]

4. FRAUD ⟹4—ACTIONS—LIABILITY.
To render one liable for misrepresentations, it must have been the intent of the one making them that they should be relied on.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2; Dec. Dig. ⟹4.]

5. BANKRUPTCY ⟹51 — ADJUDICATION — CONCLUSIVENESS — ALLOWANCE OF CLAIMS.
Where defendant's claims against the estate of her son, who became a bankrupt, were allowed, such adjudication is conclusive as to the existence of the debts, and cannot be questioned in a proceeding by another creditor of the son against defendant.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⟹51.]

6. FRAUD ⟹12—MISREPRESENTATIONS—ACTION—RIGHT TO MAINTAIN.
An action for damages for misrepresentations as to defendant's intentions for the future cannot be maintained.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. ⟹12.]

7. FRAUD ⟹27—ACTIONS—MISREPRESENTATIONS.
Where defendant represented to plaintiff that her son, who had employed plaintiff to defend him from a criminal charge, had a clear annual income of over $30,000 from his father's estate, which was his own without restriction, such statement was not false by reason of the success of the son in obtaining a discharge in bankruptcy, who in that manner was enabled to escape payment of plaintiff's fees.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. ⟹27.]

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

Action by John B. Gleason against Mary C. Thaw. There was a judgment dismissing the complaint, upon order granting a motion to that effect at the close of plaintiff's case, and plaintiff brings error. Affirmed.

See, also, 223 Fed. 527, 139 C. C. A. 75.

John B. Gleason, of New York City, pro se.

Kellogg & Rose, of New York City (L. L. Kellogg and Alfred C. Pette, both of New York York City, of counsel), for defendant in error.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

CHATFIELD, District Judge. The plaintiff in this action seeks to recover the sum of $53,000. The son of the defendant had included in his schedules in voluntary bankruptcy the agreed amount to be paid by him to the plaintiff for certain services rendered to him in connection with the trial of an indictment against him in the county of New York.

It appears that the plaintiff received, prior to the bankruptcy, some payment upon the amount due, and also a dividend in the bankruptcy proceedings. These payments were taken into account in computing the balance for which the present action was instituted, and it appears from the record that no further payments can be expected from the bankrupt himself, as the final dividend has been declared and a discharge granted.

This action is based upon the charge of false representations as to matters of fact alleged to have been within the knowledge of the defendant at the time the representations were made. It is further alleged that the defendant knew the representations to be false, and that the plaintiff was relying upon her representations in undertaking the conduct of the litigation above referred to without deposit or other security, but solely upon a contract with the son of the defendant.

[1] The language which is attributed to the defendant, and which (as the judgment was rendered upon the plaintiff's statement) must be taken as true, was used by the defendant in a conversation with the plaintiff on August 8, 1906, in the city of New York. The plaintiff told the defendant that her son desired him to act as his attorney, and discussed certain details as to the course of action to be pursued. They spoke of disbursements already made by the defendant for attorneys, expert fees, etc., and the plaintiff asked the defendant whether these were loans or debts owed by the son to the defendant, or whether she, the defendant, had given the money (which she had advanced). The defendant is said to have responded:

"Mr. Gleason, you oughtn't to speak to me as a creditor; what I do, I do in my own behalf, and as the head of the family."

The plaintiff also said that certain friends of the son would loan him money, but that the plaintiff believed that the mother (the defendant) would prefer to contribute the money. The defendant answered:

"Yes, Harry does not need to borrow of anybody. I contribute it."

Upon this part of the conversation the plaintiff brought an action against this same defendant, in contract, for the entire amount, which was tried in the District Court for the Southern District of New York, and judgment given for the defendant, on the ground that there was no agreement with the defendant in writing and that such was necessary. The judgment was affirmed in Gleason v. Thaw, 205 Fed. 505, 123 C. C. A. 573, on the ground that no contract with the defendant was broken, although this court held that such a contract need not be in writing, inasmuch as it was not an agreement to pay for the debt or default of another. The latter proposition was conceded by the plaintiff in the record of that case, and it did not appear that the defendant had agreed to pay the plaintiff for his services, or to do more than to advance money to her son to meet expenses "other than the plaintiff's charges."

But this court then further held that the action could not be maintained in tort, as no false representations were properly alleged, since the statements of the complaint showed nothing which was not true. This (in a sense obiter) finding by this court is directly relied upon by the defendant upon the present appeal. But the plaintiff answers this by the language of this court reported in Gleason v. Thaw, 223 Fed. at page 529, 139 C. C. A. at page 75, as follows:

"We construed his pleading as a declaration on contract, and that construction is binding upon both parties. Inasmuch as the earlier action was disposed of on the pleadings, the alleged contract was taken as established. That contract, made August 8, 1906, was found to be that: 'Defendant agreed that she would herself, in her own behalf as head of the family, make all the disbursements (other than payments to plaintiff) that were expedient on account of the indictment and that such payments should be chargeable against her son only as advancements; i. e., advancements on what he would receive at her death, one-third of such advancements to be remitted under her will.' We affirmed the dismissal of the complaint in that prior action, because the facts averred did not show a breach of the contract pleaded, and on the pleadings taken as proved."

The record of this case (223 Fed. 527, 139 C. C. A. 75) shows that the plaintiff after the dismissal of his former action instituted a new suit, charging the defendant with making false representations on August 8, 1906, for the purpose of inducing the plaintiff to perform services for her son upon credit as follows:

"(1) That all the disbursements thus far made by her on account of her son were made in her own behalf, as mother and head of the family, and were not liabilities of her son to her, nor chargeable against him, unless by way of advances against his interest under her last will. (2) That she had agreed with Harry Thaw to pay in her own behalf all sums necessary on account of her son and his defense (other than plaintiff's charges), by way of advancement and not creating any liability on his part for their repayment. (3) That the only restrictions as to Harry Thaw's income under his father's will were contained in an abrogated codicil, and that the provisions of the will affecting his share were in all respects the same as the provisions as to her income, and were in all respects unconditional."

It was then alleged that on or about November 1, 1906, in another interview, the defendant repeated these representations or statements, and added that all of the disbursements made by her since August 8th, and down to the date of the later interview, were not liabilities of her son to her.

The defense of prior adjudication, based upon election by the plaintiff as shown in the action which was finally dismissed (see opinion in 205 Fed. 505, 123 C. C. A. 573, supra), was considered in the District Court to be sufficient. In this court the judgment was sustained as to any contract to make further advances, and as to any representations "subsequent to August 8, 1906, which would be in accord with the obligations of the defendant under this contract"; but the judgment of dismissal of the cause of action was reversed, with leave to the plaintiff to amend his complaint so as to rely only upon representations of fact made prior to August 8, 1906. The court (205 Fed. 529, 123 C. C. A. 573) said that her statements, to the effect that her own disbursements made prior to that date "were not loans, but were paid by her as head of the family," and that she expected to treat them as advancements in making her own will, and also her statements as to the "availability of Harry Thaw's income to meet his own obligations" were not disposed of in the prior suit (205 Fed. 505, 123 C. C. A. 573).

In the present action the plaintiff has therefore brought suit upon paragraphs 1 and 3 above quoted, and has carried the actual statement of these allegations, which he was allowed by the opinion of this court to include in his amended complaint, back to the interview of August 8, 1906. He has said nothing at all about the repetition of these statements on the date of November 1, 1906, which were considered by this court as recited by the plaintiff as the basis for such credit as he extended from November 1st on, but which this court had already held, showed no breach of contract.

In quoting from these opinions, reference has been also made to the following part of the interview, which is claimed by the plaintiff to have been a false representation of fact, and as to which the plaintiff's testimony is as follows:

"'Now,' I said, 'he says that I run no risk in waiving my requirement of specific security, because I can always have recourse to the income from the Thaw estate, of over $30,000.' Mrs. Thaw said, 'Yes, I know all about that; I was one of the executors of my husband's will; Harry has the same interest in all respects, that I have, except that mine is greater. There was,' said Mrs. Thaw, 'a codicil by which Harry's income was cut down, but that codicil was abrogated and the only restriction or difference between Harry's income and mine was in that codicil, so that this amount of money is his as it comes in.' In that connection Mrs. Thaw said something with reference to the share of Harry being less than the other children by reason of certain facts with reference to the accrual of interest during minority. I do not fully recollect what was said by Mrs. Thaw upon that subject, but after saying this she said, 'That income, I know, is his in every respect unconditionally just the same as my income is;' and she said, 'Mr. Gleason, why don't you rely upon these facts and waive your requirement of security?' 'Well,' I said, 'Mrs. Thaw, it is a very unusual thing for a lawyer to go into a long case of this kind without some provision for his services; but, assuming that the facts are as you have stated, I am inclined to humor Harry. I will waive my requirement of specific security, and I will give him a credit until next summer, and probably longer.'"

It will be seen that the District Court, upon the plaintiff's testimony in the present action, has in effect held that the detailed statements of conversation, when testified to by the plaintiff, do not constitute actionable false representations, although these conversations more fully set forth the propositions which this court (in 223 Fed. at page 529, 139 C. C. A. 75) said might be presented as a cause of action by the plaintiff, and as to which, in the same opinion, this court said that the previous remarks with reference to the same subjects in 205 Fed. at pages 507 and 508, 123 C. C. A. 573 (and in which they were substantially held not to be actionable), were obiter.

[2] It is evident that the previous decisions of this court were not (as they would have been in an appeal from a decree in equity) findings of fact, nor were the conclusions used for the purpose of argument in directing the technical formulation of pleadings equivalent to a decision by this court upon the meaning of the statements, nor the findings that would be made from similar testimony when the issue was presented.

[3-7] It will be observed that the defendant did not promise at any time to pay the plaintiff, nor did she agree to become surety for her son's debt, nor did she agree to make advances for her son to the plaintiff. She, according to the detailed testimony in the present record, was following up and agreeing with the assertions of her son as to his financial capacity, as well as his responsibility to undertake payment of the expenses of the litigation. She did agree to make advances for her son to others, and not to treat these sums as loans, without notice to the plaintiff, so that he could cease to give further credit. This contract has been held not to have been broken, and it has also been held that no representations as to these later advances (after August 8, 1906) could be charged as false, if that contract was not broken (223 Fed. 529, 139 C. C. A. 75).

In such a conversation the defendant must be held to have understood, and it is not disputed in the present case that she did understand, that the plaintiff was seeking information from her upon which he intended to rely and, in so far as she was speaking of facts existing at the time of her conversation, she was under the legal obligation to state those facts truly and fully. Sawyer v. Prickett and Wife, 86 U. S. (19 Wall.) at page 160, 22 L. Ed. 105; Kountze v. Kennedy, 147 N. Y. 124, at page 129, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651. She would render herself liable if she avoided a true or full statement of facts by suppressing matters which were actually material thereto, and which she did know or should have known were material when she undertook to make statements of fact with respect thereto. Cooper v. Schlesinger, 111 U. S. 148, at page 155, 4 Sup. Ct. 360, 28 L. Ed. 382; Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910; Lynch v. Mercantile Trust Co. (C. C.) 18 Fed. 486; Farwell v. Colonial Trust Co., 147 Fed. 480, 78 C. C. A. 22.

It must be, however, borne in mind that this action is not for the rescission of a contract, nor with reference to any matter in which direct privity or contractual responsibility existed as between the plaintiff and the defendant. See cases above cited. The cause of action sounds in tort, and the liability to answer in money is implied, in the sense that it is a legal responsibility for the damages flowing from an alleged injury which the law recognizes as creating responsibility if the requisite facts appear. A conscious intent to have the plaintiff rely upon her statements as facts is necessary, and was in fact present. Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215.

As was said in 205 Fed. 505, 123 C. C. A. 573, Mrs. Thaw was under no obligation to continue the credit to her son until her death; that is, to treat as advances and provide by her will for payment by him of such amounts as she might have seen fit to spend in his behalf. She was under no obligation to then notify the plaintiff if at any time she saw fit to demand of her son, so far as he was able to pay, that which he admittedly owed her. The taking of notes for these amounts, or the proof of notes and claims in the bankruptcy proceedings of her son, could not relate back, so as to make false her statement that on August 8, 1906, she expected to extend her credit to her son for a longer period; that is, until her death. In his complaint the plaintiff alleges that the defendant stated the moneys already advanced prior to August 8, 1906, were not loans, and that she paid those sums "without recourse to" her son. In the testimony the latter phrase is not put in the mouth of the defendant; but her statement is that she should not be called "a creditor," as she intended to take what she advanced from what her son would receive at her death.

We have nothing to do with the possibility of disputing her claims in the bankruptcy proceedings. The allowance of these claims is a finding as between all of the parties that the debts from the son to the mother did exist and had not been discharged or waived.

It is evident that the plaintiff was satisfied with the expression of the intention of the defendant as to her future conduct. She could not state as a fact what her intention might or might not be in the future, and there is no authority for basing a cause of action for misrepresentation of fact upon an agreement or contract to leave matters as they were at the time the statements were made, if the statements were true at the time. To hold otherwise would be to find a breach of the contract, which was rejected by the decision of this court in 205 Fed. 505, 123 C. C. A. 573, and which decision is apparently correct.

Upon the other matter alleged to be misrepresentation with reference to the interest of Harry Thaw under his father's will, the plaintiff urges strongly that Mrs. Thaw, as one of the executors, must be held to have known the conditions of the bequest and to be bound by the law of Pennsylvania, which at the time allowed the creation of a valid spendthrift trust. Upon the previous appeals the question was considered as to the right of Harry Thaw to use his income. As was said in 205 Fed. 508, 123 C. C. A. 573, "Harry Thaw's income from his father's estate was his own without restriction," and his creditors' inability to use it made it all the more his own, in the sense that he could do as he pleased with it.

But the plaintiff contends that Mrs. Thaw made the direct statement of fact that her husband's will left the same sort of bequest to Harry as she had herself, except that hers produced more income. We can disregard the question of the abrogation of the codicil relating to the amount of income which the executors would pay to the son, as this evidently does not enter into the present case. If Mrs. Thaw had been stating as a fact there was no language in the will, of which she was coexecutor, suggesting other than a direct gift of a certain amount of income to her son, it might be held that she was stating something as to which she knew, or held herself out to know, the facts. On such a representation the plaintiff might have been excused from procuring a copy of the will before he relied upon this statement. But when Mrs. Thaw's statement shows her lack of appreciation or knowledge of the scope or validity of what is known as a spendthrift trust, and when apparently, as far as the record shows, nothing had informed her to the contrary, the District Court would seem to have been correct in holding that her statement, that Harry Thaw had a certain amount of income from the estate which was the same as her own, except that hers was greater in amount, and that the plaintiff could rely upon this income belonging to Harry Thaw unconditionally, was a mere expression of opinion or conclusion in so far as it defined the rights of creditors when seeking to collect a claim from that income.

The plaintiff in the present case has not been deprived of collecting his bill from the son in so far as the son may have been willing or able to pay his creditors from that income, if he had seen fit to do so. His application under the bankruptcy law may have defeated the plaintiff in collecting his bill, and the existence of the spendthrift trust may have cut down the dividends in the bankruptcy estate; but surely the defendant's idea that Harry Thaw had an income which he could use as he saw fit, and that there was no restriction upon it any more than upon her own, is not such a misrepresentation of fact as to make her liable if the bankruptcy statute and the laws of the state of Pennsylvania have allowed her son to free himself from debt, while still retaining the income which is his own (as was said in the previous opinion), much more than if his creditors could obtain a part thereof.

The judgment should be affirmed.

In re CLARK REALTY CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied June 7, 1916.)

Nos. 2325, 2326, 2330.

1. ASSIGNMENTS ⟹33—CONSTRUCTION—WHAT CONSTITUTE.

An agreement by the bankrupt, in consideration of a loan, to pay all rents, less cost of repairs, expenses, and insurance, to the lender, is not an assignment, being no more than an agreement to pay its debt, and the lender can enforce no lien against rents collected which were not paid over to it.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 64; Dec. Dig. ⟹33.]

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

2. BANKRUPTCY ⚿143(5)—RIGHTS OF TRUSTEE—MORTGAGEES.

Until default and entry by the mortgagee, he is not entitled to the rents therefor, though the mortgage included all the rents, issues, and profits from the land, so the mortgagee cannot, until he assert his rights, by proceedings to sequester the rents, assert any lien on rents collected by the trustee after the bankruptcy of the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 213, 214; Dec. Dig. ⚿143(5).]

3. BANKRUPTCY ⚿253—DEBTS—PRIORITY.

Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1913, § 9648), declares that debts for taxes shall be entitled to priority. A mortgagee of real estate became bankrupt, and after bankruptcy the mortgaged premises were sold for unpaid taxes. No claims for the taxes were filed against the estate. *Held*, that mortgagees, having asserted no rights in rents collected from such premises after bankruptcy and before the tax sale, could not thereafter insist that such rents should be used in redeeming the property from purchasers at tax sales.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 349; Dec. Dig. ⚿253.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of the bankruptcy of the Clark Realty Company. Petitions by Juliet Gilbert and others against Julius J. Goetz, trustee, and others, by the Citizens' Savings & Trust Company and A. E. Kuolt, as Commissioner of Banking of the State of Wisconsin, against said trustee and others, and by August Richter, Jr., against said trustee. From orders of the District Court, affirming orders of the referee, petitioners appeal. Affirmed.

The above three appeals all grow out of the bankruptcy of the Clark Realty Company. There is a separate record in each appeal, and in each record is an agreed statement of the facts involved in that particular appeal. It will simplify matters to make one statement of facts and dispose of all the questions in one opinion. From the agreed statements the following facts appear:

The Clark Realty Company, a Wisconsin corporation engaged in real estate operations, was on February 3, 1914, on its voluntary petition, duly adjudged a bankrupt. On the same day a receiver was appointed for the property of the bankrupt. The receiver acted until the election and qualification of Julius J. Goetz as trustee of the bankrupt on April 3, 1914. The bankrupt corporation owned a large amount of real estate, and its entire income consisted of rents derived from its various properties. Most of its real estate was incumbered; some of the properties being subject to one mortgage, and others subject to two and three mortgages. The mortgages involved in the first two of the above appeals, No. 2325 and No. 2326, contained provisions mortgaging "the rents, issues, and profits issuing and to issue out of said premises." It does not appear from the agreed statement of facts that the mortgage asserted by Richter, trustee, in cause No. 2330, contained such a provision.

The Citizens' Savings & Trust Company is a corporation organized and existing under the laws of the state of Wisconsin as a trust company bank, and lately engaged in carrying on said business at the city of Milwaukee. On the 2d day of October, 1913, A. E. Kuolt, who then was, and still is, the duly appointed, qualified and acting commissioner of banking of the state of Wisconsin, as such commissioner of banking, and by virtue of the laws of Wisconsin, took possession of the property, business, affairs, and assets of the Citizens' Savings & Trust Company, by reason of its being determined by him to be a delinquent banking corporation, and ever since that time has been, and still is, in possession and charge of its property, and is engaged in winding up and liquidating its affairs.

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

On November 1, 1912, the Clark Realty Company was indebted to the Citizens' Savings & Trust Company for moneys theretofore advanced to the bankrupt, by way of overdrafts, and otherwise, in the sum of $27,550.06 and accrued interest thereon, amounting to $882.50. At the same time the books of the trust company showed an indebtedness owing to it by various other corporations controlled by the people who controlled both it and the bankrupt, amounting to $34,584.85. On November 1, 1912, interest on the mortgage indebtedness of the bankrupt amounting to $12,061.50 became due and the Citizens' Savings & Trust Company was requested by Clark Realty Company to advance to it sufficient further moneys to pay such interest. The matter was considered at a meeting of the board of directors of the trust company, and on or about November 7, 1912, the realty company made, executed, and delivered to the trust company its 75 promissory notes, for $1,000 each, dated November 1, 1912, and due on or before three years after date; and to secure the same, the realty company made, executed, and delivered to the trust company a second mortgage upon various parcels of real estate owned by said bankrupt, which mortgage was dated November 1, 1912, acknowledged November 7, 1912, and recorded in the office of the register of deeds for Milwaukee county on the 10th day of March, 1913. About the same time, and as a part of the same transaction, there was executed and delivered to the trust company the following instrument in writing:

"T. J. Pereles.
"N. Pereles, Jr.
"E. G. Rahr.
"C. E. Canright.

Cable Address 'Pereles.'

"Nath. Pereles & Sons, Counselors at Law, Pereles Bldg., Milwaukee, Wis.

"November 1, 1912.

"Citizens' Savings & Trust Co., Milwaukee—Gentlemen: In consideration of your company granting to the undersigned a loan of $75,000, with which to pay interest and other charges in which we are interested, the undersigned agrees to pay to your company monthly, or at such other times as desired, all rents derived from our various properties, less cost of repairs, expenses, and insurance. Such money to be used to pay the above loan. All such money shall be collected and deposited in separate bank for that purpose.

"Very truly yours, Clark Realty Co.,
"[Signed] By Nathan Pereles, Jr., Treasurer."

The consideration for said notes and mortgage and the agreement of November 1, 1912, was the advancement by the trust company to the realty company on November 1, 1912, of $12,061.50 to pay interest charges then due and owing by said realty company on its mortgage indebtedness, the payment of the indebtedness then owing by the bankrupt to the trust company represented by overdrafts amounting to $27,550.06, and accrued interest thereon amounting to $882.50, and the payment of the indebtedness owing to the trust company by various other corporations represented by their overdrafts amounting to $34,584.85. Said sum of $12,061.50 was advanced by the trust company to the bankrupt in payment of such interest charges and the aforesaid overdrafts were canceled on the books of the trust company.

T. J. Pereles and J. M. Pereles controlled both the Clark Realty Company and the Citizens' Savings & Trust Company, and the agreed statement of facts shows that there was some irregularity with regard to the election of a treasurer of the realty company and some question as to the authority of Nathan Pereles, Jr., to execute the agreement of November 1, 1912; but the view we take of the question involved in this branch of the case does not require further reference to this feature.

Monthly after November 1, 1912, and continuing to October 1, 1913, the bankrupt voluntarily prepared and delivered to the trust company a statement showing the rents collected by it during the preceding month from its various properties, which statement showed the receipts, the disbursements made for repairs, expenses and insurance, and the net proceeds less the disbursements, and accompanied these statements with payment of such net proceeds. The moneys so paid over included not only the net rents collected from the properties covered by the $75,000 mortgage to the trust company, dated November 1, 1912, but the net rents derived from all of the real estate owned by the bankrupt, including that acquired by it after November 1, 1912.

No statements or payments of rent collections were made or rendered by the bankrupt to the trust company after October 1, 1913. The last net rents accounted for to the trust company were the rents collected during the month of August, 1913. The rents collected by the bankrupt from its various properties after that time, beginning September 1, 1913, and up to the time of its adjudication in bankruptcy, were not paid over to the trust company, but were retained by the bankrupt and by it treated as its general funds, out of which all its expenses were paid, and the balances were kept in bank and evidenced by certificates of deposit obtained by it, which were turned over by the bankrupt to the receiver in bankruptcy upon its appointment, as a part of the general assets of the bankrupt. The receiver continued the collection of the rents until the election and qualification of a trustee in bankruptcy, and thereafter the trustee collected the rents, until by virtue of orders made and entered by the District Court, he abandoned as burdensome the various properties of the bankrupt from which the rents involved in these appeals were derived, all of the property so abandoned being incumbered beyond its realizable value. The trustee has in his possession $17,233.50 net rentals collected by the bankrupt, by the receiver and by the trustee.

After the trustee had abandoned the properties from which these rents were derived, the trust company and Kuolt, as commissioner of banking, filed their petition with the referee setting forth the execution and delivery of the aforesaid notes, mortgage, and agreement of November 1, 1912, the delivery by the bankrupt to it thereafter of the net rents collected from November 1, 1912, to August 31, 1913, and alleging that no rents collected subsequent thereto had been turned over to it, that they were still the owners and holders of said notes and mortgage and agreement, that the sum of $73,500 and accrued interest was still unpaid and owing thereon, and claiming an equitable lien upon all of the funds in the trustee's possession, derived from net rents collected by the bankrupt from September 1, 1913, to the date of the adjudication in bankruptcy, by the receiver in bankruptcy and by the trustee since his election and qualification as trustee, and praying for an order directing the trustee to deliver and pay over to them all of said moneys.

On March 31, 1914, Elizabeth Gilbert, as owner of three of 15 $1,000 notes executed by the bankrupt and secured by mortgage on a portion of the real estate held by the bankrupt and the rents thereon, and Nellie Gilbert, as owner of 7 of 30 $500 notes executed by the bankrupt and secured by mortgage on another piece of real estate and its rents, intervened in said bankruptcy proceedings and by petition alleged their respective mortgage liens, that their security was wholly inadequate and the equity of redemption of no value, that they and others similarly interested were prevented from acquiring the rents and from foreclosing their mortgage liens by the order entered at the time of the adjudication, restraining all persons from intermeddling with or taking possession of any of the rights, credits, effects, or property of the bankrupt or in any manner interfering with the receiver in possession of same.

Pursuant to the prayer of this petition, the receiver and the trustee when elected were ordered to show cause before the referee on April 7, 1914, why the said premises should not be abandoned to the lien holders or why the restraining order should not be modified so as to permit foreclosure by the lien holders and the application of the rents, and why the rents of the said property should not be turned over to the lien holders, and for such other relief as might be just and equitable.

A similar application was made by petition filed July 31, 1914, by A. F. Sauer as the owner of a $3,300 mortgage executed by the bankrupt, covering certain real estate and its rents and duly recorded October 27, 1911, upon which a similar order to show cause was issued, returnable August 19, 1914. Before the hearing of said petition by the referee on November 12, 1914, a supplemental petition in behalf of and including said Sauer, Elizabeth and Nellie Gilbert and the owners of the remaining notes secured by the mortgages which they asserted, was filed.

On or about the 1st day of March, 1905, the bankrupt duly made and issued, for the purpose of borrowing money, its certain bonds to an aggregate amount of $150,000, the par value of such bonds being $500 each, wherein and whereby said bankrupt promised to pay the holders thereof, at the office of the Citizens' Savings & Trust Company, on or before March 1, 1910, the aggregate sum of $150,000. The time of payment of said bonds was extended to and including the 1st day of March, 1915. All of said bonds were duly issued and negotiated, and there is now outstanding and due thereon the sum of $143,500, and these bonds are held by various individuals.

To secure the payment of these bonds, the bankrupt, on the 1st day of March, 1905, duly made, executed and delivered to the said Citizens' Savings & Trust Company a trust deed or mortgage covering various parcels of real estate owned by said bankrupt. Said mortgage was duly executed and acknowledged and recorded in the office of the register of deeds for Milwaukee county, on the 17th day of May, 1909.

The bankrupt failed to comply with the terms of said bonds and with the conditions of said mortgage or trust deed by failing to pay the interest on said bonds which was payable on the 1st day of November, 1913, and by failing to pay any interest on said bonds since the 1st day of May, 1913, having defaulted in the installment of interest due November 1, 1913, and failing to pay any interest on said bonds since said date, and failing to pay the principal thereon on March 1, 1915, and by failing to pay the taxes levied on said real estate for the year 1913. The real estate included in said mortgage or trust deed is inadequate and insufficient security for the bonds outstanding.

On the 7th day of November, 1914, August Richter, Jr., by the circuit court of Milwaukee county was duly appointed trustee to succeed the Citizens' Savings & Trust Company, and he is the duly qualified and acting trustee under said deed of trust and as such trustee is authorized to institute and carry on the proceedings here involved.

From September 1, 1913, to February 3, 1914, the date of the adjudication in bankruptcy, the rents and profits of the real estate covered by the last mentioned mortgage were collected by the bankrupt, commingled with its general funds, and such general funds as it had remaining on hand at the time of the receiver's appointment were turned over to the receiver. From February 3, 1914, to the date of the abandonment of the property above mentioned, the rents and profits of said premises covered by said mortgage were collected by the receiver and trustee in bankruptcy. The aggregate amount of rents and profits so collected by said receiver, trustee and bankrupt derived from said premises covered by said mortgage was $3,129.31. Taxes were duly levied and assessed on said premises covered by said trust deed or mortgage for the year 1913, aggregating $4,526.38. The taxes levied and assessed on said real estate covered by said mortgage which was income producing aggregated $3,766.54. Said taxes were not paid and on February 25, 1914, the said premises were sold for the payment of the taxes levied by the city of Milwaukee on said real estate, and on May 20, 1914, the said real estate was sold for the unpaid taxes levied and assessed by the state and county and the purchasers on said sales paid the amount of outstanding taxes, which payment was evidenced by tax certificates duly issued to them and now outstanding.

On the 12th day of November, 1914, Richter, trustee, petitioned the referee to order the trustee in bankruptcy to turn over to him the rents and profits collected from said mortgaged premises or to direct the trustee to use the rents so collected in payment or redemption of the taxes for which said premises were sold, as stated. Other petitions were filed by other mortgagees of properties belonging to the bankrupt estate seeking the rents in the trustee's possession and answers were filed by the various parties in interest. The referee heard the evidence, considered the various petitions and denied the petition of the Citizens' Savings & Trust Company and Kuolt, as commissioner of banking, denied the petition of Richter, trustee, and allowed the claims of Juliet Gilbert and other claimants for rents accruing subsequent to the filing of their intervening petition and denied their claims for rents prior thereto. Petitions to review were presented to the District Court and by it the action of the referee was in each instance approved, and from this action of the District Court these appeals are taken.

Louis A. Lecher, Charles T. Hickox, and Fred C. Ellis, all of Milwaukee, Wis., for appellants.

Lawrence Olwell, of Milwaukee, Wis., for appellees.

Before MACK and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge (after stating the facts as above). [1] First. As to the appeal of the Citizens' Saving & Trust Company and Kuolt, commissioner of banking:

It is insisted that the trustee, having abandoned as burdensome the real estate theretofore belonging to the bankrupt, was not entitled to hold the net rents collected by himself and the receiver in bankruptcy; that the trustee's abandonment of the real estate carried with it the rents he had collected therefrom; that the same reverted to, or the title thereto became vested in, the bankrupt, this being the legal effect of an abandonment; and that the bankrupt made no claim to the rents and could not do so because of the superior equities of the Savings & Trust Company and the commissioner of banking.

We are not now concerned with the title of the bankrupt to these rents, but with the claim of the trust company to them. This claim is based upon the letter of November 1, 1912, hereinabove set out, and the circumstances under which it was executed, and it is insisted that this instrument, under the circumstances of its execution, operated as an equitable assignment and created a lien in favor of the trust company. In our opinion, it was a mere promise to pay. The agreement of the bankrupt to collect the rents was merely an agreement to collect what was its own and the agreement to pay over was no more than the agreement to pay its own debt. Something more was necessary to amount to an assignment of, or create a lien upon, the rents. As was said by the Supreme Court in Christmas v. Russell, 14 Wall. 69, 20 L. Ed. 762:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee."

In Trist v. Child, 21 Wall. 441, 22 L. Ed. 623, the same court said:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

In Hare & Wallace's notes to Leading Cases in Equity, it is said:

"A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the covenantee a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual."

See also Christmas, Administrator, v. Griswold, 8 Ohio St. 559; Silent Friend Mining Company et al. v. Abbott et al., 7 Colo. App. 73, 42 Pac. 318; Hossack v. Graham et al., 20 Wash. 184, 55 Pac. 36.

Tested by the above principles and authorities, the agreement in question did not operate as an equitable assignment, nor did it create any lien in favor of the trust company; and the decision of the referee and the District Court upon this branch of the case was correct.

[2] Second. As to the claim of the mortgagees to the rents and profits:

The referee held that these rents belonged to the mortgagees from the time when by intervening petitions they claimed them, but denied their right to them prior to the date of the claim. Much of the brief of counsel for the mortgagees is devoted to the proposition that the clause in the mortgages including with the property mortgaged "all the rents, issues and profits issuing and to issue out of said premises," is valid. There can be no question as to the validity of this clause. The question is as to its effect. This clause in the mortgage did not give to the mortgagees an absolute right to the rents. Until there was a default and until the mortgagees made some claim or demand for the rents, they belonged to the mortgagor. Until the mortgagee takes some steps to sequester the rents, he is not entitled to them. "Ordinarily the mortgagor is entitled to rents and profits accrued up to the time that the mortgagee enters, or brings his right of entry or his bill to foreclose, and this right inheres in a trustee in bankruptcy." In re Chase (D. C.) 133 Fed. 79, and cases cited. To the same effect are Freedman Savings & Trust Company v. Shepherd, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163; New York Security & Trust Company v. Saratoga Gas & Electric Company, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132; Wyckoff v. Scofield, 98 N. Y. 475; Rider v. Bagley, 84 N. Y. 461; United States Trust Company v. Wabash Railway, 150 U. S. 287, 306–308, 14 Sup. Ct. 86, 37 L. Ed. 1085.

Under these authorities the decision of the referee and the District Court, giving to the mortgagees the rents from and after the time they made claim for them and denying the rents accruing prior to such claims, was correct.

[3] Third: As to the claims of Richter, trustee:

Richter, trustee, petitioned the referee to order the trustee in bankruptcy to turn over to him all rents and profits collected from the premises included in his mortgage, or to direct the trustee to use the rents so collected in payment or redemption of the taxes for which said premises were sold, as stated. This petition was denied by the referee and his order was affirmed by the District Court. As to the denial of the petition to turn over the rents and profits, we need not add anything to what we have already said.

The trustee for the bondholders or the bondholders themselves could have come into the bankruptcy proceedings and petitioned the court for a sequestration of the rents and profits accruing from the mortgaged premises, but until some such steps are taken, neither the trustee nor the bondholders can assert any right to the rents and profits. This, of course, is predicated upon the proposition that the mortgage held by this trustee had a clause in it covering the rents and profits, but it nowhere appears in the agreed statements of facts in these cases that the mortgage in question contained any such clause and in the absence of such clause, it is difficult to see what possible claim Richter, trustee, can have to these rents and profits.

As to taxes, Richter, trustee, bases his petition on section 64a of the Bankruptcy Act, which is as follows:

"Debts which have priority.—The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors," etc.

It appears that the taxes for the year 1913 were not paid; that on February 25, 1914, the premises were sold for the payment of city taxes and on May 20, 1914, they were sold for the state and county taxes. The purchasers at the sales paid the amount of outstanding taxes and tax certificates were duly issued to them and now outstanding. Richter, trustee, filed his petition to have the rents used in redemption of the taxes on the 12th day of November, 1914. Whether Wisconsin real estate taxes due at the date of adjudication constitute a personal debt of the owner, as well as a lien on the property, so that a claim therefor would be allowable against his estate in bankruptcy and would be entitled to priority, we need not consider; for here no claim was filed. Moreover, the mortgagee stood by and saw the property sold for these taxes, and made no application to the bankruptcy court for an order to pay them while the bankruptcy trustee was in possession or before the tax sales; then after the trustee had abandoned the property, Richter asked the court to apply the rents, not in the payment of taxes then due and owing, but to the redemption of the property from tax sales already made. Even if the trustee in this mortgage could have procured an order upon the trustee in bankruptcy to pay these taxes upon seasonable application therefor, there is no basis for his application, after the tax sales, and after the abandonment of the property to have rents which do not appear to be covered by his mortgage applied to the redemption from sales for taxes.

The referee's orders and the decisions of the District Court were proper, and they are affirmed.

OREGON SHORT LINE R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 10, 1916.)

No. 2716.

1. MASTER AND SERVANT ⚷13—COMMON CARRIERS—HOURS OF SERVICE STATUTE.

Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), declaring that it shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad, and that the term "employé" shall be held to mean persons actually engaged in or connected with the movement of any train, by section 2 prohibits a carrier from requiring or permitting telegraph operators to remain on duty more than 9 hours; while section 3 provides that the carrier is deemed to have had knowledge of all acts of all its officers and agents, but excuses a violation if the result be of an unforeseen casualty or act of God. In violation of the defendant railroad's rules, a telegraph operator remained on duty more than 9 hours, performing clerical work after the expiration of that time. *Held* that, as the act is a remedial rather than a penal one, and as Congress before the passage of the act struck out the word "knowingly" before the word "permitting," in the phrase "requiring or permitting any employé to remain on duty," etc., the railroad company is liable, though no superior servant ordered the telegraph operator to remain on duty in violation of the statute; this being particularly true, as any other construction would render proof of a violation extremely difficult.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⚷13.]

2. CONSTITUTIONAL LAW ⚷238(2), 275(2)—DUE PROCESS OF LAW—EQUAL PROTECTION.

Such construction does not deny a railroad company due process of law and equal protection of law, guaranteed by Const. U. S. Amends. 5, 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 689, 690, 706–708, 835, 844–846; Dec. Dig. ⚷238(2), 275(2).]

In Error to the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by the United States against the Oregon Short Line Railroad Company to recover penalties for violation of the Hours of Service Act. There was a judgment for plaintiff (228 Fed. 561), and defendant brings error. Affirmed.

George H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., and J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The United States brought an action for judgment against Oregon Short Line Railroad Company to recover penalties under the act approved March 4, 1907 (34 Stat. L. 1415), entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon." For a first cause of action plaintiff alleged that defendant, during the 24-hour period beginning at 7 a. m., April 2, 1915, at its office and station

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

at Shelley, Idaho, "required and permitted" its certain telegraph operator and employé, A. R. Weston, to remain on duty for a longer period than 9 hours in that 24-hour period, namely, from 7 a. m. to 8 p. m.; that during all the times mentioned the office and station was one continuously operated night and day; and that the employé, while "required and permitted" to be and remain on duty, by the use of the telegraph or telephone received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce. The allegations of the three causes of action that follow the first are similar, except for differences in dates and hours.

Defendant denied that during the 24-hour period commencing at 7 a. m. on April 2, 1915, at its office at Shelley, it "required and permitted or required or permitted" its telegraph operator and employé, Weston, to be or remain on duty for a longer period than 9 hours in said 24-hour period, but alleged that Weston on that day worked from 7 a. m. to 12 noon, and from 1 p. m. to 5 p. m., and that thereafter, on the same day, "without the knowledge, permission, or consent of this defendant," did continuously remain on duty, performing clerical work, but not as an operator, until 8 p. m. on that date. Defendant admitted that during the time mentioned said office and station was one continuously operated day and night, but denied that Weston, while required or permitted to be and remain on duty, did at any time of that date after 5 p. m. receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce. Defendant alleged that prior to April 2, 1915, it had issued and delivered instructions to all agents and operators, including Weston, prohibiting them from working in any capacity, or performing any service of whatsoever nature, in excess of 9 hours in any 24-hour period in any tower, office, station, or place continuously operated night and day, but that, notwithstanding such instructions and prohibition, Weston remained continuously on duty as operator for a period of 9 hours, and thereafter performed clerical services for an additional period of 3 hours, but that such clerical services were performed "without the knowledge, permission, or consent" of defendant, or any of its officers or agents, except Weston, who was at the time acting contrary to the express instructions mentioned. To the three causes of action next following, similar defenses were interposed.

The plaintiff's motion for judgment on the pleadings, on the ground that the allegations contained in the answer, if true, were insufficient to constitute a defense at law to the allegations of the complaint, was granted as to the first four causes of action, and this writ of error was brought.

[1] The material parts of the statute involved are as follows:

"Be it enacted * * * that the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad * * * and the term 'employés' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours:

* * * Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency. * * *

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney. * * * In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen. * * *"

We regard the statute as one not dealing with violations of the criminal law, but as remedial in its nature and effect, designed to protect persons traveling by way of interstate carriers, and the employés of such carriers, by preventing conditions that necessarily are more or less conducive to danger to both such travelers and employés. And although it may be called punitive in so far as it prescribes penalties for its violation, still the primary rule of construction is that which will make the law effectual in its main purpose. The act is analogous to Safety Appliance Act March 2, 1893, c. 196, 27 Stat. L. 531 (Comp. St. 1913, §§ 8605–8612), which is entitled "An act to promote the safety of employés and travelers upon railroads by," etc. The Hours of Service Act here involved, approved March 4, 1907 (34 Stat. 1415), is entitled "An act to promote the safety of employés and travelers upon railroads by," etc. The Supreme Court, in Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, in speaking of the Safety Appliance Act, said:

"The primary object of the act was to promote the public welfare by securing the safety of employés and travelers, and it was in that aspect remedial, while for violations a penalty of $100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs; that rule not requiring absolute strictness of construction."

In United States v. Atlantic Coast Line Railroad Co., 211 Fed. 897, 128 C. C. A. 275, the Court of Appeals for the Fourth Circuit, construing the hours of service statute, cited Johnson v. Southern Pac. Co., supra, and said:

"This is not a criminal statute, and therefore is not governed by the rule of strict construction. * * * It is rather a remedial statute, which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. * * * Obviously, that purpose was to promote the safety of employés and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a guide to its interpretation."

See Chicago, B. & Q. Railway Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; United States v. Kansas City Southern Railway Co., 202 Fed. 828, 121 C. C. A. 136; Delano et al. v. United States, 220 Fed. 635, 136 C. C. A. 243; United States v. Boston & M. Railroad Co. (D. C.) 168 Fed. 148.

Counsel for the railroad company argue that the statute makes a clear distinction between officers and agents who may require or permit an employé to work in excess of the periods therein prescribed, and such employé; that by part of section 1 the provisions of the act apply to any common carrier or carriers, their officers, agents, and employés, and by other words the term "employés," as used in the act, "shall be held to mean persons actually engaged in or connected with the movement of any train." They then argue that, as it is provided by section 3 of the act that "any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty," it must be that officers and agents who may require or permit such employés to remain on duty in violation of the statute are on a different footing from the employés. They say that, as a carrier cannot require or permit the employés to be on duty except by direction or consent of an officer or agent, permission to do the thing inhibited "must flow from some superior source, and cannot come from an inferior, or one of equal rank, and therefore authority to violate the statute cannot reside in the employé himself." As we understand it, the essence of this position is that neither the carrier nor any of its officers or agents can be adjudged guilty, unless it is first found that one of such officers or agents charged with the duty of supervising and regulating hours of service of "employés" has required or permitted the employé to work in excess of the prescribed time.

It is not to be denied that the train dispatcher who gives orders to other men with relation to the movements of trains is an employé, as are the men who obey his orders; nor is it to be disputed that service by such dispatcher in excess of the prescribed hours for service would be a violation of the provisions of the act; but so would service in excess of prescribed hours by one of the men working under him, and, being a violation of the act, both being employés, the carrier would become responsible for the acts of both. The statute in its comprehensive terms is applicable to carriers, their officers, agents, and employés—employés, of course, being as defined. Our example may be brought closer to the present case. The superior—say the head or division telegrapher of a carrier—may become personally liable if he allows one of his subordinate railroad telegraphers to work about train operations in excess of the prescribed limit, although the operator employé who sends and delivers the message may not be. The liability in the one instance springs from the fact that the superior has authority to supervise and direct, and in the exercise of such authority he may require or permit a subordinate to work in excess service; while the subordinate, often performing duties in obedience to orders, has no power or control over any person other than himself, and may not "require or permit" another to do so. Nevertheless, both such persons are employés; both may be delivering and receiving orders pertaining to or affecting train movements; and as employés, when so engaged, both superior and subordinate, are fairly in relationship of agency to their employer, the carrier.

In thus giving to the word "agents," as Congress has used it in the statute, a broad interpretation, we harmonize the letter and purpose of the statute by holding it to be practically and vigorously remedial in promoting safety. The evident spirit of the law, as gathered from its terms, is to impose upon the carrier positive duty, for in case of prosecution it expressly imputes to the carrier knowledge of all acts of all its officers and agents. We find no room for a construction other than that defense of actual lack of knowledge is foreclosed to the carrier. It "shall be deemed to have had knowledge of all acts of all its officers and agents." Manifestly Congress, in making this rule of interpretation, had in mind the difficulties which would confront prosecutions if actual knowledge by the carrier through its superior representatives had to be proved. Suppose that a telegraph operator, through physical fatigue due solely to working for his employer carrier hours beyond what a man ought reasonably to be able to work, fails to receive and deliver a train order, and that as a result there is a collision and life is lost; is it the intent of the law that the carrier will not be held liable because it has given orders that no employé should work excessive hours, and because its officers or superiors in charge have had no actual knowledge that the operator who failed to receive and deliver the message was working in excess of hours? Such a construction would well-nigh destroy the avowed object of the statute by taking away the obligation which we believe it imposes upon the carrier to see to it that none of its employés engaged in the movement of its trains shall work in excess of prescribed hours, except where emergency conditions, not here relevant, are presented.

The rule of absolute liability logically follows the command that knowledge of all acts of all agents shall be deemed to have been had by the carrier; and as aiding in arriving at the intent to impose absolute liability in general, it is important to note the special proviso of section 3, which withdraws the general applicability of the act from "any case of casualty or unavoidable accident or the act of God," or "where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen," and also makes it inapplicable to the crews of wrecking trains. By these special exclusions of liability of the carrier, and by specific reference to instances where lack of knowledge by the carrier or its officers or agents in charge may avail, and by expressly excluding employés on wrecking crews from the operation of the statute, emphasis is given to the reasonableness of the construction which, when considered with imputed knowledge, makes liability absolute.

To require or permit an employé to work ordinarily implies knowledge by the employer, who exacts or consents to the doing of the work.

Upon this point reference to the history of the passage of the act is relevant. In the report to the House of Representatives, Fifty-Ninth Congress, May 31, 1906, which accompanied the bill to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon, the opinion of the committee was expressed that it ought not to be left to the discretion of the men themselves as to whether they should work excessive hours or not, and the opinion of the committee was that:

"The law itself should fix the maximum limit and provide sufficient penalties for any violation thereof. Neither the cupidity of the men nor of railroad managers should control in a matter of such vital interest to the public safety."

The Congressional Record also shows that the word "knowingly" was inserted in the bill during the earlier stages of its progress in the House of Representatives. Congressional Record, Fifty-Ninth Congress, February 18, 1907, p. 3251.

Section 3 of the House Bill originally read:

"That any such common carrier, or any officer or agent thereof, requiring or knowingly permitting any employé to go, be, or remain on duty in violation of the second section hereof."

Thereafter (Congressional Record 1907, p. 3755) the committee on rules reported to the House of Representatives that the bill entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" should be taken up for consideration, and that the amendment recommended by the committee on interstate and foreign commerce should be agreed to, with an amendment which would strike out the word "knowingly" in section 3 just heretofore referred to; and on March 4, 1907, when the bill was finally enacted into the law now on the statute books, the word "knowingly" had been stricken out in accordance with the recommendation of the committee on rules. We attach very great significance to the action of Congress in expressly excluding the word "knowingly," for, in our opinion, it overthrows the force of the contention of the carrier, and sustains the interpretation which we have put upon the statute.

As sustaining our conclusions we cite these opinions of the Supreme Court construing the Safety Appliance Act: St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; Chicago, B. & Q. Ry. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; Delk v. St. Louis & San Francisco Railroad Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590—and the opinions of other federal courts construing the Hours of Service Act: United States v. Oregon-Washington Railroad & Navigation Co. (D. C.) 218 Fed. 925; San Pedro, L. A. & S. L. Railroad Co. v. United States, 213 Fed. 326, 130 C. C. A. 28. United States v. Oregon-Washington Railroad & Navigation Company (D. C.) 213 Fed. 688, was reviewed by this court in 223 Fed. 596, 139 C. C. A. 142, and the judgment affirmed. While the court rested its decision upon somewhat different facts from those here presented, the doctrine of imputed knowledge was recognized.

[2] We find no substantial ground for the suggestion that the construction which we have put upon the law would deny to this defendant due process of law and equal protection guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Chicago, B. & Q. Railway Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

The fault of the carrier having been established by the pleadings, liability followed, and judgment was properly ordered.

Affirmed.

NEW YORK MAIL & NEWSPAPER TRANSP. CO. et al. v. ANDERSON, Internal Revenue Collector.

(Circuit Court of Appeals, Second Circuit. April 11, 1916. On Motion for Interest, May 9, 1916.)

No. 153.

1. CORPORATIONS ⚷459—POWERS—LEASE OF PROPERTY.

A corporation, unless prohibited by explicit terms in its grant of power, may let its property for a limited term of years.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1811, 1812; Dec. Dig. ⚷459.]

2. CORPORATIONS ⚷459—INTERNAL REVENUE ⚷9—EXCISE TAX ON CORPORATIONS—LEASE OF PROPERTY—VALIDITY.

Two corporations, chartered by special acts of the New York Legislature to construct and operate pneumatic tubes between places in the state for the conveyance of mails, newspapers, and parcels, each owned and operated tubes connecting the general post office in Manhattan with branch offices and different places, and used exclusively for transportation of mails. By the action of the Post Office Department bids were invited for carrying of mails by pneumatic tubes, but subject to the requirement that but one bid should be made for the service of the tubes owned by such two corporations, whereupon one company leased all of its property for a term of years to the other, which secured the contract and performed the required service. *Held*, that such lease was not ultra vires on the part of the lessor, but was valid, and that on its execution the lessor ceased doing business, within the meaning of Corporation Tax Law Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), and was not subject to the excise tax thereby imposed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1811, 1812; Dec. Dig. ⚷459; Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⚷9.]

3. INTERNAL REVENUE ⚷38—SUIT TO RECOVER TAX—LIMITATION.

Under Rev. St. §§ 3226-3228 (Comp. St. 1913, §§ 5949-5951), a suit for recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected cannot be maintained, unless a claim for refunding of the tax is presented to the Commissioner of Internal Revenue within two years after its payment.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⚷38.]

4. INTERNAL REVENUE ⚷38—RECOVERY OF TAX PAID—JUDGMENT—INTEREST.

On recovery of a judgment against a collector of internal revenue for the amount of an internal revenue tax illegally collected, the plaintiff is entitled to have the judgment state that it is with interest.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⚷38.]

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

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

Action at law by the New York Mail & Newspaper Transportation Company and the New York Pneumatic Service Company against Charles W. Anderson, Collector of Internal Revenue for the Second District of New York. From the judgment, both parties bring error. Affirmed.

The parties will be referred to as the Mail Company, the Pneumatic Company and the Collector. Mail Company and Pneumatic Company (plaintiffs below) brought an action against the Collector of Internal Revenue for the recovery of corporation excise taxes alleged to have been erroneously collected. The complaint contains four causes of action, for taxes paid, respectively, for the years 1912, 1911, 1910, and 1909. By stipulation the case was tried without a jury, and after the trial the court filed an opinion, and also findings of fact and conclusions of law. Thereupon judgment was entered for plaintiffs on the first and second causes of action, and for defendant on the third and fourth causes of action. The first and second causes of action (for 1912 and 1911 taxes) raised the single question whether the Mail Company was carrying on or doing business within the meaning of section 38 of the act of August 5, 1909 (36 Stat. 112). The court below held that the Mail Company was not doing business during the years in question, and was therefore not taxable, and to review this ruling defendant brings error. The court below dismissed the third and fourth causes of action (for 1910 and 1909 taxes) on the ground that the time of the applicable statute of limitations had expired, and on the judgment of dismissal plaintiffs assign error.

A. O. Townsend, of New York City, for plaintiff New York Mail & Newspaper Transp. Co.

H. Snowden Marshall, U. S. Atty., and B. A. Matthews, Asst. U. S. Atty., both of New York City, for defendant.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge (after stating the facts as above). The material part of the statute is as follows:

"Every corporation * * * engaged in business in any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year." Comp. St. 1913, § 6300.

In October, 1906, the Mail Company made a 10-year lease (with optional renewal for 10 or 20 years) with the Pneumatic Company, by which it demised all of its plant, property, and franchises, excepting only its right to be a corporation and its interest in the reversion and in the covenants of the lease. If this lease was valid, the Mail Company was not taxable, for the District Court correctly found as a fact that it was not doing business. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; McCoach v. Minehill, etc., Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842.

It is contended that the lease was void, because ultra vires and against public policy. Whether the lease can be attacked in this action on the ground that it is ultra vires need not be determined, because an examination of its provisions and of the character of the Mail Company demonstrates that the company had full power to enter into the lease. The Mail Company was organized under a special act of the New York Legislature approved March 21, 1893, with general powers—

"to construct, maintain and operate pneumatic tubes and other devices for the speedy transmission and delivery of the mails, newspapers and parcels within and between cities of this state, and to do the general business of delivery and transmitting the mails, newspapers and parcels within and between the cities of this state and to make such charges therefor as it may agree by public or private contract." Laws 1893, c. 164, § 1.

Paragraph 5 of the act empowers the corporation, "without other or further authority of law or ordinance," to locate, construct, maintain, and operate tubes between the central post office and branch post office and stations and newspaper offices in the cities of New York, and to convey and transport and to deliver the United States mails, newspapers, and parcels. This paragraph gives the corporation power of eminent domain to enable it—

"to accomplish the purposes for which this charter is given or in the exercise of the powers herein conferred, which are hereby expressly declared to be a public purpose and their use by said corporation a public use."

The Pneumatic Company is a reorganization of the Tubular Dispatch Company and possesses the same powers. The Tubular Dispatch Company was organized under the act of May 9, 1874 (Laws 1874, c. 400), as amended by the act of June 7, 1895 (Laws 1895, c. 977), with powers substantially similar to those of the Mail Company.

On October 16, 1906, the Mail Company owned a line of pneumatic tubes between the general post offices in the boroughs of Manhattan and Brooklyn, New York City, which tubes have always been used exclusively for the transportation of United States mails. The Pneumatic Company at that time was the owner of a line of pneumatic tubes between the general post office in the borough of Manhattan and the Wall Street station, and between the Wall Street station and the custom house, and between the general post office and the Grand Central station, which tubes, like those of the Mail Company, have always been used exclusively for the transportation of the United States mails. On July 27, 1906, the Post Office Department issued a request for bids for carrying the mails by pneumatic tubes. This request contained a requirement that there should be but one bid for service on the lines then owned by the Mail Company and the Pneumatic Company, respectively

[1] In order to make it possible for one of the companies to submit a bid covering its own lines, as well as the lines of the other, the Mail Company on October 16, 1906, entered into the lease, here discussed, with the Pneumatic Company. The lease stated the yearly rental in detail (which need not be here set forth); it constituted the lessee the irrevocable attorney of the lessor in language long familiar in corporate leases, and as matter of caution contained a well-known clause to the effect that, if any provision shall be adjudged invalid or ultra vires, the same shall not affect the validity of any other provi-

sion. In brief, the instrument has all the characteristics of a lease, and none of the characteristics of an agency contract. That a corporation, unless prohibited by explicit terms in the grant of power, can let its property for a limited term of years, is elementary, or, as the District Judge said, "the power to sell implies the power to lease."

[2] But it is argued that by virtue of the powers conferred by the New York Legislature the Mail Company owed a duty to the public which prevented it from authorizing any other person, whether individual or corporate, from doing that for which it was organized. This contention proceeds upon the theory that the Mail Company was what counsel for the Collector calls a public service corporation. We think it unnecessary to concern ourselves with academic inquiries, because of the common-sense rule aptly and concisely stated in Gause v. Commonwealth Trust Co., 196 N. Y. 134, 145, 89 N. E. 476, 479 (24 L. R. A. [N. S.] 967), where the court said:

"The authority of a corporation to perform a particular act is always dependent to a very considerable extent on the facts and circumstances existing at the time when it is proposed to perform the act."

Here the United States, acting through its Post Office Department, required that but one bid be made for an important service to be rendered within a certain described territory. It compelled either the Pneumatic or the Mail Company to be the sole contractor, and, now that its requirement has been fully complied with and the service has been rendered in conformity therewith, it urges that the very act it insisted upon was beyond the power of one of the corporations which otherwise could have been a bidder.

Whatever the obligations of the Mail Company may be to the people of the state of New York, it is apparent that they have been fulfilled; for the lease by the Mail Company has made possible the performance of the principal and important duty for which it was organized, and has enabled the United States to obtain the particular service which it desired. It follows, therefore, if it be assumed, though not decided, that the validity of this lease can be attacked in this action, and if it be assumed, though not decided, that the Mail Company is a so-called public service corporation, that the lease, nevertheless, was not ultra vires the Mail Company.

[3] We now come to the taxes of 1909 and 1910. The 1909 tax was paid June 28, 1910, but claim for refund was not filed until June 10, 1913, nearly three years thereafter. The 1910 tax was paid June 8, 1911, but claim for refund was not filed until June 10, 1913, two years and one day (excluding Sunday, June 8, 1913) thereafter. The relevant sections of the United States Revised Statutes are as follows:

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner had been had therein: Provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, * * * shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued. * * *"

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. * * *"

Sections 3226, 3227 and 3228 of the Revised Statutes (Comp. St. 1913, §§ 5949–5951) must be read together, and, when so read, provide a simple and orderly system whereby an aggrieved taxpayer may sue to recover taxes wrongfully collected.

In the first place, under section 3226, no suit can be maintained unless the taxpayer appeals to the Commissioner of Internal Revenue. This appeal under section 3228 must be presented to the Commissioner of Internal Revenue within two years after the cause of action accrued. Under section 3227 no suit can be maintained unless brought within two years next after the cause of action accrued. Under section 3228 the accrual of the cause of action is at the date when the tax is illegally assessed or collected. Obviously the wrongful act was done when the United States, acting in this instance through the Collector, received the money in payment of the tax. Under section 3227, the date of accrual is the date when the Commissioner of Internal Revenue decides adversely to the taxpayer. Of course, under that section the taxpayer need not wait longer than six months in the event that the Commissioner delays his decision.

To illustrate, therefore, with the precise facts in the case at bar: On June 28, 1910, the Mail Company paid the Collector the tax for the year 1909. The appeal to the Commissioner of Internal Revenue should have been made on or before June 28, 1912, but was not made until June 10, 1913. On June 8, 1911, the Mail Company paid the Collector the tax for the year 1910. The appeal to the Commissioner of Internal Revenue should have been made on or prior to June 8, 1913, but was not made until two days later, to wit, June 10, 1913. Thus the condition precedent with which it was necessary to comply before the Mail Company could maintain a suit was not complied with, and no cause of action ever accrued for the years 1909 and 1910 in favor of the Mail Company against the Collector.

If, to illustrate, an appeal in those cases had been presented to the Commissioner of Internal Revenue within two years, say on or before June 8, 1912, and on or before June 9, 1913 (June 8, 1913, being a Sunday), respectively, then the Mail Company under section 3227 would have been in time if suit had been commenced on or before June 8, 1914, and June 8, 1915, respectively. Merck v. Treat, 174 Fed. 388, 98 C. C. A. 606.

The answer of the Collector to the third and fourth causes of action, involving the taxes of 1909 and 1910, is a sufficient answer. The defense might have been pleaded in a clearer way; but when the Collector alleged that the cause of action "did not accrue within two years before the commencement of this action" he was right, for the reason that the cause of action never accrued. The findings of the

District Court (which the Mail Company contends are inconsistent) fully set forth the necessary facts. See Nos. 1 and 2 at pages 58 and 59 of the record, and No. 4 at page 60.

The judgment is affirmed.

On Motion for Interest.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. [4] The sole ground for opposing the motion for interest is that, though the action is nominally against the Collector, it is actually against the United States. We think the plaintiff is entitled to have the judgment state that it is with interest. Whether it can be collected or not is a matter with which we are not now concerned.

PACIFIC COAST CO. v. JAMES et al.

(Circuit Court of Appeals, Ninth Circuit. July 10, 1916.)

No. 2596.

1. DEDICATION ⊂⇒50—LITTORAL RIGHTS—MERGER OF INDIVIDUAL RIGHT WITH PUBLIC RIGHT.

Where the owners of land abutting the sea dedicate for street purposes a strip of land fronting on the sea, their right as littoral owners of access to the navigable waters in front of such land is merged in the public right, and injunction cannot issue to prevent interference with such right by the building of structures on the tidelands.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 91–94; Dec. Dig. ⊂⇒50.]

2. NAVIGABLE WATERS ⊂⇒36(4)—LITTORAL RIGHTS—POSSESSION OF LANDS.

Under Act Cong. May 17, 1884, c. 53, § 8, 23 St. 26, declaring that Indians or other persons in the district of Alaska shall not be disturbed in the possession of any lands actually in their use or occupation or then claimed by them. *Held* that, where complainant, holding tidelands under such statute, had abandoned them, and that defendants had openly appropriated, used, improved, and held possession of such land as vacant, unused, unoccupied, and unappropriated land of the United States for more than 12 years before the commencement of the suit, defendants were entitled to the use and possession of such land as against complainant.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 188–193; Dec. Dig. ⊂⇒36(4).]

3. NAVIGABLE WATERS ⊂⇒36(7)—TIDELANDS—POSSESSION.

Evidence *held* sufficient to support a finding that defendants for more that 12 years had been in the open, notorious, and continuous possession of certain tidelands claimed by plaintiff under Act Cong. May 17, 1884, and that defendants were entitled to the possession of the same as against complainant.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 199; Dec. Dig. ⊂⇒36(7).]

4. NAVIGABLE WATERS ⊂⇒36(4)—POSSESSION—EVIDENCE.

Since the title to all tidelands in Alaska is in the United States, evidence that plaintiff paid taxes upon a wharf-site tract *held* insufficient to show complainant's right to the possession of tide land as against defend-

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

ants' claim of open, notorious, and continuous possession for more than 12 years.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 188–193; Dec. Dig. ⚿36(4).]

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

Suit by the Pacific Coast Company, a corporation, against George E. James and another. Judgment for defendant James, and plaintiff appeals. Affirmed.

Shackleford & Bayless, of Juneau, Alaska (Farrell, Kane & Stratton, of Seattle, Wash., of counsel), for appellant.

Gunnison & Robertson and Royal A. Gunnison, all of Juneau, Alaska, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was brought by the appellant against the appellee James and one Webster to enjoin the driving by them of certain piles on the southerly portion of a certain piece of tideland 113 feet in width, at Juneau, Alaska, of which the complainant claimed to be the owner as against them—alleging that since March 6, 1881, it had been in the open, notorious, and continuous possession of a certain described tract, including the tideland in question, exercising dominion over the same and over the right of way out to deep water, and also basing its alleged rights on the averment that, as a littoral owner of lands abutting the shore of the sea, it was entitled to free access to and from the navigable waters fronting thereon.

Denying the allegations of the bill in that behalf, and alleging his own ownership of the premises as against the complainant, the defendant James sought by cross-bill an injunction preventing it from driving similar piles, which it was alleged to be threatening and commencing to do. The trial resulted in a judgment for the appellee James.

[1] In respect to the complainant's ownership of upland abutting the seashore and its alleged consequent littoral rights, the decision of this court in the case of McCloskey v. Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673, is conclusive against the appellant, for the reasons there stated, based upon facts there as well as here appearing. See 160 Fed. pages 797–799, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

[2] Respecting the contention of the appellant, based upon its alleged actual and continuous possession of, and claim to, the land in dispute, which rests upon that provision of Act Cong. May 17, 1884, c. 53, § 8, 23 Stat. 24, 26, declaring "that the Indians or other persons in said district [of Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them," the trial court held, and, in effect, found as a fact from the evidence in the case, that the piece of tideland in controversy was more than 12 years before the commencement of the suit abandoned by the appellant, and was "vacant, unused, unoccupied, unappropriated land of the United States" at the time the appellee entered into its

possession in April, 1900, since which time, according to the findings, he has been in the actual and undisputed possession and use of it. It is manifest that, unless we can properly hold the finding contrary to the evidence, the act of Congress referred to affords the appellant no basis for its suit.

[3] Prior to the establishment of a civil government for Alaska, which was done by the above-mentioned act of Congress of May 17, 1884, what is now the town of Juneau was known as Rockwell, at which was a settlement of miners and others attracted there by the discovery of gold in the vicinity, and there was recorded, according to the evidence, in the records of the district, by one W. W. Murry, this notice:

"Notice is hereby given that the undersigned, W. W. Murry, hereby claims for building and wharf purposes the following described plot of land lying about one-eighth of a mile easterly from the town of Harrisburg on the seashore: The center line is marked by a blazed tree and notice and large boulder near low-water mark in line S. 25° W. magnetic. The courses and distances are as follows: Commencing at stake and mound of stone, first, N. 25° E. (600) six hundred feet; thence, second, S. 65° E. (600) six hundred feet; thence, third, S. 25° W. (600) six hundred feet, to stake and mound of stone at low-water mark; and thence, fourth, N. 65", W. 600 feet along the water line to place of beginning.

"Located March 6, 1881. W. W. Murry.

"Witnesses:

"F. Lagliabue.

"N. G. Hilton.

"Harris Mining District, Takou, Alaska Territory, March 12, 1881.

"R. Dixon, Recorder.

"March 12, 1881."

On the 26th of the same month, at a meeting of the miners, there was adopted the following preamble and resolution:

"Whereas, Captain M. W. Murray has located outside and to the east of the city a wharf site and proposes at earliest opportunity to build a wharf and warehouse for the accommodation of vessels and steamers and for the benefit of all citizens alike, it is the sense of the meeting that we should encourage such an enterprise: Therefore it is hereby resolved that the miners and citizens of the district and city, recognizing that such improvements would be a public benefit, hereby accept, indorse, and recognize the rights of said Capt. Murray, and will by our future acts indorse and recognize his rights to the said wharf site and improvements."

The larger part of the land embraced by that location was above high-water mark, but some of it was tideland. It is not claimed that there was then any law in existence authorizing Murry's location, nor is there any very satisfactory showing as to just what he did in pursuance of it; but it would seem from the evidence that he and one Carroll constructed a wharf on the property so located about 40 by 60 feet in dimensions and in the shape of the letter T, on which were built a coalhouse and a warehouse, and that two piles were driven, one of which was on the southerly boundary of the tideland, to which vessels could be and were tied. The wharf became known as the Carroll-Murry wharf, and until 1894 was the only one at Juneau, at which all vessels arriving there landed—tying to the piles when necessary. Whether Murry and Carroll built the wharf and its appurtenances and drove the piles, or whether a part of that work was done by the appellant company, it is quite certain from the evidence that the appellant in the year 1882, being then engaged in the transportation business between Seattle and Alaska ports, entered into possession of the wharf site under claim of right, and subsequently acquired by mesne conveyances whatever rights Murry and Carroll had therein.

As the evidence shows that the wharf was commenced in 1881 and was completed in 1882, the fair inference is that it was at least commenced by Murry, or Murry and Carroll, and may have been completed by them. At all events, it does appear that in 1882 the appellant took possession of the property under claim of right and used it in the operation of its steamers from that time to and including the year 1894. The appellant's steamers being much too long for the face of the dock, it was necessary, at least in rough weather, to tie them while lying there either to the piles mentioned or to other fastenings on shore. Such, the evidence shows, was the practice of the appellant company until it ceased to use the wharf site in question in the operation of its ships. In 1892 it built in the town of Juneau another wharf, and after that year landed all of its vessels at the new wharf, with the exception that in 1895 it docked one of its steamers at the old wharf, which was thereafter never again used for shipping purposes. The evidence shows that the buildings upon the structure situated near the upland were subsequently at times rented by the appellant for a sardine factory, a tannery and glove factory, and a tenement house, but that nothing was ever done after 1894 towards the maintenance or use of the wharf or tideland for shipping purposes.

The evidence shows that in 1900 the appellee was engaged in the sawmill business at a place on Gastineau Channel, about four miles from Juneau, and in April of that year took a raft of his lumber to that town, and, finding the piece of tideland here in controversy unoccupied, but covered with logs, driftwood, and boulders, proceeded to clear and make of it a place for his rafts and lumber. The piece of tideland so appropriated by the appellee was a strip 113 feet wide on the southerly side of the tract known as the Murry-Carroll wharf site. The evidence shows that from that time until the commencement of this suit—a period of more than 12 years—the appellees openly appropriated, used, improved, and held possession of this piece of land as a landing place for his lumber for his Juneau trade, to which no objection appears to have been made by the appellant, whose Juneau agents well knew the facts. The evidence shows that the appellee's rafts and scows were beached there regularly in the summer time, and that in the winter his craft were laid up there; that in 1904 he drove some piles in the land for the purpose of tying scows to them, and in 1905 he built a gridiron 18 or 20 feet long in bents 4 piles wide. It is true that in the same year of 1905 one Davidson built a similar gridiron on the same piece of land, acting in so doing under and by virtue of a lease from the appellant; but that lease, which was introduced in evidence, shows upon its face that the right undertaken to be thereby exercised was by virtue of the appellant's ownership of its upland and in pursuance of its supposed littoral rights. The lease, to which the appellant was party of the first part, and Davidson, as receiver of a certain partnership, was party of the second part, recites and provides, among other things, as follows:

"Whereas, under the permission and license of the party of the first part, the party of the second part has erected a platform and pilings upon tidelands in front of lots 1 and 2 in block T of the town site of Juneau, Alaska; and

"Whereas, the said party of the first part is the owner of the upland upon which said tidelands abut and is entitled to littoral rights thereto:

"Now, therefore, the party of the first part, for and in consideration of the sum of one dollar in hand paid by the party of the second part to the party of the first part, receipt whereof is hereby acknowledged, and the covenants hereinafter expressed, hereby leases to the said Charles E. Davidson, as receiver of the partnership estate of E. O. Sylvester and Thomas A. Willson, deceased, the ground now occupied by that certain piling and platform in front of the lots hereinbefore described for the term of six (6) months from date hereof."

The evidence shows that the platform so erected by Davidson collapsed, was rebuilt, was then wrecked by the high tides, and such timber as remained hauled away by the Perseverance Mining Company. In 1906 appellee's gridiron was the only one upon the tract in controversy, and during that year he built a new and more substantial one, using in doing so a part of the old. In the fall of the same year the town of Juneau extended Franklin street of the town past the tract in controversy, whereupon the appellee built an approach from that street down to the westerly side of his gridiron, and has ever since continued to occupy and use the tract in the ways above indicated.

[4] The evidence further shows that the appellant has regularly paid to the town of Juneau the taxes levied upon its wharf-site tract; but, as the title to all tideland in Alaska is in the United States, it is manifest that there could have been no taxes upon the tideland in question. The only other item of evidence we find in the record tending to support the appellant's claim is the circumstance shown that in the year 1900 one Messerschmidt asked permission of the agent of the appellant company to put cordwood on the beach, which was granted; that witness, however, testifying that the place where the wood was to be put was "on dry land, practically," which would, of course, be above high tide.

Taking the record as a whole, we are unable to say that the findings of fact made by the trial court were against the evidence.

The judgment is affirmed.

SUTHERLAND v. PURDY.*

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

No. 2583.

MINES AND MINERALS ⚷14(2)—LOCATION OF ALASKA PLACER MINING CLAIM —RECORDING POWER OF ATTORNEY.

Under Act Cong. Aug. 1, 1912, c. 269, §§ 2, 5, 37 Stat. 243 (U. S. Comp. St. 1913, §§ 5055, 5058, Comp. Laws Alaska 1913, §§ 129b, 129e), providing that no person shall locate any placer mining claim in Alaska as attorney for another unless duly authorized by power of attorney in writing, acknowledged and "recorded in any recorder's office in the judicial division where the location is made," and expressly declaring that no placer mining claim shall be located in Alaska "except under the limitations" of the act, and that any such claim attempted to be located in violation of the "act shall be null and void," a location of an Alaskan placer mining claim by an attorney in fact for another before the recordation of the authorizing power of attorney is void.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20; Dec. Dig. ⚷14(2).]

Gilbert, Circuit Judge, dissenting.

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

Action by Dan D. Sutherland against F. W. Purdy. Judgment for defendant, and plaintiff brings error. Reversed.

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

Maurice D. Leehey, of Seattle, Wash. (Lyons & Orton, of Seattle, Wash., of counsel), for defendant in error.

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

ROSS, Circuit Judge. The questions presented by the writ of error on which this case comes here are whether under the act of Congress of August 1, 1912, a power of attorney, authorizing the location in Alaska of placer mining claims by one for another, is required to be recorded before any step in the matter of such location can be taken, and as to whether the court below erred in allowing parol proof of the contents of the power of attorney under which the placer mining claim in controversy was located for the defendant in error, Purdy, by one G. L. Gates. Subsequent to that location a part of the same ground was included in a location made by the plaintiff in error, Sutherland, who, as plaintiff in the court below, brought the present action against Purdy to dispossess him.

Prior to August 1, 1912, any citizen of the United States and any one who had declared his intention to become such could locate lode or placer claims in Alaska, as elsewhere in the United States, without limit as to number, and could make such locations as agent for another without having any power of attorney authorizing him to do

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

*Rehearing denied October 16, 1916.

so. And Congress never at any time required the location of such claims to be recorded, but has left that matter to legislation by the states or to regulation by the miners. Sturtevant v. Vogel, 167 Fed. 448, 458, 93 C. C. A. 84, and references there made. But on August 1, 1912, Congress enacted this statute in respect to placer mining claims in that territory:

"Sec. 129b. That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer mining claims for any one principal or association during any calendar month, and no placer mining claim shall hereafter be located in Alaska except under the limitations of this act.

"Sec. 129c. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer mining claims in any calendar month: Provided, That one or both of such locations may be included in an association claim.

"Sec. 129d. That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

"Sec. 129e. That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made."

Compiled Statutes of Alaska.

The contention of the plaintiff in error is that the location made by Gates as attorney in fact for Purdy was made prior to the recordation of the power of attorney and for that reason was void. The fact is conceded, and the question of law for decision is whether such attempted location is of any validity. The general statute of the United States regarding the location of mining claims is found in Revised Statutes, § 2324, as amended January 22, 1880 (Comp. St. 1913, § 4620), and reads in part as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the * * * names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

It is undoubtedly well settled that the order in which the several acts so required by this general law of Congress are to be performed is nonessential in the absence of intervening rights. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; Lindley on Mines (3d Ed.) § 333; Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188.

But in the present case we have a special statute of Congress in regard to placer mining claims situate in the territory of Alaska, in terms declaring that no person shall hereafter locate any such claim as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in a prescribed office, and expressly declaring that no placer mining claim shall hereafter be located in Alaska "except under the limitations" of said act, and that any such claim located in violation of the "act shall be null and void."

Whatever the reasons that caused Congress to prescribe conditions in regard to the location of such claims in Alaska essentially different from those applicable to other portions of the country, its language is, we think, perfectly clear and unmistakable and of course must be taken to mean what it says. This view renders it unnecessary to consider the ruling of the trial court admitting parol evidence of the contents of the power of attorney in question. In the recent case of Cloninger v. Finlaison, 230 Fed. 98, 144 C. C. A. 396, decided by this court February 7, 1916, after holding that the notice of location of the mining claim there in controversy was fatally defective, it was in the opinion said:

> "We think, also, that the judgment of nonsuit is sustainable on the ground that the plaintiff failed to show that the power of attorney from the defendant to Taylor was not recorded. We are of the opinion that the location of a mining claim in Alaska under a power of attorney is valid, if the power of attorney is duly recorded at any time before adverse rights accrue, or location is attempted to be made of the same ground by another."

No mention of the act of August 1, 1912, was there made, and it is manifest that that clause of the opinion was unnecessary to the decision of the case. For the reasons above given, we think that what was thus unnecessarily said upon the subject was erroneous.

The judgment is reversed, and the cause remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). The substance of the act of Congress of August 1, 1912, is that no one shall locate a placer mining claim in Alaska as attorney for another "unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded." The question here is whether that statute was complied with. I contend that it was. The opinion of the majority of the court contains the erroneous statement that the fact is conceded that the location made by Gates as attorney in fact for the defendant in error "was made prior to the recordation of the power of attorney." I find no such concession in the record. On the contrary, the court below held, and the defendant in error contends, that the power of attorney was recorded before the location was made. It is true that the discovery was made, and the boundaries were marked before the power of attorney was filed for record, but those acts are but two of the acts requisite to make a location. To locate a placer claim in Alaska, three acts are necessary: Discovery, marking the claim, and recording the location certificate. The courts have uniformly held that the order in which these acts are done is unimportant, provided that they are all done before intervening rights of third persons attach. In Mining Co. v. Tunnel Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501, the court affirmed that doctrine, and held, in construing the words of section 2320, R. S. (Comp. St. 1913, § 4615), "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," that it is not required that discovery must be made before marking the boundaries, or that no location shall be considered complete until discovery, but that the statute means nothing more than that the fact of discovery shall exist before the vesting of the right of exclusive possession which attends a valid location. In 1 Lindley on Mines (2d Ed.) § 330, it is said:

"The order in which the several acts required by law are to be performed is nonessential, in the absence of intervening rights."

In Redden v. Harlan, 2 Alaska, 402, the court said:

"The marking of the boundaries may precede the discovery and recording, or the recording may be first, and if all three are performed, though not within the time fixed by law or the rules and regulations, before other rights intervene or attach to the land, it is sufficient and the claim will be valid."

The location of the claim in the present case was not complete until the last step was taken, the filing of the location certificate. At the time when that certificate was filed the power of attorney, duly executed and acknowledged, was also filed for record. It is well settled that to file an instrument for record is to record it under statutes requiring recordation of instruments. Farabee v. McKerrihan, 172 Pa. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Shebel v. Bryden, 114 Pa. 147, 6 Atl. 905; Wagon Co. v. Hutton, 53 W. Va. 154, 44 S. E. 135; Eufaula Nat. Bank v. Pruett, 128 Ala. 470, 30 South. 731; Fairbanks v. Davis, 50 Vt. 251. In 34 Cyc. 588, it is said:

"An instrument is ordinarily deemed to be recorded when its holder leaves it with the proper officer for the purpose of being recorded, even though it is not then actually recorded."

The power of attorney and the certificate of location were therefore recorded on the same date. There are two reasons why we may assume that the former was filed and recorded before the latter. One is that the law will presume that, of the two instruments filed at the same time, that was first recorded which the statue required first to be recorded. Another is that there is no evidence that the power of attorney was not recorded first. "Every reasonable doubt will be resolved in favor of the validity of the mining claim as against the assertion of a forfeiture." 27 Cyc. 600. In a case similar to this Judge Hawley for this court said:

"The word 'forfeiture' is not used in the statute, although it is a comprehensive word to express results which flow from a failure to comply with the law." McCulloch v. Murphy (C. C.) 125 Fed. 147.

In that case this court held that the burden of proof to establish forfeiture rests upon him who asserts it. And so in the present case, the burden of proof rests upon the plaintiff in error to show that the power of attorney was not recorded before the certificate of location. .

The agent of the defendant in error started out to prospect for a placer claim, having in his possession a power of attorney duly executed and acknowledged, intending, no doubt, to record the power of attorney in case he made a discovery which justified a location for his principal. When he had made that discovery and marked the claim, he placed the power of attorney and the location certificate in the hands of the recorder for record. No rights of others intervened until some weeks thereafter, when the plaintiff in error attempted to locate the same land. An earlier record of the power of attorney would have been an idle act. It could have served no useful purpose. The act of Congress does not say that the power of attorney must be recorded before the initiation of any of the acts of location. It is a harsh and narrow construction that gives to the act that meaning, and it is a construction which is contrary to the liberal teaching of Mining Co. v. Tunnel Co., supra, and numerous other decisions.

GRIMES v. CLARK.

In re BAKER.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1916.)

No. 1452.

1. CHATTEL MORTGAGES ⟹2—AFTER-ACQUIRED PROPERTY—VALIDITY.
   The validity of a chattel mortgage covering after-acquired property depends on the law of the state in which the mortgage was executed.
   [Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 2; Dec. Dig. ⟹2.]

2. CHATTEL MORTGAGES ⟹18—AFTER-ACQUIRED PROPERTY.
   Under Maryland law, a provision in a chattel mortgage covering a stock of goods extending the mortgage lien to after-acquired property was void; and such mortgage did not authorize the mortgagee, shortly before mortgagor was adjudicated a bankrupt, to seize the after-acquired property.
   [Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 61–66; Dec. Dig. ⟹18.]

In Error to the District Court of the United States for the District of Maryland, at Baltimore, in Bankruptcy; John C. Rose, Judge.

On demurrer of James Clark, as trustee in bankruptcy of Thomas Baker, to the plea of J. Hamilton Grimes to the trustee's petition to recover the amount of a preference. Judgment sustaining demurrer (232 Fed. 190), and J. Hamilton Grimes brings error. Affirmed.

Richard S. Culbreth, of Baltimore, Md. (S. S. Field, of Baltimore, Md., and Jos. L. Donovan, of Ellicott City, Md., on the brief), for plaintiff in error.

Edward M. Hammond and Charles C. Wallace, both of Baltimore, Md., for defendant in error.

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

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

KNAPP, Circuit Judge. Clark, trustee in bankruptcy of Baker, sued Grimes, plaintiff in error, for the amount of a preference alleged to have been obtained by the transfer of property from Baker when he was insolvent. The transfer in question took place on the 11th of September, 1914, and Baker was adjudicated an involuntary bankrupt on the 17th of that month. Grimes set up in answer that in November, 1911, he loaned Baker $1,300 for one year at 6 per cent., to purchase the stock of goods, fixtures, etc., in a store at Marriottsville, Md.; that the money was used for that purpose; and that the loan was secured by a chattel mortgage, duly recorded, on all the property bought by Baker—

"and also the stock in trade, trade fixtures and personal effects which shall or may at any time or times hereafter, during the continuance of this security, be brought into the said store * * * either in addition to or substitution for the stock in trade, trade fixtures and personal effects now being therein or belonging thereto."

The answer then recites provisions of the mortgage to the effect that the mortgagee, upon default of payment, could seize and sell the property pledged, including all property afterwards acquired, and that until default the mortgagor might remain in possession and sell at retail as agent of Grimes, rendering to him monthly accounts of sales made, and paying him whenever required all moneys received from such sales. After stating that he took possession on the 11th of September, 1914; that there was then overdue the principal sum of $1,300, with interest from the 17th of November, 1913; that he sold the property for $1,040.22, and applied the proceeds to the payment of the mortgage debt—the answer alleges as follows:

"That some of the stock in said store at the date of said mortgage had been sold and replaced by other stock, and was so mixed and intermingled therewith as not to be identified or distinguished; that said Baker was solvent at the date of said mortgage; but the defendant had reason to believe that, at the date he took possession of said stock, the said Baker was insolvent; that the defendant took possession of said stock in good faith, and with no other intent than to assert the right which was fairly his under said mortgage, after the due recording of which the claims of all of the other creditors of the said Baker, the same being open accounts, originated."

It is further alleged that defendant was a farmer, living some five or six miles from Marriottsville; that he visited the store once or twice a month; that Baker frequently told him he "was getting on all right, not only holding his own, but increasing his stock"; that defendant so believed, and for that reason, and for the purpose of helping Baker in his business, no accounts were rendered to him and no money received by him for any sales made by Baker; that on or about the 11th of September, 1914, defendant learned for the first time that Baker was having difficulty in meeting his obligations; that thereupon he went to the store with one Donovan and took possession of the property, "the said Baker neither assenting nor objecting"; that Baker had no authority to sell the property except as stated in the mortgage; and that defendant did not know or have reasonable cause to believe, when he took possession of the property, that Baker intended to create a preference. The District Court sustained plaintiff's demurrer to the pleas set up in the answer and, the defendant having elected to stand upon the pleadings, ordered judgment in favor of plaintiff for the $1,040.22 which defendant had received from the sale of the property.

[1] The case then is this: Claiming a lien under the terms of his mortgage, Grimes took possession of property which Baker acquired after the mortgage was executed. He knew at the time that Baker was insolvent, though the latter was not adjudicated bankrupt until a few days afterwards. Knowing the insolvency of Baker, he seized the bulk of Baker's assets for the evident purpose of getting his own debt paid, whatever might happen to other creditors. He must have been aware that the necessary effect of what he did was to gain a preference for himself, and he cannot be heard to say that a preference was not intended. Beyond doubt the transaction was a transfer of property within the meaning of the Bankruptcy Act, and the only question here is the right of Grimes under his mortgage as against subsequent creditors without security. The answer to that question depends wholly upon the law of Maryland, whatever may be held in other jurisdictions, as the Supreme Court has repeatedly declared. Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Duffy v. Charak, 236 U. S. 97, 35 Sup. Ct. 264, 59 L. Ed. 483.

[2] A review of the Maryland decisions convinces us that the contention of plaintiff in error cannot be sustained. In Hamilton v. Rogers, 8 Md. 301, the subject is exhaustively discussed and numerous cases cited to the effect that a provision in a chattel mortgage to cover after-acquired property will be held invalid. The conclusion is summed up in the following statement:

"Looking to the maxims of the common law and the decisions of courts, both in this country and in England, we are clearly of the opinion that this action cannot be maintained for the taking of the subsequently acquired goods."

In Rose v. Bevan, 10 Md. 469, 69 Am. Dec. 170, the principle is announced as follows:

"Among other things it [the bill] denies the property levied upon to be the same as that coverd by the mortgage. If it be not the same, then, to the extent of the difference, the mortgagee has no right to interfere, or, if any portion be the result of purchases made out of the proceeds of sale of the goods mortgaged, he has no right, as to such portion, to interfere; he having no interest in, or lien on, the same. Hamilton v. Rogers, 8 Md. 301."

Applying this principle to a verbal agreement respecting subsequently acquired property, in Wilson v. Wilson, 37 Md. 1, 11 Am. Rep. 518, it was said:

"It is not, however, with that part of the contract we have to deal, but with that clause of it which professes to pass title to the property which the vendor might thereafter acquire during her life. Is that clause operative to pass the legal title to such property, so as to enable the plaintiff to maintain trespass or trover for its asportation or conversion? This question has been answered by our predecessors. Upon an able and elaborate review of the authorities, it was decided in Hamilton v. Rogers, that a clause in a mortgage of goods in a store conveying not only those then in the store, but whatever might be therein at any time in the course of the mortgagor's business, was, as to subsequently acquired goods, inoperative for the purpose of enabling the mortgagee to maintain an action at law against a party seizing them."

The ruling is repeated in Crocker v. Hopps, 78 Md. 262, 28 Atl. 99, in which the facts were quite similar to those under review, the court saying:

"The second plea is based upon the theory that because the appellee was in law, under his chattel mortgage, the owner of the chattels therein mentioned, he became entitled to the substituted or after-acquired chattels in virtue of the legal effect of such chattel mortgage. But that such was not the legal effect of such a mortgage has been held more than once by this court. It has been the settled law in Maryland since the case of Hamilton v. Rogers that even if the mortgage contain a provision by which substituted or after-acquired chattels are sought to be subjected to the mortgage lien, no title to, or right of possession of, such after-acquired chattels will pass to the mortgagee."

To the same effect is First National Bank v. Lindenstruth, 79 Md. 137, 28 Atl. 807, 47 Am. St. Rep. 366, which also dealt with a mortgage purporting to cover property afterwards acquired, and in which the court said:

"But such a provision, whilst not of itself rendering the mortgage void, as fraudulent, is at law simply a nullity. It is the settled doctrine of the Maryland courts that a provision such as this in an ordinary mortgage creates no lien at law on after-acquired property."

In view of these decisions, which disclose a clear and long-established rule of law, it must be held that the mortgage in question was ineffectual and void as to property bought by Baker after the mortgage was executed, which is the property now in dispute. As to that property the mortgage gave Grimes neither lien nor right of possession. It was simply a nullity; in contemplation of law it never existed. Grimes, therefore, had no more right to take this property, with or without the assent of Baker, than had any other creditor; and it follows necessarily, under the admitted facts, that the transaction by which he got it was an illegal preference which the trustee in bankruptcy can set aside.

It is true the mortgage contained a provision that Baker might sell at retail as the agent of Grimes, accounting to the latter for the money received, but concededly this provision was never observed. In point of fact Baker ran the store and sold goods and used the proceeds as though there were no mortgage and everything belonged to himself; and this with the full knowledge and consent of Grimes, who was apparently content to take his interest, and ask for nothing more, so long as Baker was able to make him believe that the business was flourishing. Manifestly, the rights of Grimes are to be determined by what was actually done with his acquiescence, and not by a limitation in the written instrument which from the first was wholly disregarded. The agency argument is untenable.

Nor on the whole are we persuaded that the equities of Grimes are superior to those of other creditors. He was bound to know that under Maryland law his mortgage would not be a lien upon or give him any right to seize the goods afterwards purchased by Baker; and dealers who sold to Baker on credit were presumably aware that the supplies they furnished would not be subject to Grimes' mortgage. If Grimes trusted Baker overmuch, as seems to have been the case, and allowed him to live out of the proceeds of the original stock, the wholesalers who replenished the store from time to time may well claim that their property ought not now to be taken to pay Grimes' debt.

We are of opinion that no reversible error has been made to appear, and the judgment is accordingly affirmed.

J. HOMER FRITCH, Inc., et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. July 10, 1916.)

No. 2683.

ESTOPPEL ⇐58—CONSTRUCTION OF CONTRACTS—EQUITABLE ESTOPPEL.

One who, on being notified of the acceptance of his offer to enter into a contract, is also advised that the acceptance was based on a certain construction of the offer, unless he acts promptly, is estopped to deny that such construction was the correct one, provided the other party has acted upon it to his injury, but not otherwise.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. ⇐58.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by J. Homer Fritch, Incorporated, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor, and Kate E. Spiers, against the United States. Judgment for defendant, and plaintiffs bring error. Affirmed.

The plaintiffs in error were the owners of the steamer Homer. For several years prior to 1911 the Department of Commerce and Labor had chartered the steamer for three or four months in the summer of each year for use in connection with the Alaska seal fisheries. Bowers, the Commissioner of Fisheries, and Lembkey, the agent of the Department of Commerce and Labor for the Alaska seal fisheries, recognizing the fitness of the Homer for their purposes, desired to purchase her, and they entered into negotiations with the owners with that end in view. The negotiations failed for the reason that the department had but a fund of $20,000 available for purchasing, and the purchase price was $45,000. In the charter party for 1911 there was inserted in paragraph 21: "That the charterers have the option, at any time during this charter, of purchasing the said vessel for the sum of forty-five thousand ($45,000) dollars, against which any amount paid for the hire of the said vessel, less cost of operation, shall be set off and deducted, but

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

*Rehearing denied October 16, 1916.

that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this charter to the completion of sale." The charter party was entered into on April 24, 1911, and was for a period of 3½ months, with the option to extend the same 30 days. The owners were to furnish all officers, seamen, engineers, and firemen, but the charterer had the right to appoint a supercargo. On September 12, 1911, the steamer was at San Francisco ready to be surrendered to the owners, and the owners were notified that the voyage was terminated, that the cargo had been discharged, and that at 12 o'clock noon of that day the vessel would be turned over to them. But at 10:30 a. m. of that day the owners received from Washington the following telegram of that date: "Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer. Chas. Earl, Acting Secretary of the Department of Commerce and Labor." The agent of the owners on receipt of the telegram conferred with Lembkey, who was at San Francisco, and Lembkey indorsed the following on the charter party agreement: "According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this charter is hereby extended for a period of 30 days from September 13, 1911. Subject to approval of Dept. of Commerce & Labor." On September 14th, the owners sent the following telegram to the Acting Secretary of the Department of Commerce and Labor at Washington: "As requested in your telegram of twelfth instant charter steamer Homer hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase." On October 10, 1911, the owners sent the following telegram to Bowers, Commissioner of Fisheries at Washington: "Your extension of charter and option of Steamer Homer expires October 13th. Should this expire without further action on the part of the department ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option, terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises." On October 12th, the Acting Commissioner of Fisheries answered the dispatch, saying, "Replying yours Oct. ten, Bureau of Fisheries is not in position to purchase Homer." On October 25th, the Acting Secretary of Commerce and Labor wrote to the owner as follows: "Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship Homer from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12th noon, and that the department has not extended or renewed the charter nor approved the action of any officer of the department attempting to bind it for charter money beyond that time." The correspondence explains the issues on which the case was tried in the court below. There was a stipulation of facts, and some oral testimony was taken on behalf of the plaintiffs, but they add nothing material to what has been stated. The court made the following findings of fact: "First, that the steamship Homer was fully discharged of her cargo and turned over to the owners by the charterers, on or prior to the 12th day of September, 1911, at the port of San Francisco, California. Second, that W. I. Lembkey did not have authority to extend the charter party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor, or by any department or agent of the defendant. Third, that there was no contract or agreement between plaintiff and the defendant extending the charter party beyond September 12, 1911."

Ira A. Campbell and John F. Cassell, both of San Francisco, Cal., for plaintiffs in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Franciso, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Each party to the action claims that its respective contention is sustained by the language of the telegram of September 12, 1911:

"Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer."

The defendant claims that it distinctly called for extension of the option to purchase and for nothing else. The plaintiffs claim it meant extension of both the charter party and the option to purchase, because the charter party included the option to purchase, and there had been an understanding that all moneys paid on the charter, less cost of operation, should be credited on the purchase price of the vessel, and that this meaning is made certain by the words "otherwise charter to terminate as provided therein," which words, it is said, indicate that if the option were extended, the charter was not to terminate, and that the whole dispatch means this:

"Would like to have option for purchase extended thirty days; if you do not consent the charter shall terminate as provided therein."

But counsel for the defendant say that the meaning of the word "otherwise" as used in the telegram is "in other respects," and that the dispatch means:

"Would like to have option for purchase extended thirty days; in other respects the charter to terminate as provided therein."

If that was the message intended to be conveyed, the word "otherwise" was unfortunately chosen. That meaning, it seems to us, is not suggested by the other words of the telegram, and is not the natural meaning. However, if the case rested there, and there were no more to the correspondence than a telegram accepting the proposition of the Acting Secretary, we should hold that the minds of the parties never met upon the understanding which the plaintiffs gave to the dispatch. But the dispatch called for an answer, and two days later the answer was sent:

"As requested in your telegram of twelfth instant, charter steamer Homer hereby extended for further period of thirty days from September thirteenth nineteen eleven, with option of purchase."

That telegram distinctly advised the Acting Secretary that his proposition of September 12th was understood to be a proposition to extend both the charter and the option to purchase. If he did not assent to that interpretation of his proposal, it was his duty then to disclaim it. This he did not do, and it was not until October 25th that he wrote to the owners, informing them that the department had not extended or renewed the charter, nor approved the action of any officer of the department attempting to bind it for charter money beyond September 12.

We know of no reason why the parties to this charter party should not be bound by the ordinary rules which control contracts of private parties. In the correspondence the Department of Commerce and Labor was not represented by subordinates. It was represented by the Acting Secretary himself. He it was, according to the record, who sent the proposal of the 12th, in which he asked for an answer, and we must assume that two days later he received the answer and was fully apprised of its contents.

But the ground upon which a party will be held to that meaning which he knows the other party has placed upon his proposal is equitable estoppel. It rests upon the fact that the other party, relying in good faith upon his silence or acquiescence, has been induced thereby to change his position for the worse, or has acquired some corresponding right, either of property, of contract or of remedy. The Alberto (C. C.) 24 Fed. 379; Pom. Eq. Jur. § 805. In the present case there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract. On September 12, 1911, the steamer was in Oakland creek, and there it remained during the period of the extension of the option. There is no evidence that the plaintiffs would have chartered it or used it, or would have done otherwise with it than they did but for the option.

The judgment is affirmed.

MACAULAY v. ALASKA GASTINEAU MINING CO.

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

No. 2695.

MASTER AND SERVANT ⟹211—ASSUMPTION OF RISK.

A member of a crew engaged in driving an uplift in a mine, which work was prosecuted in a good and workmanlike manner, assumed the risk of the falling, before and while being removed, of fractured portions of the rock which necessarily remained, after a blast, to be removed or barred down by hand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. ⟹211.]

In Error to the District Court of the United States for the First Division of the District of Alaska.

Action by John Macaulay against the Alaska Gastineau Mining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. H. Cobb, of Juneau, Alaska, for plaintiff in error.

Shackleford & Bayless and Z. R. Cheney, all of Juneau, Alaska (Rufus Thayer, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error brought this action in the court below to recover damages for an injury received by him while working in the defendant's mine near Juneau, Alaska. At the time of the accident an upraise was being made from the tenth to the ninth level of the mine, in which work the usual method was being pursued; that is to say, the upraise was being made by a power drill operated by two men. The upraise was on an incline of about 65 de-

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

grees, and had been extended about 90 feet from the tenth level. There was a short intermediate drift from this particular raise connecting with a stope to the east for purposes of ventilation, in which drift there was placed a small hand winch, which was used for drawing the necessary ladders up from below to be used in the prosecution of the extension of the upraise. The evidence shows without conflict that the upraise was being driven in the usual and miner-like way, in the prosecution of which work the operators of the drills, after drilling holes in the face of the upraise and inserting the explosives, shot them, thus breaking down the rock and fracturing some that for safety had then to be pried down before commencing to drill the next round of holes.

In the upraise opposite the short drift that has been mentioned was placed a bulkhead composed of timbers, below which the upraise consisted of two compartments extending down to the tenth level, one the manway, in which were the ladders to be hoisted, and the other the chute for the ore and rock. In the driving of the upraise in question a day and a night shift were employed, the shift going off duty firing the last holes drilled by it before leaving, and the next shift when coming on duty first barring down from the face and sides of the upraise all loose rock and material, and also cleaning from the ladders and the sides of the upraise all such broken rock and débris before commencing drilling another set of holes. This the evidence shows was not only the course of procedure in the driving of the upraise in question, but the usual and proper method of making such upraise in mining, the purpose of course being to eliminate as far as possible the danger resulting from the falling of broken and loose rock. Necessarily in the prosecution of all such work there was and is more or less danger. In its prosecution ladders were necessarily used to enable the miners to go up and down in the putting in the necessary temporary timbers on which to place the drilling machine and on which to stand while drilling; and additional ladders as a matter of course as the upraise was extended.

The accident in question happened on a night shift, which consisted of two drillers and two ordinary underground laborers called muckers, the duty of the latter being, as the evidence shows, to remove the ore and rock knocked down by the drillers, to help raise and handle the ladders, and to do such other underground work as the foreman or boss should direct. When this night shift came on the two drillers went up the ladders as usual, knocked down all of the loose rock and material caused by the shots of the preceding shift as far as they could reach from the ladders then in place, but needing more ladders to reach the face of the upraise went down those in place to procure others, in which work the two muckers were directed to assist them. The plaintiff in error, who was plaintiff in the court below, was one of the muckers, and he commenced helping one of the drillers to clean off the bulkhead and remove the timbers therefrom, so that the needed additional ladders could be hauled up from below through the manhole; the other driller and the other mucker went down the manhole to attach a cable to the ladders, which were to be hauled up by means of the winch in the drift that has been mentioned. That winch was in the drift, and but a few feet from the upraise. The plaintiff and the one driller who was working with him, after cleaning off the bulkhead and removing the timbers therefrom so that the ladders could be drawn up, took position in the drift a little way from the upraise, the plaintiff standing and the driller stooping in order to see when the cable was attached to the ladder and to give notice when to commence hoisting it. In this condition of affairs two comparatively small rocks fell down the upraise, bounding from side to side as the upraise was inclined, and one of them entered the drift, striking one of the legs of the plaintiff in error and breaking it. And that is the ground of the action.

The evidence, which we have attentively read in type (the court having dispensed with the printing of the record on motion of the plaintiff in error), is without substantial conflict, and shows the facts that have been above detailed. The court below directed a verdict for the defendant, upon which judgment was accordingly entered, and the cause has been brought here by the plaintiff, it being contended on his behalf that it should have been submitted to the jury for decision.

We do not think so, as we find no evidence of any negligence on the part of the defendant. On the contrary, it shows without conflict that the work in question was prosecuted in a good and miner-like way, and that the dropping of the rock which unfortunately struck the plaintiff in error was one of the incidents which at times is unavoidable in the best-regulated mines; for it is obvious that no upraise can be driven without blasting the rock, some fractured portions of which necessarily remain to be removed or barred down by hand. All engaged in such work are necessarily exposed to more or less danger of its falling before or while being removed, which danger they legally assume.

The judgment is affirmed.

TITLOW v. SUNDQUIST.*

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

No. 2652.

Banks and Banking ⚷153—Deposits for Special Purpose—"Loan."

Where plaintiff, in behalf of the mortgagor, deposited money in the bank for the purpose of discharging a mortgage indebtedness to another, and the bank made, but retained, a certificate of deposit in favor of the mortgagee and notified her thereof, the transaction was not a loan, but the bank held the money in trust for the mortgagee, and, on its failure before execution thereof, the plaintiff could recover the sum deposited, as against general creditors of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 356, 483–501; Dec. Dig. ⚷153.

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

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

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

*Rehearing denied October 9, 1916.

Action by John E. Sundquist against A. R. Titlow, as Receiver of the United States National Bank of Centralia, Wash., Walter Gustafson, and Izella J. Smith. Gustafson and Miss Smith disclaimed. Judgment was rendered for plaintiff, and defendant Titlow appeals. Affirmed.

Frederick Bausman, R. P. Oldham, and R. C. Goodale, all of Seattle, Wash., for appellant.

B. A. Crowl, of Tacoma, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellee Sundquist brought this suit in the court below against the receiver of the United States National Bank of Centralia, state of Washington, to recover $1,296 alleged to have been deposited by the plaintiff in the action with the defendant bank under an express agreement between the parties that the bank would pay it to one Izella J. Smith in satisfaction of a note executed to her by one Gustafson for $1,200, upon which there was also then due $96 in interest, secured by a mortgage upon certain lands, and under which agreement the said money was not to be used by the bank for any other purpose. Gustafson and Miss Smith were also made parties defendant to the action, both of whom, however, at the trial disclaimed any interest in the fund in question.

The evidence in the case is very brief, and there is no substantial conflict in it. It shows that on August 31, 1914, the appellee Sundquist had on deposit in the bank $3,000, for which he held three certificates of deposit in equal amounts. Gustafson, the maker of the note and mortgage to Miss Smith, was his son-in-law, and he wished to pay off that indebtedness. On the day mentioned he went to the bank, taking with him two of the certificates of deposit, aggregating $2,000, had them canceled, received from the bank $604 in cash, a new certificate of deposit for $100, and directed the bank to pay to Miss Smith the remaining $1,296 upon the cancellation of the note and mortgage, which the bank agreed to do, its vice president, Gilchrist, executing to Sundquist this receipt:

"Centralia, Wash., 190—.

"Received from John E. Sundquist twelve hundred ninety-six dollars, a/c mortgage, Walter Gustafson to Izella J. Smith, $1,200.00 & int. $96.00.

"C. S. Gilchrist, V. P.

"$1,296.00."

On the same day the bank prepared this certificate of deposit, which, however, was not delivered but was retained by it:

"The United States National Bank.

"Centralia, Wash., Aug. 31, 1914.

"No. 12215.

"Izella J. Smith has deposited in this bank twelve hundred ninety-six dollars, $1,296.00, payable to the order of herself—on return of this certificate properly indorsed.

"U. S. National Bank, J. W. Daubney, Cashier.

"Not subject to check.

"[In pencil] From Walter Gustafson."

A few days later the bank wrote to Miss Smith this letter (omitting caption):

"Centralia, Wash. September Fourth, Nineteen Fourteen.

"Izella J. Smith, Olympia, Wash.—Dear Madam: Mr. Walter Gustafson of Rochester has deposited $1,296.00 with us to pay a certain note and mortgage held by you. We would ask that you forward the same direct to us with a proper release and we will be pleased to be of service in effecting settlement.

"Very truly yours, C. S. Gilchrist, Vice President."

Before the matter was consummated the bank failed, having on hand, according to the testimony of Gilchrist, between $20,000 and $30,000 in cash when it closed. Miss Smith having disclaimed any interest in the $1,296.00, the question is whether the court below was right in giving Sundquist judgment for that sum as against the general creditors of the bank. We think the judgment right.

"All deposits," said the Supreme Court in Marine Bank v. Fulton Bank, 2 Wall. 252, 256 (17 L. Ed. 785), "made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to the banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand."

Manifestly the $1,296 left by Sundquist with the bank of which the appellant is receiver, to be paid over to Miss Smith upon her cancellation of the note and mortgage executed to her by Gustafson, was not of the latter character, but, on the contrary, was deposited with the bank for that specific purpose, and under the express agreement of the bank to execute the purpose. It was in no sense a loan by Sundquist to the bank of $1,296, and the bank did not owe him that sum or any other amount by reason of that transaction, but held it in trust for the purpose stated. The obvious result is that it did not pass to the general creditors of the insolvent bank, and on the failure of the latter to execute the trust, for whatever reason, the owner of the money is legally and justly entitled to its recovery.

A case directly in point is that of Montagu et al. v. Pacific Bank et al. (C. C.) decided by Judge Morrow and reported in 81 Fed. 602, where a number of authorities are cited in support of his conclusion, which need not be repeated here.

The judgment is affirmed.

CHIN HING v. WHITE, Immigration Com'r.*

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

No. 2651.

1. Habeas Corpus ⟹92(1)—Deportation of Alien.

The authority of the Solicitor of the Department of Labor to affirm on appeal an order of the Commissioner of Immigration denying an alien admission to the United States is not reviewable on application for habeas corpus where the record shows that subsequently to the Solicitor's action the Secretary of Labor personally affirmed the order, since, the disposition by the Secretary rendered the authority of the Solicitor a moot question.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 83; Dec. Dig. ⟹92(1).]

2. Aliens ⟹32(13)—Exclusion—Appeal—Right of Counsel.

On appeal to the Secretary of Labor from an order deporting a Chinese, appellant has no right to have his counsel appear to present further evidence or argue orally.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟹32(13).]

Appeal from District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Application by Chin Hing for a writ of habeas corpus against Henry M. White, Commissioner of Immigration at the Port of Seattle, Washington, for his discharge from the custody of the Department of Immigration. From an order discharging the writ (224 Fed. 261), he appeals. Affirmed.

John J. Sullivan, of Seattle, Wash., and Corry M. Stadden, of Washington, D. C., for appellant.

Clay Allen, U. S. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellant, a Chinese person, was refused admission to this country by the appellee, and, having been ordered deported, petitioned the court below for a writ of habeas corpus alleging his illegal imprisonment and right to discharge. The proceeding resulted in an order of the court dismissing the petition and remanding the petitioner to the custody of the appellee, from which order the present appeal was taken.

The original petition shows on its face that the petitioner was not entitled to the writ, for it alleged his arrival at the port of Seattle from China, and that he was denied admittance to the United States on the ground that he was not legally entitled to such admittance; that he was given a hearing by the immigration officials and upon evidence being presented on August 27, 1914, an order was issued by the Commissioner of Immigration at Seattle finding that he was not entitled to admission to the United States, and that he should be de-

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

*Rehearing denied October 9, 1916.

ported, from which order he was allowed an appeal to the Secretary of Labor, and that on September 26, 1914, the finding and order were affirmed and the petitioner ordered deported.

The only ground of the alleged illegality of the order of affirmance is that the petitioner's case was considered and the order of affirmance made neither by the Secretary of Labor nor by his assistant, but by the Solicitor of the Department of Labor, Mr. J. B. Densmore, who, the petitioner alleges, was not authorized to perform the duties of the Secretary of Labor or his assistant except in the absence of both from their post of duty, and that at the time of the action of the Solicitor of the Department of Labor in the matter both the Secretary and his assistant were in the city of Washington.

Conceding the facts so alleged to be true, and conceding the lack of authority of the Solicitor of the Department of Labor to act in the case under the circumstances stated, the manifest legal result is that the appeal remained pending before the Secretary of Labor and undisposed of. In re Wai Tai (C. C.) 96 Fed. 484.

The alleged action of Mr. Densmore as Solicitor of the Department of Labor was taken by virtue of his appointment to that office by the President under and by virtue of this:

"Executive Order.

"Pursuant to the authority contained in section 179 of the Revised Statutes, I hereby authorize and direct John B. Densmore, Solicitor of the Department of Labor, to perform the duties of Secretary of Labor during the absence of the Secretary of Labor and the Assistant Secretary of Labor.

"Woodrow Wilson.

"The White House, June 5, 1913."

[1] The question argued by counsel for the petitioner as to whether the Solicitor of the Department of Labor could by virtue of the President's order and the statute therein referred to legally perform the duties of the Secretary of Labor or his assistant while either of those officers remained at the seat of government, is plainly a moot question, and therefore need not be decided or considered, for the reason that the record shows that subsequent to the Solicitor's action in question the Secretary of Labor personally took the case up and affirmed the order made by the Commissioner of Immigration at the port of Seattle refusing the petitioner admission to the United States and directing his deportation to China.

[2] It is true that the record here further shows that there was filed in the court below on behalf of the petitioner an amended petition for the writ of habeas corpus and his discharge thereunder, in which, however, the only additional ground therefor set up is that the petitioner was denied the alleged right to have his counsel appear before the "Commissioner General of Immigration or the lawful acting Secretary of Labor" for the purpose of presenting such further evidence as he desired and orally arguing the appeal. No provision of any statute and no rule of the department has been cited conferring upon the petitioner the right thus claimed, and we know of none. The volume of business the department is necessarily called upon to transact would obviously render oral arguments impossible,

and the ordinary function of an appellate officer or tribunal is to review the proceedings from which the appeal is taken—not to hear it de novo.

The record shows that the opinion of the Solicitor which the Secretary adopted and approved, considered and discussed the evidence introduced before the Commissioner of Immigration, which the Secretary held was sufficient to show that the petitioner was not entitled to enter the United States.

The order is affirmed.

DAHL v. UNITED STATES.

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

No. 2724.

1. CONSPIRACY ⚷43(6)—CRIMINAL CONSPIRACY—INDICTMENT—REQUISITES.

An indictment charging conspiracy to violate Chinese Exclusion Act May 6, 1882, c. 126, § 11, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 (Comp. St. 1913, § 4298), in that it was the purpose of the conspirators to bring and cause to be brought into the country certain Chinese alien persons not lawfully entitled to enter, and to aid and abet the bringing in of said Chinese aliens, notwithstanding the use of the word "certain," charges a general conspiracy to bring in such alien Chinese as were not entitled to enter, so that the names of the Chinese to be brought in need not be given or alleged to be unknown.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 91; Dec. Dig. ⚷43(6).]

2. CONSPIRACY ⚷43(12)—CRIMINAL CONSPIRACY—EVIDENCE.

On a prosecution for a general conspiracy to bring into the country Chinese not entitled to enter, evidence that the defendant, pursuant to understanding with another defendant to smuggle in Chinese, brought in four Chinese not entitled to enter is admissible, though it may show another crime.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 90; Dec. Dig. ⚷43(12).]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Harry J. Dahl was convicted of conspiracy (225 Fed. 909), and brings error. Affirmed.

M. J. Gordon, of Seattle, Wash., and J. H. Easterday, of Tacoma, Wash., for plaintiff in error.

Clay Allen, U. S. Atty., and Albert Moodie and Winter S. Martin, Asst. U. S. Attys., all of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiff in error Dahl and one McGee were jointly indicted for conspiring together and with divers other persons to the grand jurors unknown—

"to violate section 11 of the act of May 6, 1882, as amended and added to by the act of July 5, 1884, * * * in this, that it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to willfully, knowingly, and unlawfully bring and cause to be brought into the United States * * * certain Chinese alien persons not lawfully entitled to enter the United States, * * * and it was further the object and purpose of the said conspiracy to willfully and knowingly aid and abet the bringing of said Chinese aliens into the United States; * * * all in violation of the said mentioned act."

There are three counts in the indictment, and some 17 overt acts are charged to have been done in pursuance of and to effect the object of the alleged unlawful conspiracy. There was a trial. Evidence was introduced by the government tending to support the allegations of the indictment. Defendant Dahl offered no evidence. The verdict of the jury found the defendant Dahl guilty on all three counts. Thereafter defendant was sentenced to imprisonment. By writ of error the case comes to this court.

[1] The first point urged by plaintiff in error is that the indictment does not allege that the alien persons to be brought into the United States were unknown to the grand jurors, and that the language of the indictment excludes the theory that the conspiracy contemplated generally the bringing in of Chinamen who desired to enter the United States. We do not construe the indictment as limited to a conspiracy to bring certain, particular, known, individual Chinamen into the United States, but as charging that the conspiracy was a general one having for its object the bringing into the country such alien Chinese persons as were not lawfully entitled to come in under the specially referred to acts of Congress. The use of the adjective "certain," as applied to alien Chinese, was not to make definite by specifically naming the alien Chinese persons to be brought into the United States, but was evidently intended to be applied to such Chinese aliens generally as under the specific statute were not entitled to come into the United States. The indictment under consideration is much like that in Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, and is fairly to be read as alleging a general unlawful combination to violate specifically named acts of Congress. Naturally, on forming such an unlawful agreement as that charged, those who entered into it could not determine the precise individuals who were to be unlawfully brought into the United States. We think the indictment is sufficient.

[2] As to the second point, that the court erred in admitting evidence, while the indictment nowhere charges that any Chinamen were actually brought into the United States, the evidence introduced by the government tended to show close association between plaintiff in error and another defendant, and that they had an understanding as to the smuggling of Chinese into the United States, and that in pursuance of such combination and understanding, plaintiff in error actually brought four Chinese persons into the United States. Clearly it was competent to show that these persons were not entitled to enter. Such evidence went to sustain the charge that there was a conspiracy with the object charged. Robinson et al. v. United States, 172 Fed. 105, 96 C. C. A. 307; United States v. Rogers et al. (D. C.) 226 Fed. 512; Steigman v. United States, 220 Fed. 63, 135 C. C. A. 631.

If in a conspiracy charged generally to do certain things prohibited by law, the government proves that some particular things were done in the execution of the conspiracy and for the direct purpose of carrying it out, it matters not that such things done may themselves constitute an offense against the laws of the United States. Suppose, for instance, that a conspiracy to use the mails in a scheme to defraud is alleged, and the circumstances tend to show an association and concert of action between the individuals charged, that their common purpose is to use the mails to defraud, and that in the execution of the common design letters were sent which directly related to the purpose of the combination charged, but which also showed that defendants were guilty of another offense for which they might also have been indicted: It could not be held that such evidence is inadmissible because it so happened that it tended to show defendants had committed another offense. The test would be, Does the evidence offered have material relation to the particular offense charged? If the answer is that it does, it is competent, and the court may properly admit it, being careful to instruct the jury how to regard such evidence, and that they cannot predicate a verdict of guilty upon any offense other than the one alleged. Williamson v. United States, supra; Wigmore on Evidence, §§ 216, 305.

We find no error in the record, and order of affirmance will be made.

LEGGAT v. McLURE.

(Circuit Court of Appeals, Ninth Circuit. August 14, 1916.)

No. 2761.

1. APPEAL AND ERROR ⟹1011(1)—SCOPE OF REVIEW—CONFLICT IN EVIDENCE.
Findings of fact, based on conflicting evidence taken in open court, will not be disturbed on appeal, in the absence of a showing that in arriving at such findings the trial court erroneously applied some rule of evidence or found contrary to the decided weight of testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟹1011(1).]

2. EXECUTION ⟹291—SALE—RIGHT OF PURCHASER—EFFECT OF AGREEMENT WITH DEBTOR.
Although Rev. Codes Mont. § 6836, provides that on execution sale the purchaser is substituted to and acquires the right, title, and interest of the judgment debtor, yet, if the purchaser is a close friend and business associate of the debtor and agrees to buy four properties without severance at sale for a grossly inadequate consideration, and to hold whatever title he gets only as a mortgage, and after sale before expiration of the redemption period again agrees so to hold the property, and the debtor within two years offers to redeem, the purchaser acquires no title of the debtor, who may redeem at any time, the transaction being a trust, and, once a mortgage, remaining always a mortgage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 829, 831–834; Dec. Dig. ⟹291.]

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

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

Suit in equity by Charles D. McLure against Rod D. Leggat. Decree for complainant, and defendant appeals. Affirmed.

The appellee brought suit against the appellant to compel a conveyance of certain mining properties, alleged to be worth more than $100,000 which had been levied upon on execution and offered for sale at Butte, Mont., on June 6, 1913, upon a judgment against the appellee. The bill alleged that the properties were bid in by the appellant for $1,004.15, under an agreement which he had with the appellee, whereby he was to bid an amount equal to the judgment and costs, and to hold the title so acquired as a mortgage, and that the appellant further agreed, before the expiration of the time for redemption, which was one year, that any title he might obtain he would hold as a mortgage, and that the appellee endeavored to redeem upon the payment to the appellant of the amount so bid, less $500 which he had loaned to the appellant. The appellant answered, denying the allegations of the bill. The court below found that all the allegations of the complaint were true, and directed that upon the payment of the sum bid the appellant should convey to the appellee all the property which the latter owned on the date of the execution sale.

The appellant assigns error to the findings of the court below and to the legal conclusions that the appellee was entitled to recover from the appellant the interests in the mining claims described in the complaint, and that the appellee offered to redeem within a reasonable time after the period of redemption expired.

Nolan & Donovan, of Butte, Mont., for appellant.

Gunn, Rasch & Hall, of Helena, Mont., and Maury, Templeman & Davies, of Butte, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The findings of fact are all based upon evidence which is conflicting, and which was taken in open court, and they will not be disturbed by this court, in the absence of a showing that in arriving at the same, the court below erroneously applied some rule of evidence or found contrary to the decided weight of the testimony. Moore v. Moore, 121 Fed. 737, 58 C. C. A. 19; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Tate v. Holmes, 76 Fed. 664, 22 C. C. A. 466.

[2] The evidence was that the appellant and the appellee were jointly interested in some of the mining properties, the appellee's interests in which were sold on execution; that for many years the appellant had sustained toward the appellee a relation of close personal friendship and business agency; that on the date of the execution sale the appellant attended the sale at the request of the appellee for the purpose of buying in the property for the appellee's benefit; that the appellant bought the property upon an understanding with the appellee that the title therein was to be held by the appellant as a mortgage for the amount of the appellant's bid; that on April 6, 1915, less than two years after the sale, the appellee offered to pay the appellant the sum which the latter had bid on the land, together with interest thereon, on condition that the property be reconveyed to the appellee; that in the interval between those dates the appellant repeatedly admitted the appellee's title to the property, and promised to reconvey the same to him.

Additional considerations suggesting equitable relief are the facts of the gross inadequacy of the consideration, the ample evidence that the appellant abused the trust and confidence of the appellee, and the irregularity in the sale, in that the interests of the appellee in four separate parcels of property were not sold separately, but were sold in gross to the appellant, he making no protest or objection thereto, and he being the representative of the appellee at the sale and attending the same at the appellee's request.

The appellant contends that under section 6836, Revised Codes of Montana, which provides that "upon a sale of real property the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto," the appellant acquired the complete legal and equitable title of the appellee in the property, the appellee retaining only the bare right to repurchase (McQueeney v. Toomey, 36 Mont. 282, 92 Pac. 561, 122 Am. St. Rep. 358, 13 Ann. Cas. 316), and that thereafter nothing passed to the appellant by reason of the expiration of the period of redemption or by the sheriff's deed, and that a promise, if made by him within that period, to hold the property as a mortgage was without consideration and void. But the evidence shows that the promise was made before the expiration of the period of redemption, and that the trust relation remained unchanged after that date as it existed before, and that the agreement, once a mortgage, was always a mortgage as between the two parties thereto.

The case needs no further discussion. We find no merit in the appeal. The decree is affirmed.

DEWEY PORTLAND CEMENT CO. v. TEXAS BLDG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1916.)

No. 4654.

MUNICIPAL CORPORATIONS ⟹348—PUBLIC WORK—CONTRACTORS' BONDS—ACTIONS—JURISDICTION.

Equity has jurisdiction of a suit by one who furnished material to be used on four separate contracts for public work against the contractor, its surety, which executed a bond under each contract conditioned to secure payment for work and materials, and the other parties to the contracts, where the contractor is insolvent, there are other creditors, and the material was used indiscriminately on all the contracts, making a complicated accounting necessary to determine the liability of the surety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 878; Dec. Dig. ⟹348.]

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

Suit in equity by the Dewey Portland Cement Company against the Texas Building Company and others. From a decree dismissing the suit as to certain of the parties, complainant appeals. Reversed.

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

H. M. Beardsley, of Kansas City, Mo. (B. F. Hegler, of Wichita, Kan., Beardsley & Beardsley, of Kansas City, Mo., and Stanley, Stanley & Hegler, of Wichita, Kan., on the brief), for appellant.

R. R. Vermilion and Stanley, Vermilion, Evans & Carey, all of Wichita, Kan., for appellee Wichita Union Terminal Ry. Co.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This case arises out of the project for the elevation of tracks in the city of Wichita, Kan. The defendant the Texas Building Company entered into four separate contracts for the doing of different portions of the work, two with the Wichita Terminal Railway Company, one with the city of Wichita, and one with the Wichita Railway & Light Company. It gave bonds for the faithful performance of the several contracts, with the United States Fidelity & Guaranty Company as surety. The condition of the bonds was the same, and provided that the Building Company would not only perform the contract, but would also discharge all claims for labor and materials. The works provided for in the several contracts were completed, but the Building Company at the time of their completion had become insolvent. The complainant, the Dewey Portland Cement Company, furnished the cement used by the Building Company for the entire enterprise. It amounted to 103 carloads, each carload containing from 500 to 800 sacks. The price of the cement varied for different shipments. No account was kept showing what particular shipments were applied to each of the several projects. On the contrary, the Building Company used all shipments promiscuously, carrying forward all of the projects at the same time. Numerous payments were made by the Building Company. It was also entitled to a credit of 10 cents for each sack returned. Neither the sacks nor the payments were applied specifically to either of the four contracts. There is due to the plaintiff, as the general balance of its account, the sum of about $10,000. There are also sums due to the Building Company in respect of two of the contracts. The bill was filed by the Dewey Portland Cement Company against the Texas Building Company, the Surety Company, and the concerns from whom a balance was due to the Building Company. The Surety Company, by its answer, disclosed that there were numerous other parties who had claims for work and material in respect of the several contracts, and asked that they all be made parties, and their claims determined. These parties were brought in. It happens that they have been settled with since the disposition of the case by the trial court, but that cannot affect the question of jurisdiction upon which this appeal turns. In the answers that were interposed, and by motions, the question was raised by the defendants that there was no jurisdiction in equity, because the plaintiff had a plain, speedy, and adequate remedy at law. The trial court sustained these contentions. It dismissed all the parties that were brought in at the instance of the Surety Company, at the cost of that company. It dismissed the parties who were brought in, because there was a balance due from them to the Building Company, at the cost of the plaintiff. It then directed that the action be transferred to the law docket, to be there proceeded with as an action at law.

This was error. The accounting itself is so long and complex as to make it wholly unfit for submission to a jury. The plaintiff must obtain an apportionment of the cement to the four several contracts, in order to fix the amount of liability against the Surety Company as to each bond. At the time of the action of the trial court there was also a large number of other claims against the funds in the hands of the Surety Company to which the plaintiff here must resort, and in order to do full justice it would be necessary that all claims be ascertained in a single proceeding, and the fund accruing from the Surety Company applied upon the claims thus ascertained. There is also a right, both on the part of the Surety Company and of the plaintiff, to have the balances due to the Building Company applied equitably in the discharge of the different claims.

We have not attempted to state all the features of complexity disclosed by the pleadings. Sufficient, we think, has been said to show that upon well-established principles of equity and the repeated decisions of this court the case is one for a chancellor and not for a jury. Gunn v. Brinkley Car Works & Mfg. Co., 66 Fed. 382, 13 C. C. A. 529; Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592; McMullen Lbr. Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; Fechteler v. Palm Bros. & Co., 133 Fed. 462, 66 C. C. A. 336.

The judgment is reversed.

EIBEL PROCESS CO. v. REMINGTON-MARTIN CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 205.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—FOURDRINIER MACHINE.
The Eibel patent, No. 845,224, for an improvement in Fourdrinier machines for making paper, was the first to instruct the art in a new principle of operation, applied by maintaining the breast roll at a substantial elevation above the guide roll, and by which a great economy is effected, was not anticipated by prior patents or prior use, and is not invalid for indefiniteness of the claim. Claims 1, 2, and 3 also *held* infringed.

2. PATENTS ⚷36—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
Where there is doubt as to patentable novelty, the immediate commercial success of the patented machine in an old art should resolve the doubt in favor of the patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⚷36.]

3. PATENTS ⚷165—VALIDITY—INDEFINITENESS OF DESCRIPTION.
Where the principle of operation of a patented machine is made clear, and the subject-matter is incapable of exact expression in terms of measurement, and a skilled worker in the art has no difficulty in following the directions of the patent, the claims will not be held invalid for indefiniteness because measurements are not given.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⚷165.]

⚷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 Northern District of New York.

Suit in equity by the Eibel Process Company against the Remington-Martin Company and others. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 226 Fed. 766. See, also, 197 Fed. 760.

The decree of the District Court dismissed a bill for infringement of patent to William Eibel, No. 845,224, dated February 26, 1907, covering an improvement in Fourdrinier machines for making paper. Claims 1, 2, 3, 7, 8, and 12 are in controversy.

F. P. Fish, Guy Cunningham, and Harrison F. Lyman, all of New York City, for appellant.

Crocker & Wickes, of New York City (F. L. Crocker, of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. The Fourdrinier machine has been known and used for over 100 years and has attained an efficiency beyond which it is difficult to advance. It is the machine universally employed for making all except a few special sorts of paper. In the following description we have adopted almost literally the language used by the expert, Arthur D. Little, in his admirably clear and concise exposition of the art.

The Fourdrinier is an aggregation of several sections, each composed of many parts, and each section performing a function which is in a sense independent, although for the production of a sheet of finished paper all these functions are interdependent and must be co-ordinated. The first section of the machine has for its function the actual formation of the web, which is later to be transformed into the finished paper, and it does this by distributing the wet stock as uniformly as possible upon an endless wire-cloth sieve, to which, as it travels forward, a sidewise motion or "shake" is imparted to insure the felting and interlocking of the fibers as they are deposited upon the wire by the drainage through the wire of the water in which they were suspended, and this portion of the machine is further supplied with mechanical devices, known as "suction boxes," over which the wire passes, and whose function is to compact the sheet by atmospheric pressure, which forces into the box considerable additional water not removable by drainage.

The next great division or section of the Fourdrinier machine has for its purpose the compacting of the wet sheet by mechanical pressure under rollers, and the compacted sheet then passes continuously to the third section of the machine, the function of which is to dry the sheet; the drying being effected by carrying the sheet over the surface of heated metal cylinders or dryers. The remaining sections of the Fourdrinier machine have for their object the "finishing" of the sheet by improving or smoothing its surface by means of heavy and highly polished steel rolls between which the sheet is passed.

It is primarily with the first section—that is, the sheet-forming section, known as the Fourdrinier part, or wet end, of the machine—that the Eibel process is concerned, which end of itself strictly, although not always popularly, speaking constitutes the Fourdrinier machine. This consists of:

(1) A flow box into which is pumped a constant supply of the paper-making stock, consisting usually of fibers of wet pulp with or without added mineral matter, the whole being mixed with from 135 to 200 times its weight of water, and having the appearance of diluted milk.

(2) An endless wire sieve woven with 60 or 70 meshes to the inch in common practice and often 75 feet long and 100 inches or more wide, the whole traveling rapidly over the breast roll, which runs on a horizontal axis at the flow box end of the machine, and the couch roll likewise running on a horizontal axis at the further end of the machine from the flow box.

(3) A supporting frame bearing a series of parallel horizontal rollers, called "table rolls," between the breast roll and the couch roll, upon which table rolls the top or active portion of the traveling endless wire sieve is supported, so as to present a plane, but not necessarily horizontal, surface for the reception of the stock.

(4) An opening connected with the flow box, called the "slice" opening, through which the mixture of fiber and water, called "stuff," or the "stock," flows onto the sieve in a stream the width of the desired sheet of paper. The stock is carried along on the sieve, draining off its water as it goes, until before the couch roll is reached at the further end of the wire the greater part of the water has drained away, and the paper in the form of a uniformly distributed wet pulp has sufficient strength to hold together and be carried through a series of pressing and drying rolls and calendars, from which it is rolled up as complete paper.

(5) Deckle straps, consisting of endless rubber bands of square or rectangular section, traveling at the speed of the wire, are placed at each side of the wire in contact with the top of the same. They are supported on wheels above the wire, so that their bottom side, which is in contact with the wire, runs along with it; the strap thus forming a wall which prevents the paper stock from running off at the sides of the wire.

(6) About 20 feet from the breast roll a series of suction boxes is placed beneath and in contact with the under surface of the wire. A partial vacuum is maintained within these boxes, so that through the agency of the atmospheric pressure upon the upper surface of the wet pulp a greater part of the water then remaining in the paper stock is forced out of the pulp into these boxes, so that very little free water remains in the wet web of paper after this has passed beyond the suction boxes.

These are the essential features of the Fourdrinier machine. It comprises in addition many supplementary details of construction and equipment. For instance, above the suction boxes, in contact with the surface of the paper is a skeleton roller, faced with wire cloth and called the "dandy roll," which gives to the upper surface of the paper substantially the same texture as the surface in contact with the paper-making wire.

Under the wire from the breast roll to the suction boxes are shallow boxes or trays for receiving the water which runs through the wire sieve. This water contains a considerable amount of fiber and of mineral matter, provided clay or similar materials have been used for loading; and to prevent waste this water carrying these materials in suspension is caught by these "save-alls," as they are called, and pumped back again into the paper stock before it reaches the flow box.

The last roller for supporting the wire is larger than the others, and is called the guide roll, since it is equipped with a device for automatically varying the position of the axis of this roll as may be necessary to keep the wire running straight. After the wire goes over the guide roll it drops to the couch roll at a different angle.

In addition and very important is the "shake," namely, means for shaking the whole front end of the machine sidewise to promote the interlocking and felting of the fibers during the process of deposition by drainage. The motion of the shake is very rapid, say two or three times a second, and its amplitude may rarely amount to as much as one-half an inch.

Paper machines of the Fourdrinier type are very expensive, the cost of a news machine, independent of its housing, often reaching $100,000, so that, in order to earn a proper return upon this heavy investment, the paper maker is forced to utilize to the utmost the productive capacity of the machine. The machines are constantly operated day and night, and every endeavor is made to run them at the highest speed consistent with the quality of merchantable paper desired under the conditions imposed by the character and quality of stock and the limitations of the particular machine itself. The desirability of securing the maximum production is, of course, obvious in case of any sort of paper; but, where news paper is concerned, the low price of the product and the competition among the mills, with the resultant small margin of profit, make the question of output one of vital importance. With a given machine the total cost of labor and overhead charges, is approximately the same, whether the machine is producing 25 or 35 tons for 24 hours, so that, if a machine normally rated for say 25 tons can have its production increased to 35 tons, the additional 10 tons of paper thus gained is produced at little more than the cost of the materials entering into its composition.

In operating the machine, the paper stock in the flow box flows onto the paper-making wire at, or more commonly slightly beyond, the breast roll, the thickness of the stream flowing onto the wire being governed by a cross-bar extending across the entire width of the sheet of paper to be made, and at a height above the wire corresponding to the amount of stock which it is desired to flow upon the wire. This cross-bar is called the slice, and it holds back the stock from the wire, so that only a stream of the desired thickness can escape from the flow box out under the slice onto the wire. The supply of stock is so adjusted that the stock in the flow box behind the slice extends some distance above the bottom of the slice, and therefore the stock flows out onto the wire under the pressure of a hydraulic head, which may be varied within certain limits if the paper maker so desires. The original purpose of the slice was to keep the froth and chips, if any, upon the surface of the stock, from flowing onto the wire and causing breakage of the paper, with the loss of production incident thereto; but it has also the effect, in so far as it assists in the maintenance of a hydraulic head, of giving a substantial speed to the stock as it flows upon the wire. If the head in the flow box is, for example, 2¼ inches, the speed with which the stock at the bottom of the stream will flow to the wire will be substantially 200 feet per minute.

Accordingly, if the paper-making wire under these conditions is run at a speed not exceeding 200 feet, the wire has no work to do in the way of causing the stock to attain the speed of the wire, since the stock starts at that speed, and, although it is true that, even in that case, the wire performs the work of drawing along the stock, yet the work is slight, as the wire has no inertia of the stock to overcome, but only the friction of the air. If, however, the wire runs at 400 feet a minute, as was a common speed for news machines—that is, machines making news paper—at the time of Eibel's invention, then the making wire would be moving at a speed twice that of the stock coming onto the wire under a head of 2¼ inches, and the wire drawn out from under the paper stock, causing under these conditions waves and ripples, until the wire had by its friction given to the stock approximately the speed of the wire. Even when the stock starts at the exact speed of the wire, ripples always occur in the first portions of the flow on the wire of any machine running at any speed which even approximates 200 feet per minute. Many factors prevent an instantaneous quiescence of the sheet of stock, and the quantitative influence of each at the start is difficult to measure. Among these factors are the irregularities caused by the rush of water from under the slice, the variations between the speeds of the top and bottom of the sheet of stock, the effect of the shake, which is greatest near the breast roll, and the effect of the drainage of water through the wire, which is also greatest immediately after the stock comes upon the wire, and causes irregularities of flow.

Accordingly it is recognized by paper makers that the sheet is necessarily more or less rippled for several feet from the slice and any sheet smoothing out in that distance may be said to do so "at the start." As the machine is speeded up above 200 feet in case of machines with a horizontal wire, the wavy part extends further and further from the slice, and greater commotion is caused. This establishes a limit to the possible speed of the machine, for, while waves and ripples, if confined to the beginning of the wire, have substantially no effect on the sheet, because of the great fluidity of the stock at this point, and the fact that the sheet has hardly begun to form, yet if the disturbed condition is allowed to extend too far down the wire to a point where the viscosity of the stock is increasing so rapidly as to prevent readjustment after an initial disturbance, the paper formed will be irregular, because that formed at the crest of the waves will be thick, and at the hollows very thin, and the proper interlacing of the fibers will be disturbed or checked. At a further increased speed the paper, owing to these irregularities in structure, would break on the machine so often, causing so many delays and interruptions, that no gain in production would follow from the increased speed. Eibel recognized that the variation of speed between stock and wire was the chief cause of this long-extending commotion of the stock on the wire, which made the paper uneven in texture and strength, and caused breaks, and thus limited the increase in machine speeds, and this invention relates to the remedy.

[1] Eibel announced what he believed was a new principle of operation as follows:

"In accordance with my invention I operate entirely above the level to cause the stock to travel by gravity at a velocity approximately equal to the speed of the making wire, which I believe to be a new principle of operation."

He recognized and understood what had been done in the art in this respect up to his time, for in his specification he explained:

"The Fourdrinier wire has usually been arranged to move in a horizontal plane, although I am aware that means have been provided for adjusting the breast-roll end of the wire to different elevations, usually below the level, to provide for running with different grades of stock—as, for instance, with quick stock and slow stock; but so far as I am aware the making wire has always had to perform the work of drawing along the stock, and as the wire moved much faster than the stock the stock waved or rippled badly near the breast-roll end of the wire, which gradually diminished until an equilibrium was established and a smooth, even, and glassy surface presented, and not until the waving or rippling ceased did the fibers lay down uniformly and produce a well formed sheet of paper. The machine has been run necessarily at a low rate of speed to give ample time for the water to escape and for the fibers to lay down so as to make a uniform sheet, and in case the time was insufficient the breast-roll end of the wire has been lowered still farther until the desired result was accomplished."

The prior art showed instances where the pitch of the wire had been 2 or 3 inches and in two isolated cases up to 6 inches; but, as soon as the Eibel process became known, its principle was extensively adopted and applied so that to-day Eibel's process is the practice of the art. The testimony is that 2,600 tons of news paper are manufactured daily in the United States in accordance with the Eibel patent and the machines have been speeded up from an average of 400 to 450 feet per minute up to over 680 feet per minute; and that speed may, at any time, be exceeded, for the only limits which remain are certain practical factors such as strength of machine parts, drying capacity, and ability of the workmen in handling the paper. In short, the commercial success has been wide and pronounced in an art where time means money and increased production at practically no increased expense reflects itself in increased profits.

Among the tributes to the efficacy of the invention are the two infringing machines of defendant, in one of which the wire has a pitch of 18 inches from breast roll to guide roll, and in the other a pitch of 20 inches, enabling the speed to reach about 550 and 575 feet, respectively, per minute. We are satisfied from the evidence that Eibel was the first to instruct the art in a new principle of operation, and we agree with the conclusions of the District Judge, when he pointed out succinctly what Eibel had accomplished:

"So far as I have been able to discover, no one claims to have discovered the advantages of having the wire carrying the stock and the stock move together at substantially the same speed, the stock impelled by gravity and directed by the wire, and to have embodied such idea and principle of operation in a patent, or an application for a patent, prior to the application by Eibel. This idea, so far as letters patent are concerned, appears to have been evolved by Eibel. It was urged * * * that it was not invention to ascertain and fix the degree of incline and ascertain by experiment the best method of paper making by means of a moving wire so adjusted. The rule is invoked that it is not invention to improve in degree merely on a principle of operation old in the art. This may be conceded, but I think Eibel discovered and practically disclosed much more than this. He not only elevated the breast-roll end of the paper-making wire, but regulated the speed at which the wire should move, making it move at equal speed with the stock, so that there is no obstruction to the natural flow of the stock under the influence of gravity and consequently no eddies and ripples and uneven laying down of the fibers."

The District Judge, however, held the patent void in view of the disclosures of previous patents and of prior uses, and intimated that the language of the claims was "indefinite" and "uncertain." These claims are as follows:

1. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a *substantial* elevation above the level, whereby the stock is caused to travel by gravity, *rapidly*, in the direction of movement of the wire, and at a speed approximately equal to the speed of the wire, substantially as described.

2. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a *high* elevation, whereby the stock is caused to travel by gravity *faster* than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the *rapidly-moving* stock, substantially as described.

3. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, the breast-roll end of the wire being maintained at a *substantial* elevation above the level, whereby the stock is caused to travel by gravity, *rapidly*, in the direction of movement of the wire and at a speed approximately equal to the speed of the wire, substantially as described.

7. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the suction boxes supported at a corresponding declination, substantially as described.

8. A Fourdrinier machine having the paper-making wire declined from the breast roll, to the guide roll, and the several suction boxes arranged at different elevations, substantially as described.

12. In a Fourdrinier machine, a downwardly-moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the velocity of the wire in the same direction that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described.

We will now consider: (1) prior patents; (2) prior use; and (3) validity of the claims as drawn.

1. The Prior Patents. Six United States and ten foreign patents were received in evidence. All show means for effecting a slight ad-

justment of the breast roll, and none amounts to more than an illustration of the drainage adjustment which Eibel fully understood and referred to in his patent. The patents demonstrate that skilled men prior to Eibel did not appreciate the possibility of raising the breast-roll end of the machine more than an inch or two, and that none of them had the faintest conception of the principle of operation which characterizes the Eibel invention.

2. Prior Use. We think it is clearly established that no one of the alleged prior users had any understanding or appreciation of the Eibel principle. The question then remains whether as matter of fact the Eibel principle was operated, and whether, therefore, his contribution is merely an improvement representing an advance in degree.

Eight prior uses were testified to. Three of these (Rhinelander, Wis., Palmer Falls, N. Y., and Niagara Falls, N. Y.) do not merit discussion.

The use at Stockton, Cal., the latest date of which was 1892, must be regarded as an abandoned experiment and the pitch of 1½ inches as an unsuccessful temporary expedient. The highest speed attained was 250 feet per minute, and the regular speed 220 feet per minute.

Willamette Company, at Oregon City, Or. Here there were five machines, having pitches of 2 inches in some instances and 3 inches in others.

When the Eibel patent was issued, only two of these machines were carrying pitches, and the best speed was from 400 to 450 feet. On August 4, 1907, about five months after the issue of the Eibel patent, the wires were elevated on the various machines from 8 to over 20 inches, with a resultant increase of speed from 400 or 450 feet to from 500 to over 680 feet. Warner, a machine tender and presumably expert man, referring to conditions at the Willamette mill, said:

"We were continuously trying to form a better sheet, to make an increase in the speed that they were calling for. They wanted more speed, and at the same time they wanted as good a grade of paper. We puzzled our brains over the business to find a way to meet the requirements. * * * Our mill wasn't paying very well, and we were wild to increase our product, and trying all manner of schemes to increase the speed of the machines, that we might make some profit off the mills."

Nothing could be more convincing of the futility of a so-called use than the failure by expert practical men to accomplish a desired result and the discarding of an old method and the adoption of a new one immediately upon its advent.

Remington-Martin, at Norfolk, N. Y. When the Eibel patent was issued, the Remington-Martin machines were running flat; i. e., with horizontal wires. Shortly thereafter, high pitches were adopted.

Raymondville, at Raymondville, N. Y. There is testimony that one machine was running at a pitch of 3 inches in 1903, and that in October of that year an additional 3 inches was added, but the experiment was unsuccessful, for, as the superintendent testified:

"The machine tender had a lot of trouble, and when I asked what the matter was he said he thought, if I had raised the machine a little higher, it would not run at all."

The best proof of the failure of this effort is the fact that the production fell off.

Finally, Northern Paper Company, at Green Bay, Wis. The most that the evidence shows as to this use is that a pitch of not to exceed 6 inches was tried for two weeks or less and abandoned.

[2] Within the limits of an opinion it is not possible to analyze the testimony as to prior use in further detail. We think the evidence establishes that no one before Eibel had any knowledge of his theory, that, where not abandoned, the slight pitches were used, in most instances, to bring stock to the dandy roll more quickly than when the horizontal wire was used, thus giving it less time to drain, and causing it to reach the dandy roll in a more fluid condition; and, in any event, if there remained any doubt as to patentable novelty, that doubt would be resolved in this case in favor of the patent by commercial utility. Tilghman v. Proctor, 102 U. S. 707, 711, 26 L. Ed. 279; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 441, 86 C. C. A. 469; Borgfeldt Stripping Machine Co. v. Universal Tobacco Machine Co., 215 Fed. 715, 132 C. C. A. 125.

3. Indefiniteness of Claims. It is urged that the use in claims 1, 2, and 3 of such words as "substantial elevation," "high elevation," and "rapidly" renders the claims void for indefiniteness and uncertainty. It is apparent that Eibel's invention is not susceptible of definition in terms of inches or feet per minute. As Little testified:

"The exact speed for any particular pitch was something which could not be accurately determined in advance, owing to the variations in stock used, paper desired, and construction of machines. Such determination is not, in fact, necessary. The grade is to be arranged to give a rapid gravity flow of the stock, and the machines then speeded up to meet it as long as the sheet remains smooth."

Any attempt to define lower and upper limits would have been an invitation to infringers. The practical workers in the art had no difficulty in understanding that the pitch must be higher than 3 or 4 inches, and that the pitch of the wire and the wire speed must be so correlated that gravity will accelerate the stock to speed equality with the wire.

[3] It is difficult to lay down a rule, and it is best to confine the test of indefiniteness to the facts of a particular case. Where, as here, the principle of operation is made clear, the pitch is substantially higher than that theretofore known in the art, a different result is accomplished, the subject-matter is incapable of exact expression in feet and inches, and the worker in the art has no difficulty in following the directions, then a claim using the phraseology of claims 1, 2, and 3 will not be held invalid. Any other construction might readily result in depriving a meritorious invention of its commercial value. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 437, 22 Sup. Ct. 698, 46 L. Ed. 968; Woerheide v. H. W. Johns-Manville Co. (D. C.) 215 Fed. 604, affirmed 220 Fed. 674, 136 C. C. A. 316.

In this connection our attention is called by appellants to the opinion of the High Court of Justice, Chancery Division, in European Eibel Co., Ltd., v. Edward Lloyd, Ltd., reported in the Illustrated Official

Journal (Patents) Supplement, June 21, 1911, p. 349, and by appellants to the action of the German Patent Office. While the opinions of foreign courts may often be helpful, the record before us does not afford the means for an accurate comparison of the issues and proof which were before the English court and those here presented, and, indeed, there is enough to indicate that there were some differences. Haskell Golf Ball Co. v. Sporting Goods Sales Co. (D. C.) 210 Fed. 628. In patent cases especially, differences of opinion may readily arise because of the nature of the subject-matter. Mast, Foos & Co. v. Stover Co., 177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856; Baldwin v. Abercrombie, 228 Fed. 895, — C. C. A. —.

As we conclude that claims 1, 2, and 3 are valid and infringed, we deem it unnecessary, for the purposes of this case, to pass on claims 7, 8, and 12.

The decree is reversed, with costs.

GIBSON et al. v. AMERICAN GRAPHOPHONE CO. et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 29.

1. PATENTS ⟾222—INFRINGEMENT—ACTIONS—NOTICE.

Under Rev. St. § 4900 (Comp. St. 1913, § 9446), declaring that it shall be the duty of all patentees and their assigns and legal representatives, and all persons making or vending any patented article, to give sufficient notice to the public that the same is patented, either by affixing the word "patented" together with the day or year when the patent was granted, or when from the character of the article this cannot be done, by fixing to it, or to the package wherein one or more of such articles is inclosed, a label containing a like notice, and that in a suit for infringement by a party failing to so mark, no damages can be recovered save on proof that defendant was duly notified of the infringement and continued after such notice to make and vend the article so patented, complainants cannot in an infringement suit recover damages where the defendants were not notified of the patent, and the patented articles bore no insignia showing that they were patented.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ⟾222.]

2. PATENTS ⟾324(5)—INFRINGEMENT SUITS—REVIEW—FINDINGS.

As the trial court sees the witnesses, its finding in a suit for infringement of patent that no notice was given defendant of the existence of the patent will, though the evidence was conflicting, be deferred to on appeal.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 606; Dec. Dig. ⟾324(5).]

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

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

Suit by Robert L. Gibson and another against the American Graphophone Company and others. From a decree refusing an accounting, complainants appeal. Affirmed.

On appeal from a decree entered by Judge Mayer refusing an accounting in an action based upon letters patent No. 628,813, granted to Henry Jones, July 11, 1899, for improvements in gramaphones, and other sound producing and sound recording machines of a similar nature. The principal object of the invention is to improve the construction of the recording and reproducing mechanism, especially that part known as the sound box and stylus supporting bar. The patentee insists that by means of his improvement the sound delivered from the receiver is greatly improved and a clear and distinct articulation is obtained. An accounting was refused because of the failure of the complainants to comply with the requirements of section 4900 of the Revised Statutes (Comp. St. 1913, § 9446), regarding the giving of notice.

Charles Neave, of New York City, and Ernest Howard Hunter, of Philadelphia, Pa., for appellants.

C. A. L. Massie and Ralph L. Scott, both of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

COXE, Circuit Judge (after stating the facts as above). [1, 2] The question presented by this appeal is whether the complainants are entitled to an accounting in view of their failure to comply with the law as provided by section 4900 of the Revised Statutes. This section provides inter alia that it shall be the duty of all patentees to give notice that the article made by them is patented,

"either by affixing thereon the word 'patented' together with the day and year the patent was granted; or, when from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice. In any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

There is no pretense that the complainants have complied with that part of the statute which requires notice to be affixed to the patented article but it is argued that the defendants were duly notified of the infringement "and continued after such notice to make, use, or vend the article so patented."

Various defenses are urged by the defendants-appellees, but we deem it necessary to consider only the defense which Judge Mayer held to be established, viz., the noncompliance with the provisions of section 4900, first, because they did not put the notice required by law upon their sound boxes and second, because they did not give the defendants notice orally or in writing of the infringement claimed by them.

In Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, Mr. Justice Gray says the clear meaning of the statute is that if the patentee makes or sells the patented article he cannot recover damages—

"unless he has given notice of his right, either to the whole public by marking his article 'patented,' or to the particular defendants by informing them of his patent and of their infringement of it."

Whether this notice was given depends upon whether Burns or Gibson is to be credited. There was a sharp controversy between the two men. Their testimony was taken in open court, and the trial judge had the great advantage of seeing and hearing both. He accepted the version given by Burns. Under such circumstances we think we should not reverse the conclusion so reached. The personal equation is a very important element in determining such questions. The narratives of two witnesses may seem equally persuasive on paper and yet the difference in their manner and deportment may be so marked that no two intelligent men would differ as to which should be credited. The complainants could have put all question on this subject beyond doubt by giving the notice required by section 4900; having failed to do so the burden was on them to prove that actual notice was given. The trial court has found that they have not sustained the burden and we think we should not disturb this finding, especially is this so when the trial court had the advantage of seeing and hearing the witnesses.

The decree is affirmed with costs of this court to the appellees.

FOWLER & WOLFE MFG. CO. v. RICHMOND RADIATOR CO.

(Circuit Court of Appeals, Second Circuit. April 21, 1916.)

No. 102.

PATENTS ⚿328—ANTICIPATION—RADIATOR.

The Fowler & Wolfe patent, No. 609,800, for a radiator, *held* void for anticipation.

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

Suit in equity by the Fowler & Wolfe Manufacturing Company against the Richmond Radiator Company. Decree for complainant, and defendant appeals. Reversed.

D. W. Brown, of New York City, for appellant.

R. M. Barr, of Philadelphia, Pa., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. We have held that claims 1 and 2 of the Fowler & Wolfe patent, No. 609,800, for radiators read in connection with the specification, while of narrow scope, are valid. Fowler & Wolfe v. McCrum-Howell Co., 215 Fed. 905, 132 C. C. A. 143, to which reference may be made for a fuller statement of the facts. The radiator of that patent is a cast-iron section or unit containing four outside large hollow tubes and two or more similar cross tubes, the latter being connected by smaller connecting tubes. It is primarily a

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

wall radiator and being the first of such in the art was a great success. These sections may be united to make radiators of any size desired. A particular advantage mentioned in the specifications is that increased radiating surface may be had without taking up floor space. The feature we held to be patentable was that the cross tubes, being larger and longer than the connecting tubes, a better circulation of hot air or water whichever was used, was secured. Of course the heating principle is the same in a floor as in a wall radiator. Several earlier patents for floor radiators, notably Wood, No. 176,915, and Safford, No. 355,-216, were relied upon by the defendant in the former case. We held them to be no defense, because they did not show the relative difference in size between the cross and the connecting tubes above pointed out.

In this case, however, there are produced two floor radiators manufactured some years before the Fowler & Wolfe patent was applied for, the Jarecki and the International, which are made up of unitary sections of four large outside tubes, two large cross tubes with two smaller connecting tubes. This is the construction of the Fowler & Wolfe patent. The fact that there are fewer connecting tubes than those appearing in the drawings of that patent and that they are shorter is immaterial, because it calls for a series without prescribing any particular number or any particular length of the connecting tubes. Moreover, it makes no difference whether the cross tubes are of a perpendicular or horizontal position. We think that a radiator made after the Fowler & Wolfe patent, though with but from two to five connecting tubes and shorter than the series of six appearing in the drawings of the patent, would unquestionably infringe, and conversely, if in use before the patent was applied for, would anticipate it. The principle of construction and the function is the same, and accomplished in the same way; the difference being only one of degree.

In view of the prior uses now established, the decree of the District Court is reversed.

BRAUN v. JOHN GRIFFITHS & SON CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2276.

1. PATENTS ⚷165—CONSTRUCTION—CLAIMS.
The monopoly of a patent is limited in its scope to the claims thereof.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⚷165.]

2. PATENTS ⚷328—INFRINGEMENT—WHAT CONSTITUTES.
Patent No. 1,015,989, for an improvement in metal door frames, *held* as limited by the claims not to be infringed, by metal door frames constructed by defendant.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Jacob Gottfried Braun against John Griffiths & Son Company. From a decree for defendant, complainant appeals. Affirmed.

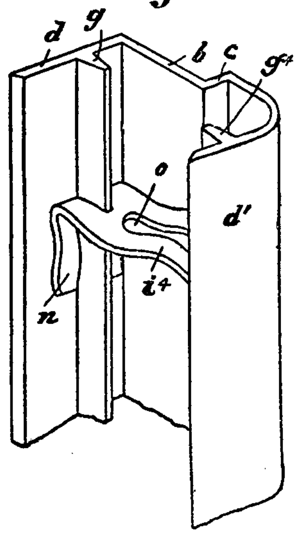
⚷For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This action was brought by appellant charging infringement of patent No. 1,015,989 to Buchholz, for improvement in door frames, title to the patent having by mesne assignment passed to appellant. The District Court dismissed appellant's bill for want of equity.

The claims of the patent of which infringement is alleged are sufficiently shown in Fig. 4 of the patent, which is as follows:

This shows a section of a metal door frame *d'*, having inwardly extending vertical ribs *g*, *g'* on the inner surface of the opposite sides or jambs. Engaging the inner surface of the sides or jambs, extending transversely between them is shown a piece of metal *i'*, having its ends recessed to receive the projecting rib on either side.

Fig. 4



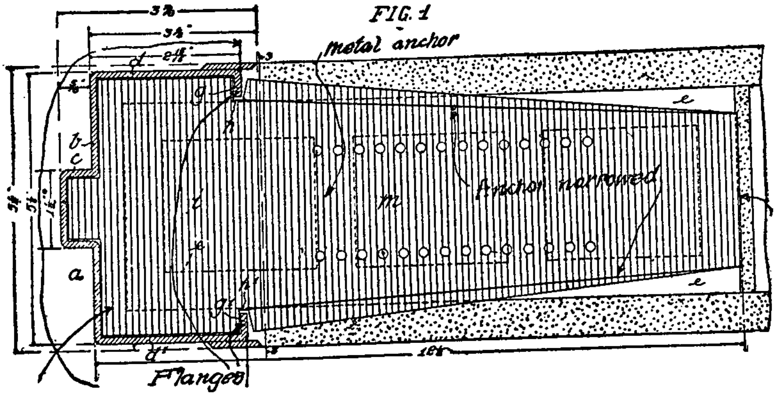
The claims of which infringement is charged are as follows:

"1. A metallic door frame provided with a pair of vertical ribs, in combination with a bracing cross-bar of solid construction, extending transversely from one jamb of said door frame to the other, recessed in its ends to permit adjusting said bar up or down in said frame on said ribs without separation, thus varying the point at which said frame will be braced."

"2. A metal bar of door frame form and U-shape in cross section provided with vertical ribs, in combination with bracing cross-pieces of solid construction, extending transversely from one jamb of said frame to the other, recessed to fit said ribs and adapted to be raised and lowered in said frame while engaging said ribs."

The alleged infringing structure appears in Fig. 1 of complainant's exhibit of drawings of defendant's device, and is as follows:

FIG. 1



The use complained of is in door frames employed in the construction by appellee of the new Cook County, Illinois, Hospital. The metal door frames there used are of heavy rolled steel having inwardly projecting flanges *g*, *g'* on the sides or jambs. The contract for the building required that the metal door frames be anchored to the walls, and for such anchor appellee employed single pieces of thin sheet metal, transversely corrugated, cut substantially to fit into the section of the door frame, and extending from the door frame back into the wall, engaging inwardly projecting flanges of the door frame by slots or shoulders in the sheet metal anchor at *g*, *g'*, the sheet metal having small holes through it so that the grout or mortar of the wall may have better hold. The anchor may be raised or lowered at any point along the frame and thus laid into the wall at any place where it is desired during the construction of the wall to have the frame anchored to it.

It is claimed on behalf of appellee that claims 1 and 2 are invalid because of inventions shown in various prior patents, notably a patent of the German government published March 18, 1909, and United States patent to Shean No. 978,948, December 20, 1910; and that in any event claims 1 and 2 are not infringed by appellee's structure.

Frank T. Brown, of Chicago, Ill., for appellant.

Charles C. Linthicum and William N. Cromwell, both of Chicago, Ill., for appellee.

Before KOHLSAAT and ALSCHULER, Circuit Judges, and ANDERSON, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). There is no issue here as to the right to use a metal door frame having vertical ribs or flanges extending inwardly from the door jambs. The claims in issue are for metal door frames of such construction, "in combination with a bracing cross-bar of solid construction extending transversely from one jamb of said door frame to the other," etc., as stated in claim 1, and "in combination with bracing cross-pieces of solid construction extending transversely from one jamb of said frame to the other," etc., as described in claim 2.

The claims make no reference to the use of the cross-bar or cross-pieces in relation to anchorage of the frame to the wall. Claims 4 and 5, which are not in issue, refer to slots in the cross-pieces adapted to receive the ends of a "hold-fast" in the wall, but even if these claims were in issue, no such alleged infringing structure is here claimed.

The expert testifying for appellant construes claims 1 and 2 as having reference to means for anchoring the door frame into the adjacent wall, and he attaches little importance to the expressions "solid construction" and "bracing" as employed in the claims, stating that the phrase "solid construction" is a curious one, and he could not, in the absence of the file history, state what it means. The same expert says that the specification of the patent throws little light on this language of the claims, and in his opinion the alleged "bracing" action seems to be of very little practical importance.

But it might be of considerable importance if the material of the frame itself were not stiff enough to afford the necessary resistance to shocks. Frames may be of thick or of thin material. The specification and drawings of the patent do not indicate what is there contemplated. The thinner the material the greater utility will be found in the bracing action of solid metal cross-pieces. The thicker and stiffer the material of the frames the less necessity would there be for additional bracing. There seems to be nothing complicated or mysterious about this. The language of the claims is such that if there is nothing novel or useful in the "bracing" cross-pieces of "solid construction" the patentee takes nothing by these claims.

[1] The fact that door frames can be made of metal thick and stiff enough to obviate the necessity for the additional bracing afforded

by metal cross-pieces of solid construction cannot authorize abandonment of the claims in this connection, and a revival of them as an element in some anchoring device, merely because they might also be useful in such a function. The monopoly of the patent is limited in its scope to the claims thereof. White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303; Cimiotti, etc., Co. v. Am. Fur Ref. Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Harder v. U. S. Piling Co., 160 Fed. 463, 87 C. C. A. 447 (7th Circuit); Wolff Truck Frame Co. v. Am. Steel Foundries, 195 Fed. 940, 115 C. C. A. 628 (7th Circuit).

[2] It is claimed for appellant that any metal, however thin, placed in the frame extending from one side to the other, would have some bracing effect, and would therefore be readable on claims 1 and 2. The file history which is in evidence shows that claims 1 and 2 were originally drawn to cover any iron or steel that might be employed for a cross-piece, but that the claims were not thus broadly allowed. The terms "bracing" and "of solid construction" were afterwards inserted. This was done to avoid conflict with the prior Shean patent, No. 978,948, for wall-tie, granted December 20, 1910. This patent shows a metal door frame, and extending into and adjustably attached to it a corrugated sheet metal piece extending also into the wall, for the purpose of anchoring the frame to the wall. Referring to this invention Buchholz said in a letter to the Commissioner of Patents November 6, 1911, that the Shean construction had no bracing cross-bar, and cannot brace the door frame; and as to the words "bracing" and "of solid construction," which the said letter adopts by way of amendment to the claims, it is stated in the letter, "We have inserted a few words to make the differences more salient," thus indicating that the inventor differentiated between his solid bracing bar or cross-piece and the corrugated sheet metal of the Shean patent.

The specification of the patent seems to contemplate just such a function of the cross-piece as is stated in claims 1 and 2, wholly independent of the function of anchorage. It is there said:

> "The arrangement of parts as described secures a considerable strengthening of the door frame so that any shocks or the like happening against one side are taken up by the other and thus reduced in action, so that the door frame is kept securely in place and position, even in case of excessive strain."

If the purpose to be accomplished is, as expressed in these claims and specification, to increase the resisting power of the frame itself as against any shock applied to one side, by communicating the shock through means of the solid bracing piece to the other side, it is manifest that nothing short of a solid piece of metal or its equivalent would do this. It seems clear to us that the structure complained of is an anchor pure and simple. It is not a cross-piece of "solid construction," nor does it have a "bracing" effect within the purview of claims 1 and 2 of the patent.

The transverse corrugations of the sheet metal would, in some degree, add to the stiffness of it if pressure were brought against its edges, but we believe that as a resisting agent in a metal door frame this would be quite negligible. The purpose and effect of the corrugation was well, and probably truthfully, expressed by witness Mendenhall, who said "it was in order to have a better bond in the mortar joint."

Being of the opinion that appellee's device does not infringe claims 1 and 2 of the patent in issue, it will not be necessary to determine whether the Shean patent and the German patent referred to show prior invention by others than Buchholz.

The decree of the District Court dismissing the bill for want of equity is affirmed.

THACHER v. TRANSIT CONST. CO.

(Circuit Court of Appeals, Second Circuit. June 7, 1916.)

No. 290.

1. PATENTS ⚷324(5)—SUITS FOR INFRINGEMENT—REVIEW—QUESTIONS PRESENTED.

   Where defendant did not appeal from that portion of a decree adjudging a patent valid, the matter will not be reviewed on complainant's appeal from a finding that there was no infringement, except as may be necessary in interpreting the claims.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 606; Dec. Dig. ⚷324(5).]

2. PATENTS ⚷157(2)—CONSTRUCTION—CLAIMS.

   If possible, the claims of a patent should be construed so as to uphold and not to destroy it.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 231; Dec. Dig. ⚷157(2).]

3. PATENTS ⚷168(2)—PROCEEDINGS IN PATENT OFFICE—CONCLUSIVENESS.

   Where the patent office disallowed a patentee's broadest claims and to obtain the patent he limited his claims, he cannot thereafter assert that his invention included such broad claims.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⚷168(2).]

4. PATENTS ⚷328—CONSTRUCTION—IMPROVEMENT IN CONCRETE ARCHES.

   The Thacher patent, No. 617,615, for an improvement in concrete arches, consisting of a combination with abutments and a concrete arch spanning the intervening space, of a series of metal bars, in pairs, each bar of a pair being independent of the other, is valid, but is limited to a structure in which the bars are not members of a truss or built-up metallic girder, and, as so construed, *held* not infringed.

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

Bill by Edwin Thacher against the Transit Construction Company. From a decree (228 Fed. 905), dismissing the bill for want of infringement, complainant appeals. Affirmed.

A. A. Thomas, of New York City, for appellant.

E. C. Seward, of New York City (Brown & Seward and Wm. McK. Barber, all of New York City, of counsel), for appellee.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

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

CHATFIELD, District Judge. This action involves a charge of infringement of claims 1 and 3 of patent No. 617,615, granted to Edwin Thacher, the plaintiff-appellant, on January 10, 1899, upon an application filed October 16, 1896. Claim 1 sufficiently shows the question presented and reads as follows:

"1. The combination with abutments, and a concrete arch spanning the intervening space, of a series of metal bars, in pairs, one bar of each pair above the other, near the intrados and extrados of the arch, and extending well into the abutments, each bar of a pair being independent of the other, substantially as described."

The District Court found the patent valid, following a decision by Judge Rose (Thacher v. Mayor, etc., of Baltimore [D. C.] 219 Fed. 909), in which the claims of the patent were held both valid and infringed.

On the question of infringement, however, the District Court, in the present action, reached the conclusion that the structure of the defendant, which consists of a series of concrete arches to support the Ashokan bridge of the aqueduct for the city of New York, did not include pairs of bars or rods of which one bar of each pair was "independent of the other," in the sense in which those words were used in the claims of the patent. It therefore held the claims not infringed and, in so doing, stated that the structure under consideration by Judge Rose was substantially the same as that described in the patent. The invention claimed in this patent "relates to concrete arches for bridges or vault-covering or for spanning openings in building construction."

The file wrapper shows, among the citations by the Patent Office, a patent, No. 545,301, granted August 27, 1895, to one Milliken, which was not pleaded as an anticipation, but was the only patent of the prior art presented in the record or discussed in the opinion of the court below. This Milliken patent provided a method for the construction of arches, partitions, floor, etc., and evidently contemplated the use of I-bars or iron beams from which the concrete arch should spring. This arch was to be made by concrete poured around and through wire netting or corrugated metal, so woven or bent as to connect and inclose longitudinal strengthening bars, which bars were to be placed at different levels in the arch, and were to follow the lines of curvature according to their location. These bars were to be interwoven in or fastened to the wire mesh or corrugated metal, and were to be as long as the total arc of the span. When applied to a bridge it can be seen that no such mass of rods, corrugated plates, or wire mesh could be evenly bent into an arch of varying thickness. The larger the span the more impossible would be the construction, and no machinery could make the metallic arch in one piece for transportation or bend it in shape if first assembled for the entire length.

In this sense the Milliken patent is impracticable and could not be considered as an anticipation of the Thacher patent. This Milliken patent was not mentioned by Judge Rose in the Baltimore Case, supra. In the court below, however, the Milliken patent was considered in so far as it disclosed a concrete arch with upper and lower bars imbedded in the concrete in pairs, each bar having the same relative position with respect to the upper and lower faces of the arch as the bars of each pair shown in the Thacher patent.

[1] The defendant has not appealed from the finding of the court that the patent is valid, and it is necessary to consider only the question of infringement. But the plaintiff-appellant has added to its brief a copy of the Von Emperger patent No. 583,464, allowed June 1, 1897, upon an application filed May 19, 1896. This was held by Judge Rose in the Baltimore Case to have been antedated by Thacher, and the defendant in this case has not questioned the action of the Patent Office in allowing Thacher his patent as a prior invention to Von Emperger. Hence Von Emperger is not available as an anticipation nor as a part of the prior art.

[2-4] The Von Emperger patent shows the use of ribs or longitudinal strengthening rods in pairs, of which each pair is "reinforced by distance rods between said ribs and by diagonals connecting the two adjacent pairs of ribs." In some of the drawings of the Von Emperger patent, it is evident that the inventor was contemplating merely the formation of a truss or skeleton structure, which could be erected on the spot, and need not be completed before the concrete was poured around the lower part, in place of using a solid iron beam or solid truss sufficient to span the entire arch. But Von Emperger relies upon the idea of strengthening the arch by the use of a pair of rods substantially in a vertical plane, of which one shall follow the curvature of the lower surface and the other the curvature of the upper surface, and in which pair connection in the vertical plane may be merely by distance rods to keep the strengthening bars in shape or in place until the concrete can harden around them. In this, so far as the mere presence of a pair of bars is concerned, Von Emperger evidently had in mind the same idea as Thacher, but he did not claim this alone as invention, nor does Von Emperger seem to rely upon the mere presence of the pair of strengthening bars without reference to their connection with the other parts of what he in effect treats as a girder. In this way his patent is exactly the same as the Milliken patent, in that it has rods present which correspond in position and in material to the rods called for by the Thacher patent, but which do not perform the same functions in the same "independent" way.

The specifications in the original Thacher application show that the patentee was seeking to imbed his bars firmly, and that he contemplated for this purpose the use of bars with extensions or projections in order to allow better holding by the concrete. He also contemplated the possibility of using jointed or extension bars, so that they might be put in place in smaller sections, and that the lower bar or the lower part of each bar could be covered with concrete first. He planned to have one of the bars near what is called the extrados of the arch and the other near the intrados, thus having one follow the curve of the upper surface and the other the curve of the lower surface. He contemplated and has always used some means of holding the bars in position until the concrete was completely around them, and these means can be left in the concrete or removed as may be most convenient. But in all of this structure the patentee had in mind the idea which was not claimed by Milliken (but was recognized by Von Emperger) of using two single rods or bars, which should not in any way obtain power to resist a strain or stress by direct trusslike connection with the other bar of the pair. This proved to be the ultimate patentable idea in the Thacher application, and in this sense the patent seems to have properly been held valid.

It has been necessary to state these matters, inasmuch as the District Court failed to state, so as to avoid criticism by the appellant, what seems to be its intended finding upon the question of infringement.

The plaintiff who acted as his own expert testified that the strengthening bars are subjected to internal stress by the application of a load upon the concrete, and that this stress is caused by the strain which is resisted longitudinally of the bar. The bars thus add to the strength of the concrete in its ability to resist those components of any load or force tending to distort the arch, but which do not waste themselves as a mere shearing or crushing strain normal to the face of the arch. The plaintiff points out that when the two bars of a pair are imbedded in the concrete, and when the concrete has hardened, the bars and the concrete form a compact and complete whole, which is integral in the sense that neither of the bars can move in the concrete. There can be no longitudinal motion at all, and no distortion or twisting, unless the entire body of the concrete is broken or cracked. In this sense of course the Thacher bars are connected and are not "independent" of each other in resisting any shearing strain which can be transmitted by the concrete so as to be exerted against both bars and against the concrete as well.

The plaintiff therefore contends that the words in the claims of the patent "independent of the other" mean independent in action. In other words, he claims that each of these bars exerts whatever effect it has upon the concrete in which it is imbedded independently of whatever action may be exerted by the other bar.

The District Court, in holding that the defendant's structure did not infringe, made the statement that the defendant's upper and lower arched bars were in no sense "independent" of each other. The court says that they are "physically and mechanically connected to each other by exceedingly strong iron fasteners." The court then says that the transverse fasteners between the upper and lower arched bars "appear to be considerably stronger and heavier than the arched bars themselves," and that "the cross-frames are directly bolted to the angle iron cross-frames by heavy bolts."

It appears from the drawings that these cross-frames are trusslike structures extending transversely to the roadway or floor of the arch, and holding in place each of the longitudinal arched bars. They are firmly fastened to the arched bars and give rigidity against transverse strains, but also act as a definite connection between the upper and lower of each pair of arched bars.

In addition, as found by the District Judge, so-called stirrups or hooks are fastened by bolts to bars crossing from the upper and lower strengthening rods in one pair to those in the next pair. The cross-bars are firmly bound to the rods by wire fastenings.

The defendant's structure enjoys the same advance as the Von Emperger patent and as described by the patentee in suit, in that it is possible to place the lower bar in position, fill in the concrete, and then add the upper bars, instead of having to fill in the concrete under and around the projecting surfaces of a solid truss or beam.

In the same way convenience in erecting upon the spot from small members instead of placing in position a heavy trusslike structure, is obtained by the patentee and also by the method used by the defendant.

But it would appear that the District Judge was right in his finding that the particular construction used by the defendant is not that of the patent. The plaintiff urges that mere vertical or radial connection between the upper and lower arched bars serves no purpose other than to definitely locate the position of these arched bars and to take the place of false work in their erection. He points out the difference between a member constituting a truss with triangular bracing and the parallel tieing together of two horizontal rods, which even when so tied would not support their own weight, beyond the strength of the joints of the structure if these joints be fixed and not movable. But he overlooks in some of the Von Emperger constructions, and also in the defendant's structure, the fact that two bars, one near the extrados and the other near the intrados of the arch, firmly fastened together by rods of sufficient stiffness and arranged radially with cross-bars or plates imbedded in the concrete, and heavy enough to resist distortion, would of themselves form a truss, and are not independent in action of each other.

If the advantage of this form of construction would justify the extra expense for material, then no idea shown in the patent in suit would be used except the mere presence of a pair of bars in the relative positions in which they were planned by the patentee and in which they occur in the Milliken patent. But unlike those described in the Thacher patent, they would not be "independent" of each other mechanically nor in action, and would not be within the claims of this patent.

It may be assumed that the bars of the Thacher patent when imbedded in concrete are thereby "physically and mechanically" connected to form a girder of concrete and iron. The immobility of the bars does not take away their "independent" action against internal stress. But the patentee plainly meant to imply a definite limitation to "independent" as distinguished from combined resistance to that stress.

The doctrine that such meaning should be given the claims as to uphold and not destroy the validity of the patent (when two meanings are possible), Gaisman v. Gallert (C. C.) 105 Fed. 955, and National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544, does not require a construction of the word "independent" which shall include all forms of construction for resisting longitudinal stress and exclude only normal or shearing strains.

The word "independent" even when meaning "independent in action" is limited to the meaning *independent of each other,* or *independent of reciprocal action* except as affected by the concrete.

Von Emperger recognized (as contended by Thacher) that "the use of metal in the core of a vault or arch is useless as only those portions of the ribs are called into action which are located near the intrados and extrados of the arch," and that "the reinforcing ribs should follow the shape of the arch," but he does not seem to mean that each bar is unaffected in its internal resistance by its metallic connection with other bars entering into its ability to resist and transmit its own internal stress.

The specifications for the defendant's structure called for the fastening in position of the steel reinforcement "by cross-frames and stirrups or other means, so as to prevent its becoming displaced during the placing of the concrete."

Under this an infringing structure might have been furnished, but the case at bar depends upon the precise form used, and not upon some other form which might have fulfilled the contract. The patent has now expired, and the patentee as his own expert looks upon the meaning of the patent from the standpoint of the broadest interpretaion which his language might allow. But he cannot enlarge what the Patent Office granted, and what he accepted in obtaining favorable action. Goodwin Film & Camera Co. v. Eastman Kodak Co. (D. C.) 207 Fed. 351, at page 357; National Tube Co. v. Mark, 216 Fed. 507, at page 522, 133 C. C. A. 13.

The District Judge thought the claims narrower as granted than those originally submitted. In some senses they seem to be broader in scope than they would have been construed upon the earlier form of claim, but a recognition of this fact does not give the patentee the right to claim all the ideas which he sought to urge upon the Patent Office and which they clearly and correctly considered anticipated by the patents of the prior art. The use of strengthening rods in a concrete arch near the extrados and intrados was shown in Milliken and other patents, and the patentee sought to get away from the idea of constructing and imbedding a metallic truss or girder by using separate and independent rods which should form the truss or girder only when the concrete had hardened. But he did not thereby obtain a claim which can be held to include as "independent" those rods which, while to a great extent independent, are yet in nature members of a truss or built-up metallic girder. The defendant's structure falls in the latter class.

The decision that the patent is valid, but not infringed, will be affirmed.

DECKER v. SMITH.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 272.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—NURSING BOTTLE.
The Decker patent, No. 521,773, for a nursing bottle, was not anticipated and disclosed invention; also *held* infringed.

2. PATENTS ⚷328—VALIDITY—NURSING NIPPLE.
The Decker patent, No. 587,939, for a nursing nipple, *held* void for lack of patentable novelty.

3. PATENTS ⚷318(6)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.
Where it was shown by satisfactory evidence that a certain portion at least of the time of a traveling salesman was devoted to the sale of an infringing article, the infringer is not deprived of the right to an appropriate credit for the expense, because he did not keep books in which it was so apportioned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 576; Dec. Dig. ⚷318(6).]

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

Suit in equity by William M. Decker, doing business as the Hygeia Nursing Bottle Company, against De Wane B. Smith, doing business as the Yankee Company. Decree for complainant, and defendant appeals. Modified.

For opinion below, see 225 Fed. 776.

Defendant appeals from an interlocutory decree holding valid and infringed patent for nursing bottle, dated June 19, 1894, and patent for nursing nipple, dated August 10, 1897, each issued to plaintiff. Defendant also appeals from final decree awarding to plaintiff the amount of defendant's profits, the sum of $2,826.26, with interest from November 10, 1914, and costs.

R. R. Martin, of Utica, N. Y., for appellant.

J. W. Ellis, of Buffalo, N. Y., for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judges.

MAYER, District Judge. [1] As both patents have expired, and so far as appears, this is the only outstanding controversy in respect thereof, an extended discussion of the patent features of the case is unnecessary.

"My invention," says the patentee, "relates especially to the gravity species, and has for its object to facilitate the gravitation of the fluid without obstruction, and consists of a cell or receptacle constructed without breast or neck, and closed by an elastic cover constituting an integral breast and nipple, substantially similar to a mother's breast and nipple. As a result of this construction the receptacle as well as its cover are capable of ready and perfect cleansing, which is an all-important consideration in administering artificial food to infants and another result is the ready flow of the fluids by gravity into the breast and nipple without necessitating the undue elevation of the receptacle and also the avoidance of collapse of the nipple as the result of

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

suction. A further advantageous result of my invention consists in the fact that the infant is restricted to a natural hold on the nipple and it can only enter the mouth to a limited extent and not so far as to gag or choke the child, but to a sufficient distance to avoid ingestion of food by restricting its discharge to the tongue and not beyond the tongue and into the throat, as occurs in the use of receptacles which may be forced into the mouth."

Claims 1 and 3 of the first patent, as to which infringement is charged, are as follows:

"1. A nursing device consisting of a cell or receptacle having substantially an uncontracted and open upper portion closed by an elastic breast of dome-shaped form, terminating at its apex in a perforated nipple substantially as and for the purposes set forth."

"3. As a new article of manufacture a cover for a nursing cell or food receptacle consisting of an elastic dome-shaped breast open at its base and adapted to embrace the cell, and, terminated near its upper portion and made integral with a perforated nipple, substantially as and for the purpose set forth."

The device accomplished all that Decker claimed for it, attained a large commercial success, received the approval of physicians, and was acquiesced in for a long period of years. The prior art is merely a history of vain attempts to produce a simple and hygienic device such as Decker succeeded in doing. The opinion of the District Judge deals so comprehensively with the patent and the prior art that we need only add that the Ware nipple, upon which so much emphasis is laid by defendant, does not, in our opinion, either anticipate or negative invention; for, in addition to certain structural differences, it is obviously objectionable on hygienic grounds, because of an internal vent tube which can be kept clean, if at all, only with great difficulty. We therefore agree both with the reasons and conclusion of the District Judge, sustaining the patent and finding infringement.

[2] The second patent is merely for "a new article of manufacture" having a reinforced zone, or, in other words, part of the breast portion of Decker's original device is made thicker. This so-called invention was devised, according to Decker, because:

"From practical experience in the use of said device I have discovered that the breast portion of the cover has a tendency to sink or draw down into the cell or receptacle, and also to collapse laterally as a result of suction, and the nipple portion consequently has a tendency to likewise sink bodily and turn over laterally."

We think this is the old story of trying to add to a meritorious invention an obvious improvement, so as to extend the life of the patent monopoly, and that this patent represents even less than would be expected from the man skilled in the art. We therefore hold it void for want of patentable novelty.

[3] Four exceptions were filed to the report of the master on the accounting and overruled by the District Court. We agree with the court below, except as to the third exception, which relates to the disallowance of an item of $1,162.50, one-quarter of the salary and expenses paid by defendant to C. E. Marks, as one of the proper expenses of defendant's business in selling the infringing merchandise. Defendant conducted business at Utica as D. B. Smith & Co., and also as the Yankee Company, and was sole proprietor of both concerns.

As D. B. Smith & Co. defendant sold spray pumps. As Yankee Company defendant sold mufflers for gas engines, a few whistle outfits for motor boats, and nursing bottles and nipples. The nursing bottles and nipples were manufactured for him, and he assembled and shipped them to customers.

Marks was employed as a traveling salesman during the years 1909 and 1910, and during the accounting period traveled from coast to coast, visiting cities and towns of a population of 25,000 and upwards. His salary of $1,800 per annum and expense account of $40 per week seem to us to be reasonable. He testified that he spent more than half his time in selling and working up a trade in the defendant's nursing bottles. There is no reason to doubt his testimony, although it was based on memory, and not on any written memoranda. The claim is not made for defendant's payments to Marks on the basis of one-half, but only for the irreducible minimum of one-quarter, because defendant's son, who was his general manager, figured out one-quarter as a fair allowance attributable to the nursing bottle business.

We agree with the District Judge that the "loose business methods of an infringer cannot be used by him as a shield * * * to defeat the recovery of profits actually made by the infringer"; but the question is always one of the probative value of the testimony. Many small merchants do not keep elaborate sets of books pursuant to the teachings of the modern accountant or the much talked of efficiency engineer, and, because of limited facilities, do not and probably cannot work out accurate calculations of complicated overhead problems. But, if the evidence of a specific and separable item of expenditure is satisfactory, and, in a case like this, a figure named undoubtedly represents the minimum, then the mere failure to keep books cannot deprive a defendant of the right to an appropriate credit for expenses, within the principle of Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566, and there is nothing in Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, to the contrary.

Had the District Court doubted the truthfulness of the Marks testimony that he spent some of his time in this business, we should have hesitated to disturb this item; but the court said, "He [Marks] undoubtedly was occupied during part of his trip in selling nursing bottles and nipples," and the master said precisely the same.

We conclude, therefore, that the interlocutory decree should be modified by dismissing the bill as to the second patent, and that the final decree should be modified by deducting from $2,826.26 the sum of $1,162.50, leaving a balance of $1,663.76, with interest from November 10, 1914, to December 6, 1915, the date of the entry of the final decree. As neither party has been entirely successful, there will be half costs in this court and in the District Court, and the final decree will be further modified accordingly. When the correct amount of principal, interest, and costs shall have been ascertained as of December 6, 1915, such amount will bear interest from December 6, 1915.

BROWN PORTABLE ELEVATOR CO. v. INTERIOR WAREHOUSE CO.

(District Court, D. Oregon. August 7, 1916.)

No. 6872.

1. PATENTS ⚷74—PREVIOUS ART.

A patentee is chargeable with knowledge of all pre-existing devices which go to the establishment of the prior art that may pertain in any degree to his device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 65; Dec. Dig. ⚷74.]

2. PATENTS ⚷328—VALIDITY—ANTICIPATION.

Patent No. 668,971, for a portable elevator, comprising a frame having an adjustable top portion adapted to be raised and lowered to permit the elevator to pass obstructions, which was equipped with vertical side pieces longitudinally slotted for the reception of bolts for securing the top section at the desired adjustment, *held*, in view of the prior art, not to show invention; the only addition to the art being the raising of the frame by the use of bolts, which is not a patentable invention.

3. PATENTS ⚷112(3)—ISSUANCE—PRESUMPTIONS.

A patent regularly and duly issued is evidence of invention and patentability.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 164; Dec. Dig. ⚷112(3).]

In Equity. Suit by the Brown Portable Elevator Company, a corporation, against the Interior Warehouse Company, a corporation. Bill dismissed.

W. R. Litzenberg, of Portland, Or., for plaintiff.

Robert R. Rankin and Jos. L. Atkins, both of Portland, Or., and D. N. Mackay, of Condon, Or., for defendant.

WOLVERTON, District Judge. This is a suit to enjoin infringement of a patent, being for a portable warehouse elevator, numbered 668,971, and issued February 26, 1901. One Eugene Brown is the inventor, and the plaintiff is the present owner, having derived title from Brown. At the trial plaintiff was required to prove title, but controversy as to ownership was subsequently abandoned.

The infringement is predicated on claims 1 and 4 of the patent. These claims are as follows:

1. A portable elevator comprising a frame having an adjustable top portion adapted to be raised and lowered to permit the elevator to pass obstructions, a sheave or pulley mounted on the top portion of the said frame, a pivoted frame mounted on the said frame and provided with an endless carrier, and a hoisting rope or cable passing over the said sheave or pulley and connected with the pivoted frame, substantially as described.

4. In an apparatus of the class described, the combination of a supporting-frame having a vertically-adjustable top portion adapted to be raised and lowered to permit the elevator to pass obstructions, a pivoted frame having an elevator or carrier, and hoisting mechanism adjustably connecting the pivoted frame with the vertically-adjustable portion of the supporting-frame, substantially as and for the purpose described.

The contrivance, so far as it is necessary for the present inquiry, may be briefly described as a main frame or base, composed of a hori-

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

zontal portion and a vertical rear portion supported by inclined braces, and provided with an adjustable top adapted to be raised and lowered to enable the elevator to be adjusted to the desired height and permit the same to pass under beams or other elevated obstructions. The base is mounted on casters or wheels and composed of longitudinal side pieces and suitable connecting crosspieces, and is provided at the back with a platform, upon which is mounted an engine for operating the endless carrier of the elevator. The vertical rear portion at its upper part is composed of vertical side pieces longitudinally slotted for the reception of bolts or suitable fastening device for securing the top or section at the desired adjustment, which side pieces are connected by a horizontal piece at the top. On this piece are secured brackets, on which are mounted pulleys or sheaves. Through these pulleys are operated hoisting ropes for hoisting or lowering the outer or upper end of the elevator. The elevator is pivoted on the front end of the main or supporting frame, the vertical position of such frame being at the rear.

The elevator is operated, as stated in the specifications, for elevating commodities in sacks, bales, boxes, barrels, and other packages, by appropriate machinery. The outer or upper end of the elevator is hoisted and lowered as desired by means of a windlass, around which the ropes are wound which pass through the pulleys or sheaves attached to the upper vertical portion of the supporting frame and to the elevator.

In brief, the contrivance consists of a base mounted on casters, with a vertical frame at the rear capable of being adjusted in height at its upper portion by means of slots in the frame or side pieces, and bolts, and provided with pulleys or sheaves attached to a cross-piece at the top, and of an elevator mounted or pivoted on the front end of the base, with its outer or upper end passing back through the vertical portion or frame, which is raised and lowered by means of ropes attached to such outer end and passing through the sheaves and to a windlass attached to the vertical portion.

The defendant has interposed and now insists upon three defenses, namely: Anticipation, lack of invention, and lack of patentable quality in respect to the alleged combination of the claim. Without these, it is practically admitted that there is infringement.

[1] In determining whether there is anticipation and lack of invention, it is essential that we enter the realm of the prior art, and ascertain what the state of the art was at the time of the alleged invention of the patentee. The patentee is chargeable with knowledge of all pre-exising devices which go to the establishment of the prior art that may pertain in any degree as it respects his device. I will not trace the development of the prior art, and only deem it essential for a determination of the cause to refer to a couple of the many patents that have been put into the record for showing the state of the art.

[2] As long ago as February 23, 1886, a patent numbered 336,771 was issued to J. F. Warner and F. Cook for a hay-stacker, which comprised in its elements every element of the plaintiff's device ex-

cept the element of adjustability of the vertical portion thereof. I refer to the top that is adapted to be raised and lowered by means of the slots and bolts. It has the base on casters and wheels, the vertical frame at the rear held in place by a brace, the elevator pivoted to the base in front, and raised and lowered in the rear by means of a rope or cord passing over a pulley attached to the upper part of the vertical portion and running down to a drum operated by a windlass. The functions performed by the device are in all respects the same, barring the adjustability of the rear portion, as above defined as those to be performed by the plaintiff's machine, except that the one is used as a hay-stacker and the other is designed, as alleged, to be used for elevating commodities in sacks, bales, boxes, barrels, and the like, if this constitutes a distinction.

The next device I mention is for a straw-stacker, patented by R. S. Arbogast, March 12, 1889, bearing number 399,312. This device is provided with the means of adjusting the height of the vertical portion; that is to say, the vertical portion is susceptible of being raised and lowered. The manner of adjustment is quite different from that of the plaintiff's device, but the means of adjustment are there. The idea is there. The adjustment is so arranged that when the vertical portion is raised and lowered it operates also, and automatically, to raise and lower the outer end of the elevator in the same way as the alleged infringing device, so that, in reality, the machine may be lowered to pass obstructions, as well as the plaintiff's device, and in somewhat the same way. The only other distinction which concerns the present case between the Arbogast device and this is that the lower end of the elevator is not in reality pivoted directly to the base, but is suspended above it, and may be said to be mounted upon it, considering the manner in which it is maintained with reference thereto. In construction, the real difference in the two machines, that is, so far as material here, is the manner of adjusting the height of the vertical portion. In the plaintiff's machine, this adjustment is accomplished by means of slots and bolts; and in the Arbogast machine it is done automatically as the outer end of the elevator is raised and lowered.

The prior art, it must be conceded, brings invention so very close to plaintiff's device as to leave but the one inquiry, and that is, whether the plaintiff's predecessor exercised inventive faculty or power when he conceived the manner of raising and lowering the height of the vertical portion of his machine by means of slots and bolts, and applied it to a portable warehouse elevator. The art of attaching two pieces of boards or timbers together by means of slots and bolts is manifestly so simple as not to require the exercise of inventive faculty; and to make them so adjustable requires no greater ingenuity. If, however, there be any doubt about this, I need only observe that it has been used so many times in application in mechanics that it has assuredly become a part of the prior art.

But is it invention to attach the device to a portable warehouse elevator, when the prior art shows that the vertical portion of a straw-stacker was adapted to being raised and lowered in height by another means? It is hardly conceivable that the function of elevating straw or hay in the field is different from that of elevating commodities in sacks, bales, and boxes in a warehouse. The function would surely be the same whether hay or straw in bales was elevated in the field or in a barn or in a warehouse. The coincident that the hay or straw was loose and not baled could make no difference in the art of raising the same to a higher level by an endless chain elevator. The machines might require different adaptability in other respects for handling the different commodities, but the function performed in the process of elevating is the same, and cannot be otherwise. The question is therefore ultimately resolved to whether it required inventive genius to provide plaintiff's device with the specific means devised for raising and lowering the vertical portion, so as to enable the elevator to pass obstructions. The question thus resolved is answered by undoubted authority against the contention of plaintiff. Such an application of the known device of slots and bolts does not arise to the dignity of invention. This is very well illustrated by the case of Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. The case is so nearly analogous on principle that I will not take time to analyze it. The court there, in speaking through Mr. Justice Brown, has this to say:

"Martin, therefore, discovered no new function; and he created no new situation, except in the limited sense that he first applied an internal gearing to the old Mast-Foos mill, which was practically identical with the Martin patent, except in the use of an internal gearing. He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply it to a new purpose in a machine where it had not before been used for that purpose. The result may have added to the efficiency and popularity of the earlier device, although to what extent is open to very considerable doubt. In our opinion this transfer does not rise to the dignity of invention. We repeat what we said in Potts v. Creager, 155 U. S. 597, 608 [15 Sup. Ct. 194, 198 (39 L. Ed. 275)]: 'If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use.' The line between invention and mechanical skill is often an exceedingly difficult one to draw; but in view of the state of the art as heretofore shown, we cannot say that the application of this old device to a use which was only new in the particular machine to which it was applied, was anything more than would have been suggested to an intelligent mechanic, who had before him the patents to which we have called attention. While it is entirely true that the fact that this change had not occurred to any mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices; but, as before stated, in determining the question of invention, we must presume the patentee was fully informed of everything which preceded him, whether such were the actual fact or not."

In further support of this view, see Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; St. Germain v. Brunswick, 135 U. S. 227, 10 Sup. Ct. 822, 34 L. Ed. 122; Ansonia Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 1327; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L.

Ed. 552; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 C. C. A. 166; Campbell v. Mangle, 194 Fed. 110, 114 C. C. A. 188.

This conclusion results in rendering plaintiff's patent nugatory in so far as it affects defendant's device.

[3] I am aware of the rule that a patent regularly and duly issued is primary evidence of invention and patentability. But, having this rule in mind, it so clearly appears that plaintiff's device, in the light of the prior art, is without the application of inventive faculty that I am irresistibly impelled to the conclusion reached.

The bill of complaint will therefore be dismissed, with costs to the defendant.

INDIVIDUAL DRINKING CUP CO. v. PUBLIC SERVICE CUP CO.

(District Court, E. D. New York. July 11, 1916.)

1. PATENTS ⚷308, 326(4)—INFRINGEMENT—VIOLATION OF INJUNCTION.

In an infringement suit where defendant is found to have infringed the patent, complainant, having been granted an injunction, may, before final decree, move that it be extended so as to include a new device, or a changed device within the claims of the patent as found by the court, and where the device is in use by defendant during the pendency of the action, or after decision, but before the hearing on the reference, the master may consider what acts constitute an infringement, and this may involve comparison of structures to see if changes are merely colorable, but it is improper to bring a new device into the case by contempt proceedings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506, 615–619; Dec. Dig. ⚷308, 326(4).]

2. PATENTS ⚷308—INFRINGEMENT SUITS—REHEARING.

In an infringement suit, where complainant moved to extend the injunction to a new device claimed to infringe the patent, defendant cannot, without any assertion of proper ground, be granted a rehearing of the whole case on the questions of the validity of the patent and infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506; Dec. Dig. ⚷308.]

3. PATENTS ⚷308—INFRINGEMENT—INJUNCTIONS—MOTION TO EXTEND.

In an infringement suit, complainant was granted an injunction, and after the discontinuance of an independent suit to enjoin the manufacture of a second device, which complainant contended also infringed, it moved to extend the injunction to include such device. That device was on the market, and actually in complainant's possession, before the decision of the case. Defendant contended that such device was not an infringement; the claims of the patent being limited by the prior art and a subsequent patent. *Held*, that as defendant was entitled to its day in court, and as such matters could not be decided on a motion to extend the injunction, there being no ground shown for a rehearing of the case the motion to extend the injunction should, in the discretion of the court properly be denied, and complainant required to protect its rights by an independent suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506; Dec. Dig. ⚷308.]

In Equity. Suit by the Individual Drinking Cup Company against the Public Service Cup Company. On motion by complainant to

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

extend the injunction already granted to another device manufactured by defendant. Motion denied.

See, also, 226 Fed. 465.

Clifford E. Dunn, of New York City, for plaintiff.

Briesen & Schrenk, of New York City (Hans v. Briesen, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. This action was brought upon patent No. 1,081,508, granted to Lawrence W. Luellen, for a device to store and furnish sanitary drinking cups, either in connection with a coin mechanism, or a liquid supplying mechanism, or both, or neither. After careful consideration the patent was held valid and infringed by a device of the same general character. The interlocutory decree was entered on the 30th day of July, 1915. A second action was instituted, upon patent No. 1,043,854, which shows merely a receptacle for a nest of cups, with a constricted opening of a certain sort, to allow access to but one cup at a time. A preliminary injunction was granted therein, in this court, against the defendant upon the 30th day of March, 1915.

[1] Subsequently the plaintiff brought a third action against the defendant, upon the original patent No. 1,081,508, charging infringement by the device now under consideration, while at the same time proceeding with the reference before a master, upon the decree in the first suit. Subsequently the independent action was discontinued, and the plaintiff sought to include the use of the device charged as infringement therein, in the accounting before the master in the first action. Upon objection, the master excluded this testimony, whereupon the plaintiff now brings the motion to extend the injunction already granted to the device used by the defendant in its present form. This consists of a receptacle for the nest of cups, which is suspended by two flanges (on opposite sides of the opening through which the cups fall) connected with a rod terminating in a pushbutton at the front of the casing. When this button is pressed against the spring which holds it in place, the flanges are displaced from under the lower cup in the case, but at the same time two other wedge-shaped flanges pass between the rim of the lower cup and that of the cup next above, thus forcibly separating the lower cup so that it may fall through the opening; and holding up the balance of the stack.

The defendant's device is within the language of certain claims of the patent originally held valid. But the defendant now seeks to introduce many patents, some of which were cited in the answer in the original action as anticipations, some of which were merely referred to as a part of the prior art upon that trial, and some of which have not before been discussed in connection with this litigation. In addition, the defendant seeks to go into the art from the standpoint of such patents as that of Flatau, No. 1,091,921, which upon the previous record were considered as improvement patents, but which the defendant now urges are not covered by even the broad claims of the patent in suit.

It may be assumed that the new device could not, under the circumstances, have been brought into this case by contempt proceedings. Crown Cork & Seal Co. v. American Cork Specialty Co., 211 Fed. 650, 128 C. C. A. 154. In Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.) 126 Fed. 764, and in California Artificial Stone Paving Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618, 28 L. Ed. 1106, it was held that *after final decree,* a new action was necessary unless the change in the form of device was merely colorable. In Sundh Electric Co. v. General Electric Co. (D. C.) 217 Fed. 583, the practice was upheld of bringing on a motion for supplementary interlocutory decree to extend the injunction.

It may be considered, therefore, that the practice is established that before final decree, application on motion may be made to include a new device, or a changed device, within the claims of the patent as found by the court. Where the device is in use by the defendant during the pendency of the action, or after decision but before the hearing upon the reference, the master may consider what acts constitute an infringement, and this may involve comparison of structures to see if changes are merely colorable. Brown Bag-Filling Mach. Co. v. Drohen (C. C.) 171 Fed. 438; Hoe v. Scott (C. C.) 87 Fed. 220; L. S. Starrett Co. v. Brown & Sharpe Mfg. Co., 208 Fed. 887, 126 C. C. A. 47. But in the latter case, a device was under consideration before the master, which was placed upon the market after the filing of the bill. The question under consideration was a change or modification from the device held infringed in the decree. As to this the court said that the defendant was entitled to a day in court, but that this could be had before the master.

[2, 3] In this case the defendant did not present before the master, and is not urging before the court, that the device now complained of is so changed from the similar portions of the structure held to be an infringement as to escape inclusion in the injunction and decree, if the broad claims of this patent are given the same meaning which it appeared *upon the previous record* they should have been given. He contends, however, that he is entitled to raise the issue of validity, and to limit the construction of these claims by practically a rehearing of the case in these respects, and by what amounts to an amendment of the answer, so as to set up an entirely new prior art and list of anticipations. The parties are the same, the defendant has not applied for a rehearing upon newly discovered evidence, nor does he contend that he did not properly have his day in court upon these issues. So far as he is concerned, the meaning of the claims and the question of their validity, based upon the prior art, is settled by the interlocutory decree which has already been entered. In this respect, therefore, the defendant's position is untenable, and he cannot ask the court to review its own decision, in the light of such matters as the defendant may now wish to present to the court under the guidance of a new attorney in the case. In so far, therefore, as the defendant seeks to raise any issue (except that of infringement through identity of the present device with that held to be an infringement on the trial) the motion could be granted. Under ordinary circumstances, it must also be held that the question of identity should have been passed upon by the master upon the merits, and it would be referred back to him for that purpose, except for other considerations entering into the present case.

It appears that the new device which the plaintiff now seeks to bring in as an infringement was upon the market and was actually in the plaintiff's hands before the decision of this case. It is a different device as a whole than the patent in suit. It appears, as has been stated, that it may involve in certain ways the other patent taken out by the plaintiff, and which the defendant alleges contradicts the broad scope now claimed by the plaintiff for the patent in suit. At any time when the plaintiff sought a finding by the court upon the charge of infringement by this particular device, the defendant was entitled to a day in court upon such issues as could be properly presented for the court's consideration under the plaintiff's charge of infringement.

If a new action, charging infringement by an entirely different style of cup distributor, is brought under the broad claims of the patent in suit, and if the plaintiff claims that as between it and the defendant, the issue has been adjudicated by the decree with respect to these broad claims, then the court will be compelled to decide upon a full hearing how far the validity of the broad claims of the patent has been settled by consideration of those broad claims in their application to the cup dispenser involved in the previous action.

The court cannot take back, modify, or explain a previous finding of validity, which was correct upon the prior record; nor can the court, as between the same parties and in the same action, and in the absence of proper newly discovered evidence, retry the same issue, as to an exhibit alleged to be an infringement (which was in the possession of the plaintiff prior to the entry of the interlocutory decree, but which was in effect disregarded by the plaintiff until the independent action was started and discontinued), and thus allow the plaintiff to retrace its steps so as to throw upon the court the responsibility of deciding what the court's decree would have been, in case the present structure had been on trial, in case the defendant had pleaded all the matters which it now seeks to allege, or in case it had defaulted, as to proof of part, in so doing.

The only sure way to dispose of these matters on the merits is to deny the present application, which it is believed is within the discretion of the court, without thereby deciding in any way any of the issues that might be presented in a new action based upon the present form of structure. If the plaintiff thereby loses anything from the effect of the plea of res adjudicata, it will at least be after a full hearing, and if the plaintiff's position should be sustained upon that trial, then the defendant will have had its day in court.

WARREN BROS. CO. v. EVANS.

(District Court, E. D. Pennsylvania. June 17, 1916.)

1. COURTS ⚷96(1)—PRECEDENTS—FEDERAL COURTS.

A District Court will follow decisions of the Circuit Court of Appeals sitting for other districts, where the Circuit Court of Appeals for its own district has not decided the matter; such decisions, while not res adjudicata, constituting prior precedents.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 334; Dec. Dig. ⚷96(1).]

2. PATENTS ⚷58—PRESUMPTION—INVENTION.

In considering the defense of anticipation, it is presumed that the patentee was the first inventor, and defendant, asserting anticipation, has the burden of proof.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. ⚷58.]

3. PATENTS ⚷58—ANTICIPATION—PRIOR ART AND PATENTS.

A subsequent producer of an article already produced is presumed to have knowledge of the state of the prior art, as well as publications and prior patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. ⚷58.]

4. PATENTS ⚷328—ANTICIPATION—WHAT CONSTITUTES.

The Warren patent, No. 727,505, for bitulithic pavement, consisting of stone of varying sizes, thus filling all of the interstices, and the whole being held together by some binder as pitch, was not anticipated because a portion of an asphalt pavement in front of the property of an owner, who objected to asphalt and demanded stone, resembled it, the stone in varying sizes having been dumped at that portion without any design or purpose, and the asphalt forming a binder.

In Equity. Suit by the Warren Bros. Company against W. C. Evans. Sur final hearing on filing hearing on bill, answer, and proofs. Decree for complainant.

Edward G. McCollin, of Philadelphia, Pa., and James M. Head and W. K. Richardson, both of Boston, Mass., for plaintiff.

Walter Biddle Saul and Cornelius D. Ehret, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Due to the interesting subject-matter of this controversy, or to its admirable presentation by counsel, or doubtless to both, it is with a feeling almost of regret that we accept the compulsion to take the excluding view of it which we have taken. The case in its formal features is the ordinary one of the claim of a proprietary right in a product based upon the issue of letters patent and a denial of their validity. The patent bears the number 727,505, was issued for the claimed invention of Frederick John Warren, and now belongs to the plaintiff by assignment. The invention is based upon the discovery or recognition of a fact which, however familiar it may be to the initiated, seems so startling to the uninformed mind that there is a hesitation in its statement for fear of misconception. The fact, however, as we understand it, is this: If a delimited space be occupied, as nearly as may be, by broken material of a uniform unit

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

size of the parts of which it is made up, the proportion of the total volume of the space which will be void or unoccupied by the material will be about the same, no matter what the size of the unit parts. If it is desired to relatively reduce the voids, this result is accomplished, not by reducing the size of the unit parts (still retaining their uniformity), but by varying the sizes of the parts. The desired condition of a road when perfected is that the material of which it is composed should present the feature of a solid mass, in that the whole road space should be free from voids. Time and use direct their efforts toward bringing this about, and would eventually accomplish this result were it not for the faster working disrupting influences of water, frost, and the displacing pressure of heavy travel. This solidity must, in consequence, be produced before the road is used. The ideal construction is then the mosaic. The large voids between the large units to be filled as nearly as may be with units as large as the space will accommodate and to repeat this down to the smallest units; and then to cement the whole by a binder, so that you have a road unit made up of solid material. The vital elements of the defense presented require the claims of the patent to be so interpreted that the defendant's pavement can be held to not infringe or to compel an interpretation so broad as to open them to the successful assertion of anticipation.

[1] The real, at least in the sense of the first, question involved is whether there is now any question which is an open one, always excepting, of course, the question of infringement. There is a substantial (although not a formal) concession that the present case is to be so determined. Independently of the merits of the question of the validity of a patent, there must come a time when that question must be deemed to have been settled, whether rightly or wrongly; nevertheless, settled. If this be not so, rights evidenced by letters patents are no rights at all. All which can profitably be said upon the subject of the validity of this patent (except upon subsequently discovered evidence of anticipation) is embraced in the opinion accompanying rulings already made. That of Judge Lurton and the comments of Judge Anderson afford a sufficient reference. This patent was issued May 5, 1903. Time will therefore soon heal any hurt which the upholding of its validity may have done to the rights of others. Such validity is supported by the prima facie findings of the Patent Office. It has confirmation in a juridical experience so extensive that a mere list of the cases in which it has been litigated would unduly lengthen this opinion. This experience has embraced adjudications, not only in a number of the District Courts but in the Circuit Courts of Appeals in two different circuits and recognition in three other circuits supplemented by consideration in almost, if not quite, a round dozen of applications for preliminary injunctions. Out of all of this judicial consideration something in the nature of the establishment or denial of some definite rights must have resulted. What we find has resulted is the establishment of the validity of claims 5, 6, 9, and 11 of this patent beyond the reach of successful attack upon any grounds then litigated. Warren v. Owosso, 166 Fed. 309, 92 C. C. A. 227; Warren v. New York, 187 Fed. 831, 109 C. C. A. 591.

However free courts of different territorial jurisdictions, having equal powers and of like authority (such as the appellate courts of the several states and Circuit Courts of Appeal), may be to accept or refuse guidance from each other, trial courts ordinarily do not enjoy and cannot, without just criticism, assert a like freedom. We deem ourselves controlled by the rulings of Circuit Courts of Appeal of other circuits until the court of our own circuit has passed upon the same question. This, of course, is not because of the res adjudicata principle, but of comity and the acceptance of decided cases as a statement of what the law is. Because of these rulings there remains in this case only the question of infringement and the consideration of any evidence of anticipation not before considered. This view places the burden of the argument, after prima facie evidence of infringement, upon the defendant.

[2-4] The defense of anticipation may first be considered. The only new feature in this is the so-called McGovern, or more properly, Blake, pavement, or part of a pavement which has been found in an alley at the rear of No. 1442 Arapahoe street, in the city of Denver. The genesis of this pavement is worth tracing. It antedates the Warren patent. Parts of it bear a strong likeness, if not similitude, to the bitulithic pavement. In point of fact it would seem that parts of it could be found which would resemble almost anything. This is because of its origin. It cannot be said to have been made by McGovern, who had nothing to do with its actual construction, nor by Blake, who did have something to do with it. It would be more correct to say that it made itself. It came into existence after this fashion: A pavement there could be laid only at the instance of abutting property owners. McGovern was one of them. All the others wanted, or were at least persuaded to accept, an asphalt pavement. McGovern insisted upon having stone. Doubtless what he had in mind was a cobble stone or Belgian block pavement. The result of his attitude was that an asphalt pavement was laid, except opposite his property. To meet his views, or appease his opposition, Blake, who was city contractor had stone dumped there. The broken stone was of all sizes. The material used in the paved part of the street supplied the necessary binder. It is now found that in places the mixture was such as to show a very fair counterpart of the Warren pavement. In other places the accidental mixture was different. Can this be said to be such an anticipating as to defeat the patent? Something of the same question arose in the former cases with respect to other pavements. It was met with the observation that if "somebody had in fact made the (Warren) composition before he did, this does not necessarily defeat his patent."

In considering anticipation defenses (prior use or prior invention) we start with the presumption that the patentee is the first inventor. This must be overcome, and by that measure of proof which the law requires. The effect given to prior use, prior invention, prior publication, prior patents, is based upon essentially the same thought—the denial of the claimed invention. There are two thoughts in the statutory meaning of invention. One is the idea of originality, either of discovery or of creation; the other, the idea of priority or of novelty.

Each of two or more persons may independently discover or invent something. Each is an inventor. One, however, was prior in time. The accomplishment of the second man lacks novelty. The policy behind the patent laws is applied in view also of two things: One is to encourage invention and stimulate effort by recognizing and rewarding merit; the other is to be just to the other inventors and to the public. Neither the first inventor nor the public will have taken from them what is already theirs for the benefit of one who, however deserving as an inventor, has added nothing to the public possessions. There is also a secondary policy operating as a rule of evidence. It is pursuing a sound and indeed a necessary policy to assume the second producer knew of and had the aid of such knowledge of prior use, prior disclosures in publications, and prior patents; in other words, he is held to a knowledge of the prior art. The principle is clear enough, but when it comes to be applied in instances of prior use, or prior invention, common knowledge of human nature, or a very limited experience, will convince us of the necessity for extreme care in its application. Hence the rule requiring a high standard of proof to overcome the prima facie rights of a patentee. There is no suggestion of actual purloinment of ideas. There is no conflicting claim of another inventor. The real question here is whether the claimed discovery of Warren was already part of the public possessions. A very practical touchstone may be supplied in this test. A useful road can be made according to the Warren formulæ. It is the product, however, to which he makes claim and not the process. If, therefor, some one had previously produced the product, it had thereby become a public possession and it will not be taken from the public to be given to Warren. The quality of stability is one of the things which gives value to a road. The previously produced road (in common with the Warren road) possesses this quality. It is of no importance whether the maker of the road understood or could give a statement of the "why" of this result, or had an appreciation of the principles of its construction. Road making is an art as well as a science. If McGovern or Blake had produced the Warren pavement before Warren did, there was no novelty in the Warren product. This point of the argument for defendant is clearly presented and driven home. Let us go to the extreme verge on the other side.

The practice of the art of road making was limited to a mixture of pitch and sand or fine stone, the small units of which were of a uniform size. Without thought or intention on the part of any one, stone material of varying sizes had been dumped in some place, together with some pitch. The mixture happened to be in such proportions of stone of different sizes and of pitch as that the result was the same as the material of the present bitulithic road. Subsequently some one discovered the present method of producing this material, and was awarded a patent on his product. If the first dump heap was found, would its existence defeat the patent as an anticipation? Would it make any difference if the dump heap further happened to be within the limits of a road? Between these two extremes is to be found the line which separates what is from what is not an anticipation. Anticipation is essentially a fact to be found. We do not think the existence of an isolated product, blindly produced, and unrecognized for what it really was, never reproduced, and in that sense abandoned to oblivion, is sufficient, merely because of its resurrection, to defeat, a patent. It would be inaccurate to call it "an abandoned experiment," because that would give it a merit which could not be claimed for it. It is found not to be an anticipation because there is, in such an instance of production and use, no prior use of this product.

If the plaintiff was relying upon a process and not a product claim, the defense of noninfringement would be hard to meet. As against a product claim the defense is as hard to allow without a denial of all right in the plaintiff. The differentiation which the state highway officials make is impressive at first blush, but, to use a colloquial expression, "gets us nowhere," because its statement of the different modes of road construction is no denial of the further statement that the product of the third may be an infringement of a product patent owned by the users of the first.

If it were not for the adjudications referred to, we might readily yield to the persuasiveness of the very able counsel for defendant, and be convinced by the forceful argument addressed to us, but we have not been able to see how we can follow him without refusing to follow the courts by which this patent has been held valid. For this reason the bill of the plaintiff is sustained, and the usual form of decree in favor of the plaintiff, with costs, may be submitted.

DAY v. CHAS. H. LILLY CO.

(District Court, W. D. Washington, N. D. March 1, 1915.)

No. 27.

PATENTS ⚷328—CONSTRUCTION—ANTICIPATION—INVENTION.

Patent No. 727,597, for an automatic watering device for chickens, consisting of the combination of a jar or bottle, with the top so constructed that a cap may be screwed upon it, a pan with the bottom raised toward the center, and an opening through the inverted screw-cap, etc., *held*, despite the prior art, to show invention and not mere mechanical adjustment.

In Equity. Bill by John Mills Day against the Chas. H. Lilly Company, a corporation. Decree for complainant.

E. W. Howell, of Seattle, Wash., for complainant.

Peters & Powell, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. Complainant alleges an infringement by defendant of complainant's patent for a device to be used in watering chickens. This device is covered by letters patent No. 727,597, and is described therein as follows:

"1. In an automatic watering device, the combination of a jar or bottle, with the top so constructed that a cap may be screwed upon it, a pan with

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

the bottom raised toward the center, an inverted screw-cap for said jar secured to said pan near the center of its raised bottom, with an opening through said inverted screw-cap near the perimeter of the lower part of the same, said opening being lower than the sides of said pan, so that said pan may be attached to the said jar or bottle by means of said screw substantially as described.

"2. In an automatic watering device, the combination of a jar or bottle, with a top so constructed that a cap may be screwed upon it, a pan with the bottom raised toward the center, an inverted screw-cap for said jar secured to said pan near the center of its raised bottom, with an opening through said inverted screw-cap near the perimeter of the lower part of the same, said opening being lower than the sides of said pan, so that said pan may be attached to said jar or bottle by means of said screw and a bar across underneath the raised bottom of said pan to serve as a handle, substantially as described.

"3. In a watering device the combination of a pan with a screw-cap inversely attached to the inside of said pan, with an opening in said cap to admit of the passage of air and water, the sides of said pan rising higher than said opening, and a jar or bottle attached to said cap.

"4. In a watering device, the combination of a fruit-jar or bottle with the top so constructed that a cap may be secured thereto, and a pan having secured within itself a cap so constructed as to be attached to the top of said jar or bottle, with an opening in said cap at a point above the bottom of said pan but below the sides of the same, substantially as described."

The defendant admits the manufacture and sale by it of a device identical to that described in claims 1 and 2. The defense made is that, in view of the prior state of the art, there is no such novelty in the article designed by complainant as to render it patentable; that, if it is an improvement over what was known to the prior art and, more expressly, an improvement upon the device covered by letters patent No. 645,680, it is only such improvement as would require ordinary mechanical skill to produce and is not of such an ingenious and novel nature as to uphold the letters patent.

Complainant does not contend that his patent covers the design of a bottle or jar set in a pan with an opening below the upper rim of the pan, which, when the bottle or jar is filled with water, inverted and placed in the pan—as the water flows out of the jar and rises above such opening, will be sealed and thus prevent the escape of further water from the jar until sufficient has been removed from the pan to lower the surface of the water to the opening. Such arrangement is termed a "waterseal" and is old in the art and conceded to be nonpatentable.

It is the attachment of the inverted jar top in and to the bottom of the pan, into which top the jar may be screwed, making of the interior of the pan, around the inverted jar top, a reservoir into which the contents of the jar will flow until the opening is sealed. The advantages of this device over what was known to the prior art are: A wide mouth jar, which is more easily filled and kept clean; greater stability on account of the screw and attachment of the jar top to the pan, rendering the handling of the whole more convenient; the better accomplishment of the primary object sought to be attained with greater simplicity of design and construction.

The device covered by patent No. 645,680, instead of such an attached jar, included in its design an inverted bottle, resting by its weight in a collar over the pan with a peg attached to the pan bottom inserted loosely in the neck. The arms supporting the collar rise from the rim of the pan, and are therefore outside of the drinking fountain, or reservoir from which the chickens are expected to drink. These arms constitute obstructions keeping the dirt in the pan and rendering its removal more difficult, and also making the water more difficult of access to the chicken and forming at times a trap for small chickens.

While the accomplishment of one of the advantages pointed out in the present device might be an improvement to be expected from the exercise of ordinary mechanical skill, the accomplishment of all of them, with the simpler and obviously less cumbersome and expensive device, shows such ingenuity and original conception as to render the contrivance patentable.

Decree may be entered in accordance with the above.

UNITED STATES v. SIOUX CITY TERMINAL RY. CO.

(District Court, N. D. Iowa, W. D. August 11, 1916.)

No. 106.

CARRIERS ⚷37—CARRIAGE OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

Where the defendant railway company received hogs to transfer from one carrier to another, which had been confined for nearly 34 hours, the shipper having agreed that they might be confined for 36 hours, and defendant's agents, owing to the indistinctness of notations on the bill of lading, failed to discover that the hogs had been confined for nearly the maximum period, and kept them confined for more than the 36 hours, defendant was liable for a violation of the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1913, §§ 8651-8654]), it appearing that two hours would have been a reasonable time for it to have transferred the hogs and unloaded them; the indistinct notation on the bill of lading not affecting defendant's liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⚷37.]

At Law. Action by the United States of America against the Sioux City Terminal Railway Company, to recover a penalty for violation of the Twenty-Eight Hour Law. Judgment for plaintiff.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa.

Milchrist, Scott & Pitkin, of Sioux City, Iowa, for defendant.

REED, District Judge. The cause is submitted on the pleadings and a stipulation of facts, which reads substantially as follows:

That on the 8th day of January, 1915, at 12 o'clock noon, one J. Dimming loaded at the town of Sanders, in the state of Montana, 60 hogs into a car of the Northern Pacific Railway Company, consigned to Byron Clow at South Omaha, Neb., to be carried and delivered to the consignee at South Omaha; that said car left Sanders, Mont., for its destination at 12 o'clock noon, January 8, 1915, and was carried by the Northern Pacific Railway Company, to the city of Mandan, N. D., and arrived there at 10 o'clock a. m. on January 9, 1915; that said hogs were unloaded at Mandan, and reloaded at said place at 6:30 o'clock p. m. mountain time on said January 9, 1915, and continued towards its destination, and arrived at Oakes, N. D., and was there transferred to the Chicago & Northwestern Railway Company, and transported by that company from that city to the city of Sioux City, Iowa, where it arrived at about 5 o'clock a. m. January 11, 1915, at which time said car was delivered to the defendant company; that the hogs were continued in the possession of the defendant company until the hour of 9:04 o'clock a. m. on said January 11th, at which time they were unloaded. It is agreed that the shipper made a written request that the time of confinement of the hogs in shipment might be extended to 36 hours. It is further stipulated that late in the afternoon of January 10, 1915, the employés of the Chicago, St. Paul, Minneapolis & Omaha Ry. Co. (the Chicago & Northwestern Railway) telephoned to defendant's transfer office at Sioux City the fact that there would arrive some time during the night 16 cars of sheep from Montana, upon which the time limit was nearly up, but said nothing about the car of hogs; that defendant's day yard clerk, just before going off duty at 6 o'clock p. m. on that day, notified defendant's night yard clerk of this information.

That about 5 a. m. January 11, 1915, the conductor of the train bringing in said sheep delivered to defendant's night yard clerk waybills for 30 cars; that said clerk inspected the bills, discovering the billing for 16 cars of sheep, and notified the foreman of the switching crew of conditions; that defendant's switching crew thereupon switched and unloaded said 16 cars of sheep, giving the same preference over other cars, and completed unloading them within the time limit; that the car in question containing the 60 hogs came in on the same train, was located near the rear of the train, and the 16 cars of sheep were located in the forward part of the train; the indorsement of the last loading upon the waybill in question was so dim and indistinct as to be scarcely noticeable; that defendant's night yard clerk did not notice said indorsement or discover that there was a carload of hogs with the time limit nearly expired, and for that reason did not include the same in the emergency notice given in respect to the sheep; that defendant's switching crew for that reason did not attempt to handle said hogs out of order, but in regular order of receipt, and did not discover that the time limit had expired in time to have unloaded them within the time limit.

It is further agreed that 2 hours is a reasonable period of time for the defendant to deliver stock from its junction with the Northwestern Railway to the Sioux City Stockyards, and for unloading the same.

It thus appears that the carload of hogs in question was confined without being unloaded for proper food, water, and rest, from 6:30 p. m. mountain time, January 9, 1915, until 5 a. m., January 11th, when they were received by the defendant at Sioux City, and were thus confined for 34 hours and 30 minutes, or deducting 1 hour for difference in time, 33 hours and 30 minutes; so that defendant received the stock 2 hours and 30 minutes before the expiration of the 36-hour period, and detained them without unloading until 9:04 o'clock a. m., thus having the stock in its custody for a period of 4 hours and 4 minutes. The defendant, therefore had the hogs in its custody 2 hours and 30 minutes before the expiration of the 36-hour period, and detained them beyond that period for 1 hour and 34 minutes, or in all 4 hours and 4 minutes after it received them, and that 2 hours would be a reasonable time for unloading the hogs after it received them at 5 o'clock a. m.

It is also stipulated that the billing of the hogs showing the time they were reloaded at Mandan was so indistinct that defendant's employés failed to discover the time noted upon the bill. The defendant, therefore, received the stock 2 hours and 30 minutes before the expiration of the 36-hour period, and detained it beyond that period 1 hour and 34 minutes. Under the ruling in United States v. Sioux City Stockyards Co. (C. C.), 162 Fed. 556, and St. Joseph Stockyards Co. v. United States, 187 Fed. 104, 110 C. C. A. 432, the defendant incurred the penalty for detaining this carload of hogs beyond the 36-hour period without unloading them for food, water, and rest, and is liable for such penalty.

The indistinct notation upon the bill of lading of the time the stock was last reloaded at Mandan is not, of course, a defense to the action, and it can only be considered, if at all, in mitigation, and it may be doubtful under the facts stipulated if it ought to be so considered; for employés of interstate railways must not detain live stock in transportation from one state to another beyond the 28 or 36 hour period, except as provided in the 28-hour law.

The plaintiff is entitled to recover of the defendant $100, and costs, and judgment is accordingly ordered therefor.

In re FRANK.

(District Court, E. D. Pennsylvania. June 23, 1916.)

No. 5639.

BANKRUPTCY ⟹84—PETITION—VERIFICATION.

Under Bankr. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 (Comp. St. 1913, § 9602), declaring that all pleadings setting up matters of fact shall be verified under oath, an involuntary petition in bankruptcy cannot be amended, where the petitioning creditors knew nothing of the alleged acts of bankruptcy, and the petition was not sworn to before a notary, although it bore a notary's certificate, for, as there was no verification of the petition, but only a falsification, there was nothing to amend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⟹84.]

In Bankruptcy. In the matter of the bankruptcy of Charles Frank. Application by petitioning creditors for leave to amend. Application denied.

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

Jacob I. Weinstein, Fox & Rothschild and Joseph Sternberger, all of Philadelphia, Pa., for petitioning creditors.

Clinton A. Sowers, of Philadelphia, Pa., for alleged bankrupt.

THOMPSON, District Judge. At the trial upon the issue of the bankruptcy of Charles Frank, the three subscribers to the creditor's petition were called, and from their sworn testimony it appeared that, at the time they respectively signed the petition, they had no knowledge of any of the acts of bankruptcy alleged therein, and that they did not make oath to the petition before the notary public who attached his jurat thereto. Upon this state of facts, the petition was dismissed because it did not meet the requirements of section 18c of the Bankruptcy Act, providing that:

"All pleadings setting up matters of fact shall be verified under oath."

The depositions of the three subscribers are now presented in support of a petition to permit the filing nunc pro tunc, as of November 20, 1915, of an amended petition in bankruptcy, reciting the same facts as those recited in the petition filed on that date, and properly verified by the petitioning creditors. There is no pretense upon the part of any of them that they swore to the petition in bankruptcy before the notary public, who solemnly certified under his official seal that they had appeared and made oath before him, but they now swear to knowledge of the alleged acts of bankruptcy. In so far as the facts now sworn to are contradictory to those deliberately, freely, and voluntarily testified to under oath by the deponents in court, their depositions cannot be considered. It appears from the depositions that the petitioners in this case have been accustomed to having affidavits in bankruptcy proceedings taken in this manner. It is to be hoped that such a practice is not general among creditors in bankruptcy proceedings. But it is urged by counsel that:

"While in theory the taking of an oath out of court is accompanied with a certain degree of formality, in fact much of that formality is customarily dispensed with."

If that means that the practice which was followed in this case is that customarily followed, and that the appearance of the affiant, to a pleading to be filed in court, before an officer who certifies that an oath has been taken before him, is a mere formality, which is customarily dispensed with, it is sufficient to say that the custom will have no recognition in this court.

The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. The filing of the petition is frequently followed by the appointment of a receiver, which results in taking away from the alleged bankrupt all of his property, closing up and ruining his business and destroying his credit. Thus irreparable damage may result from an honest mistake. Stringent as the provisions of the act are, they do not contemplate that creditors may invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out acts of bankruptcy without even the so-called "formality" of having appeared before a notary public for the purpose of making oath to the petition, and where the notary public falsely certifies that oath was made before him. Such a certificate is not a verification. It is a falsification.

There was no verification to the petition in this case; consequently there is nothing to amend.

The petition is dismissed.

THE DEL NORTE.

(District Court, N. D. California, First Division. June 9, 1916.)

No. 15874.

SHIPPING ⚷141(3)—LOSS OF CARGO—LIABILITY OF VESSEL.

Goods shipped on a lumber steamer from a port on the coast north to San Francisco under a bill of lading exempting the vessel from liability for loss from perils of the sea were washed overboard with the deck load of lumber and lost during a storm of unusual severity. *Held*, that the vessel was not rendered liable for the loss because the goods were stowed on deck instead of in the hold, where that was the general custom of such vessels which first filled their holds with lumber and stowed such merchandise as might be offered with or on the deck load, which custom was binding on the shippers whether they knew of it or not.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498; Dec. Dig. ⚷141(3).]

In Admiralty. Suit by James L. Hansen against the steamer Del Norte. Decree for respondent.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for libelant.

Titus, Creed, Jones & Dall, of San Francisco, Cal., for claimant.

DOOLING, District Judge. Libelant shipped from Crescent City on the steamer Del Norte certain boxes containing books, papers, and a typewriter. There was issued to him a bill of lading as follows:

"Received in good order to steamer Del Norte the following packages, contents unknown, to be delivered at S. F., dangers of fire and navigation, or any other accident or danger of the seas, rivers or steam navigation of whatever kind or nature soever excepted."

The Del Norte is a lumber carrier, which makes the trip down the coast loaded with lumber both in the hold and on deck, and the trip up the coast with such general cargo as it can secure.

The boxes here in question were stowed on top of the deck load of lumber and were washed overboard with the lumber in a severe storm. Libelant claims that the vessel is liable: (1) Because the boxes were not stowed in the hold; (2) because of improper stowage on deck, even if the ship were permitted to stow them on the deck; and (3) because the storm was not an unusually severe one. But it was clearly established that there is and has been for years a general custom among the lumber carriers on the coast, plying between San Francisco and the North Coast ports to fill the hold with lumber on the down trips, and stow such merchandise as is offered for carriage, with or on the lumber which is carried as a deck load. On the up trip, there being no lumber to carry, the general merchandise is stowed in the hold. The carriage of cargo other than lumber on the down trip is for the convenience of the shippers, as the primary business of these vessels is to carry lumber, and the custom of stowing on deck is not an unreasonable one, as the other cargo is received only after the lumber is stowed. It may be true that libelant had no knowledge of this custom, but he is bound by it nevertheless. Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568. The deck load was not improperly stowed, the storm was unusually severe, and the loss falls within the exception in the bill of lading, being due to a danger of the sea.

The libel must therefore be dismissed, and it is so ordered.

ST. LOUIS SOUTHWESTERN RY. CO. et al. v. UNITED STATES et al.

(District Court, W. D. Kentucky. April 13, 1916.)

No. 33

1. COMMERCE ⟹88—INTERSTATE COMMERCE COMMISSION—FINDINGS AS TO REASONABLENESS OF RATES.

All presumptions are in favor of a finding of the Interstate Commerce Commission, made in the exercise of its especial functions and after full investigation, that a rate in force is not so low as to be unremunerative, and that a proposed increase is not justified; but the commission cannot condemn a rate without a finding based on substantial evidence that it is unjust, unreasonable, or discriminatory.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. ⟹88.]

2. COMMERCE ⟹97—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

The courts cannot interfere with a rate fixed or practice established by the Interstate Commerce Commission unless it is made plainly to appear that the orders are void as violative of the Constitution or wanting in conformity to statutory authority, or that the power of the commission has been arbitrarily exercised; and the duty of the court in reviewing the action of the commission is to determine the sole question whether the order in the particular case is within such authority and is based upon substantial evidence heard and considered by the commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. ⟹97.]

3. COMMERCE ⟹88—INTERSTATE COMMERCE COMMISSION—VALIDITY OF ORDER ESTABLISHING THROUGH ROUTE AND JOINT RATES.

Petitioners operate railroads extending into the yellow pine lumber district lying west of the Mississippi and south of the Rock Island line from

Memphis to Little Rock and make a blanket rate on lumber from such territory to Cairo, Ill., of 16 cents per 100 pounds, and to Paducah, Ky., about 40 miles east of Cairo on the Ohio, of 22 cents. The two cities are competitors in the manufacture and sale of lumber and its products. None of petitioners reach Paducah with their own lines, but two of them reach Cairo by lines crossing the Mississippi a few miles above, and the Paducah rate is based on the rate to Cairo with the local rate from there to Paducah added. All of petitioners can reach both Cairo and Paducah through connecting lines by way of Memphis by a shorter route, that to Paducah being shorter than that to Cairo, but in order to do so some of them, especially those whose lines reach Cairo, would have a much shorter haul on their own lines. The rate to Cairo is reasonable. *Held*, that a finding by the Interstate Commerce Commission that the rate to Paducah is unjustly discriminatory against that point and in favor of Cairo was sustained by the facts, and that an order based thereon requiring petitioners and their connecting lines to establish through routes and joint rates to Paducah not higher than those now charged to Cairo, by way of Memphis or Cairo in the alternative, was within the powers of the commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. ⚷88.]

4. COMMERCE ⚷88—INTERSTATE COMMERCE COMMISSION—POWER TO FIX RATES.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (Comp. St. 1913, § 8583), which authorizes the Interstate Commerce Commission to correct unjust practices, and also provides that the commission may, after hearing, with or without a complaint, establish through routes and joint rates, the power of the commission to establish through routes and joint rates does not depend upon a finding that all of the carriers affected have been guilty of unjust discrimination, but such power may be exercised if discrimination in fact existed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. ⚷88.]

5. COMMERCE ⚷88—INTERSTATE COMMERCE COMMISSION—POWERS.

An order of the Interstate Commerce Commission requiring the establishment of a through route and joint rates is not invalid, as beyond its powers, because it compels some of the carriers affected, which do not reach the terminal point with their own lines, to accept a shorter haul, or in the alternative to make a reduction in their rate to another connecting point which in itself is reasonable.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. ⚷88.]

In Equity. Petition by the St. Louis Southwestern Railway Company ("Cotton Belt"), the St. Louis, Iron Mountain & Southern Railway Company ("Iron Mountain"), the Chicago, Rock Island & Pacific Railway Company ("Rock Island"), and the Louisiana & Arkansas Railway Company, intervening petitioner, against the United States of America, respondent, and the Interstate Commerce Commission, intervening respondent, for an injunction and on motions by respondent and intervener to dismiss. Motions granted and injunction denied.

Edward A. Haid, of St. Louis, Mo. (A. L. Burford, H. G. Herbel, and F. G. Wright, all of St. Louis, Mo., W. F. Dickinson, of Chicago, Ill., and Henry Moore, of Texarkana, Ark., on the brief), for petitioners and intervening petitioner.

Blackburn Esterline, Sp. Asst. Atty. Gen., and P. B. Miller, U. S. Atty., of Louisville, Ky. (Thomas L. Kibler, of Washington, D. C., on the brief), for the United States.

Charles W. Needham, of Washington, D. C. (Joseph W. Folk, of Washington, D. C., on the brief), for intervening respondent Interstate Commerce Commission.

Before WARRINGTON, Circuit Judge, and EVANS and HOLLISTER, District Judges.

PER CURIAM. The controversy relates to through routes and joint freight rates on yellow pine and lumber in carload lots to Cairo, Ill., and Paducah, Ky., originating from the territory in Louisiana and Arkansas, bounded on the north by the line of the Rock Island from Memphis, Tenn., to Little Rock, Ark., including Des Arc, Ark.; on the east by the Mississippi river; on the south by the Gulf of Mexico; and on the west by a line drawn through Kansas City, Mo., and Houston, Tex.—embracing a tract about 400 miles long by 300 miles wide.

The petitioners operate west of the Mississippi river. The Cotton Belt and Iron Mountain extend far into the territory described, each having its own rails to Bird's Point on the Mississippi opposite Cairo. The Rock Island, extending far into this territory, may send its lumber to Cairo and to Paducah by the Iron Mountain or the Cotton Belt west of the river, or by delivery at Memphis to the Illinois Central, or the Nashville, Chattanooga & St. Louis Railway.

There is no bridge or other present method of crossing the Mississippi at Cairo, and the lumber is hauled across the river at Thebes, some 30 miles northwest of Cairo, thence to Cairo by the Iron Mountain over its own line, and by the Cotton Belt over the Chicago & Eastern Illinois, or Illinois Central, with which roads it has trackage agreements. The Louisiana & Arkansas Railway operates its own lines far within the lumber territory in which it crosses the lines of the other petitioners and connects with them for this traffic. The Iron Mountain and Rock Island have their own lines to Memphis. From Memphis and east of the Mississippi, the line of the Illinois Central runs to both Cairo and Paducah; and Memphis and Paducah are also connected by the line of the Nashville, Chattanooga & St. Louis. It appears, therefore, that the lines of none of the petitioners reach Paducah, whether the lumber is routed via Cairo or via Memphis. The Paducah rates are combination—not through joint—rates.

Production of yellow pine in this territory is a comparatively modern development, the railroads gradually extending their lines southwardly as the northern market for it developed, and in the beginning established low rates to assist in overcoming the then prejudice against southern pine. When the production was extended south of the Arkansas river, the rate to Thebes and Cairo from that territory was made 13 cents per 100 pounds, and was by the railroads themselves made a blanket rate covering the entire territory at that time exploited.

As further production extended southwardly, the railroads built further into the territory, but the same blanket rate existed until 1899, when the Cairo rate was increased to 14 cents, and in 1903, to 16 cents, at which figure the rate remained up to the time of the institution of the proceedings involved in this controversy.

This increase of 2 cents was attacked by producers as unreasonable and unjustly discriminatory, but was sustained by the commission (May 4, 1909), because the evidence did not warrant a disturbance of the blanket adjustment, and because transportation conditions west of the Mississippi were sufficiently different from those east to warrant higher rates from the southwest than from the pine districts extending through the southern tier of states from the Mississippi river to Florida. Chicago Lumber & Coal Co. v. Tioga S. E. Ry. Co., 16 Interst. Com. Com'n R. 323. The Cairo rate was again attacked (Wisconsin & Arkansas Lumber Co. v. St. Louis, I. M. & S. Ry. Co., 33 Interst. Com. Com'n R. 33), but the commission found (January 12, 1915) that neither the existing blanket arrangement nor the rates were shown to be unreasonable or unjustly discriminatory. Thereafter, upon the filing and suspension of tariffs by these petitioners and others proposing to increase the rates on lumber from all southern points to the Ohio river crossings and other points, the petitioners, seeking an increase from 16 cents to 17 cents from the southwestern blanket to Cairo, the commission, in an elaborate opinion by McChord, Chairman, reviewing the history of the development of the yellow pine production in the entire southern territory, and the rates on the same, both east and west of the Mississippi river, found that the proposed increase on yellow pine to Cairo was not shown to be reasonable, and the 16-cent rate not shown to be unremunerative. Investigation and Suspension Docket No. 520, decided July 12, 1915; 34 Interst. Com. Com'n R. 652.

[1] While in these cases the commission recognized the competitive character of the Cairo rate, yet, when they were determining the application of these very railroads to increase the rate, they, with all the facts before them, and dealing with an intricate situation, could see no justification for making the increase. The problem before them in that application directly concerned rate making, and their duty was peculiarly administrative in character. Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 50, 36 Sup. Ct. 228, 60 L. Ed. 517. The fixing of rates was in the exercise of one of their especial functions; and when they expressed the opinion, as they did, that the Cairo rate was not unduly low, all the presumptions are in favor of their finding. Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280; Interstate Commerce Commission v. Chicago & A. R. Co., 215 U. S. 479, 480, 481, 30 Sup. Ct. 163, 54 L. Ed. 291; Interstate Commerce Commission v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 88, 110, 30 Sup. Ct. 651, 54 L. Ed. 946. It may, for present purposes, be assumed that the 16-cent rate to Cairo was reasonable for the service performed.

The rate to Paducah via Cairo is 22 cents, and is made by adding to the Cairo rate the local rate (6 cents) charged by the Illinois Central for its haul of 42 miles. There was evidence tending to show that this was reasonable for the service rendered, and nothing appears to the contrary. It may be conceded, for it is the law (Interstate Commerce Commission v. L. & N. R. Co., 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431), that the commission cannot condemn a rate without a finding to that effect on substantial evidence; and, if there were no other route to Paducah except through Cairo, it is quite sure the commission could make no order in any way depriving the petitioners of their reasonable rate to Cairo. But the commission was also dealing in this case, as will appear, with the route to Paducah via Memphis, which, in its opinion, based on substantial evidence, was the more natural, and hence the logical route to Paducah.

The Paducah Board of Trade (June 28, 1913) filed a petition with the commission against the petitioners and many other railroads west and east of the Mississippi participating in the lumber traffic from the southern hardwood and yellow pine district, alleging the injustice, unreasonableness, and unduly discriminatory character of the rates from the southwestern blanket as against Paducah, to the undue preference and advantage of Cairo. Thereupon the commission found (March 3, 1914, Paducah Board of Trade v. Illinois Cent. R. Co., 29 Interst. Com. Com'n R. 583, 592) the charge true and required the petitioners "to maintain rates to Paducah from substantially equidistant points or groups in Arkansas and Louisiana west of the river, on and south of the line of the Chicago, Rock Island & Pacific from Memphis to Little Rock, no higher than those contemporaneously maintained from the same points to Cairo." Since the petition did not contain a specific request for the establishment of through routes and joint rates, the commission found itself without power to make an order in that behalf (29 Interst. Com. Com'n R. 592), and the railroad companies, including these petitioners, the Illinois Central and the Nashville, Chattanooga & St. Louis, ignored the commission's expectation that they would revise their tariffs by May 1, 1914, in accordance with the commission's views. Thereafter, February 8, 1915, the Paducah Board of Trade filed a second petition against the petitioners and others, including the Illinois Central and the Nashvillle, Chattanooga & St. Louis, in which it was truly alleged, in substance, that:

"Paducah, Ky., is on the south bank of the Ohio river and is a jobbing and manufacturing city and does a large business in buying, selling, rehandling and manufacturing lumber and lumber commodities, and is a large shipper of lumber and lumber commodities made from hardwood lumbers, pine and cottonwood and gum. That the principal competitors of the lumber merchants and manufacturers of Paducah are located at Cairo, Ill., a city located on the north bank of the Ohio river about 40 miles from Paducah, and that both Cairo and Paducah obtain a large part of their supply of lumber from the producing territory west of the Mississippi river in the states of Louisiana and Arkansas, and that the rates maintained by defendants (petitioners herein) on lumber and lumber commodities from said territory to Paducah, Ky., are from 2 to 6 cents higher than the rates contemporaneously maintained by defendants to Cairo, Ill."

It was charged that the rates maintained by the defendants "on logs and lumber in carloads to Paducah from producing points in Louisiana and Arkansas, on and south of the Chicago, Rock Island & Pacific Railway from Memphis, Tenn., to Little Rock, Ark., and including Des Arc, Ark., are unjust, unreasonable and discriminatory and give to Cairo, Ill., an undue preference and advantage and subject Paducah, Ky., to an undue prejudice and disadvantage; that the route from said producing points to Paducah, Ky., via Cairo, Ill., is unduly long as compared with the route from said producing points to Paducah via Memphis, Tenn., and that through routes and joint rates should be established from said producing points to Paducah, Ky., via Memphis, Tenn., and joint rates should be established via said route which do not exceed the rates contemporaneously maintained from said producing points to Cairo, Ill." The prayer was for the establishment of "through routes and joint rates for shipments of logs and lumber to Paducah, Ky.," from the points named "via Memphis, Tenn., with joint rates via said routes which shall not exceed the rates contemporaneously charged for the transportation of logs and lumber from the same points to Cairo, Ill."

The Cairo Association of Commerce intervened in the interests of Cairo, but does not join in the petition in this action.

On the evidence, including the evidence on the first petition, and upon a full hearing, the commission filed its report in writing (Paducah Board of Trade v. Illinois Cent. R. Co., 37 Interst. Com. Com'n R. 719, 725), and found:

"The defendants unduly discriminate against Paducah to the undue preference and advantage of Cairo by the maintenance of their present rates on logs and lumber from the producing points here involved; * * * the rates on logs and lumber to Paducah from points of origin in the territory involved are unreasonable to the extent that they exceed the present rates to Cairo."

And, further, "that the defendants should establish through routes to Paducah" from the territory involved, "and joint rates applicable via such through routes no higher than the rates at present maintained from the same points or groups to Cairo. These through routes and joint rates may be established via either Memphis or Cairo." An order was made, effective March 20, 1916, requiring defendants, in so far as they participate in the traffic, to cease and desist from publishing, demanding, or collecting their present rates for the transportation of logs and lumber to Paducah, Ky., from the points or groups named, and ordered them to establish and maintain "through routes * * * via Cairo, Ill., or Memphis, Tenn., to Paducah, Ky.," from the territory involved, "and to establish and maintain joint rates to Paducah, Ky., applicable via such through routes, not in excess of the rates at present in effect from the same points or groups to Cairo, Ill."

The effective date of this order was extended by the commission to June 1, 1916.

March 14, 1916, petitioners filed their petition in this court against the United States, praying that the order of the commission be enjoined and set aside, and for a "temporary" injunction, which we interpret to mean the "interlocutory" injunction contemplated by the statute (Act Oct. 22, 1913, c. 32, 38 Stat. at L. pt. 1, p. 220). The case was, however, heard upon its merits and finally submitted.

March 17, 1916, the United States filed a motion to dismiss, and the commission filed its answer as intervening respondent, moving also to dismiss. The Illinois Central and Nashville, Chattanooga & St. Louis were parties to all of the earlier proceedings, and, not having joined in this application for relief against the order, presumably intend to comply with it.

The petitioners contend that the rates prescribed are unreasonably low, and, in effect, confiscatory, and the order void for the reasons:

(1) The commission by its order attempts to establish joint rates less in amount than the present combination of rates, although it has not found the present combination of rates to be unreasonably high.

(2) There was no evidence before the Interstate Commerce Commission from which it could find the present combination of rates to be unreasonably high.

(3) In determining whether "the present rates to Paducah are unjustly discriminatory and give an undue preference to Cairo," the commission failed to consider the dissimilarity of conditions under which freight is transported and rates made to Cairo and Paducah, respectively.

(4) There was no evidence before the commission to sustain a finding that the present combination of rates makes or gives an undue or unreasonable preference or advantage to Cairo.

(5) The commission is without authority to find petitioners guilty of discriminating against a point which they do not serve with their own rails, and to which they publish no joint through rates.

(6) Said order of the commission is not responsive to the prayer of the complaint.

(7) The prayer of the complaint being for the establishment of through routes and joint rates via Memphis, the commission was without jurisdiction to enter an alternative order, as it attempted to do.

(8) The commission is without jurisdiction to establish through routes and joint rates over the lines of petitioners St. Louis Southwestern Railway Company and St. Louis, Iron Mountain & Southern Railway, via Memphis, in the absence of a finding that the routes via Cairo are unreasonably long.

(9) There was no evidence before the commission from which it could find that the routes over the lines of petitioners St. Louis Southwestern Railway Company or St. Louis, Iron Mountain & Southern Railway via Cairo are unreasonably long.

(10) The commission has not designated the carrier to the through routes ordered by it, between Memphis and Paducah.

(11) The commission is without authority to order through routes via all lines operating between Memphis and Paducah.

(12) There was no evidence before the commission bearing upon the constructive mileage of the bridge at Cairo.

(13) The commission is without authority to take into consideration the constructive mileage of a bridge in determining the reasonableness of a route.

(14) There was no evidence to support the finding of the commission that the present Cairo rate would be a reasonable rate for the transportation of lumber and logs to Paducah.

(15) There was no evidence before the commission justifying the establishment of through routes and joint rates.

(16) The order of the commission amounts to confiscation, and is therefore in violation of the fifth amendment to the Constitution of the United States.

[2] At the threshold it may be said that the scope of our inquiry is exceedingly limited, and involves only the ultimate question as to whether the commission, in the order complained of, acted within its power. Whatever view the court might entertain upon it, or upon the expediency or wisdom of the order, is not material. The court cannot interfere with the rates fixed, or practice established, by the commission, unless it is made plainly to appear that the orders are void, as violative of the Constitution, or wanting in conformity to statutory authority, or has been arbitrarily exercised; and the duty of the court is to determine the sole question, whether or not the order of the particular case is based upon substantial evidence, heard and considered by the commission. Int. Com. Comm. v. Union Pacific R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308; Procter & Gamble v. United States, 225 U. S. 282, 297, 298, 32 Sup. Ct. 761, 56 L. Ed. 1091; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247, 257, 33 Sup. Ct. 916, 57 L. Ed. 1472; A., T. & S. Ry. Co. v. United States, 232 U. S. 199, 221, 34 Sup. Ct. 291, 58 L. Ed. 568; United States v. L. & N. R. Co., 235 U. S. 314, 321, 35 Sup. Ct. 113, 59 L. Ed. 245; L. & N. R. Co. v. United States (D. C.) 225 Fed. 571, 579, 580.

The commission has power to deal with acts made unlawful by section 3 of the act to regulate commerce, revised to September 1, 1912, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Comp. St. 1913, § 8565.

[3] Complaint was made by Paducah Board of Trade in its first petition for alleged infractions of this section; and in its second it invoked also the power granted the commission by section 15, which, among other things, provides:

"The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates. * * * And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

Cairo, Ill., of about 17,000 inhabitants, lies at the confluence of the Mississippi river and the Ohio river. The lumber traffic from the south converges on Cairo, which is one of the Ohio river gateways for southern lumber to the northern market. Served, as it is, by the Cotton Belt and Iron Mountain by their own lines, the lumber hauled by those roads naturally goes to Cairo via Thebes. To that point the local rate was charged; from thence the rate to the market is local, so that lumber destined for Paducah pays the Cairo rate plus the Illinois Central local rate to Paducah. The Paducah rate is not a joint rate, but is a proportional rate.

Since the Cotton Belt does not go to Memphis on its own line, as the Rock Island and Iron Mountain do, it appears that rates are made by the Illinois Central on lumber from those roads to Cairo and to Paducah highly discriminatory against Paducah (22 cents, and in some instances 24 cents), for which, apparently, there is no reason, except the power of the Illinois Central to compel them. Naturally, since on the west side of the river the roads haul to Cairo via Thebes for 16 cents, the Illinois Central would, as it does, exact no greater amount via Memphis than would make the Cairo rate equal to that rate established on the west side of the river. Thus, the rates to Paducah are made on the basis of the Cairo combination, although, in some instances, the rate via Memphis to Paducah is even greater than the Paducah rate via Cairo. The Rock Island's long haul is to Memphis, reaching Cairo by the Illinois Central. All of its rates are made on the Memphis combination, with the exception of its Cairo rate. The distance from Memphis via Illinois Central to Paducah and Cairo is about the same—169 miles. What the division between the Rock Island and the Illinois Central is on Cairo traffic does not appear. The representative of the Rock Island had no objection to furnish the information to the commission, but did not care to give it to the public.

The point of this is, and the evidence shows, that, although the distance from Memphis to Paducah is the same as to Cairo, and the Illinois Central serves both localities, the rate to Paducah via Memphis is from 2 to 6 cents higher than the rate to Cairo by any of the roads.

The Nashville, Chattanooga & St. Louis reaches Paducah on its own line, and Cairo by connections with the Illinois Central. Its line is much longer than the Illinois Central's line to Paducah, and yet, in competition with the Illinois Central, it would not receive a greater rate from traffic via Memphis. The result is that the Rock Island and the Iron Mountain and the Louisiana & Arkansas, shipping via Memphis for Paducah, would receive, on division with the Illinois Central or the Nashville, Chattanooga & St. Louis, presumably some part of the excess of the Paducah over the Cairo rate. This would be true, also, of the Cotton Belt, if it shipped that way.

The Rock Island's most available route to Paducah is via Memphis, and we see no reason why it and the Louisiana & Arkansas, located as it is at the heart of the territory, could not, at least as well, ship to

Paducah via Memphis as via Cairo. Two or more lines would have to be used in any event.

Paducah, with a population of about 25,000, is as well located relative to the northern market for yellow pine as is Cairo, both having important connections with the market, north, northeast, and northwest, and it is nearer the great northeastern market. Paducah lies rather better than Cairo, being on higher ground, since a part, at least, of the manufacturing district at Cairo, is subject to overflow in times of high water. Lumber from the southwestern blanket to Paducah via Cairo must cross both the Mississippi and the Ohio, while lumber from the same territory to Paducah via Memphis crosses the Mississippi only. The Cairo bridge was an expensive structure, and, while there was no evidence how large an arbitrary mileage might be considered for the bridge, yet its existence was a proper subject for consideration.

The actual mileage from the southwestern blanket is 40 to 60 miles shorter to Paducah than to Cairo, and it is only sufficient to glance at the map to see, the shorter distance also being considered, that Memphis is the logical and natural gateway for Paducah rather than Cairo from all of the roads operating in the southwestern blanket. This the commission found, and the Illinois Central acquiesces. See opinion, St. Louis, I. M. & S. Ry. Co. v. United States (D. C.) 217 Fed. 80. The facts were all before the commission, and well they might find, as they did, looking over the whole field, and comparing the relative advantages of Paducah and Cairo—

"that the rates on logs and lumber to Paducah from points of origin in the territory involved are unreasonable to the extent that they exceed the present rates to Cairo." 37 Interst. Com. Com'n R. 719–725.

While it may be true, and there are decisions to the effect, that undue discrimination between two localities is not shown by difference of distance alone, or difference in rates alone, or by the mere fact that the difference in rates operates to the disadvantage of one locality as against another (it abundantly appeared by the evidence that those dealing in lumber at Paducah in various ways compete with Cairo merchants in the same business at a great disadvantage, and, in instances, to the destruction of the business at Paducah and its establishment at Cairo), yet all of these, together with the lay of the land, the directness of the route via Memphis as compared with the route via Cairo, and the other facts enumerated above as they appeared to the commission, present a situation in which appears no reason why, from the southwestern blanket, there should be a higher rate to Paducah than to Cairo.

It is true that it was to the interest of the Cotton Belt and Iron Mountain to ship via Cairo, yet the Memphis route was to them not only available and practicable, but it has the advantages enumerated over the Cairo route; and, except for the fact that those roads would lose a part of their haul and the greater revenue derived therefrom, there is no reason why they should not, and every reason why they should, route via Memphis, unless the lumber business at Paducah is to be abandoned to its fate.

The commission therefore had before it the difficult and delicate problem of giving the interests of these railroads recognition, while at the same time granting to Paducah at least equality with Cairo from the territory nearer to it than to Cairo; on more direct lines, and abundantly served by adequate railroad facilities.

Aside from isolated instances of hardship to the Rock Island and to the Louisiana & Arkansas, growing out of the order as affecting some particular locality in the blanket, it must be said that the rates are blanket rates, established by the railroads themselves; and, if there are particular instances of hardship with respect to any particular locality, it will be time to deal with that when it is properly presented to the commission for specific consideration. There seems to be no reason why these two roads should not route their Paducah lumber via Memphis rather than via Cairo, and every reason why Paducah should be entitled to have it routed that way.

The case really narrows down to a conflict in interest between the Cotton Belt especially, and the Iron Mountain to a less degree, since it reaches Memphis with its own line, on the one side; and Paducah on the other. If Paducah is to be served, those railroads must give up something. If the railroads' interests are to be solely considered, Paducah must abandon the lumber business, or carry it on at an enormous disadvantage in favor of Cairo.

But the commission must conserve, as nearly as possible, the interests of both, and, taking a comprehensive view of the entire situation, having in mind the interests of the public, the localities affected, and their commercial interests, have power to compel the railroads to sacrifice something when justice requires such sacrifice. It was said by Mr. Justice McKenna, in Int. Com. Comm. v. Chicago, Rock Island & Pac. R. Co., 218 U. S. 88, 103, 30 Sup. Ct. 651, 656 (54 L. Ed. 946):

> "The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country."

We find there was substantial evidence before the commission that the rates from the blanket territory were unduly discriminatory against Paducah, to the preference and advantage of Cairo; and, since 16 cents to Cairo was a reasonable rate, the Paducah rate should be no higher. If the lumber could go only via Cairo, this would amount to a finding that the 22-cent rate by that gateway was in itself unreasonable; but, because there is a preferable way to Paducah via Memphis —and Paducah is situated at least as advantageously as Cairo—it is unreasonable to haul via Cairo at a higher rate if the Memphis route be open. It was not open as long as the Illinois Central stood in the way, maintaining, via Memphis, the 22-cent rate to Paducah; but when the order commanded that road to establish, with the petitioners, through routes at a rate no more to Paducah than to Cairo, this cleared the way to all of these railroads to serve Paducah on the same basis as Cairo.

The blanket local rate to Memphis is 14 cents; thence via Illinois Central to Cairo 2 cents, and to Paducah 8 cents. The Rock Island

and Louisiana & Arkansas and the other petitioners, if they wished to haul via Memphis, were at the mercy of the Illinois Central. What division in fact the Illinois Central made, or was willing to make, on Paducah traffic, does not appear.

The fact, however, that the Rock Island and Louisiana & Arkansas were helpless, and, if they shipped to Paducah, must do so on rates fixed on the Cairo combination, and that the Cotton Belt and Iron Mountain, if there were no other route to Paducah than via Cairo, would be entitled to maintain their 16-cent rate to Cairo on Paducah traffic, does not alter the essential fact that, another practical route being available, the Paducah rate was discriminatory and unreasonable in comparison with the Cairo rate. Whatever the reasons were, all of these petitioners participated in a rate discriminatory to Paducah. The discrimination lay in fixing the Paducah rate on the Cairo combination when justice to Paducah required the rate to be fixed on the Memphis combination.

The commission, having power to do justice between Cairo and Paducah under section 15, by compelling the Illinois Central, with the petitioners, to establish a more reasonable through route via Memphis at no greater rate to Paducah than to Cairo, the 22-cent rate, based on the Cairo combination, could no longer stand.

[4] But we think we are not compelled to the conclusion that power to establish through routes and joint rates depends upon finding the petitioners guilty of discrimination. In addition to other powers enumerated in section 15 and in section 1, it is said in that part of the section hereinbefore quoted that the commission may *also*, after hearing, with or without complaint, establish through routes and joint rates; and other parts of the section give power to correct unjust practices. The practice of compelling Paducah traffic to bear so great an additional burden, it would seem to us, could be remedied by the commission, even though the petitioners, or any of them, were not directly responsible for it.

It would seem that the commission itself did not consider the basis of the order to be altogether discrimination by these petitioners, for they say (37 Interst. Com. Com'n R. 719, 720, the second Paducah Case):

"The principal issue in the present case is whether it is appropriate or lawful to require the defendants to establish through routes and joint rates to Paducah via Memphis. In the previous case we held that the Memphis route was the natural route for the movement of this traffic, but as the complaint did not contain a prayer for through routes we did not require their establishment."

And in the case of St. Louis, Iron Mountain & S. Ry. Co. v. United States (D. C.) 217 Fed. 80, 83, a case in which the town of Metropolis, Ill., not far from Paducah, made a complaint of discrimination against the same railroads, and for largely the same reasons, Judge Baker, speaking for the court, said:

"The Commerce Act gives the commission jurisdiction to entertain a hearing against two or more railroads as joint respondents for the purpose of compelling them jointly to establish a through route and jointly to establish over such through route through rates. In a proceeding of that character the Commission would have legal jurisdiction, if there was a legal basis in the evidence to support the finding, to compel the joint railroad respondents to establish a through route with through rates and to compel them to submit to an apportionment of the through rates. But in this proceeding, which in our opinion involves only a question of discrimination against each railroad separately, the Commission had no legal jurisdiction to undertake to compel these complainants to establish a through route with a through rate, jointly with the Illinois Central."

But whether the petitioners, or any of them, could be justly found to be discriminating against Paducah, or not, discrimination against Paducah existed, and we are of opinion that the commission had power to grant Paducah relief.

If, in strict accordance with the allegations and prayer of the second petition, a through route over the Illinois Central from Memphis to Paducah had been established, then the Cotton Belt and Iron Mountain would lose the advantage of their long haul to Cairo, and the Nashville, Chattanooga & St. Louis, so far as it competed for the business, would have to haul at the same figure. This would not have interfered with the rate to Cairo, but would have compelled the petitioners to send their Paducah traffic through Memphis. This would have required, under section 15, a finding that the routes of the Cotton Belt and Iron Mountain via Cairo were "unreasonably long" as compared with the other practicable route via Memphis. We say "required," not only because of the language of section 15, but also by analogy; for we take it that if a rate cannot be condemned as discriminatory, except upon a finding based on substantial evidence that it is unreasonable, so a railroad could only be required to abandon its long haul upon substantial evidence, and a finding that the long haul was, in comparison, unreasonably long. There was substantial evidence, and, in substance, a finding to this effect, for the commission say (29 Interst. Com. Com'n R. 583, 591)—

"* * * it is evident that the route to Paducah via Cairo is, in the language of section 15 of the act, 'Unreasonably long as compared with' the direct route to Memphis."

If the route had been established via Memphis alone, and included both the Illinois Central and Nashville, Chattanooga & St. Louis, there might have been ground, and the petitioners make much of the point, that such route over the line of the latter would in fact have made a longer through route to Paducah than via Cairo. If the order involved only the Illinois Central, an injustice might have been involved in shutting out the Nashville, Chattanooga & St. Louis from this traffic altogether. But the order does not compel any of the petitioners to route via Memphis, and does not compel the Iron Mountain and Cotton Belt to give up their long haul unless they choose to do so; so that the case is not one for the application of that part of section 15 which withholds from the commission power to require a railroad to give up its long haul unless it is unreasonably long as compared with a more practicable route. There was no occasion for a finding that their routes were unreasonably long in themselves. What the commission meant was that the Cairo to Paducah route was unreasonably long in comparison with the route via Memphis. As their own long hauls were left open to them, it was no concern of theirs that through routes were also established elsewhere. Int. Com. Comm. v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 88–109, 30 Sup. Ct. 651, 54 L. Ed. 946; Clark v. Kansas City, 176 U. S. 114, 118, 20 Sup. Ct. 284, 44 L. Ed. 392. The petitioners were given a choice of through routes, either via Memphis or Cairo, and the alternative presented to the Cotton Belt and Iron Mountain was to route via Memphis, in which case they would lose their long haul, or forego as much of their 16-cent rate to Cairo as the Illinois Central would exact for its haul thence to Paducah. They could adopt either alternative, or forego Paducah traffic altogether.

[5] The question then remains whether or not, if they preferred their long hauls, they could be compelled, as they were, to reduce their Cairo rate. Paducah was not on the lines of the Iron Mountain and Cotton Belt. They had no inherent right to ship to Paducah via Cairo, if, in the judgment of the commission in the exercise of the power to establish through routes to prevent injustice to Paducah, another route was available, although thereby they must forego a part of a reasonable local rate. The reasonableness of that local rate was not a limitation upon the power of the commission simply because it resulted in the reduction of a rate which, under other circumstances, was reasonable, for the reason, as the commission has frequently held, "that rates may be reasonable *per se* and yet unlawful because of their unduly discriminatory character." (Through Rates to Points in Louisiana and Texas, 38 Interst. Com. Com'n R. 153, 162; Board of Trade of Lynchburg v. Old Dominion S. S. Co., 6 Interst. Com. Com'n R. 632; Lumbermen's Exchange of St. Louis v. Anderson & S. R. R. Co., 24 Interst. Com. Com'n R. 220; Transcontinental Commodity Rates Cases, 32 Interst. Com. Com'n R. 449).

It is said in Tap Line Cases, 234 U. S. 1, 28, 29, 34 Sup. Ct. 741, 748 (58 L. Ed. 1185), in speaking of the commission:

"That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers."

No doubt that the court would have said localities also, if appropriate.

These roads, therefore, must submit to the power, the exercise of which, indirectly, causes a reduction in their Cairo rate, should they choose to haul that way. The fact that it causes them a loss becomes the result of competitive conditions, but is not confiscatory of their property. In any event, this property is not taken without due process of law. O'Keefe v. United States, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651 (U. S. Supreme Court, February 21, 1916). The fact is the commission have held on testimony and evidence properly before them that the Cairo rate was fairly remunerative. The Illinois Central must deal with these roads in fairness, or be compelled to do so by the commission in some other proceeding. It is probable the traffic would be profitable even with considerable reduction. But it cannot, in any event, be regarded as confiscatory, unless it appears what the reduction is, and its effect. The effect of the order compels the Cotton Belt and Iron Mountain to compete with the other roads for the Paducah traffic on terms fair to Paducah. There seems to be no reason why they should not be compelled to do so.

It is true that in many cases the commission have declined to consider issues sought to be raised in proceedings before them not included in the complaint or covered by its prayer for relief. 6 Interst. Com. Com'n R. 647, 677; Board of Trade of Chicago v. Atchison, T. & S. F. Ry. Co., 29 Interst. Com. Com'n R. 438, 444; Stuart Draft Milling Co. v. Southern Ry. Co., 31 Interst. Com. Com'n R. 623, 624; Lindsay & Co. v. N. P. Ry. Co., 33 Interst. Com. Com'n R. 150, 151; Michigan Bean Jobbers' Ass'n v. Grand Rapids & I. Ry. Co., 33 Interst. Com. Com'n R. 318, 320), yet the statute itself gave the commission the power to act on its own initiative. The whole situation was before them. None of the petitioners were taken by surprise, a full hearing was had, and the establishment of the alternative route was the only departure from the prayer of the complaint. What is said in N. Y. C. & H. R. R. Co. v. Int. Com. Comm. (C. C.) 168 Fed. 131, 138, 139, by Judge Noyes, sitting with Judges Lacombe and Ward, is directly applicable. See, also, C. H. & D. Ry. Co. v. Interstate Commerce Commission, 206 U. S. 142, 149, 150, 27 Sup. Ct. 648, 51 L. Ed. 995.

We think the order complained of is not open to any of the objections to it. It does not deprive the petitioners of any paramount rights. Cairo is in no position to complain, and does not complain, since its rates are not affected; and Paducah obtains the relief to which she is entitled.

The motions to dismiss will be granted, and the petition and intervening petition will be dismissed, but without costs.

LEHIGH VALLEY R. CO. v. UNITED STATES.

(District Court, E. D. Pennsylvania. May 12, 1916.)

No. 1521.

1. COMMERCE ⟹91—COMMON OWNERSHIP OF RAIL AND WATER CARRIERS—REVIEW OF ORDERS OF INTERSTATE COMMERCE COMMISSION.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 5, 24 Stat. 380, as amended by Panama Canal Act Aug. 24, 1912, c. 390, § 11, 37 Stat. 566 (Comp. St. 1913, §§ 8567, 8568), makes it unlawful for any railroad company subject to the provisions of the act after July 1, 1914, to own, operate, control, or have any interest in any common carrier by water with which its railroad does or may compete for traffic, under penalty of a fine for each day's violation. By a further provision it confers on the Interstate Commerce Commission jurisdiction to determine, on application of any railroad company also owning or controlling a water line, the questions of fact as to competition or possibility of competition between the rail and water lines, and upon certain findings to make an order extending the time during which the water service may be continued after July 1, 1914. In all such cases the order of the commission is made final. *Held*, that an order of the commission pursuant to the statute dismissing the petition of a carrier for such an extension does not require a dissolution of the connection between the rail and water service, but merely leaves the petitioner subject to the operation of the statute, and that a suit in

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

the District Court to enjoin enforcement of the commission's order is not an appropriate proceeding to review its action.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. ⚿91.]

2. COMMERCE ⚿97—COMMON OWNERSHIP OF RAIL AND WATER CARRIERS—REVIEW OF ORDERS OF INTERSTATE COMMERCE COMMISSION.

Under the jurisdiction so conferred on the commission to determine the questions of fact as to actual or potential competition between the rail and water service of a petitioner and the provision making its order final, such order is reviewable by the courts only so far as to ascertain that the fundamental requirements of a hearing have been observed, and that the findings were not arbitrary, but based on relevant and substantial evidence; its weight and effect being for the commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. ⚿97.]

3. CONSTITUTIONAL LAW ⚿62—COMMON OWNERSHIP OF RAIL AND WATER CARRIERS—CONSTITUTIONALITY OF STATUTE.

In the exercise of the jurisdiction so conferred, the commission, although it finds that the two carriers do or may compete, may nevertheless permit the common control to continue if the public interest will be promoted thereby and if the common control does not injure existing or potential water competition, and the authority to make such an order, based on findings of fact in each particular case, is not unconstitutional as a delegation of legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102; Dec. Dig. ⚿62.]

In Equity. Suit by the Lehigh Valley Railroad Company against the United States, and the Interstate Commerce Commission intervened. Decree dismissing bill.

John G. Johnson, of Philadelphia, Pa., and R. W. Barrett and E. H. Boles, both of New York City, for plaintiff.

E. Marvin Underwood, Asst. Atty. Gen., and Edward W. Hines, of Washington, D. C., Asst. Atty. Interstate Commerce Commission. Blackburn Esterline, Sp. Asst. Atty. Gen., and A. H. Elder, of Washington, D. C., for defendants.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In form this suit in equity is brought against the United States alone, but the Interstate Commerce Commission (which has intervened and answered) is the real defendant. The controversy has been heard in the District Court by the three circuit judges under the provisions of the Act of October 22, 1913 (38 Stat. 220, c. 32).

The questions for decision arise under the Act of August 24, 1912, known as the Panama Canal Act, and especially under section 11, which amends section 5 of the Interstate Commerce Act of 1887. The amendment makes it—

"* * * unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal *or elsewhere* with which said railroad or other carrier aforesaid *does or may compete for traffic*, or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

But, in order that any railroad or other carrier aimed at by the section might have an opportunity to have the question determined whether its relation to the carrier by water was forbidden, and (in case that question should be determined against it) might have a further opportunity either to divorce itself from the carrier by water, or to take such other steps as might seem advisable, the section was not to go into effect until July 1, 1914. Meanwhile the Interstate Commerce Commission was to have the following powers:

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine the questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section, and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion, or the application of any shipper, institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final."

Still further, Congress was aware that certain situations then existing might fall within the letter of the statute, although they did not offend against the spirit; and the section therefore goes on to enlarge the power of the commission by the following provision:

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water, other than through the Panama Canal, is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914. In every case of such extension, the rates, schedules and practices, of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July 1, 1914, but for any reason not heard and disposed of before said date, may be considered and granted thereafter."

Upon the passage of this act the Lehigh Valley Railroad Company was obliged to decide what course it should pursue. It is a Pennsylvania corporation and an interstate carrier; it owns or operates a rail line from Jersey City to Buffalo, and connects with other carriers. It is the sole stockholder in the Lehigh Valley Transportation Company, a New Jersey corporation which owns and operates a fleet of freight-carrying steamships on the Great Lakes, that interchange both east-bound and west-bound freight with the railroad company at Buffalo. The railroad company has no interest, either by ownership, lease, or otherwise, in any rail line west of Buffalo, but by means of through routes and joint rates it has an interest in the freight that is carried over several lines between the East and Chicago, Milwaukee, and other western points. Its rail line and its water line do not parallel each other. Physically, one merely prolongs the other, but by means of through routes and joint rates some freight carried over one line reaches some of the markets entered by freight carried over the other. At once, the question was presented: Is this a situation forbidden by the act of 1912? The railroad company believed that a negative answer should be given, but of course it desired a decision by some tribunal of authority.

To obtain such a decision, two courses at least were open: First, to continue the operation of both lines, and take the risk of defending successfully when the United States should sue for the penalty imposed by the act to regulate commerce. But, as the penalty is $5,000 a day, the risk was evidently excessive, and in the end the other course was adopted, namely, to apply to the commission for a ruling. Indeed, the commission itself had taken the initiative, for in February, 1913, it had sent out a circular to numerous carriers—to the plaintiff, among the number—asking for information in reference to water lines, and in the following July the plaintiff had furnished the information requested. In December the commission called attention to the fact that it was empowered "to extend the time beyond July 1, 1914, during which a railroad or other common carrier may continue the operation of service by water, if such service is of advantage to the convenience and commerce of the people, and such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration"; adding, that it would expect every application for such extension to be filed with the commission not later than March 1, 1914. Accordingly, on January 21st, the plaintiff applied for a hearing on the question whether competition, or the possibility of competition, existed between itself and its water line, and prayed the commission to make an order that the railroad company might continue to operate the steamships of the transportation company after July 1, 1914. Under this petition a hearing was had a few months later, and evidence was taken—but what evidence, or how much, we do not know. Similar applications on behalf of other carriers were also heard, and on May 7, 1915, the commission made a report and order upon the general subject of "Lake Line Applications under the Panama Canal Act." The full report will be found in 33 Interst. Com. R. 699, but the parts that bear upon the case of the plaintiff—either specially, or in common with the other carriers—are for convenience repeated here:

"These cases are before this commission upon petitions filed in accordance with the provisions of section 5 of the act to regulate commerce, as amended by the Panama Canal Act of August 24, 1912. The petitioners are rail carriers owning or having an interest in one or more boat lines with boats plying on Lakes Ontario, Erie, Huron, Michigan, and Superior, hereinafter referred to as the Great Lakes. There has been no order consolidating these cases, but they were heard together. Each case has been considered and decided upon its own record, but as all of the cases involve many points in common, they will be disposed of in one report. * * *

"The Lehigh Valley Transportation Company is owned by the Lehigh Valley Railroad Company and is in addition to this railroad's interest in the Mutual Transit Company line. The only port served in common by the rails and the boats of this line is Buffalo, the port of interchange. * * *

"The first controlling question arising under these applications is whether or not, within the meaning of the Panama Canal amendment, there is or may be competition for traffic between the vessels operated and the railroad interested in them.

"This question would be easily answered in the affirmative if the ports of call were served in common by the boats and by the paralleling rails of the owning railroad. The physical situation would itself establish the case. It appears, though, that no such case is made out on the records here presented, since no two ports of call are served in common by the boats and the paralleling rails of the particular owning railroad entity. * * *

"It is urged that this does not establish a case within the meaning of the act, and that the act only applies to cases where there is competition, actual or potential, between the boats and the rails actually operated by the owning entity. This position takes no account of the extremely broad language used, to define the character of interownership which the act was meant to reach:

"'From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.'

"The unsoundness of the contention is at once manifest when it is seen how in every case the act could be evaded by a reorganization incorporating the paralleling rails which reach the port of call into a railroad entity distinct from the entity owning the boats, with the real ownership, through stock control, remaining as before. The contention is faulty and is contrary to the spirit as well as the letter of the act. * * *

"The case presented by the applications of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company requires a further consideration of the relation these roads bear toward the traffic hauled, or, rather, which might be hauled, by their boat lines. As before noted, the boat lines owned or in which these railroads have an interest, with the exception of the interchange port of Buffalo, serve no points in common with the rails of any part of the owning railroad system.

"Each of these roads, however, is a party to through all-rail routes and joint rates to all the ports served by its boats with respect to west-bound and east-bound traffic. All of the principal carriers in central freight association territory concur in these rates, including the lines west of Buffalo, which form parts of systems controlled by the petitioning trunk line carriers. The concurrences in the Lehigh Valley rates are shown in Lehigh Valley R. R. I. C. C. B. 9000. The concurrences in the Delaware, Lackawanna & Western rates are shown in Delaware, Lackawanna & Western R. R. I. C. C. No. 9400. These carriers in common with all other trunk line roads make through passenger fares from points on their lines to all central freight association points, including ports served by their boats, in connection with all central freight association carriers who concur in C. L. Hunter's Trunk Line Tariff I. C. C. A-75; Joint Passenger Tariff No. 15. They are also members of the Lake Lines Association and are parties to certain fast freight line arrangements. The effect of such alliances on their boat lines indicates that these railroads are parties to arrangements which make them competitors of their boat lines.

"The through all-rail routes and joint rates which these roads maintain with carriers connecting at their lake interchange ports for points beyond, including the ports served by their boats, are legitimate and necessary arrangements for the convenience and facility of their rail transportation.

"These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by their respective lines is the concurrence of their connections in these rates. Together with their connections they make a through line from the east to the lake ports over which both east-bound and west-bound traffic moves all rail. They originate the west-bound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports.

"The all-rail connections of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, which participate in the through route west of Buffalo, are capable of delivering to these roads at Buffalo many times the volume of east-bound tonnage that it would be possible for these roads to originate through the medium of their own boat lines and deliver to their rails at Buffalo. These petitioning roads, therefore, are very solicitous to promote and improve their relations with their western rail connections. Through route arrangements are reciprocal, since the entire movement of traffic is not in the one direction. So the most potent way in which these petitioning roads can encourage a routing of the east-bound traffic from these western rail connections over their rails is to route as much west-bound traffic as possible over the particular connection or connections which are able to furnish the most east-bound traffic. The west-bound traffic which is so routed is necessarily diverted from the boats of these petitioners. This sacrifice of the boat lines is small when compared to the gains made by these petitioning carriers in the interchanging of all-rail traffic. The east-bound all-rail traffic in almost every instance might just as well be turned over at Buffalo to one of the several rivals of the petitioners extending east. The striving or rivalry for this east-bound traffic causes these petitioners to divert west-bound traffic from their boats, and when they do this they are competing with their boats within the meaning of the act as amended.

"That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. Neither at the time the amendment became a law, nor now, is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. If therefore the participation of a petitioning railroad in such through route arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from and to common points, then this amendment, as applied to traffic through the Panama Canal, is of no effect.

"The 'fast freight line' was the forerunner of the through route and had its origin in the lack of arrangements for the interchange of equipment. These fast freight lines acquired large numbers of freight cars and made arrangements with certain roads over which it was desired to establish a through service. This through service could be established by using several different combinations of roads, so there was the same rivalry and striving between these several roads to be members of the particular fast freight line as exists under through route arrangements. The through route established, their business then is to solicit through shipments of freight to move all rail over the 'line' that has been organized. To this end soliciting offices were established in many trade centers. The participation in these 'fast freight lines' entails the same sacrifice on the part of these petitioners' boat lines as was pointed out with respect to the through route arrangements. These roads are members of 'fast freight lines' which are still in existence, and in the nature of things the best interests of their boat lines are made subservient to the interests of their rails, which, of course, are of much greater importance.

"The Lehigh Valley Railroad Company is a party to and has a proprietary interest in the Traders' Dispatch and the Lehigh Valley Wabash Dispatch, fast freight lines reaching Chicago and Milwaukee, ports served by boats of the Lehigh Valley Transportation Company. This petitioner in the year 1913 contributed $69,208.27, to cover its share toward the maintenance of the Traders' Dispatch. * * *

"The Lehigh Valley Railroad Company insists that, if its participation in these fast freight lines and contributions to them is wrong and contrary to the law, it is ready and willing to make any changes that might be suggested by the commission. While such a position is commendable, these cases are to be tried on facts, not promises for future performances, and, under the amendment, the commission is empowered only to pass on the facts of past and present conditions as presented. * * *

"The Lake Lines Association is an 'understanding organization' which, while claiming not to be an organized agency, has held meetings, the records of which, as shown in the evidence presented in these cases, indicate that its function is to insure a 'proper' management of these lines, from the viewpoint of the railroads, which could not have been possible if their operation were unrestrained. The whole arrangement might be classed as a 'get-together movement' to which all the roads here petitioning are parties. While these two petitioning roads which are here specifically under consideration may not directly compete with their boat lines over the rails of their systems, their membership and activity in this association or participation in any like understanding places them in a position inimical to the best interest of their boat lines. Placed in such an attitude, these roads, through the agency of other roads with which they are 'partners,' become the competitors of their own boat lines.

"The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk line association of which the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrary switching charges at Buffalo, which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are also determined by this outside authority. This is accomplished by maintaining a scale of rates not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk line association. The interests and concern of the trunk line association in fixing these different combinations of rates is simply the solidified interest of the several member railroads, whose individual interests have been above indicated.

"What has been said with special reference to the petitioners Lehigh Valley Railroad Company and the Delaware, Lackawanna and Western Railroad Company applies with equal force to each of the other petitioners herein, since each is a party to through all-rail routes reaching the several ports served by their boats, as well as a member of the Lake Line Association.

"From a consideration of all the circumstances, the commission is of opinion, and finds, that each of the applicants here involved does or may compete for traffic with the lake line or lines in which it has an interest.

"In the present cases, however, which are not applications for the extension of a service operating through the Panama Canal, the finding that competition, actual or potential, exists does not ipso facto require the separation of the petitioning railroads from the boat lines in which they are interested within the meaning of the act.

"In extending to all water commerce the legislative idea above referred to, of unrestricted competition between rail lines and water routes, a proviso was prescribed where such water commerce was not routed through the Panama Canal, as follows:

"'If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914.'

"Each of the applicants strongly urges that the boat line or lines in which it is interested is being operated within this proviso of the act, and quite an array of conditions now prevailing are advanced in support of this contention.

"It is urged that the experience has been that the boat lines have been a losing proposition as a distinct operating unit, but that by reason of the financial strength of the owning railroad the boats have been kept in service, the operating at a loss, and that this condition could not or would not prevail if it were not for the joint ownership; that the boats would otherwise disappear from the lakes; and that thus keeping these boats in the service is 'in the interest of the public and is of advantage to the convenience and commerce of the people.'

"Whether the poor financial statements presented by certain of the lake lines are due to inherent natural difficulties or the course of operation induced by the joint control is a question of considerable doubt on the records presented here. By reason of the particular accounting plan that has been followed, a material deficit is shown; whereas, according to the apparently more accurate system employed by the commission's examiners of accounts, the same line, viz., the Mutual Transit Company, shows profitable operation. The explanation of the system employed made by the auditor of this line was that it was devised to avoid taxation of the profits that would otherwise have been shown. It also appeared as the opinion of an official of one of the lines that the condition was due to the fact that the differential between the lake-and-rail rate and the all-rail rate was too small to encourage a remunerative amount of traffic to move, and he intimated that, if the joint control did not exist, the boat lines would lower their rates to a point where their bottoms would be filled.

"It is urged, however, that, though such independent operation might be more remunerative, it would necessarily become irregular and irresponsible, and that joint ownership has furnished the shipping public with a regular and uninterrupted service, which is admittedly of advantage to the convenience and commerce of the people. To render this regular service, it is said, the boats must move whether under light or full cargo, and experience indicates that the cargoes are light most of the time, entailing expensive operation, a policy of operation that can only be maintained under joint ownership.

"The joint ownership and operation guarantees to the public the responsibility of the lake service, it is contended, to the same degree that the responsibility of the service of the owning railroad is assured.

"It is urged that, under the joint ownership and operation, a duplication of records and much work is obviated and many terminal expenses are reduced, all of which tend to more economical transportation and a lower cost for the lake haul, in the interest of the public and of advantage to the convenience and commerce of the people.

"In further support of the contention, it is urged that the increased powers of this commission under the act as it is now amended confer full jurisdiction to regulate and control the lake line situation, so that the railroads cannot in the future so use the boat lines they own as to stifle competition on the great lakes. It is pointed out that this commission may require the establishment of physical connections between the dock of the water carrier and the rails of any rail carrier or carriers subject to the act and prescribe the terms and conditions under which such construction is to be performed; that through routes and maximum joint rates may be established between and over rail and water lines, and the commission may determine the terms and conditions under which they shall be operated; that maximum rail proportional rates may be established, and the traffic to which and the vessels to which same apply may be determined; that, where there is an extension of the joint service as now operated, the rates, schedules, and practices of the water carriers will have to be filed with the commission and be subject to the same supervision as that exercised over the railroads in this respect.

"In passing on the question of whether or not the particular boat line is being operated within the proviso of the act, it is necessary to first determine the purpose of the legislation which gave rise to these petitions. From an examination of the congressional debate from which the act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the 'water roadbed' via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other parts of the amendment with respect to waters 'elsewhere' must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination that would reduce their usefulness.

"For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which pevail, or would prevail, were the water service independently operated. On a water course where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or their ingenuity of their owners makes possible, there will be, and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This rivalry manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the 'nation's highway.' Necessarily, coincident with the lowering of the rate, there is a rivalry in service which is an equally strong weapon of competition. The condition is one which results in the beneficial use of the waterways accruing to the shippers. As far as this legislation concerns water routes elsewhere than through the Panama Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.

"The right to use the waterways of the country as a means of transportation is a natural right, but this right may not be abused to the injury of others, and it is the public right that the waters be so used as to return benefit to the people.

"The waterways of the country furnish ready-made roadbeds for transportation routes, on which the rates for shipment may be made low because of this physical fact. But these arteries of commerce, without boats to ply on them, are useless for transportation purposes. And although there may be many boats plying on these water routes, they may be so operated as to produce practically the same condition of things as would exist were there no boats afloat.

"As a natural and usual course of experience, where a railroad acquires and undertakes to operate a competing boat line, the rate for the water transportation ceases to be influenced solely by those ordinary conditions which affect such traffic, because a new element is introduced into the situation, namely, the interest of the owning railroad.

"This discussion of general principles points the basis for the legislation here under consideration. If such is the basis, what is the purpose of the legislation, if it is not to relieve the water courses of the country from the domination of the rail carriers?

"Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That the legislation might not be arbitrary, but be effective within constitutional limitations, certain provisions were made so that in given instances, which form exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

"The inquiry in these cases is, therefore: Is the joint operation of these boat lines such as to make of them an exception? Or, in the words of the statute, is the service by water being operated in the interest of the public, and is it of advantage to the convenience and commerce of the people, and will an extension and a continuance thereof exclude, prevent, or reduce competition on the route by water under consideration?

"The contentions of petitioners as to responsibility and regularity of this service under joint operation lose weight when it appears that there has been no lowering of the cost of water transportation accompanying them. It appears from correspondence passing between a boat line manager and an official of the owning railroad, which forms a part of these records, that this manager attributes the small tonnage hauled by his line, and the consequent small revenues, to the fact that the differential between the lake-and-rail rates and the all-rail rates is too small. He urged a larger differential, assuring his superior that such a policy would enable him to profitably operate the boat line.

"Instead of lower rates in prospect, it is made to appear that it is only the greater financial strength of the owning railroads that enables the present boats to operate, as it is contended that certain boat lines are being operated at a loss. If this be true, then there is no prospect for lower rates under continued joint ownership, and the public is reaping little benefit from this waterway, and the situation is almost the same and will be the same as if no waterway existed.

"No doubt, under joint operation, certain economies can be effected; but these economies have not manifested themselves in a reduced lake-and-rail transportation cost to the public. Instead of any reduction in lake-and-rail rates, they have been steadily advanced under joint ownership. Beginning about 1900, when trunk line control over the lake lines was becoming perfected, the first-class lake-and-rail rate from New York to Chicago has been advanced by successive increases from 54 cents to 62 cents; the rates on the other classes have been correspondingly advanced. In 1910, according to statements in the records which were not controverted, the trunk line interests agreed that the lake-and-rail rates should actually be advanced to the all-rail basis, thus wipe out the differential except on first class, which was to be advanced from 62 to 70 cents. This action was only thwarted by the refusal of a foreign railroad owning a lake line to acquiesce therein. These successive advances, as the records show, have had the effect, not only of preventing an increase in lake line tonnage, but in diverting from the lake routes to the all-rail lines, part of the tonnage which formerly moved on the lakes. Furthermore, there is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to divert tonnage to the all-rail lines. As a direct result of this rate policy of the owning railroads, the lake boats have operated with small cargoes, although their operating expense was almost as great as if they had been fully loaded. This has in turn resulted in a high operating cost to the lake lines per unit of freight. Does not this policy fully explain the lake line deficit? Again, do not such facts make clear that whatever economies might be realized by joint ownership are offset by the waste resulting from the unfair use of vessel tonnage in the interests of the owning railroads? The railroad control of these boat lines cannot be said to be in the public interest when the policy of these railroads has been, by an artificial rate structure, to deprive the public of the natural benefits that would flow from a free use of this waterway.

"In deciding these cases, the commission is required to judge as to whether or not these boat lines are being operated in the public interest under joint ownership, and then it must say whether the continuance of this operation will result in reducing, preventing, or excluding competition on the route by water.

"That the joint ownership and operation of these boat lines has resulted in no real benefit to the people, and that the operation is not in the interest of the public or of advantage to the convenience and commerce of the people, is established by the facts as above indicated, and a complete monopoly is exercised by the owning railroads over the lake line situation through the medium of the Lake Line Association.

"The arguments that the increased powers of the commission have remedied the situation are faulty, since it does not appear that this commission has any special jurisdiction under this amendment to stop the operation of this Lake Line Association or to prevent the establishment of some other like arrangement later on. These arguments also lose weight in view of the fact that the increased jurisdiction of the commission will be just as available in the control of the lake line situation hereafter under independent operation of the lake lines, as under a continued joint operation. The public will enjoy all the benefits contained in the amendment through the enlargement of the commission's jurisdiction with respect to water transportation, and at the same time, and in addition, there will accrue such benefits as will result when water rates and service are influenced by competition.

"After divorcement this commission may still regulate just as fully as under joint control, and through rail-and-water rate, fixing a reasonable maximum. It may also fix the maximum rail proportional of such through rate. It may still require the physical connection between the dock of a water line and the rails of any and all carriers serving a port of interchange.

"The records here show no instance where the boat lines owned by the different rail carriers have actively competed for traffic with one another or with the paralleling railroads under the régime of joint ownership and operation. Under independent operation each of the lines which is now owned and operated by a railroad, in order to survive, will become a competitor of every other boat line and of every paralleling railroad for all traffic which moves by the great lakes or which might move over that route, and the result of such operation will be reflected in the character of service furnished the public and in the rate charged therefor.

"The boat lines operating on the Great Lakes in conjunction with the barge lines operating on the Erie Canal furnish a through water route from the western lake ports to the eastern seaboard. It is significant from the records in these cases that the through route arrangements and the interchange of traffic between lake lines and these canal barge lines have been terminated under the joint ownership of the lake lines, and the traffic has practically disappeared, to the injury of the boat lines and of the Erie Canal barge lines on east-bound traffic. It is contrary to the interests of the owning railroads operating from Buffalo east, for their boat lines to continue any through operating arrangement with these canal barge lines for the movement of east-bound traffic. There is no power in this commission to require the establishment of a through route between these railroad-owned lake lines and barge lines operating the Erie Canal, but under divorcement the lake lines will be free to make arrangements for the through carriage of freight in connection with the Erie Canal barge lines, and it will be to their interest to do so. The interests of the shipping public will be conserved, and those of the boat lines will be bettered in this respect under divorcement.

"These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the lake line association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

"From a consideration of all the circumstances and conditions disclosed by the respective records herein, the commission is of the opinion and finds that none of the several existing specified services by water herein concerned is being operated in the interest of the public or is of advantage to the convenience or commerce of the people within the meaning of the act, and that an extension and a continuance thereof will prevent, exclude, and reduce competition on the great lakes. The application of each of the petitioners herein is therefore denied, effective December 1, 1915. An order will be entered accordingly."

The order of May 7th made the report of the commission a part thereof, and denied the plaintiff's application, but postponed the effectiveness of the order until December 1, 1915 (afterwards extended to December 15th). The railroad company was dissatisfied with the result, and on September 17th applied for a rehearing. This was granted, and in October the rehearing was had. On December 13th the commission made another report (37 Interst. Com. R. 77), which follows in extenso:

"The Lehigh Valley Railroad Company, as owner of the entire capital stock of the Lehigh Valley Transportation Company, which operates six vessels on the Great Lakes, filed a petition for rehearing on September 18, 1915, requesting the commission to reopen and reconsider the petitioner's application for permission to continue its lake line service after July 1, 1914. The commission, in lake line applications under Panama Canal Act, 33 I. C. C. 700, had previously denied the original petition of this carrier under section 5 as amended; such denial to be effective December 15, 1915. The subject-matter of the present petition was set for argument on October 23, 1915, solely upon the question whether the commission's order of May 7, 1915, in so far as it affected the Lehigh Valley Railroad Company, should be modified.

"Subsequent to the filing of the petition by the railroad company, petitions for permission to intervene were filed by the Milwaukee Chamber of Commerce and the Chicago Board of Trade. These parties were permitted to intervene.

"While the petition requested a rehearing, it was conceded by counsel for the railroad company at the argument that no reason had been suggested why the case should be reheard. The only issue raised was whether or not the commission had erred in assuming jurisdiction to deny the application of the Lehigh Valley Railroad for permission to continue its lake service. In other words, the only question now before the commission is whether or not the Lehigh Valley Railroad Company does, or may, compete with its lake line so as to bring it within the provision of section 5 as amended. The petition of the railroad company was based upon two grounds: (1) That the commission's finding of fact that competition does or may exist between the railroad company and its lake line was erroneous; and (2) that the commission's interpretation of the word 'competition,' as used in section 5 as amended, was, as a matter of law, unsound. It will be observed that these propositions, if true, would establish that the commission had no jurisdiction over the Lehigh Valley Railroad lake service under section 5 as amended.

"In support of the petitioner's first contention, it was urged that the commission erred in finding that this carrier's participation in joint rates and through routes with railroad companies which parallel the Lehigh Valley Transportation Company tended to show competition between this carrier and its lake line, since joint rates and through routes may be prescribed by the commission, and it is contrary to reason to assume that a relationship which the commission itself could establish is sufficient to give the commission jurisdiction to order a divorcement. It was further urged that the commission erred in finding that the participation of the railroad company in fast freight lines which compete with the lake service tended to show competition, since these fast freight lines are said to be mere trade-names employed for advertising purposes, and in fact imply no more than the existence of joint rates and through routes.

"It will be manifest fom a reading of the commission's original opinion that the two considerations just noted were not deemed by the commission in themselves to be conclusive evidence of competition. The participation of the railroad company in fast freight lines, joint rates, and through routes, which run parallel to through routes in which the lake line participates, were deemed significant as showing that in addition to the purely local traffic of the railroad and the lake line, as to which there could be no competition, these companies were largely interested in through traffic as to which there might be competition. The above circumstances, together with the large volume of evidence showing aggressive activities of the Trunk Line Association and the Lake Lines Association, in which the Lehigh Valley Railroad Company was a party, in developing and extending the traffic over the all-rail through routes at the expense of the lake-and-rail routes, including that in which the lake line participated, demonstrated that the possibility of competition for through traffic between the railroad company and its rail connections and the lake line was real and substantial—so real and substantial that the railroad company acting with other trunk lines organized and maintained the Lake Lines Association, a chief function of which was the controlling of lake rates and service in such a manner as to advance the interest of the all-rail routes.

"The second contention of the petitioner was that in spite of all the facts of record the commission could not, as a matter of law, find that competition did or might exist between the petitioner and its lake line, because competition as a matter of law could not exist between two carriers unless one was 'striving' for traffic which the other one was actively seeking and wished to secure, and that such a relationship could not exist between the petitioner and its lake line, since the latter was merely an extension of the former. The record discloses that the lake line has an annual deficit of about $100,000 which must be borne by the petitioner. Why the railroad company should be anxious to continue its interest in the lake line in spite of this annual deficit is a question that immediately suggests itself. One of the officials of the railroad, who should be familiar with all of its traffic and rate interest, testified that he could not tell whether the lake line was a benefit or a burden to the railroad from a dollars and cents standpoint, but that one reason which he was certain led the railroad to maintain its interest in this lake line was to secure for the railroad a voice in the making of the all-rail rates from Chicago to the East.

"This leads to the inquiry: What interest has the Lehigh Valley Railroad in the all-rail rates from Chicago to the East? Its chief interest obviously is in the amount of the division of the all-rail rate which it is able to exact from its rail connections. If the Lehigh Valley was wholly dependent on its rail connections, they would be in a position to dictate the division it would receive. While the Lehigh Valley has a lake line, however, it has a voice in what the all-rail rate should be, and, what is more important, it is in a position to demand large divisions of these rates. The record shows, as might be expected under such conditions, that on most of the east-bound traffic the Lehigh Valley Railroad divisions of the all-rail rate from Chicago to the East are larger than its division of the lake-and-rail rate for the same haul. Thus it has come about that the railroad gets more revenue out of the all-rail haul than out of the lake-and-rail haul on a particular shipment. Here, then, is a situation where the interest of the Lehigh Valley Railroad directly conflicts with the interest of the lake line. To the extent that the Lehigh Valley Railroad is induced by its division of the all-rail rates to divert traffic from the lake-and-rail to the all-rail route, it is 'striving' against the lake line which it owns.

"That this conflict of interest between the railroad and the lake line as to through traffic is not academic, but, on the contrary, exerts a real influence on the traffic policy of the railroad, is made clear by the record. A letter from one official of the railroad company to another in 1904 is in the record, wherein it was stated that in connection with the east-bound movement of flour from Chicago 'the old question' was presented 'whether it is better to allow this business to go via central traffic roads and go after them for a share of it or make arrangements at Buffalo which would bolster up our lake line and concentrate freight there for shipment to the East.' The official who wrote this letter testified that the situation from the standpoint of freight solicitation was the same to-day as in 1904. Thus it appears that the solicitation of east-bound traffic by the railroad is not done with an eye single to the interests of the lake line in the haul from Chicago to Buffalo, but is influenced by the interests of the central freight association road which, with the aid of the Lehigh Valley Railroad, directly compete with the lake line.

"The above considerations make clear that as to a large volume of through traffic east-bound the petitioner does or may 'strive' in the interest of the all-rail routes for traffic which the lake line might otherwise secure. The facts referred to in the original report of the commission tend to show a 'striving' in another way by the railroad company in the interest of the all-rail route for west-bound traffic from New York to Chicago which might otherwise move by the rail-and-lake route. The record discloses many other facts which, together with those referred to above, show 'competition' within the definition of that word which was given by the Supreme Court in the Union Pacific Case, 226 U. S. at page 87 [33 Sup. Ct. 53, 57 L. Ed. 124].

"The interveners at the argument did not address themselves to the issue raised by the petition of the railroad company. These interveners confined their remarks to a statement as to the hardship that might be imposed upon certain shippers if the lake line were divorced from the railroad company. Their statement reflected the uncertainty that attends a change effected by legislation. The views urged by the interveners have no bearing upon the question as to the proper interpretation and application of the act to the facts at hand.

"After reviewing its previous findings and order in the light of the present proceeding, no reason appears why the commission should modify its order denying the application of the petitioner as to its lake line service. An order will be entered dismissing the petition for rehearing."

Accordingly, an order was filed on December 13th, making the report just quoted a part thereof and dismissing the petition for a rehearing. Being still dissatisfied, the railroad company (having tried and failed in the previous September to induce the Department of Justice to agree to a test case in the courts) renewed the effort, ran one of its boats on December 16th from Chicago to Buffalo, and again asked the department to bring suit for the penalty so that the question might be decided by the federal tribunals. After some correspondence, this effort also came to nothing, and the result was that the bill now before us was filed.

After a full recital of the foregoing facts, the bill prays for service on the respondent (the United States), on the Attorney General, and on the Interstate Commerce Commission, and asks that the United States and the commission "be perpetually enjoined and restrained by a decree and injunction of this court from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof." A preliminary injunction "to the same purpose, tenor, and effect" was also asked for, and was granted as a matter of form, in order to preserve the status quo. Shortly afterwards, a final hearing was had, but no evidence was offered except the two reports of the commission.

Upon the foregoing facts, we are of opinion that for either of two reasons the injunction prayed for should not be granted.

[1] 1. We have serious doubt whether injunction is an appropriate remedy in the present situation. We think it important to observe precisely what Congress has done. Essentially, the act ordains that after July 1, 1914, common interest of a certain kind between two classes of carriers shall be unlawful, but it does not declare how such common interest shall come to an end. The only express sanction to be found in the act is a penalty for each day's violation of the statutory command. A method of procedure is provided by which the commission may determine whether a carrier does or does not fall within the class of offenders: if it does not so fall, of course the act

does not forbid the relation; but, even if it does so fall, the commission still has the power to suspend the operation of the act, if certain specified conditions are found to exist. If the conditions do not exist, the offending carrier is left exposed to the statutory penalties; the commission is not directed and apparently has no power (unless the power be implied) to take affirmative action toward dissolution. The plaintiff seems to suppose that the commission has authority to order an offending carrier to divorce itself from the carrier by water; and, indeed, it seems to suppose also that the order of May 9, 1915, is at least the equivalent of such a command. We do not so understand the situation. Whatever advice on this subject the commission may have seen proper to give, either expressly or by implication, what the commission has actually done is merely to refuse to act; it has declined to suspend the operation of the statute in the plaintiff's favor. No order of divorcement or any other affirmative command has been issued. The order complained of is purely negative, and nothing else is before us.

We are not considering the power of the United States to interfere directly by asking a court of equity to decree that the relation between two carriers should be dissolved. We confine the discussion to the questions that we understand to be presented—the power, and the action, of the commission. If a federal court had authority to issue a mandamus to the commission directing it to suspend the operation of the act in a case that might seem sufficient to the court, such a proceeding might furnish a remedy under which the plaintiff could raise the questions it desires us to consider. But Congress has added no such power to the limited jurisdiction of the federal courts, and we think none can be exercised. Section 11 of the Canal Act must be left just where Congress chose to leave it, namely, with a declaration of what conduct is to be unlawful after a specified date, and with the sanction of a penalty large enough to make the declaration effective. In substance, Congress has said to an offending carrier:

"Here is a rule of conduct for your guidance. If you choose to continue a relation that has thus been declared unlawful, although the commission does not take any direct action to dissolve the connection, we shall make that connection so expensive to maintain that you will be glad to dissolve it of your own motion."

And as the commission has kept strictly within the power conferred by Congress, and is not threatening to overstep the mark, we are much in doubt whether any ground exists upon which the injunction asked for can be based.

[2] 2. But, if we should be mistaken in this view, and if an injunction should issue in a proper case, we are further of the opinion that no such case has been made out by the record before us. No evidence was offered except the two reports quoted above, and as section 11 makes the order of the commission final, and as that order embraces the finding that the plaintiff "does or may compete for traffic with the lake line or lines in which it has an interest," this would seem to be an end of the controversy. The plaintiff, however, attacks the "jurisdiction" of the commission to make such a finding or order, and

(as we understand the argument) supports the position by contending that no competition is possible under the physical conditions that confessedly prevail, and therefore that the order is arbitrary and completely disregards the evidence. But this is not an attack on the commission's "jurisdiction"; its right to judge depends on the statute, and the statute in terms gives it the right to inquire and determine whether a given situation presents a case of actual or potential competition. This is precisely what the plaintiff asked, and what the commission undertook, namely, an inquiry whether the railroad competed actually or potentially with its own fleet of boats; and we entertain no doubt that the jurisdiction existed, and that it was directed to a proper object. In what manner the commission may have exercised this right is, of course, a different question. Its findings are made final, and final they must remain, but with one qualification—certain fundamental rules must have been obeyed. In spite of the statutory declaration of finality, the courts still retain a limited power of supervision—enough to see that constitutional requirements have been observed. Intermountain Rate Cases, 234 U. S. 490, 34 Sup. Ct. 986, 58 L. Ed. 1408; U. S. v. R. R., 235 U. S. 320, 35 Sup. Ct. 113, 59 L. Ed. 245. There must have been a "hearing," with the essentials involved in that word, and the action of the commission must not have been arbitrary; but in other respects we have no right to review what has been done, or the manner of doing it. We cannot substitute our judgment for the judgment of the commission on the weight or the effect of the evidence, or correct mistakes that may have entered into the findings of fact.

Now the finding, that the plaintiff does or may compete for traffic with its boat line, is the finding of an ultimate fact, exactly as the finding of discrimination was decided to be in Meeker v. Railroad Co., 236 U. S. 427, 35 Sup. Ct. 328, 59 L. Ed. 644; and the only question that remains is whether such a finding was made without evidence, or by disregarding the evidence plainly and arbitrarily. In view of the full reports of the commission, the subject need not be discussed. It is clear to us that the commission had before it other relevant evidence than the fact that the plaintiff's boat line did not parallel its rail line, but that physically one was merely a prolongation of the other. The real question was: What effect the traffic over one line had, or might have, upon the traffic over the other? Or, in other words, was the amount of money received from freight carried by one line affected, or likely to be affected, by the amount of money received from a similar source by the other line? Upon this point there was relevant evidence before the commission, and its finding is conclusive.

[3] 3. In conclusion, a few words may be said concerning the constitutionality of section 11. The plaintiff's argument does not attack the power of Congress to enact that competing carriers must be free from control by a common interest, and concedes the power to authorize the commission to decide whether competition exists, either actual or potential. The contention is that Congress has gone too far in the third paragraph of section 11, which empowers the commission to permit the operation of an "existing specified service by water"

beyond July 1, 1914. The paragraph is perhaps somewhat lacking in clearness and precision:

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen."

But, taken in connection with the earlier paragraphs, we think the fair construction is that, even if the commission shall find that competition, or the possibility of competition, now exists between a particular carrier by land and a carrier by water under common control, the service by water may still be continued if the commission shall be of opinion that the convenience and commerce of the people will be promoted thereby, and "that such extension will neither exclude, prevent, nor reduce, competition on the route by water under consideration."

In other words, having found that the two carriers actually compete, or may compete, the commission may nevertheless permit the common control to continue and may allow the land carrier to continue the service by water, if the public interest will be promoted thereby, and if continuance of the common control does not injure the existing, or the potential, competition. The plaintiff objects to these provisions on the ground that Congress should have enacted a standard to which the commission should conform in determining these questions, and contends that no such standard has been ordained, and that the whole subject has been turned over to the arbitrary action of the commission. We do not agree with the argument. In our opinion Congress has done all that was reasonably necessary. In the earlier paragraphs of the section, a standard is set up—actual or potential competition—but of necessity Congress was obliged to leave the commission to decide whether the varying facts of varying situations did or did not conform thereto. The statute declares what rule of decision shall be applied to every case; but, as the precise facts of every situation could not possibly be known, the commission was of necessity empowered to ascertain them. As already stated, this part of the section is not attacked, and in view of several well-known decisions of the Supreme Court it could not be successfully attacked, as unconstitutional. It is no more a delegation of legislative power than is the delegation of power to decide whether a rate is "reasonable" or a practice is "discriminating."

And for similar reasons we think the objections to the paragraph now in question must also fail. No legislative body can deal in detail with all the complex relations of modern commerce. In most instances, all that can be done is to state principles and lay down general rules, intrusting the proper tribunals with the task of applying them. Congress evidently saw that in exceptional situations the convenience and the commerce of the people might profit from an existing service by water, although a carrier by land might be controlling its operation. This is the first inquiry, and it presents a question of fact. And the second inquiry is also of fact: If the common control and operation be continued, will competition over the route by water be excluded, prevented, or reduced? The facts once ascertained, the rule laid down by Congress is to be applied, namely, unless the public interest will be served, and unless competition will be maintained, common control is forbidden; but, if the public interest will be promoted, and if competition will not suffer, common control may continue. In our opinion these provisions were indispensable, and indeed unavoidable.

The lawmaking power laid down as definite a rule as it could, and merely intrusted the commission with authority to ascertain the facts. The commission did not ordain the rule, but merely applies it. Indeed, the plaintiff seems to overlook this aspect of the statute. In sweeping terms, *all* forms of joint control are forbidden to the carriers described, but the paragraph now attacked allows the commission to suspend the prohibition in a certain class of cases. This is a favor granted to the carriers in exceptional cases, and is not the invasion of a right. If they had a right to be invaded, it was the right of common control; but this (it is conceded) was lawfully taken away, and the carrier can hardly criticize the terms on which the sovereign sees fit to restore it as a matter of grace.

A decree may be entered dismissing the bill.

NASHVILLE GRAIN EXCHANGE et al. v. UNITED STATES et al.

(District Court, N. D. Georgia. June 8, 1916.)

No. 75.

COMMERCE ⚿85—INTERSTATE COMMERCE ACT—LONG AND SHORT HAUL CLAUSE—POWERS OF COMMISSION.

Although the existence of water competition may justify railroad carriers in granting to dealers in a commodity at a certain point the privilege of unloading, rebilling, and reshipping to further points at through rates from the point of initial shipment, it does not necessarily follow that the particular privilege granted does not give to such dealers an undue preference or advantage over dealers at others points to whom the same privilege is not extended, but the question is one of fact to be determined by the Interstate Commerce Commission under the power conferred by section 4 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Act June 18, 1910, c. 309, § 8, 36 Stat. 547 [Comp. St. 1913, § 8566]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. ⚿85.]

In Equity. Petition by the Nashville Grain Exchange and others against the United States and others. Bill dismissed.

On application to enjoin the enforcement of a certain order of the Interstate Commerce Commission and to annul and vacate the same under the act of October 22, 1913, c. 32, § 1, 38 Stat. 208, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen, and for

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other purposes." Application for injunction denied, and bill dismissed. See, also (Com. C.) 191 Fed. 37; (Com. C.) 197 Fed. 58; and United States v. Louisville & N. R. Co., 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

Perkins Baxter and O. P. Anderson, both of Nashville, Tenn., for petitioners.

Blackburn Esterline, Sp. Asst. Atty. Gen. (E. Marvin Underwood, Asst. Atty. Gen., on the brief), for the United States.

Charles W. Needham, of Washington, D. C. (Joseph W. Folk, of Washington, D. C., on the brief), for Interstate Commerce Commission.

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

PER CURIAM. The bill in this case is an attack upon the order made by the Interstate Commerce Commission after the Supreme Court had remanded a former case attacking a previous order of the commission to enable a decree dismissing the bill in that case to be entered without prejudice to the right of the carriers to apply to the commission to be relieved from the operation of the provisions of section 4 of the Act to Regulate Commerce, upon a rebilling and reshipping privilege on grain, grain products, and hay which was in effect at Nashville when said section 4 was amended by the Act of June 18, 1910. United States v. Louisville & Nashville R. Co., 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

Under the decision in that case we do not think that it is here open to dispute that the right to continue the exercise of that privilege is dependent upon an authorization of it, in whole or in part, conditionally or unconditionally, by an order of the Interstate Commerce Commission made in the exercise of the power conferred by amended section 4 of the Act to Regulate Commerce. By the order of the commission which is the subject of attack, the carriers were "notified and required to cease and desist, on or before the 15th day of October, 1915, from granting to Nashville, and to the dealers in grain, grain products, and hay located at Nashville, the said privilege of rebilling or reshipping said commodities from Nashville, so long as said defendants refuse and refrain from granting to Atlanta, Columbus, Macon, Cordele, Albany, Valdosta, Dublin, Montezuma, Rome and Athens, or any of them, and to the dealers in said commodities located at said cities, the said privilege of rebilling or reshipping said commodities from said cities." The order provided that it "shall continue in force for a period of not less than two years from the date when it shall take effect." Before the order was to become effective, the railroads put in the reshipping and rebilling privilege at the points other than Nashville named in the order and retained it at Nashville, changing the privilege, however, as it had previously existed at Nashville, by making it applicable to carload traffic only; whereas, it had previously been in effect at Nashville also as to shipments of less than carload quantities. This change was the act of the carriers, and was not required by anything contained in the order complained of.

We understand that the attack made upon the commission's order is based upon the contention that the privilege formerly allowed at Nashville, while it was withheld from the other localities mentioned in the order, was not subject to be changed by the commission unless, upon investigation, it was disclosed by evidence that it operated to give Nashville an undue preference or advantage, and that there was an entire absence of evidence tending to prove that such was its operation and effect. It may be assumed, without being decided, that Nashville grain dealers, or an association of them, have such an interest in the continuance of the practice as it formerly existed as to have a standing in court to complain of an invalid order of the commission which enabled the carriers to discontinue the practice altogether or partially, and that such a complaint would have to be sustained, if it was made to appear that the commission's order was made in the absence of any evidence to support a finding that the practice operated to the undue or unreasonable preference or advantage to Nashville. But we are not of opinion that the charge of arbitrariness or that the action taken was unsupported by evidence is sustainable. The tariffs which were in evidence before the commission show that under them dealers at Nashville in grain, grain products, and hay could bring those commodities from the Ohio river crossings to Nashville, unload, treat, and store them, and ship them on to points of final destination further south, at the through rates from the river crossings to points of final destination, while dealers or jobbers in the same things in the other places named in the order had to pay the through rates to those places on such commodities shipped from the river crossings, and, to get them to other points, had to pay also local rates to such points of final destination—the through rate to the jobbing point and the local rate to a nearby point of final destination frequently amounting to considerably more than the through rate from the river crossings to the point of final destination.

The commission had before it much evidence to illustrate how this rate situation operated to aid in building up a grain, grain products, and hay business at Nashville, and to circumscribe and obstruct the carrying on of a jobbing business in those commodities in the other places named in the order. The question whether the resulting advantage to Nashville was or was not undue or unreasonable was one of fact peculiarly appropriate for the determination of the Interstate Commerce Commission. Though the fact was that the existence of river competition at Nashville was a serious, or even insuperable, obstacle in the way of the railroads to that place attracting to themselves grain, grain products, and hay for carriage from the Ohio river crossings to Nashville if the through and local rates to and from that place were applied to such shipments without modification as they were at the other places which complained of the preference accorded to Nashville, it does not necessarily follow from that fact that the particular privilege with reference to such commodities which the railroads saw fit to allow at Nashville, while they withheld it from the other localities named in the attacked order, did not amount to an undue or unreasonable preference or advantage to Nashville and have the effect of subjecting such other localities or jobbers or dealers thereat to undue or unreasonable prejudice or disadvantage. In view of the great mass of evidence having some bearing on the inquiry submitted to the commission, a tribunal expert in matters of rate regulation and adjustment, we are of opinion that there is no merit in the contention that it was so entirely without data from which to draw an inference as to the reasonableness or unreasonableness of the practices of the carriers which were the subjects of consideration as to justify a court in pronouncing the order complained of arbitrary and unwarranted. O'Keefe, Receiver, v. United States, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651 (Feb. 21, 1916).

The conclusion is that the bill should be dismissed, and it is so ordered.

UNITED STATES v. McCUTCHEN et al. SAME v. KINSEY et al. SAME v. MIDLAND OILFIELDS CO., Limited, et al.

(District Court, S. D. California, N. D. July 12, 1915.)

Nos. A-12, A-13, A-30.

1. MINES AND MINERALS ⚷2—OIL MINING CLAIMS—ORDER WITHDRAWING LANDS FROM ENTRY.

An oil locator on a placer mining claim has in strictness no vested right as against the United States until he has made a discovery of oil; but it has been the policy of the law to recognize his equity so long as he is expending money in a good-faith attempt to make the discovery, and the exception in the presidential order of September 27, 1909, withdrawing certain lands from entries of any kind, of "all locations or claims existing and valid on this date," and permitting them to proceed to entry in the usual manner, extends to and protects a claim previously located, on which work leading to a discovery of oil was then being diligently prosecuted, although no discovery had been made at that time.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. ⚷2.]

2. MINES AND MINERALS ⚷2—OIL MINING CLAIMS—RIGHTS OF CLAIMANTS—WITHDRAWAL OF LANDS FROM ENTRY.

Neither the exception in such order nor the provision of Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. §§ 4523–4525), that the rights of any person who at the date of any such order was a bona fide occupant or claimant, and was at such date "in diligent prosecution of work leading to a discovery of oil," should not be affected by such order so long as he should "continue in diligent prosecution of said work," applies to save any right in a locator who prior to the date of the order had ceased work for want of funds and never resumed, and where the claim was then resided on by a person placed there for the sole purpose of holding possession. Nor did subsequent work by an assignee of such locator in sinking new wells, commenced while the order was in force and prosecuted to a discovery, give any right to such assignee; the land having previously become subject to the full force and effect of the withdrawal order.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. ⚷2.]

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

3. MINES AND MINERALS ⇒9—OIL MINING CLAIMS—EFFECT OF ORDER WITHDRAWING LANDS FROM ENTRY.

A claim initiated by a location made while such order was in force can be the basis of no rights as against the United States as the owner of the title, but the claimant is a mere trespasser.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. ⇒9.]

4. MINES AND MINERALS ⇒38(7)—SUIT BY UNITED STATES TO RESTRAIN WASTE—RECEIVERSHIP.

In a suit by the United States to quiet its title to lands, its legal title to which is unquestioned, and to restrain waste by defendants, who are in possession and extracting and selling oil therefrom, which constitutes their only value, complainant *held* entitled to the appointment of a receiver.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 91; Dec. Dig. ⇒38(7).]

In Equity. Suits by the United States against George W. McCutchen and others, against David Kinsey, the Midway Field Oil Company, and others, and against the Midland Oilfields Company, Limited, and others. On motions by complainant for injunctions to restrain waste and for appointment of receivers. Motions granted.

E. J. Justice, Sp. Asst. Atty. Gen., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States in all cases.

In Case No. A-12:

Beasly & Fry, of San Jose, Cal., for Bean-Spray Pump Co.

Samuel Shortridge, of San Francisco, Cal., for Spreckles Oil Co., and John D. Spreckles.

A. L. Weil, of San Francisco, Cal., for General Petroleum Co.

J. W. Wiley, of Bakersfield, Cal., for McCutchen and others.

A. L. Weil, of San Francisco, Cal., for Davis S. Bachman.

R. T. Harding, of San Francisco, Cal., for Pacific Midway Oil Co. and Monroe.

M. S. Platz, of Bakersfield, Cal., for D. F. & M. F. Francis.

Curtis H. Lindley, of San Francisco, Cal., for Obispo Oil Co.

Geo. W. Lane, of San Francisco, Cal., for Independent Oil Producers' Co.

R. T. Harding, of San Francisco, Cal., for Pacific Midway Oil Co., Pacific States Refiners' Co., and American Oriental Co.

A. V. Andrews and T. O. Toland, both of Los Angeles, Cal., for Union Oil Co., Maricopa Star Oil Co., and Producers' Transp. Co.

A. V. Andrews and T. O. Toland, both of Los Angeles, Cal., for Maricopa Oil Co.

Geo. E. Whitaker and Rowan Irwin, both of Bakersfield, Cal., for Edith F. Coons.

Oscar Lawler, of Los Angeles, Cal., for Midway Field Oil Co.

In Case No. A-30:

A. L. Weil, of San Francisco, Cal., for Midland Oilfield Co.

Andrews, Toland & Andrews, of Los Angeles, Cal., for Union Oil Co.

Geo. Lane, of San Francisco, Cal., for Independent Oil Producers' Co.

In Case No. A-13:

Oscar Lawler, of Los Angeles, Cal., for Midway Field Oil Co. and United Midway Oil Lands Co.

Andrews, Toland & Andrews, of Los Angeles, Cal., for Union Oil Co.

J. S. McKnight, of Los Angeles, Cal., for Letteau & Kinney.

Hunsaker & Britt, of Los Angeles, Cal., for A. T. Jergins.

BLEDSOE, District Judge. Application is made in each of the above-entitled cases for the issuance of an injunction in the nature of a restraint of waste, and for the appointment of a receiver to take charge of and operate the oil wells situate upon the properties in controversy. Substantially the same state of facts is presented in each case, and the legal questions presented for determination are essentially similar. All are suits to quiet the title of the government in and to certain oil lands in this state now in the possession of and claimed under oil land locations by the respective defendants. The basis of the government's claim in this behalf is that the lands were withdrawn from entry and location by the government and that in consequence the entry of the respective defendants thereon has served in no wise to give them any rights as against the government.

It will be remembered in this connection that on September 27, 1909, the President of the United States issued his much discussed withdrawal order, temporarily withdrawing from all forms of location, settlement, etc., certain specified public lands, including those in controversy herein, then belonging to the United States government; and, although the validity of this order was challenged at every step by those interested in the oil industry, it successfully withstood every attack, and was finally and definitely upheld in its every aspect by the Supreme Court of the United States in United States v. Midwest Oil Co. (decided February 23, 1915) 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673. All of the lands involved in these cases were included within the terms of the withdrawal order.

In the Kinsey and Midland Oilfields Company Cases the facts as alleged in the verified bills are comparatively simple. In the Kinsey Case it is alleged: That the plaintiff, the United States government, now is, and at all the times mentioned and ever since the treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all of the lands described in the bill, and particularly all of the oil, petroleum, gas, and other mineral therein contained. That at all times mentioned all such lands have been and now are part of the public domain, except as withdrawn and reserved from entry as is thereinafter alleged. That said lands now are and at all times have been oil and gas bearing lands, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times said lands have been and now are chiefly valuable for the petroleum or mineral oil deposits therein.

It is then alleged that on the 14th day of September, 1908, the Secretary of the Interior duly and regularly withdrew and reserved the said lands from settlement, entry, or purchase, under the agricultural land laws of the United States, for the purpose of examining and classifying them. On June 9, 1909, the said lands were duly and regularly classified by the said Secretary as petroleum or oil-bearing lands. On September 27, 1909, the President of the United States, under authority legally invested in him so to do, duly and regularly withdrew and reserved all of said lands by the withdrawal order hereinabove referred to. On July 2, 1910, the President, under the authority specially invested in him by virtue of the provisions of the act of Congress approved June 10, 1910 (36 Stat. 847), duly and regularly ratified, and continued in full force and effect his order of withdrawal of September 27, 1909, aforesaid, and did further withdraw and reserve all of such lands from mineral exploration, occupation, and from all forms of location, settlement, application, selection, etc., under the mineral or nonmineral public land laws of the United States. That both of said orders of withdrawal and reservation have ever since their respective dates been, and now are, in full force and effect.

It is next alleged that there was no petroleum or other mineral produced or discovered on said lands until long after July 10, 1910, but it was first produced thereon on or after March 15, 1912, by the Midway Field Oil Company, one of the defendants named, and that there was no other production by any of the defendants, or any other person, of petroleum or mineral oil or gas, or other mineral, on said premises, until long subsequent to March 15, 1912. Several placer mineral locations upon said land are then specifically referred to, but speaking of them in gross, it may be said that all of them that were made prior to September 27, 1909, were abandoned by their respective locators, and that none of the locators thereof ever made any discovery on said lands.

It is alleged that on June 8, 1910, the "Blue Feather" mineral location was made on said land, and that on June 9, 1910, the "Midway mine" location was made thereon. It is also alleged that subsequent to the 2d day of July, 1910, the United Midway Oil Land Company, claiming under and through the said "Midway mine" location, entered upon said property, and that thereafter the Midway Field Oil Company, as its lessee, entered upon said property under and by virtue of said "Midway mine" location, and, after drilling a well upon said claim, made a discovery of oil thereon, and proceeded to and are now extracting from said land large quantities of petroleum and mineral oil. It is also alleged the Union Oil Company of California, the only other operator upon said claims, entered thereon subsequent to the 2d day of July, 1910, and made a discovery thereon, and effected a subsequent production of oil therefrom.

It is then alleged that no discovery of oil or petroleum upon said premises has ever been made upon any part of said land, except as is hereinabove set out; that no valid location or entry of, or claim to, said land under the public land laws, or otherwise, was ever made or acquired by defendants, or either of them; and that on the 27th day of September, 1909, there was no locator or person in occupancy of the said claim, as claimant or otherwise, and that on the 2d day of July, 1910, there was no person or corporation in diligent prosecution of work leading to the discovery of oil or gas on said lands under any location or pretended location, or otherwise. It is then alleged in apt language that the defendants have no rights upon said lands; that they are trespassers thereon, and are extracting oil and gas therefrom without right, and to the irreparable injury of the proprietary rights of the plaintiff in and to the said property. It is also alleged that the value of the lands referred to exceeds $1,000,000.

In the Midland Oilfields Company Case, the bill of cómplaint in which was filed March 30th of this year, with reference to the particular matters in controversy, it is alleged that the President made the withdrawal order of September 27, 1909, hereinabove referred to including the lands in controversy in the suit, and that notwithstanding such order, and in violation of the proprietary rights of plaintiff, and of the lawful orders and proclamations of the President, and particularly in violation of the aforesaid withdrawal order, the defendants named entered upon the premises in controversy long subsequent to the said 27th day of September, 1909, but that, some time after the year 1910, one of the defendants discovered petroleum on said lands, has since produced and caused to be produced large quantities thereof, and threatens to continue the extraction and sale of the same. It is then alleged that none of the defendants or any other person was bona fide occupant or claimant of said land, and in the diligent prosecution of work leading to the discovery of oil or gas, on September 27, 1909. It is alleged that the value of the lands in controversy in this suit exceeds $500,000.

General allegations are made in all the complaints that the defendants in possession and engaged in producing oil from the respective properties involved are actually extracting oil therefrom in large quantities, and converting the same to their own use; that defendants threaten to continue so to operate said properties, and otherwise commit waste and trespass upon the lands of right belonging to plaintiff, to its irreparable injury, and in violation of its settled policies with respect to the conservation of its petroleum deposits. It will be observed that in both of the cases last hereinabove referred to the initiation of the rights of the defendants upon the lands in controversy occurred subsequent to the date of the presidential withdrawal order of September 27, 1909. In this respect these cases differ from the McCutchen Case now to be referred to, in that the rights of defendants involved in that case were initiated prior to the date of the withdrawal order. The McCutchen Case is also different, in that an application for a receiver, based upon the bill of complaint therein, has been made to this court heretofore, Judge Dooling, of the Northern District of California presiding, and an order was made denying such application. It is different also in that one of the defendants named therein made application for a patent to a part of the land involved, which application, after hearing by the Commissioner of the General Land Office and the Secretary of the Interior, was, subsequent to the making of Judge Dooling's order, refused. Land Decision dated April 21, 1915, Advance Sheets, p. 420, vol. 44.

The facts involved in the McCutchen Case are very succinctly stated by Judge Dooling in his opinion filed at the time of the denial of the motion for a receivership, reported in 217 Fed. 650, and it is unnecessary, therefore, to reiterate them here, or to refer to them save merely for purposes of explaining my ruling herein. It is apparent from Judge Dooling's decision that request was made of him for the appointment of a receiver upon two grounds: First, the alleged fraud on the part of the locators of the lands in question in the making of the location which was sought to be made the basis for the patent; and, secondly, because of the nondiscovery of oil upon the premises previous to the promulgation of the withdrawal order of 1909. Judge Dooling refused to grant the application upon either of the grounds urged, because he had, as he says, prior thereto, and in another proceeding, held that the withdrawal order was ineffective, and also because, considering the strongly controverted questions of fact involved, he felt that there was such a doubt as to the fraud alleged as to justify, if not require, a denial of the application. Since the rendition of his opinion, the Supreme Court, as adverted to hereinabove, has held, however, that the withdrawal order was valid, and this court must now determine, in the added light of the Supreme Court decision, the effect of that valid order upon defendants' claims herein.

With respect to the other question involved and considered by Judge Dooling, to wit, that of fraud, I am constrained to agree with him that at this time, and in the advance of a trial upon the merits, that issue is not so free from doubt as to justify this court upon that ground in taking the property of the defendants out of their possession and giving it over into the hands of an officer of the court.

[1] Referring to the facts pleaded as affecting defendants' rights under the withdrawal order, it may be stated generally that no discovery of oil was made on the property involved in the McCutchen Case prior to June 6, 1910, at which date a discovery was made, and oil and gas were produced by defendant Pacific Midway Oil Company. This discovery and production of oil was made under and pursuant to an oil placer location upon the premises in question, of date February 12, 1909, or possibly prior thereto. Under that location the Obispo Oil Company, as assignee of the locators of the land in controversy, entered upon the lands on or about March 1, 1909, and began active operations in the matter of drilling for oil. After a well had been drilled several hundred feet it was found impossible to continue the operations thereat, whereupon the rig was moved, and a new well was started. Thereupon a second well was drilled to a depth of almost 500 feet, when, some time during the month of July, 1909, the company having exhausted all of its available funds, the work was discontinued. On August 31, 1909, the committee appointed by the stockholders of the company at a meeting held on the 30th day of July reported that on August 5th they had visited Maricopa and had secured an agreement from the McCutchen brothers (the original locators hereinabove referred to) that the company might have an extension of 90 days, during which to make arrangements to continue drilling operations. The committee further reported that they had discharged the employés, had shut down the well, and left the properties

in charge of a keeper at a salary of $65 for the balance of the month of August. Some time in September a house on the land was occupied by a caretaker, who continued thereon, without salary, until March, 1, 1910. The Obispo Company never resumed work on the claim. Some time during the latter part of February following, the Pacific Midway Oil Company, as an assignee or successor in interest of the Obispo Oil Company, began operations on the property.

The two old wells hereinabove referred to were examined by the Pacific Midway Company, and after some experimentation were found unserviceable, whereupon the drilling rig was moved, and a third and entirely new well was started. This was in March, 1910. The work was pushed forward with diligence, and a discovery of oil was made by the medium of such well on June 5, 1910. Thereafter other companies, referred to in Judge Dooling's opinion, went upon the property and after some large expenditures of money produced oil in paying quantities. In this connection it may be suggested that upon the refusal by the land office, as hereinabove referred to, to issue a patent to the Pacific Midway Oil Company, an opinion was rendered, and from such opinion, containing a statement of the facts involved, the foregoing summary has been taken. This I do, not that I feel that the court is bound, in this proceeding, by the findings of fact of the land department of the government, but because of my belief that the facts as stated in said opinion are in accordance with the truth of the controversy.

With reference to the situation existing on the date of the presidential withdrawal order of September, 1909, it may be said that, in addition to the facts as stated by the Commissioner of the General Land office in his opinion, one of counsel for the defendants in his brief says:

"The care-taker had been in the employ of the Obispo Oil Company, and was then working on an adjoining piece of property, and lived, with his family, on this property, rent free, and with the assurance of further employment when operation should be resumed."

Another counsel, in the brief used before the land department and also presented to the court herein for its consideration, said with reference to the transactions occurring on and about the date of the withdrawal order:

"The continued active operations of the Obispo Company embraced a period from February, 1909, to August 5th. During this period they drilled well No. 1 to a depth of 500 feet, when they encountered shift boulders, which crushed the pipe. Then they moved the rig a short distance away and started drilling. In this they reached a depth of 470 feet, when operations were suspended—August 5, 1909—by reason of financial difficulties. On this date a committee of stockholders of the Obispo Company visited the ground. Up to this time there had been expended by the Obispo Company somewhere between $15,000 and $18,000 on this venture. The committee ordered the operations stopped, put Watterson, one of the drillers, in charge to take care of the property, at a salary of $65 per month, and secured from McCutchen brothers, by W. C. McCutchen, an agreement permitting a suspension of drilling for 90 days. * * * At this time, and subsequent to September 10, 1909, a man by the name of May and his wife moved into the house on the quarter, at the instigation of the Obispo Company, to hold possession of the property. Watterson, who had been employed by the committee of the Obispo stockholders, left about September 9th. The Mays were simply holding possession by residence on the ground, but were not paid employés. May was subsequently employed when operations were resumed by the Pacific Midway. * * * It is conceded that between August 5, 1909, and until operations were resumed by the Pacific Midway in February 1910, there was no active drilling upon the property. From August 5 until September 10, 1909, Watterson was in possession as an employé of the Obispo. Thereafter May and his wife moved in *for the purpose of holding possession.* No salary was paid them, but they entered into possession *simply to hold it for the Obispo Company.*" (Italics mine.)

By a reference to the decision of the Supreme Court in the Midwest Case, supra, it will be observed that, though the presidential order of withdrawal of September 27, 1909, purported to withdraw from all forms of location or settlement under the mineral or nonmineral public land laws all the public lands specifically referred to in the lists accompanying the withdrawal order, yet this important exception was ingrafted upon that order, viz.:

"All locations or claims *existing and valid* on this date may proceed to entry in the usual manner after filing, investigation, and examination." (Italics mine.)

It is obvious that it was not and could not have been the intention of the President, acting for and in behalf of his principal, the United States government, to except from the operation of the withdrawal order all claims or locations that might then be subsisting upon lands included within such order. Special pains were taken to indicate that the intention of the executive was that only *"valid"* locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the presidential action, constitute a *"valid"* location or claim. In this behalf it should be remembered that "valid" is defined as:

"Good or sufficient in point of law; efficacious; incapable of being rightfully overthrown or set aside; sustainable and effective in law, as distinguishable from that which exists or took place in fact or appearance, but has not the requisites to entitle it to be recognized and enforced by law." Cent. Dict.

What constitutes a "valid" mineral oil location, one "sustainable and effective in law," is very succinctly stated by the Supreme Court of California in McLemore v. Express Oil Co., 158 Cal. 559, 561 et seq., 112 Pac. 59, 60 (139 Am. St. Rep. 147). It is therein stated:

"The principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work is the condition of their continued possession. * * * But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable minerals in place has been made. In the case of ordinary minerals, little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice, he made discovery. The staking of the boundaries of the claim and the posting of notice followed such discovery. When, however, Congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, 29 Stat. at Large, c. 216, p. 526 [U. S. Comp. Stats. 1901, p. 1435]), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which, in their nature, were radically dissimilar. Thus, it is well established, that the sole power of disposition and control of the public lands being vested by the Constitution of the United States on Congress (Const. U. S. art. 4, § 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired. It was fully established, also, that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, includes discovery), acquired vested rights, which no change in congressional policy could affect or impair, but, per contra, that '*a change in policy could impair the rights of one upon the public domain who had not acquired a valid location.*' As has been said, in the case of other minerals, discovery preceded the demarkation of the boundaries, the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made, except at the end of much time and after the expenditure of much money; the discovery of oil involving the erection of a derrick, the installation of machinery, and the laborious drilling of a well, frequently to the depth of 3,000 feet or more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and *by protecting him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made.* So it was held by the federal courts, by the courts of some of the other states, and by this court in Miller v. Chrisman, 140 Cal. 447, 73 Pac. 1084, 74 Pac. 444, 98 Am. St. Rep. 63, to the following effect: 'One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open, and above board, and made in good faith, or no right can be founded upon it.' Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Cosmos, etc., Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20; Id., 112 Fed. 4, 50 C. C. A. 79 [61 L. R. A. 230]; Id., 190 U. S. 301, 23 Sup. Ct. 692 [24 Sup. Ct. 860, 47 L. Ed. 1064]; Whiting v. Straup, 17 Wyo. 1 [95 Pac. 849] 129 Am. St. Rep. 1093; Moffat v. Blue River, etc., Co., 33 Colo. 142, 80 Pac. 139. But it is always to be borne in mind that, until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal. * * * What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, *while he is diligently prosecuting his work to a discovery.* This 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 brick. *It means the diligent, continuous prosecution of the work, with the expenditures of whatever money may be necessary to the end in view.*" (Italics mine.)

The gist of this decision, as I read it, is that after entry, and the initiating of the mineral placer claim by the oil locator, he has no vested right as against the government until he makes a discovery of oil upon the lands in question. In other words, the posting or recording of his oil placer claims gives him no rights as against the government until by discovery of oil it is made apparent that the land is in truth and in fact mineral land and subject to location under the mineral law. Having, however, initiated his claim by the posting of his notices, he is protected as against third persons as long as he "remains in possession and with due diligence prosecutes his claim toward a discovery." As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless he has rights which ought to be by all parties respected.

And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order had their rights respected by the President by the exception contained therein and hereinabove referred to; that is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in possession, and was "with due diligence" prosecuting his work toward a discovery of oil, by the express provisions of the withdrawal order, it did not affect him. He had a "valid" location, and he could, despite the general terms of the order, "proceed to entry in the usual manner"; that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order, such locator was not in possession, or was not with "due diligence" prosecuting his work toward a discovery, then he had no "valid" location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal the land so claimed by such locator. Furthermore, if, notwithstanding such situation, such locator, conceiving the withdrawal order to be entirely invalid, thereafter began or resumed operations looking to a discovery of oil upon his claim, he was met by the terms of the order itself, to the effect that the land was no longer open to entry or claim, and that, as between him and the government, all subsequent efforts of his could not serve to divest the government of its proprietary title therein.

The Supreme Court having determined, after most careful consideration, that the withdrawal order in question was valid in its every aspect, and effectual as serving to withdraw from entry or settlement the public lands referred to therein, it indubitably follows that any entry made or claim initiated upon such land so withdrawn subsequent to the date of such withdrawal order, and while the same was in full force and effect, would be void and futile as against the proprietary rights of the United States government. If discoveries of oil were made subsequent to the withdrawal order, in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators or their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein, they would be protected in their rights by the express terms of the withdrawal order itself. If they were not so engaged with diligence in endeavoring to effect a discovery of oil, then their rights would be no greater than, or different from, the rights of one who might have entered upon withdrawn lands subsequent to the date of the presidential order, and as to such an one the Supreme Court has said in the Midwest Case that his rights were nil.

In the Midwest Case, with respect to the validity of the withdrawal order, and as its ultimate conclusion thereon, the Supreme Court said:

"The long continued practice of acquiescence in Congress, as well as the decisions of the Courts, all show that the President had the power to make the order. And as was said in Wolsey v. Chapman, 101 U. S. 769 [25 L. Ed. 915], the '*withdrawal would be sufficient to defeat a settlement * * * while the order was in force.*' "

In this connection it might be well to observe that the order remained in force until some congressional action or some other executive action annulled it. No congressional action was ever had in that behalf (Midwest Oil Case, supra), and no executive action, except in so far as the withdrawal order of July, 1910, served to ratify it.

[2] The claim seems to be made, and if I understand the opinion of the land department aright, is given recognition therein, that the scope or comprehensiveness of the withdrawal order of September, 1909, was in some wise affected or enlarged by the so-called Pickett Act, passed June 25, 1910. 36 Stat. 847. The Supreme Court in the Midwest Case, supra, held that there was nothing in that act "indicating the slightest intent to repudiate the withdrawals already made under the executive order of September, 1909." The court also said that:

"The legislative history of the statute shows that there was no such intention and no purpose to make the act retroactive or to disaffirm what the agent in charge had already done."

It would seem to me that since the act in question was passed some months after the promulgation of the executive order, and it having been held by the Supreme Court not to have been in any degree an impairment of that order, the conclusion ought to follow that the act in no wise or at all affects the scope or purpose of the order. If it have any effect at all, however, it is, in my judgment, in support of the conclusions hereinabove announced by me with respect to the general effect of the withdrawal order. This follows because by the terms of the act itself it is provided that:

"The rights of any person who at the date of any order of withdrawal heretofore * * * 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, *so long as such occupant or claimant shall continue in diligent prosecution of said work.*" (Italics mine.)

If this provision amounts to anything at all, it is tantamount to a declaration on the part of Congress itself to the effect that one who would claim the benefit of a location initiated previous to the promulgation of the withdrawal order, but not followed by a discovery until after the order, must have been, at the date of the withdrawal order, in diligent prosecution of work leading to a discovery of oil, and must have continued in such diligent prosecution until a discovery was effectuated.

[3] If I am correct in my views of the law as hereinabove declared, the claims of the defendants in the Kinsey and Midland Oilfields Company Cases, having been initiated subsequent to the promulgation of the withdrawal order of 1909, have no force or validity as against the holder

of the paramount title, the government, and defendants' intrusion into, and trespass upon, the lands covered by such claims, stand without warrant; in consequence their further waste thereof should be enjoined, and the operation of the oil properties thereon should be committed to the hands of a receiver of this court pending a final judgment quieting complainant's title thereto.

With respect to the questions involved in the McCutchen Case I find much greater difficulty in arriving at a conclusion satisfactory to myself. I am persuaded that if, under the law as stated, the Obispo Company had not a "valid" location at the date of the withdrawal order of 1909, then the subsequent efforts of their successors and assignees could not and should not be permitted to create a title to, or valid claim upon, withdrawn land. The real difficulty in the case, in this behalf, centers around a determination of the question as to whether or not the Obispo Company was "with due diligence" prosecuting its work toward a discovery of oil on its placer claim at the time of the promulgation of the withdrawal order. The land department, in the opinion hereinbefore referred to, has held that it was not prosecuting its work with due diligence at that time, and that in consequence its claim was not valid. This conclusion of that department, confessedly, is not binding upon the court, and perhaps it ought not to be at all persuasive with it. After a very careful consideration of the facts, however, as adduced from the record, and as admitted by counsel, and indicated hereinabove, I can come to no other conclusion than that the Obispo Oil Company was not prosecuting its work towards a discovery of oil with due, or even any, diligence at the time of the withdrawal of its land.

Recurring to the facts in the case, it will be remembered that the company, because of a visit of its stockholders to the ground, and *because all of its available funds were exhausted,* discontinued and actually ceased work looking to a discovery of oil on or before the 5th day of August, 1909, almost 60 days previous to the promulgation of the withdrawal order. It thereupon secured an extension of time under its contract with the original locators of the land, within which it might delay a resumption of operations. This extension of time lasted until November 5, 1909, but nothing was done on the property at that time, nor until more than three months thereafter. It further appears that the committee of stockholders discharged the employés and left the property in charge of a keeper under salary for a very short time. Thereafter a man, working on an adjoining piece of property, at the instigation of the Obispo Company, moved onto the property and lived there, rent free, "*simply to hold it for the Obispo Company.*" Upon this state of facts it would seem to me as if the court, upon the trial, would be compelled, indubitably, to indulge in the conclusion as a matter of law that no due diligence looking to a discovery of oil upon the property was evident, either at the date of the withdrawal order or for some months subsequent thereto. McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147; Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417; Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550.

The point is made and urged with much force that it should not be held that the Obispo Company was lacking in diligence at the date of the withdrawal order, because they had theretofore expended a sum of approximately $20,000 in an endeavor to make a discovery of oil on the lands in question, and it is apparently insisted that that expenditure in itself is amply sufficient to refute the claim of a want of diligence. It should be remembered, however, with respect to this, that under the facts shown all efforts made by the Obispo Company in connection with the expenditure mentioned were fruitless, and the wells attempted to be sunk through such expenditure have actually, ever since on or about the 5th day of August, 1909, been abandoned, and if the defendants were given a clear title to all the land in question at this time, the expenditures made and relied upon herein by the Obispo Company would still constitute a false factor in their claim of title, because no muniment thereof would rest upon such expenditures. In other words, no discovery of oil at any time upon the premises in controversy in the McCutchen Case was made through, or by means of, or at a place developed by, the moneys laid out by the Obispo Company. When the Pacific Midway Oil Company, in the latter part of February, 1910, took over the rights of the Obispo Company and entered upon its property, it examined the wells theretofore sought to be sunk to the oil sands by the Obispo Company, but found them upon such examination wholly unserviceable, and actually sunk the wells which resulted in the discovery of oil at a different place. In this wise it may be said, as I view the situation, that the expenditures of the Obispo Company as heretofore indicated contributed in no degree or respect to the discovery of oil, and should not now be held as evidence of due diligence at the time of the promulgation of the withdrawal order.

In somewhat similar vein it is also urged that it would be highly inequitable now for the government to retake the title, so to speak, of these lands, after the defendant companies have gone upon them and made the expenditures of hundreds of thousands of dollars in the prosecution of work leading to a discovery and extraction of oil shown here by the facts. The simple and sufficient answer, however, to this contention, is that all of these defendants went upon these lands at a time when they knew that they had been withdrawn from entry and settlement by order of the President of the United States. If they relied upon a claim initiated previously to such withdrawal, it was their bounden duty, under the circumstances, to investigate and consider whether or not such claim was "valid," and therefore within the protective provisions of the executive order. What they did, then, in that state of the case, and in disregard of their duty to investigate, they must be held, and held rightly, to have done at their own risk. That they misconceived the law, and determined in their own minds that the withdrawal order of 1909 was invalid, does not suffice, in the judgment of this court, to secure for them any rights because of the expenditure made under such misconception. The government of the United States did nothing to lead them to believe that the withdrawal order was invalid, and to hold that a party may deliberately refuse to recognize a valid executive order, and thereby and because of such refusal profit himself, is to put at once a premium upon disregard of law and constituted authority, and make it the rightful privilege of every one to misconceive and disregard the law, if in so doing he will thereby advantage himself. I cannot believe such to be a safe or salutary rule, and in consequence feel that there are no equities of any sort or nature inuring to the benefit of those who now claim rights in these public lands merely because of their disregard of the presidential order of withdrawal thereof, and because of their financial ability and willingness thereafter to prosecute to a successful conclusion a discovery of minerals thereon.

The contention is urged in the McCutchen Case that a receiver should not at this time be appointed because of the fact that Judge Dooling has heretofore refused to make such appointment, and the claim is made that there is no change in the situation now from what it was at the time of the action of Judge Dooling. Waiving all other considerations, however, it may be said that the last premise is not well taken. There are two changes in respect of the situation, differentiating it from that contemplated by Judge Dooling. In the first place, the withdrawal order which Judge Dooling held to be invalid has since been declared entirely valid by the highest court in the land. In the second place, and of more than slight importance, in my judgment, the land department of the government, for reasons entirely satisfactory to itself, no doubt, has refused to grant a patent to the defendants to the precise lands in dispute. While this fact alone would not, in my judgment, authorize or justify the appointment of a receiver by this court at this time, nevertheless it may be taken into account in determining whether or not, in view of the changed situation, plaintiff may not be entitled to renew his application.

[4] The point is also made that the government, being out of possession, is not entitled to a receivership in advance of a judgment in its favor in an action at law, awarding to it the possession of the various premises in controversy. Owing to the rapidity, however, with which the very substance of plaintiff's property is being wrongfully, as I view it, depleted, it is obvious that to deny plaintiff the provisional relief it seeks of this court at this time, until it should, perchance, have been victorious in an action at law, would be most successfully to deprive it of all the substantial fruits of the victory which that selfsame action at law would secure. If plaintiff is possessed of any rights in and to these properties, it is entitled to assert them now, because, in view of the continuous extraction of oil—the only valuable element of the properties—the mere lapse of time in itself would suffice to deprive plaintiff of its valuable and most substantial rights in their entirety. As is said in 34 Cyc. p. 17, the appointment of a receiver is made by a court of equity, in the performance of one of its prerogative functions, in order to enable the court to accomplish, as far as practicable, complete justice between the parties.

Assuming, as I am led to assume, the ownership of and right to the products of the lands in controversy herein by the government of the United States, there would seem to be no doubt, in order, under the circumstances, that complete justice may be done as between the government on the one hand and the defendants on the other, that receivers should be appointed, and injunctions in restraint of waste should be awarded, as the same have been prayed for.

Appropriate orders, embodying these conclusions, will be drafted by the government's counsel.

THE HUMAROCK.

(District Court, S. D. Georgia. May 13, 1916.)

1. SALVAGE ⟹36—CONTRACT FOR SALVAGE SERVICE—VALIDITY.

A contract between the master and part owner of a schooner, which had been rescued from a stranding and brought into port in a leaking condition, and the salvor, for the services of a tug at $10 per hour to stand by and pump until the schooner was unloaded, which service continued for 6½ days, where the contract was not made under duress, but in a port where the master could have obtained other assistance, *held* not so unreasonable as to justify its being held invalid; the value of the tug being $30,000, and the cost of its operation during the pumping $100 or more per day. Such contract, however, *held* not binding on the cargo owner, who was accessible, but was not consulted.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 85–91; Dec. Dig. ⟹36.]

2. SALVAGE ⟹30—AMOUNT OF COMPENSATION—RESCUE OF STRANDED VESSEL.

The services rendered by the salvor prior to the making of the pumping contract consisted in pulling the schooner from a quicksand reef near the mouth of Savannah river, on which she was stranded and in serious danger, and bringing her into port. In this service two tugs, worth $60,000, were employed for 4 hours, during which it was also necessary to keep her pumped to prevent sinking. Both vessel and cargo were saved without loss; but the service was not dangerous. *Held*, that the salvor was entitled, in addition to the contract price for pumping, to an award of 10 per cent. of the net price realized from the sale of vessel and cargo.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 72–74; Dec. Dig. ⟹30.]

3. SHIPPING ⟹133—INJURY TO CARGO—LIEN.

The owner of a cargo has a maritime lien on the ship for any damages sustained by the cargo, after it is delivered on board, through the fault of the vessel or master.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 488; Dec. Dig. ⟹133.]

4. SHIPPING ⟹137—LIABILITY FOR INJURY TO CARGO—HARTER ACT.

Under Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031), which provides that, if the owner has exercised due diligence to make a vessel seaworthy, and properly manned, equipped, and supplied, neither the vessel nor owner shall be liable for damage to the cargo resulting from faults or errors in navigation or in the management of the vessel, where a vessel was stranded through an error in navigation, evidence that the master had been in charge of vessels making the same port for 10 years, and was familiar with the waters, and could go in or out over the bar in daytime, is sufficient to show his competency prima facie, and to exempt the general owners and vessel, where she was otherwise seaworthy and properly manned, equipped, and supplied, from liability for damage to the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟹137.]

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

5. SHIPPING ⟹136—LIABILITY FOR INJURY TO CARGO—HARTER ACT.

Where, in such case, however, the master, through whose negligence or error the stranding occurred, was a part owner of the vessel, the Harter Act does not exempt his interest from liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟹136.]

In Admiralty. Suit for salvage by the Propeller Towboat Company against the schooner Humarock, with intervening libel by the Hirsch Lumber Company, owner of the cargo, against the Humarock. Decree for libelant, and in part for intervening libelant.

The Humarock, a three-masted schooner of 500 tons burden, left Savannah about 11 o'clock a. m. on Friday, April 16, 1915, loaded with a cargo of over 327,000 feet of yellow pine lumber, alleged to be of the value of $5,000, shipped by the Hirsch Lumber Company, and consigned to the same company at New York. The schooner was towed down the Savannah river by the tugboat Cynthia No. 2, belonging to the Propeller Towboat Company of Savannah, Ga., the schooner having on board a licensed pilot; and when it reached a point in Tybee Roads, near the mouth of the Savannah river and nearly opposite the Tybee Light, its master, Capt. Foxwell, brought it to anchor, because he did not want to proceed to sea on his trip to New York against the adverse wind which was then prevailing. The tugboat was discharged when the schooner cast anchor, and it was the intention of the master to proceed to sea on the next morning if the wind was favorable. As to what happened between the master of the schooner and the pilot when the schooner was anchored there is some conflict of evidence. The pilot, Daniels, testified that the master of the schooner bade him and the master of the tugboat good-bye, and wished the captain a pleasant voyage; that the schooner was anchored in a safe place, and a place where ships are customarily anchored, in plenty of water; that the master was to put up a signal the next morning, the letter P, if he wanted a pilot, but that the next morning he looked and did not see such a signal; that he gave Capt. Foxwell particular directions as to how to steer the schooner out to sea, and that Capt. Foxwell replied, "Daniels, I know the way out as well as you do;" that the master said if the weather was favorable he would go out to sea the next morning without a pilot, and that he would put up the flag if he needed a pilot; that frequently vessels went in and out from Tybee without the assistance of a pilot; that he (the pilot) on the next morning was on the pilot boat, which was anchored at the bar about six miles away from the schooner, and could see the hull of the schooner and its sails but could not see any flag; and it was the pilot's opinion that no flag was put up. The pilot denied that he told the master to get his vessel under way the next morning and to proceed down the river, and that as soon as he, the pilot, saw the sails he would come to the schooner.

The master testified that the pilot, before leaving the schooner, after it was anchored, said to him: "If the wind and weather are favorable to-morrow morning, and you decide to go to sea, it will be high water at 8 or 8:30. Get your sails up, and start the schooner along down by the row of black buoys, keeping them on your starboard side, and I will meet you when I see your sails up." The master replied: "Pilot, don't forget what you are talking about, because I am not too well acquainted here; be sure and meet me over at that buoy." The pilot replied: "Don't worry about that; we will meet you if the weather is right; we will take you out to sea clear of the sea buoy." To which the master replied, "All right." The master further testified that the next morning he broke anchor at about 8:30, and before getting under way he hoisted "the American," the flag signal for the pilot, at the foretop masthead, and that as the weather was good and the wind had changed, and was from the west-southwest, he proceeded on down the river by the buoys, and that when the schooner got to the second black buoy it began to get calm, and then the wind gave out entirely. He thereupon at about 9:30 or 10 o'clock anchored, and lay in that position about three-

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

quarters of an hour, when he felt the vessel touch the bottom, and soon after that the vessel was stranded on ebbing tide. He then put up the American ensign upside down as a signal of distress, and sent his mate and three men in the schooner's boat out for assistance. This boat went towards the pilot boat, which was anchored off the bar towards the ocean. In going out to the pilot boat, the schooner's boat met the tug Jacob Paulsen, which belonged to the Propeller Towboat Company, and thereupon the tugboat went to the assistance of the stranded schooner, reaching the schooner about 1:30 p. m. April 17th.

The schooner was stranded on what was known as "North Breaker," which lies to the northeast of the main channel of the Savannah river at a point about midway between the buoys known as C-9 and C-7, and which point is known by the pilots of the Savannah harbor as the "Eleven-Foot Lump," about 2½ miles from the point where the schooner was anchored the afternoon before. The schooner drew 16 feet of water, and the breaker at low water is only 10 to 13 feet. The evidence discloses that this North Breaker is a dangerous and exposed shoal, being composed of sand of the same quality as that at Bloody Point, Gaskins Bank, and other shoals in the vicinity of Savannah, which shoals are of a quicksand quality, and the tendency of vessels which are stranded on the same is to continue to sink lower and lower until they sink out of sight.

When the tugboat Paulsen found the schooner, there was a considerable swell running on the bank, and the schooner was pounding heavily, and a part of her keel was floating in the water, and the point of the anchor had broken a hole into the bottom of the vessel, and it was filling rapidly. The garboard strake, which runs along the ship, was also open, and the water streamed into the vessel through this also. The surface of North Breaker at this place is very uneven, irregular, and lumpy. The schooner was in a perilous position, and would undoubtedly have pounded to pieces and sunk without assistance. It could not have gotton off without assistance. The master had put all of his personal effects in a small boat. The schooner, besides being loaded with a cargo of lumber, had 100 tons of copper ore as ballast. According to the evidence it is clear that her position was one of great peril, and that in a short time she would have gone to pieces, if assistance had not arrived in the nick of time.

The tugboat Paulsen devoted about two hours pulling on the schooner in an effort to get her off the breaker, and the schooner's hawser parted two or three times during the pulling. As the tug did not seem to be making any headway in extricating the schooner from its dangerous position, the captain of the tug went to Tybee and telephoned to the Propeller Towboat Company's office in Savannah, asking for assistance. He then returned to the schooner, reaching her about 4 o'clock p. m., and began pulling on her again, and finally succeeded in getting her off into deep water. The tugboat Cynthia No. 2, which had been cruising out in the ocean, came by at that time, and as the schooner was rapidly filling with water, having about 8 feet of water in her hold, the master of the schooner requested the tugboat Cynthia to pump the water out of the schooner with her wrecking pumps. Thereupon the Cynthia was lashed to the side of the schooner and her pumps put to work. The tugboat Paulsen then towed the schooner up the Savannah river, and she was docked at the Municipal Dock about 8 o'clock at night. In response to the telephone message sent by the captain of the Paulsen to the Propeller Towboat Company, Capt. Van B. Avery, the general manager of the Propeller Towboat Company, hastened down the Savannah river in the tug Cambria, and met the other two tugs and the schooner coming up the river about the Quarantine Station. Thereupon Capt. Avery went on board the schooner, and advised with the captain of the schooner as to what was the best disposition to be made of the schooner. The master inquired as to the advisability of putting the schooner on the mud flats in the Savannah river, but Capt. Avery said this would be throwing her and the cargo away, and it was upon his advice that she was anchored at the Municipal Dock in Savannah. There were about 7 or 8 feet of water in the schooner, and she was filling rapidly all the time, at the rate of 6 feet per hour. Therefore Capt. Avery ordered the tug Cynthia to continue pumping the schooner during Saturday evening and that night. Capt. Avery advised the master of the schooner to get in communication with the owners of the cargo, and he called up Mr. A. L. Farie, who was the representative of certain underwriters in Savannah, and Capt. Foxwell talked with him over the phone, and it was agreed that the proper thing to do was to keep her pumped out that night. Capt. Avery was asked what it would cost for pumping, and he told them his charge would be $20 an hour. The next morning Capt. Avery came down, and he, Capt. Foxwell. and Mr. Farie discussed the matter of pumping, and Capt. Avery thereupon agreed to reduce the charge to $10 an hour on account of the length of time it would take; the same to be continued until the schooner's pumps were able to keep the water down. This pumping was continued for 6½ days, or 156 hours.

The Propeller Towboat Company thereafter libeled the schooner Humarock and its cargo for salvage for its services in rescuing it from North Breaker, and keeping it afloat at the Municipal Dock by pumping the water out, as above stated. The Hirsch Lumber Company also libeled the schooner for damages sustained by it to its cargo of lumber and for any salvage that might be awarded against the cargo in the case, claiming that the master of the schooner was incompetent, and that the ship owners were negligent in the matter of the stranding. Various intervening libels were also filed in behalf of supply men and others who furnished materials and made advances to the Humarock. Neither the charter party nor bill of lading contained any general average agreement or any limitation affecting the liability of the vessel.

Capt. Foxwell, the master of the Humarock, was the owner of $^{24}/_{64}$, or ⅜, interest in the Humarock. He filed his claim to the same, and claims were also filed by the owners of the remaining interests. The holder of a mortgage for $600 on Capt. Foxwell's interest in the schooner also intervened. Under an order of the court the schooner and the cargo were duly sold at public outcry by the United States marshal. The schooner and appurtenances brought $4,401, and the cargo of lumber $2,128.15. The cost bill of the marshal for expenses of caring for the schooner, making the sale, etc., including $52 extra compensation for him for the 26 days he had it in charge, amounted to $520.08, and the bill of the Paulsen Company for discharging the cargo was $522.30.

Capt. Foxwell also filed an intervention for $415.15 for pilotage fees, towage fees, harbor master's fee, and for loading the cargo, which he claimed should be paid before any other interventions, except the salvage claim, and also an intervention for $16.86 for certain ship's expenses.

By an order of the court all the libels and interventions were consolidated, and the matter was duly heard by the court, and argument had for all parties and interests.

A. Minis, of Savannah, Ga., for Propeller Towboat Co.

Huger, Wilbur & Guerard, of Charleston, S. C., for owner of cargo.

Lawton & Cunningham, of Savannah, Ga., for owners of five-eighths interest in the Humarock.

W. R. Hewlett, of Savannah, Ga., for master and owner of three-eighths interest in the Humarock.

LAMBDIN, District Judge (after stating the facts as above). The court finds that the facts in the case are as set out in the foregoing statement which was prepared by it.

1. The first question is as to the amount that should be awarded as salvage to the Propeller Towboat Company for the services of its tugboat Paulsen and crew in rescuing the schooner from its perilous position on the North Breaker, and towing it to the Municipal Dock in Savannah, and for the services of its tugboat Cynthia in pumping the water out of the schooner up to the time it was anchored at the Municipal Dock, and also for the continuous services of its tugboat

McCauley, which lay by the schooner and continued to pump water out of its hold for 6½ days, or 156 hours, night and day.

[1] The cargo owners and the ship owners contend that the alleged contract for pumping at the rate of $10 per hour was not established, and further that it was exorbitant, excessive, and inequitable, and made after the services were begun and while the schooner was in the possession of the libelant, and was therefore made under circumstances which rendered the contract null and void. Capt. Foxwell, the master of the schooner, in his answer denied that such a contract was made, but, when placed on the stand as a witness in the trial of the case, stated that this denial in his answer was a mistake, and admitted that he did make the contract with Capt. Avery, the manager of the Propeller Towboat Company, for pumping the schooner Humarock, at the rate of $10 per hour. It is evident that he deceived his counsel in the preparation of his answer on this point. Capt. Avery testifies positively to the making of such a contract, stating that the contract was first made at $20 an hour, and that afterwards, realizing that several days would be consumed in pumping the schooner and thus keeping it afloat, he reduced the price to $10 an hour, which was agreed to by Capt. Foxwell. Mr. Farie, who represented certain underwriters in Savannah, was present during a portion of this conversation, and while he denied that he represented the cargo at the time, or had any authority to bind the cargo owner, he admitted hearing Capt. Avery state to Mr. Foxwell that the price would be $10 per hour. The court is of the opinion that the contract was sufficiently established.

The next question is whether this contract was made under such circumstances as would render it null and void. This pumping was carried on night and day, and the water rose in the schooner at the rate of a foot for every 10 minutes, or 6 feet per hour. It was absolutely essential that this pumping should be continuous until the water in the hold was controlled, and it was not under control until after the expiration of 6½ days from the time the pumping began. Capt. Avery's statement was that $25 per hour for a short time was reasonable, that $20 per hour was his regular price, and that he reduced the price to $10 per hour on account of the time it was supposed the pumping would be continued. It is true that for some portions of the time the pumps were only pumping at half speed, but this was owing to the fact that sometimes the water would be reduced so low that the pumps would not reach it; but the tug had to lie by the schooner continuously, and its pumps were practically in continuous operation. According to the evidence, taking into consideration the wages and expenses of the crew of the tug, and also the cost of the coal consumed, it appears that the cost of operating the tug and its pumps for a day of 12 hours was about $50. When we consider the wear and tear and depreciation of the tug and its machinery, as well as the interest on the investment (the tug was worth $30,000), and the fact that the pumps were operated 24 hours a day, and therefore a double shift of men was required, and all the other elements which enter into such matters, it is quite probable that the expense of operating the tug's pumps for a continuous day of 24 hours would probably amount to $100 or more. It is reasonable that the libelant would also expect a fair profit on this expense. The contract price was $10 an hour, or $240 per day. The court is of the opinion that this contract price, while reasonable for an operation continuing over a period of a day or two, is rather high for a period of 6½ days.

However, the court is of the opinion that the price is not so unreasonable as of itself to vitiate the contract, if it is otherwise valid. The contract was not made out at sea, under circumstances of danger or duress. It was made in the city of Savannah, where the services of others might have been secured, and after full time for deliberation. Mr. Farie, the insurance agent, who appeared to have had some interest in the matter, and who was called into consultation, although disclaiming having authority to represent the cargo or any one else in the transaction, did not object to the price. Capt. Foxwell was a part owner, and the other owners were in Philadelphia. He testified that he was at liberty, so far as Avery was concerned, to call any one else to do the pumping, and that Capt. Avery did not try to coerce him, and that the contract was entirely voluntary on his part, and that he made it as a business proposition, because he thought it best for the ship. He considered himself free to employ any one else. He testified that he was a $^{24}/_{64}$ owner of the vessel, and he thought, if he could get the vessel pumped and unloaded, that the price would not be too much, and he thought that the pumping might continue for a week. It is true that under cross-examination Capt. Foxwell said that he understood that the schooner was in the possession of Capt. Avery, and that he did not feel as a free man to make a contract with him after he pulled the schooner up the river. Yet he testified that he did not understand that Capt. Avery might object to his employing some one else, and said that he considered the price reasonable, and he repeated several times that he considered himself free to employ any one else if he chose.

Taking all of the evidence as a whole, and taking into consideration the fact that the contract was entered into openly, after full deliberation and consideration, and was made in the city of Savannah, where prices could have been obtained from other people, and both parties had equal means of knowledge, and where the parties at interest could have put an end to the contract promptly if they were dissatisfied with it, and considering, also, the apparent fairness of Capt. Avery, who advised Foxwell to consult with the owners of the cargo before making the contract, the court is of the opinion that no advantage was taken by the libelant or its manager, Capt. Avery, and that the contract was free from fraud, duress, compulsion, or other circumstances which would render the same null and void in law or equity. I therefore think that the same should stand. Capt. Foxwell seems to have been perfectly willing to make the contract, and neither he nor Mr. Farie demurred to same. Had the same not been considered reasonable, Capt. Foxwell should have made an effort to procure some one else, and if he had gotten a better bid no doubt Capt. Avery would have allowed the other person to have done the pumping. In view of the circumstances existing at the time, it seemed then to be fair and reasonable, and the fact that it may afterwards have turned out to be a very profitable contract (if, indeed, such was the case) is no reason to set the same aside. An interesting pumping contract case, showing cost of pumping and price charged for same, is that of The Tornado, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874.

Although it was formerly held that contracts for salvage are always subject to be revised in the discretion of the admiralty court, the Supreme Court of the United States, in the leading case of The Elfrida, held that such contracts will not be set aside simply because the compensation is excessive, and that they, like other contracts, will be upheld when entered into fairly by the parties, with full knowledge of all the facts, without fraud, compulsion, or duress, and that while it is not necessary, in order to impugn a salvage contract, to show such duress as would require a court of law to set aside an ordinary contract, yet "where no circumstances exist which would amount to a moral compulsion, the contract will not be held bad simply because the price agreed to be paid has turned out to be much greater than the services were actually worth." The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413; Benedict on Admiralty (4th Ed.) § 226; The Thornley (C. C. A. 5th Circuit) 98 Fed. 735, 741, 39 C. C. A. 248; The Stanley H. Miner (D. C.) 172 Fed. 486; The Myrtle Tunnel (D. C.) 146 Fed. 324.

The court is therefore of the opinion that the contract is valid, and should stand, as between the ship owner and the libelant, the salvor, and also, as explained below, as between the cargo owner and the salvor.

[2] The next question would be as to what would be the compensation of the libelant for rescuing the schooner from the North Breaker, and for the services of pumping the water out of its hold, and towing it to the Municipal Dock in Savannah. There was no contract for these services. The court is of the opinion that the services thus rendered were not of a very high order of merit. Still the schooner was in a perilous position, and under the evidence would have certainly gone to pieces, and it and its cargo would have been a total loss, had it not been for the services of the libelant. These services were rendered promptly, skillfully, and efficiently. As stated by one of the witnesses, "The tug arrived just in time to save the schooner's 'bacon.'" The sands of the breaker in question are of the quicksand variety, and, under decisions rendered in similar admiralty cases occurring along the South Atlantic coast, these quicksands have been judicially declared to be very dangerous. The Agnes I. Grace (D. C.) 49 Fed. 662; The Sandringham (D. C.) 10 Fed. 562; The Egypt (D. C.) 17 Fed. 360; The Mary E. Dana (D. C.) 17 Fed. 353; The Alamo, 75 Fed. 602 and page 607, 21 C. C. A. 451; The Craster Hall (D. C.) 203 Fed. 188; Id. (C. C. A. 5th Circuit) 213 Fed. 426, 130 C. C. A. 72. There was, however, no danger to life, either to the crews of the schooner or of the tugs engaged in the operation. The time consumed in the operation of extricating the schooner from its perilous situation was only four hours, yet the shortness of this time is to the credit of

the salvors. The value of the two tugs engaged in the operation was about $60,000. They saved the schooner and its cargo, without the loss of any part of the ship or the lumber.

There were two stages in the salving operations. The first was in pulling the schooner off the breaker and getting it into a port of safety; and the second was in keeping it afloat by pumping the water, which was rapidly flowing into it through the hole made by its anchor and through the open seam. The first stage of the operation was not covered by a contract; the last was covered by a contract. We see no reason in law or equity why a contract should not be made as to a portion of the operations. A contract is often made after operations have begun, as was done in the case of The Thornley, cited above. Especially can this be done when a portion of the operation is to move along certain definite lines, as in the case of pumping. Therefore the court is of the opinion that the contract should not fall on account of the fact that it was entered into after the vessel had been partially saved. However, it is proper to look at the transaction in its entirety as one whole, so that the total amount of salvage awarded will not be disproportionate on the one hand, and so that it will adequately compensate the salvors on the other. Taking into consideration the fact that the libelant probably made a very profitable contract for keeping the vessel pumped out, the court is of the opinion that the same may be considered as a circumstance in making the award for the first part of the salving operations. Such being the case, the court is of the opinion that 10 per cent. of the value of the vessel and cargo saved would, in view of the amount of the award for the pumping operations, be proper and reasonable.

The ship brought at the sale $4,401, and the cargo of lumber $2,-128.15, making a total of $6,529.15. From this should be deducted the marshal's expenses for protecting and selling the property, $520.08, and the expenses of discharging the schooner, $522.30, making a total of $1,042.38, which leaves a balance of $5,486.77, on which salvage is to be calculated. Ten per cent. of this amount is $548.68, which the court hereby awards for the first stage of the salvage operation above mentioned, which, added to the $1,560 on the pumping contract, makes $2,108.68, which is hereby awarded as salvage to the libelants in this case.

2. While the pumping contract is, in the opinion of the court, binding between the salvor and the ship owner, yet the court is of the opinion that this contract is not binding as a contract so far as the cargo owner is concerned. Such contracts are upheld as affecting the rights of cargo owners entirely on the ground of necessity. In this case, however, the master knew who the cargo owner was. He knew the agent of this cargo owner in Savannah. He could have consulted this agent. There was no necessity, therefore, for him to make a contract without the consent of the agent, and consequently the contract, so far as the cargo owner is concerned, must fall. In volume 26 of the Laws of England, by the Earl of Halsbury, published in 1914 by Butterworth & Co., London, on page 573, the rule is laid down in the following language:

"The owner of the cargo on board the salved vessel is not bound by a salvage agreement made by the master, and it is open to him to dispute the reasonableness of the reward fixed by it."

Mr. Congdon, in his treatise on General Average, bottom of page 97 and top of page 98, lays down the rule as follows:

"The ship owner may, in some cases, by reason of a contract or otherwise, be primarily liable as between him and the salvor for the whole amount agreed upon for the latter's services to the vessel and cargo, but as neither he nor the master can bind the owners of the cargo by any contract with a salvor, the whole amount is chargeable to general average only when it can be shown that it was a reasonable one for the services rendered for the common benefit of the vessel and cargo."

The court is of the opinion, that in the light of subsequent events the contract turned out to be rather high, and yet for reasons stated above, it should be sustained as between the ship owner and the salvor, because it was made between the salvor and the ship owner fairly and after full opportunity for consideration and deliberation. However, the cargo owner is not bound by this contract because, as stated above, it could only be bound in cases of emergency or necessity where it could not be consulted, which was not the case here. Astsrup v. Lewy (D. C.) 19 Fed. 536, 541. However, it is the view of the court, as above expressed, that the services rendered by the libelant should be considered in their entirety, beginning at the time the schooner was found in distress, and ending when the pumping operations ceased. The court is of the opinion that if the operations had stopped at the end of the first day, and if the schooner had then proceeded on its voyage without having to be pumped for 6½ days in the port of Savannah, the libelant should have been awarded 25 per cent. as salvage. It has reduced the salvage award on account of the profitable nature of the pumping contract afterwards entered into. If the cargo owner is allowed to go behind this contract, and have it reduced, then, inasmuch as the pumping contract was considered by the court and given effect in reducing the award for the first stage of the salving operations, the cargo owner should have to pay its proportion of the full value of the first stage of the salving operations, which the court thinks, considered alone, would be reasonably worth 25 per cent. of the property saved. What the cargo owner would gain in one case it would lose in the other, and in the end it would be put on an equality with the ship owner. Such being the case, the court is of the opinion that the cargo owner should stand its proportion of the entire salvage award made above, to wit, its proportion of the sum of $2,108.68.

3. The libel in this case was against the schooner, its tackle, apparel, and appurtenances, and also against the cargo, and under it the ship and cargo were duly seized by the marshal. Thereafter the Hirsch Lumber Company, the owner and claimant of the cargo duly filed its petition and intervening libel against the schooner, claiming damages against it for any salvage or expenses that might be awarded against the cargo upon the libel in favor of the salvor, and also for damages to the cargo of lumber on account of the stranding of the schooner,

alleging that the owners of the schooner were at fault and the master incompetent, and that the stranding was due to the same, and praying that process issue against the schooner, its tackle, apparel, and furniture, and that all persons claiming any interest therein should be cited to appear and answer its petition, and that the schooner should be condemned and sold to pay the damages sustained by the cargo, and also praying for general relief.

The claimants and owners of the vessel contend that the cargo owner has no rights under its said intervening libel, for two reasons: (1) Because, as contended by them, the cargo owner is limited in this case to a proceeding in rem and cannot proceed against the owners in personam; and (2) because, as contended by them, the ship owners are protected by the provisions of Act Feb. 13, 1893, c. 105, known as the "Harter Act" (U. S. Comp. Stat. 1901, p. 2946).

[3] (a) In their brief counsel for the owners of the vessel say that the petitions which the cargo owner filed are in terms proceedings in rem against the Humarock, and are not proceedings in personam against the vessel owners. They contend that the intervener must necessarily proceed under the thirty-fourth and forty-third rules in admiralty; that the court has a fund to administer, and that it can distribute the fund only among those persons who have vested liens in the same; that the claim of the cargo owner is one in personam, and that, therefore, the court cannot consider in this case such personal claim which the cargo owner may have against the ship owner in his individual capacity.

It is the opinion of the court that the cargo owner is rectus in curia. Under the well-settled principles of the admiralty law it has a maritime lien on the vessel for any damages sustained to the cargo after the same was delivered in the vessel. As stated by Mr. Justice Davis, in The Keokuk, 9 Wall. 517, at page 519, 19 L. Ed. 744:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master."

The second headnote in The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772, is in the following language:

"The owner of the cargo has a lien by the maritime law upon the ship for the safe custody, due transport, and right delivery of the same."

See, also, The Belfast, 7 Wall. 624, at page 642, 19 L. Ed. 266; The John G. Stevens, 170 U. S. 113, at pages 122, 123, 18 Sup. Ct. 544, 42 L. Ed. 969; The Queen of the Pacific (D. C.) 61 Fed. 213, at page 215; 36 Cyc. 263, 264, 277; 26 Cyc. 752.

[4] (b) The ship owner claimed immunity under section 3 of the Harter Act, mentioned above, which is in the following language:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from the faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Before the passage of this act, the vessel owner as a common carrier was liable to the cargo owner for all damages to the cargo, except those caused by the act of God, the public enemy, or from the inherent qualities of the cargo itself. The Harter Act was passed in order to modify this stringent rule of liability, and to encourage shipping in the United States. Under its terms, above quoted, neither the vessel nor its owner can be held "responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel," provided such owner shall exercise due diligence "to make the vessel in all respects seaworthy and properly manned, equipped, and supplied." As stated by Mr. Benedict, in his treatise on Admiralty (4th Ed. § 229):

"This section of the act is intended to relieve the ship owner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipmen after the ship has gone below the horizon and away from his personal observation."

In other words, after the ship owner has exercised due diligence in providing a seaworthy vessel, properly equipped, manned, and supplied, and starting it out on a voyage, he is not liable for damages resulting from the negligence of his agents and employés in charge of the vessel; he is only liable for his own personal negligence or fault, and the negligence of his agents and employés cannot be imputed to him. As stated by the court in the case of Great Lake Towing Company v. Mills Transportation Company, 155 Fed. at page 16, 83 C. C. A. at page 612, 22 L. R. A. (N. S.) 769:

"The purpose of Congress was, as we think, to relieve the ship owner from the consequences of those extraordinary risks which were imposed without limitation by the law of admiralty as that law had been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by, those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contract; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a ship owner and had been imputed to him because of his relation to the ship, and not those liabilities, whether for torts or from contracts, which spring from his own personal conduct or stipulations."

It is necessary, therefore, to determine whether the ship owner in this case exercised due diligence in the particulars required of him by the third section of this act. The evidence on this question in the record is somewhat meager, and no direct issue seems to have been made on this point in the trial of the case.

Capt. Foxwell, the master of the schooner, testified that the vessel was a good vessel, a strong vessel, and fit to go anywhere. He also testified that, when the vessel left Savannah to go on its voyage, it was in "good condition, properly manned and equipped, and everything in good shape." Capt. Foxwell was asked whether he had been in and out of the port before, and he replied that he had been trading to Savannah off and on for 10 years, that he knew the Savannah river, and could go in and out over the bar with wind in the daytime. As shown by the evidence, the Humarock was a small schooner of only 500 tons burden, and Capt. Foxwell was owner to the extent of $^{24}/_{64}$, or $3/8$. As stated above, he had been in and out of the port of Savannah off and on for 10 years, and had been master of the Grace Seymour, another schooner, for 7 years. We think that by this evidence the ship owners have carried the burden of diligence imposed upon them by the act in question, and shifted the burden to the cargo. It is clear from the evidence that the stranding did not occur on account of any lack of seaworthiness, or lack of equipment or supplies, on the part of the vessel. It occurred from an error in navigation, or in the management of the vessel, due, as claimed by the cargo owner, to the negligence of the master. All the other requirements of the statute, therefore, can be eliminated from the determination of the questions here involved, except the requirement that the vessel should be "properly manned."

There is no contention that it was not "properly manned," except as to the master. The direct evidence in the case as above pointed out shows that the vessel was "properly manned." We think this made out a prima facie case of competency on the part of the master, and it then became necessary, if the cargo owner would succeed in its contention, for it to introduce evidence to show to the contrary, which it failed to do. Reference is made in the brief of counsel for the cargo owner to certain evidence which was taken at Philadelphia. This evidence, however, was taken entirely with reference to the claims of certain persons who had furnished materials and supplies to the Humarock, and these witnesses were not examined with reference to the point now in question. None of this evidence sustains the contentions of counsel for the cargo owner, in the opinion of the court.

There is nothing in the way the stranding occurred to show incompetency on the part of the master, or to contradict the prima facie case of competency made out by the evidence above quoted, as was the case in The Cygnet, 126 Fed. 742, 61 C. C. A. 348, referred to in the brief of counsel for the cargo owner, where the court held that the offending vessel was not relieved, because the evidence showed that the negligence of the master caused the collision, and that this negligence was "so gross as to raise so strong a presumption of fact that the master was not competent as practically to throw the burden on the vessel owners to establish that they used due diligence with reference to his selection, whether the statute does or not impose such a burden," and that this presumption was not overcome by the evidence for the vessel owners. In the case at bar, however, the negligence of the master was not gross, and did not in the opinion of the court show any incompetency on his part so as to overcome the general evidence as to his competency referred to above.

Counsel for the cargo owner referred at some length in their brief to the language of the District Court in The Fri, 140 Fed. 123, at pages 124 and 125. In that case the evidence revealed that the master had been a sailor since 1878, taking part in many and varied voyages, and that for 15 years he had been master of sailing vessels. The District

Court held that this was not sufficient evidence to show due diligence on the part of the vessel, nor in the selection of a proper master, but that the ship owner should have introduced further testimony as to his habits, fidelity, caution, diligence, and other qualifications for the performance of his duty. The Court of Appeals of the Second Circuit, however, reversed the District Court below (The Fri, 154 Fed. 333), and at the top of page 336 used the following language:

"It appeared by the proofs, and was undisputed, that the master for over 15 years had navigated ocean vessels as master in many seas. Before he was appointed to the command of the Fri by her owners, he had been in command of another steamship of theirs for over a year, and he had made several voyages in command of the Fri before the voyage upon which the disaster took place. They had had an ample opportunity to estimate his capacity. It would seem to be holding them to an extreme and impracticable rule of diligence to require them to give better proof of his general competency than was actually shown."

The court does not think that the stranding of the vessel shows any incompetency on the part of the master. It shows a mere fault or error in navigation, or in the management of the vessel, from which the owners of the ship are protected by the express language of the section in question. This section was passed by Congress in order to meet just such a case as the one at bar as same appears to the court, and the court is bound to give effect to the same. The court, therefore, holds that the ship owners are protected by the Harter Act against the claim of the cargo owner in this case, except as to the 3/8 interest owned by Capt. Foxwell, the master, as hereafter explained. Hanson et al. v. Haywood Bros. et al., 152 Fed. 401, 81 C. C. A. 527 (C. C. A. 7th Circuit); The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; The Merida, 107 Fed. 146, 46 C. C. A. 208 (C. C. A. 2d Circuit); The Rosedale (D. C.) 88 Fed. 324, at page 328; The Nettie Quill (D. C.) 124 Fed. 667; The Sandfield, 92 Fed. 663, 34 C. C. A. 612.

(c) The court is, however, of the opinion that the stranding of the vessel was negligent—Capt. Foxwell being negligent in the management of the vessel at the time of the stranding. In his testimony Capt. Foxwell stated that he told the pilot not to forget to meet the vessel, because he (Capt. Foxwell) was not too well acquainted with the locality. In the answer which was filed by the vessel owners to the libel, and which was sworn to by Capt. Foxwell, it was denied that Capt. Foxwell told the pilot that he was perfectly familiar with the course, and could go out to sea without any trouble, and it was stated that, on the contrary, the master relied entirely upon the advice of the pilot, and relied upon him to come to him as soon as the sails were raised. The evidence shows that Capt. Foxwell, on the morning in question, raised his sails and began his course down the river towards the sea. He states that he hoisted a signal for the pilot, who was out at the pilot boat at the ocean bar about five miles distant; but the pilot denies he saw the signal. There are two theories in the case—one, that advanced by the pilot, that the master attempted to go to sea without a pilot; the other, as testified by Capt. Foxwell, that after raising his sails and giving the signal for the pilot he began going down the channel in momentary expectation that the pilot would meet him. The pilot does not testify positively that no signal was hoisted for him; he merely testifies negatively that he saw no such signal. If a signal was hoisted for the pilot, and he did not respond, the evidence shows that despite this fact the vessel, under a light breeze, continued its course down the Savannah river towards the sea, a distance of two or three miles, and that the wind then died out, and the current carried the vessel northwardly out of the channel, where Capt. Foxwell anchored it in sufficient water at the time, but in about three-quarters of an hour the ebbing tide left his schooner, which drew 16 feet of water, stranded on the sand bank, which is shown on the government chart, where the water at low tide measured only from 10 to 13 feet. We cannot hold that these facts show any general incompetency on the part of the master, but think that they merely show fault or negligence in the management of the vessel. According to his own statement, although he could go in and out of the Savannah river with proper wind in the daytime, yet on the occasion in question he thought he was not able to do so without a pilot. Notwithstanding this fact, instead of waiting after raising his sails and his signal until the pilot came, he proceeded down the river for two or three miles, and, instead of staying in the channel, anchored upon the North Breaker, where his vessel was stranded. Proper prudence and diligence on his part, in the opinion of the court, required that he should not have attempted to go down the river in this way without a pilot, and that if he hoisted the signal for the pilot, as he claimed, he should have waited for the pilot before proceeding down the river. Several witnesses testified that this showed a lack of due care on his part. It is the conclusion of the court, therefore, that the stranding was brought about by a fault or error in navigation, or in the management of the vessel, on the part of the master.

[5] (d) Under the provisions of the Harter Act, however, since the owners of the ship exercised due diligence in the particulars required by the statute, as set out above, this negligence on the part of the master cannot, in the opinion of the court, be imputed to the other ship owners, as they did not personally participate in the same. As far as the other ship owners are concerned, Capt. Foxwell was as to them only the master of the ship, and only their employé. The court does not think that his negligence can be imputed to them. The court, however, is of the opinion, that as far as his interest is concerned, which is a 3/8 interest, inasmuch as the accident was caused by his negligence, the provisions of the Harter Act do not relieve his interest from liability to the cargo owner. The court is therefore of the opinion that, while the cargo owner cannot in its intervening petition claim damages against the entire ship, or all the interests in the ship, it yet has a maritime lien for its damages against the 3/8 interest owned therein by Capt. Foxwell. The court does not find any direct authority on this precise point, and yet it is of the opinion that the position here taken is in accordance with the principles of equity and the provisions of the act in question.

A question somewhat similar arose under what is known as the Limited Liability Act (Revised Statutes, §§ 4283, 4285 [Comp. St. 1913, §§ 8021, 8023]), in Re Leonard et al. (D. C.) 14 Fed. 53. In that case Judge Brown held that although the master, who was a part owner, was privy to the negligence which caused the loss in that case, the other innocent part owners might have the benefit of the statute. The court is of the opinion that the same principle is applicable to the case at bar. The court is therefore of the opinion that the cargo owner is entitled to a lien against the 3/8 interest in the Humarock owned by Capt. Foxwell, or in the proceeds of the same, for the portion of the salvage award chargeable against it in this case, as well as the portion of the expenses of discharging the cargo chargeable against it, and for any other damages sustained by it, and that this lien or claim is superior to the lien for previous supplies claimed by certain interveners in the case.

It would seem, also, that Capt. Foxwell has no lien for the advances which he made to the ship, as such are matters of accounting between him and the other part owners of the vessel. 26 Cyc. 757. The fund in court should therefore be distributed as follows:

(1) To the payment of all court costs and expenses, including the marshal's extra compensation, except as to the costs and expenses (including costs of taking testimony) of such claims and libels as are held to be of inferior rank, the costs and expenses attending any claim to have the same rank as the claim itself.

(2) To the payment of the Paulsen claim for discharging the vessel's cargo.

(3) To the payment of the salvage award of $2,108.68.

(4) To the payment of the crew's wages.

(5) To the payment out of the 3/8 interest in the fund owned by Capt. Foxwell of the amount of salvage and expenses chargeable to the Hirsch Lumber Company, and the damages to the cargo sustained by it.

(6) The balance of the fund owned by the other vessel owners shall be distributed to the payment of the claims of the other interveners according to their relative rank and priority.

There may be a distinction between the rank of wages of the crew earned prior to the stranding and those earned subsequent to the stranding, and it may be, also, that the claim of the Hirsch Lumber Company is superior to the wages of the crew earned prior to the stranding of the vessel; yet as the amount of the wages is small, and they have already been paid by consent by order of the court, it is not necessary to discuss this question.

A decree may be drawn in accordance with this opinion.

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

(District Court, N. D. New York. August 11, 1916.)

MUNICIPAL CORPORATIONS ⚷808(4)—DEFECTIVE SIDEWALK—LIABILITY OF ADJOINING OWNER—STATUTE.

Under Cortland City Charter, § 80, as amended by Laws N. Y. 1901, c. 196, § 10, providing that the board of public works shall have power to require sidewalks or any part of them to be constructed or repaired by the owners or occupants of abutting lands, and to require it to be done in such manner, at such times, and of such materials as it may direct; and that the owner or occupant of abutting lands shall be liable for "any" injury or damage by reason of omission, failure, or negligence to make or repair the sidewalk, or nonobservance by him of a resolution of such board authorized by such section, the absolute duty of repair is placed on such owner, though he has not been directed by the board to make it; and he is liable directly to a pedestrian injured by a defect negligently left.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1685; Dec. Dig. ⚷808(4).]

At Law. Action by Robert H. Madden against the Delaware, Lackawanna & Western Railroad Company. Verdict for plaintiff. Motion by defendant Delaware, Lackawanna & Western Railroad Company for an order setting aside the verdict of the jury in favor of the plaintiff for $15,064, and granting a new trial or absolutely dismissing the complaint. The cause of action alleged is negligence on the part of the defendant in not repairing or neglecting to replace a plank in the sidewalk in a public street in the city of Cortland on and abutting on lands leased and occupied by the defendant for railroad purposes and owned and purchased by the defendant's lessor for railroad purposes. The defendant while not questioning the fact that the sidewalk abutted on the lands leased and occupied by it and used for railroad purposes, denied and denies any obligation or duty to the public or to the plaintiff who was a traveler thereon to reconstruct or repair such walk even if it knew it was out of repair and in such a condition as to make it dangerous for persons lawfully traveling on such public street to walk thereon. Motion denied.

Clayton R. Lusk, of Cortland, N. Y., for plaintiff.
Charles V. Byrne, of Syracuse, N. Y., for defendant.

RAY, District Judge. The defendant leases and operates a railroad running from Binghamton, N. Y., to Syracuse, N. Y., through the city of Cortland, formerly the village of Cortlandville. In 1852 the lands involved here were acquired by the Syracuse & Binghamton Railroad Company, and in 1867 they passed by conveyance to the Syracuse & Southern Railroad Company, later Syracuse, Binghamton & New York Railroad Company, defendant's lessor. A railroad was constructed across these lands long prior to 1867, and at that time (1867) there was no highway or public street across same at the place in question, but some time prior to September 1, 1875, a road or public highway (now known as Elm street) came into public use across this property at the place in question extending from Church street, running north and south about parallel with the railroad and west of the same, and up to such railroad tracks, and later this highway by public use and travel up to September 1, 1875, was extended on east to Pomeroy street east of the railroad which street runs parallel with it. Whether this public highway by user was worked and whether it had walks does not appear.

September 1, 1875, the authorities of Cortlandville village duly adopted a resolution accepting said Elm street from the railroad easterly to Pomeroy street as one of its public streets. It does not appear when or how Elm street westerly of said railroad became one of the streets of the village, now city of Cortland, and I think it immaterial. Easterly from the railroad on the south side of Elm street there was a sidewalk, extending up to the tracks, prior to 1904, but who constructed it or repaired it does not appear. In 1904, there were changes made at this crossing at Elm street. The existing tracks of the railroad were raised some 4 or 5 inches and the existing sidewalk at this place in question (where the defect existed and the accident occurred) was raised and reconstructed. While the walk on the south side of Elm street was raised above the surface of the earth making the rise at the approach to the tracks more gradual and easy, the space below was not filled in and the result was a considerable space between the walk, which was constructed of boards or planks, and the earth beneath. Consequently if one of the planks or a considerable portion thereof was worn out or removed and a traveler thereon should step into the open space or hole his foot and limb would go down some distance and he would be liable to lose his equilibrium and fall, and, depending on circumstances, more or less serious results might follow. From spring about March or April, 1914, and continuously down to and including the night of September 21, 1914, there was a hole in this sidewalk, the part that had been elevated above the surface of the ground, which was some 18 inches to 2 feet in length, measuring from side to side of the walk, and about 6 or 7 inches wide, and on the part thereof on the railroad company's land and right of way and only a few feet from the most easterly rail. It was not large enough to attract attention in the nighttime nor small enough so that a traveler on the walk could step thereon with impunity or without danger of his foot and limb going therein and he being caught and thrown if moving. In short it was a dangerous hole and a dangerous defect on the walk. It was but a few feet from the flag shanty of defendant's flagman stationed at this crossing, and its existence must have been well known to that employé and servant of defendant. Its existence was thoroughly proved, as well as the time it had been there. The evidence tended to show that this particular plank by reason of dozy wood or rot had become broken about the center of the walk where it rested on the center sill of the walk and after being broken in had become detached on that side of the walk and had been then thrown or shoveled to one side leaving this dangerous hole in the walk on that side of it. It was a dangerous defect and one easily repaired with a piece of plank 2 to 3 feet long and 6 inches wide, a hammer, a saw or an axe, and a few nails. Repair did not call for expert or engineering skill or even the skill of a carpenter. Any ordinary workman possessing ordinary common sense could have repaired the defect in 10 minutes if provided with 25 cents' worth of plank, one cent's worth of nails, a hammer and a saw, or for want of that an axe. The necessity of repair was obvious. Repair (unless the Legislature has so ordained) did not demand a meeting of the five commissioners of public works of the city of Cortland, formal resolutions of that body and a notice to the railroad to repair and the assessment and levy of a tax to meet and cover the expense. Neither did repair of this defect demand a meeting of the board of directors of the railroad company. It was a repair that should have been made and which could have been made without inconvenience to any one within a half hour after its existence was discovered. If the repair of this dangerous defect in this walk was not devolved on the railroad company by the charter of the city on its discovery or within a reasonable time thereafter without a meeting of the commissioners of public works of the city of Cortland and a determination by that board of city officials as to the size and character of the plank that should be put in to take the place of the broken piece to fill a hole 2½ feet long and 6 inches wide, and just how and when it should be done and the cost to be incurred in doing it, followed by notice of this official action to the railroad company—in short without the expenditure of more ink than necessary plank—then the Legislature of the state of New York has demonstrated its ability as an adept in the art of "How not to do it." Many lawyers drawing large fees have wrangled and many judges of experience and ability have studied and differed and written learned and conflicting opinions, and many clients have had their pocketbooks emptied and bank accounts depleted in efforts to ascertain the true meaning of statutes or charters similar to that of the city of Cortland, the product of the wisdom, or want of wisdom, of the lawmakers of the state of New York. And the question whether this plaintiff has the right to maintain this action and a right to the amount awarded by the jury depends on the proper construction and interpretation of the charter of the city of Cortland which, it must be confessed, is somewhat ambiguous and susceptible of at least three constructions.

But the intent and purpose of the statute to make the abutting owner or occupant, in this case the railroad company, liable to the city for the expense of the repair of a sidewalk, or liable to make the repairs on notice, etc., from the city and answer in damages to the city in case it does not repair, or liable directly to a person who is injured by reason of the failure of the railroad to make repairs when it knows of the defect, is plain. There was no evidence in this case that the defect had been brought to the attention of the city or its authorities, or that it had taken any action in relation thereto or given the railroad company notice to repair. On the evening of September 21, 1914, this plaintiff Robert H. Madden had been down Elm street easterly of the railroad tracks on business and was returning walking westerly on this plank walk on the south side of the street in the neighborhood of 11 o'clock. There were some high buildings on both the north and south sides of Elm street near the railroad tracks, making it necessary for the plaintiff as he approached the tracks to look both north and south up and down the tracks for approaching trains, and this he was doing, walking at an ordinary gait for a pedestrian, when he stepped into this hole before described in the walk, and his foot was caught and he was thrown or fell forward, striking heavily on the ground and iron rail. He sustained serious injuries, which are probably permanent and which make it impossible for him to get about without assistance or to do any work except with his hands. There was a light on the street at this crossing, but the jury found there was absence of contributory negligence.

At the close of plaintiff's case and again at the close of the evidence the defendant moved to dismiss and for a direction to the jury to find a verdict for the defendant on the ground, generally speaking, that there was no common-law liability on the defendant to repair this walk, and that under the charter of the city of Cortland no liability to repair is placed on the railroad company until notice, etc., from the city, and that even then the liability to a person injured by reason of defects in the walk rests upon the city and the city must look to the railroad company. The court charged the jury:

"Now gentlemen, I say to you that under the provisions of the charter of the city (of Cortland) taking all of this charter together, that under the provisions of section 80, it was made the duty of the railroad company to replace that board or plank in that walk, or repair the walk, if it was unsafe, and you so find, and if such condition had continued such a length of time and under such circumstances as to give the railroad company notice of the defect and of its character, condition, and existence."

This was duly excepted to, and the question was duly raised by the defendant later and passed upon by the court adversely to the defendant. Exception was duly taken.

Section 80 of the charter of the city of Cortland, as amended by chapter 196, Laws of 1901, contains this provision:

"The *owner or occupant of lands fronting or abutting any street shall be liable for any injury or damages by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands or* for a violation, or nonobservance by him of a resolution or ordinance of the board of public works, authorized by this section, and shall not be relieved therefrom by the service of the notice above specified."

The whole of section 80 will be quoted later, but going back to section 13, as amended, we find a provision for the appointment of a board of "five commissioners of public works." By section 72, as amended, the powers of this board of public works are defined, and it has the following:

"The board of public works shall be commissioners of highways in and for the said city, and shall have all the powers and perform all the duties of commissioner of highways in towns, other than as provided in this act. The said board is vested with the charge, management, control and maintenance of all bridges, streets, sidewalks, public places and public squares within the city, of the sewers and the extension thereof, and of all buildings and structures appurtenant thereto, and of all machinery, tools, appliances and materials used in connection therewith. The board of public works shall have power: * * *

4. To make all contracts relating to construction, paving and repairs of the streets and sidewalks, public places and public squares, parks and sewers, and the cleaning of the streets, sprinkling, and the removal of dirt therefrom, the grading, paving and repaving and macadamizing and remacadamizing of all streets, public places, and public squares, and laying and extending of sewers and the provision of all materials, machinery, implements and utensils necessary therefor. * * *

5. To lay out, make, open, grade, level, regulate, pave, macadamize, plank, gravel, clean, repair and improve highways, streets, lanes, alleys, public grounds, parks, sidewalks, sewers, gutters, drains, acqueducts, reservoirs, crosswalks, and alter, amend, widen, straighten and discontinue the same and to establish grades and levels therefor, and alter the same through any lands, buildings or inclosures in said city."

Section 80, as amended, above referred to, reads as follows:

"*Sidewalks, Construction and Repair Thereof; Assessment or Expenses, et cetera.*—The board of public works shall have power to require sidewalks, curbs and gutters, and the whole or any part of such sidewalks, curbs or gutters in said city to be constructed, made, paved, flagged, curbed, guttered, relaid, reset, mended, or repaired by the owners, possessors, or occupants of lands adjoining such sidewalks, curbs, or gutters; and to require any or either of such improvements, acts or things to be made or done in such a manner, at such times, and of such materials as it may prescribe and direct. Such improvements shall conform to the grades established or to be established before such improvements are made. The board of public works, in the resolutions or ordinances requiring any of the improvements, acts or things authorized by this section, shall specify in what manner and within what time and of what material the same must be made or done. It shall cause to be served upon the owners or occupants of the lands adjoining such sidewalks, curbs or gutters, so to be improved as aforesaid, a copy of said resolution or ordinance, with a notice, that, if the same is not done within the specified time by the several owners or occupants of the adjacent lands, it will be done by said board of public works at the expense of such owner or occupants. Such service shall be made either upon the owner or occupant by delivering the same to him personally or by leaving the same, in his absence, with some member of his family or person of suitable age, residing with him. In case the land is unoccupied, or the owner a nonresident, such service may be made upon the agent of such owner, if known to the board of public works, or by depositing the same in the post office, properly inclosed and the postage thereon prepaid, and directed to such owner at his place of residence or the post office nearest his place of residence. In case such owner or his place of residence is unknown, and there be no resident agent or occupant to the knowledge of the board of public works such service may be made affixing a copy of such ordinance or resolution and notice upon a conspicuous part of said premises. Affidavits of the service of such resolution or ordinance may be filed or recorded, or both, in the office of the clerk of said city, and the affidavits or the records thereof, or a certified copy of either, shall, in all courts and places, actions and proceedings be prima facie evidence of the facts stated therein. In case any such improvement, act or thing so required shall not be made, done or completed, as required, within the time so specified, the board of public works shall have the power to make, do or complete the same, and, having done so, shall, without giving any further notice, proceed to make a special assessment roll of the expense thereof against the delinquent owners or occupants, and upon said adjoining lands owned or occupied by them, assessing upon each parcel or lot of land the expense of the sidewalk, curb or gutter immediately adjoining it and file the same with the city clerk. Whereupon the said city clerk shall give notice in the official newspapers of the city that the same had been left with him and may be examined by all persons interested; and that at a time and place to be specified in said notice, which shall not be less than ten days from the first publication thereof, the common council will hear and act upon the application of any person deeming himself aggrieved by said special assessment, to have the same altered or corrected, as he may deem just. After hearing all such applications, the common council may proceed to make such alterations and corrections, if any, in said special assessment roll, as it may deem just, and by resolution confirm the same. And said assessment shall thereupon become and be final and conclusive upon all parties interested in said real estate or affected thereby, and the said assessment shall be collected in the manner and with the fees prescribed for the collection of such special assessments in this act. The owner or occupant of lands fronting or abutting any street shall be liable for any injury or damages by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands or for a violation, or nonobservance by him of a resolution or ordinance of the board of public works, authorized by this section, and shall not be relieved therefrom by the service of the notice above specified. The board of public works shall have power in its discretion to allow a rebate of three cents per square foot to be paid out of the public works fund, upon the expense hereafter incurred by any person for laying in a public street of the city a stone or cement sidewalk adjoining lands owned or occupied by him, provided said sidewalk shall be constructed in the manner and of the material and quality prescribed by the said board, and the work shall be done under the supervision of the superintendent of public works, and shall be approved by him."

It is seen that by section 72 this board of public works is charged with the management, control, and *maintenance* of sidewalks and of the tools, appliances, and materials used in connection therewith; that it has power to make all contracts relating to *repairs* of sidewalks; and that it may lay out, make, plank or gravel or *repair* sidewalks. Section 80 relates specifically to "sidewalks, construction and repair thereof; assessment of expenses, et cetera" (thereof).

The opening clause or subdivision of section 80, as amended, provides that:

This board of public works shall "*have power* to require sidewalks * * * and the whole or *any part* of such sidewalks * * * to be constructed, made * * * *mended or repaired* by the owners, possessors or *occupants* of lands adjoining such sidewalks * * * and to require any or either of such * * * acts or things to be made or done in such manner, at such times, and of such materials as it may prescribe and direct."

It is urged that the duty of discovering defects in and need of repair to a sidewalk in a dangerous condition for the pedestrian using it rests on the city, and that until the city has discovered or been advised of the defect and until it has notified the abutting owner or occupant, in this case the railroad company, of the defect and demanded repair and prescribed what is to be done, and the manner of doing it and the material to be used in doing it, no duty rests on the occupant in any event, even if thereafter the railroad company would become liable directly to a person injured through its neglect to comply with the directions of the board of public works. If this be true, then, in case of the sudden breaking down of a sidewalk or its becoming unsafe for public travel, first, the city must have notice either specific and direct or by lapse of time, and, second, its board of public works must then meet and act and prescribe the repairs to be made, the mode and manner of doing the work, and the material to be used, and, third, notice of all this must then be given the railroad company, which, of course, would have a reasonable time, to be fixed in the notice, in which to comply with the demand and directions. If this be the true construction or interpretation of section 80 of the charter of the city of Cortland, then the words, "The owner or occupant of lands fronting or abutting any street shall be liable for any injury or damage by reason of omission, failure or neglience to make, *maintain or repair* the sidewalk adjoining such lands," would require the following additions or interpolations to make them properly express in plain and unambiguous terms their meaning, viz., "After such action and on receiving such notice and demand to reconstruct or repair," at the beginning of the paragraph, and the words "or for a violation or nonobservance by him of a resolution or ordinance of the board of public works, authorized by this section, and shall not be relieved therefrom by the service of the notice above specified," would become and should be held to be superfluous and unnecessary. Those words would, in effect, be a repetition. Neither section 80 nor any other section of the charter of the city of Cortland as it stood prior to the amendments of 1901 (see chapter 160, Laws of 1900), contained the words, "The owner or occupant of lands fronting or abutting any street shall be liable for any injury or damages by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands," etc., although it did provide that the burden of construction and repair could be placed on the abutting owner by action of the board of public works by resolution and notice substantially in the same manner as is prescribed in section 80 as amended. The addition of the language quoted substantially at the end of the section cannot be held surplusage or meaningless. As under the charter as it stood prior to the amendments of 1901, the city through its board of public works had power to impose on the abutting owners the duty and obligation of repairing sidewalks a liability to persons injured by reason of a neglect to perform that duty when once imposed of course arose and it seems to me that the purpose of the Legislature was to make the duty of repair absolute without action on the part of the city, or its board of public works, when the city failed to act or saw fit not to act, and also gave the city the power to provide for improvements and changes and general repairs and prescribe the mode and manner of making them when it saw fit to do so.

The defendant contends as follows:

"(1) That defendant owed plaintiff no legal duty to repair the walk, because the absolute duty to maintain was cast upon the city, by virtue of the charter provisions and the common law.

"(2) That no duty was cast upon defendant to repair the walk until the notice specified by section 80 was served upon it or its lessor; and there being no specific statutory duty or obligation imposed upon defendant by section 80 to repair the walk, until the notice was served, it cannot be subjected to liability for failing to do that which it was not obliged to do.

"(3) That under section 80, defendant is not liable to plaintiff, but is only liable to the city for any loss it may sustain through defendant's failure to repair the walk; i. e., the purpose of the statute was not for the protection of the pedestrian, the latter having ample protection under the common law and statutory duty of the city to maintain its sidewalks in a reasonably safe condition, but as a means of empowering the city to keep its walks in shape..

"(4) That if section 80 can be construed as making defendant liable to plaintiff for mere failure to repair, then the section is violative of both the federal and state Constitutions, because it penalizes defendant for not doing that which it is neither by common or statute law required to do, and constitutes a taking of its property, without due process of law.

"(5) That the statute is highly penal, and therefore is to be strictly construed, and that nothing can be read into it which it does not contain, so as to extend its provisions."

The defendant cites Selleck v. Tallman, 93 Wis. 246, 67 N. W. 36, City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762, 93 Am. St. Rep. 478, McAuliffe v. Noyce, 86 Neb. 665, 126 N. W. 82, Toutloff v. City of Green Bay, 91 Wis. 490, 65 N. W. 168, Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760, Webster v. City of Beaver Dam (C. C.) 84 Fed. 280, and Kosters v. National Bank of Auburn, 62 Misc. Rep. 419, 116 N. Y. Supp. 647, as supporting these propositions.

In New York in the absence of statutory provision to the contrary a municipal corporation is under obligation to keep the sidewalks constructed by it in the public streets in reasonably safe repair, and this duty it owes to the public. For its neglect in this regard it is liable to a person injured by reason thereof. 28 Cyc. 1340, 1341; Hines v. Lockport, 50 N. Y. 236; Pomfrey v. Saratoga, 104 N. Y. 459, 11 N. E. 43. But this duty of repair may also be imposed by statute on the abutting owner and he made liable for negligence in failing to repair the sidewalk if injury to a person lawfully using same for public travel results. Imposing this liability by statute on the abutting owner does not of itself exonerate the municipality. 28 Cyc. 1340, 1344, 1345, and cases there cited. It was competent for the Legislature of the state of New York to impose the absolute duty of making repairs to sidewalks in the city of Cortland on the abutting owners or occupants and reserve to the city, when it saw fit to act in the premises as quite likely it would do in important matters, the right and power to regulate repairs and construction and dictate the mode and manner of doing the work and the materials to be used.

It does not follow that for the reason the power to regulate and control in these respects was reserved to the city through its board of public works and the mode and manner of exercising such power when exercised was prescribed, the absolute duty of repair was not imposed on the abutting owner of making repairs, etc., for the benefit of the public or that the city must exercise the power so reserved as a condition of duty and liability on the part of such abutting owner. In construing and interpreting a statute every part of it is to be given effect if possible, and when it is amended and important words are added we are not at liberty to disregard them or ignore or distort their plain import and meaning. The end to be accomplished as well as all the surrounding circumstances and conditions are to be observed with a view to effectuate the object for which the statute was enacted. Essex v. New England Telegraph Co., 239 U. S. 313, 322, 36 Sup. Ct. 102, 60 L. Ed. 301. If the abutting owner or occupant was not to be under the duty to the public to repair sidewalks abutting on his premises except on the doing of certain acts by the city the added words quoted were unnecessary. When a duty to do an affirmative act in which the welfare and safety of the public is involved and concerned is imposed and there is refusal or neglect to perform that duty so imposed and injury results, such neglect gives rise to a cause of action for damages in the absence of any statute so declaring. 1 Cyc. 700, and cases cited. Prior to the amendments of 1901, the city could impose the duty of repairing sidewalks on the abutting owners respectively and when that duty was imposed in the mode and manner prescribed by law and such owner neglected to perform his duty and injury to a traveler thereon resulted, he was liable in damages to the injured party. This assumes that the duty imposed was for the benefit of the public and not the city alone. If this was doubtful before the amendments of 1901, the doubt was cleared away when it was enacted that:

"The owner or occupant of lands fronting or abutting any street shall be liable *for any injury or damages*" (not damage or injury to the city) "by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands," and then further, "or for a violation or nonobservance by him of a resolution or ordinance of the board of public works authorized by this section (section 80) and shall not be relieved therefrom by the service of the notice (to repair) above specified."

Was all this necessary to give a cause of action over in favor of the city and against the abutting owner in case of failure to repair when directed so to do and damage to a third person and recovery by him against the city resulted? I think not. If it was the duty of the abutting owner or occupant on receiving notice in compliance with the statute to repair then in case he did not comply and the city was sued and recovery had for such negligence the abutting owner was liable for the amount of the judgment.

"So a person who has been exposed to liability and compelled to pay damages on account of the *negligence* or tortious act of another has a right of action against the latter for indemnity provided plaintiff and defendant are not joint tort-feasors in such a sense as to prevent plaintiff from recovery." 22 Cyc. 96, and cases cited.

It must appear that the parties are in pari delicto as to each other before recovery will be barred. 22 Cyc. 99, and cases cited. To defeat recovery over the one seeking indemnity must have joined in the negligent act. 22 Cyc. 94, and cases cited.

In City of Rochester v. Campbell et al., 123 N. Y. 409, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760, the statute in question provided:

"It shall in all cases be the duty of the owner of every lot or piece of land in said city to keep the sidewalks adjoining his lot or piece of land in good repair, and also to remove and clear away all snow and ice or other obstruction from such sidewalk."

The court held that this imposed no duty on the abutting owner to those who used the sidewalk and for whose benefit and use it was constructed and was to be kept in reasonably safe condition and repair for public travel, but was for the benefit of the city and to enable it to recover of such abutting owner after being itself sued and compelled to pay damages to a person injured by reason of the walk being out of repair through its own negligence in not repairing, thus making two lawsuits necessary, one by the injured party against the city and the other by the city against the abutting owner for indemnity.

The statute quoted says nothing about its being for the benefit of the city solely, but imposes the duty of repair on the abutting owner "in all cases." That statute was silent on the subject of who should be liable in damages to a person lawfully and properly using the walk for negligence in not keeping it in reasonably safe condition or repair. Here the statute states that the abutting owner shall be liable for all damages if the walk is out of repair and unsafe, but is silent except by implication as to whose duty it is to repair. Undoubtedly, if the statute referred to had imposed the duty of repair on the abutting owner by express and explicit language, and then had added the words quoted from the charter of the city of Cortland imposing liability for damages for negligence in not repairing, that court would have held the provisions were not made for the benefit of the persons lawfully using such walks for purposes of public travel and injured by reason of their being out of repair. I know of no good reason why a city may not have the right at its election to prescribe the repairs to be made and the mode and manner of making them, including a specification of the materials to be used without destroying the force and effect of plain and unambiguous language, imposing the duty of making repairs on the abutting owner or occupant, and providing that:

"The owner or occupant of abutting lands "shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands."

I think the fair inference is that such provision in a statute, in the absence of a declaration to the contrary, is for the benefit of persons lawfully using such sidewalk and liable to be injured by the negligence referred to, and that such persons may avail themselves of it. If the abutting owner or lessee, in this case a lessee for a long term of years, and occupant sees a dangerous hole in the sidewalk into which people passing thereon may step and be seriously injured, and hesitates to expend a dollar in time and material in simple repairs to make it safe through apprehension that it may be compelled to do the work over again, it is easy and simple for it to request the city to act and prescribe the necessary mode, manner, and material for doing the work. I do not think a court need worry itself into giving a strained and unnatural construction to plain language found in a statute because of fear that an abutting owner may be compelled to make repairs the second time if it acts before having explicit directions from the city or because of fear that cities may become lax in making repairs if the burden is imposed both on city and adjoining owner or occupant. The abutting owner or occupant has a way to avoid such double liability, viz., call on the city to act, while the travelers over the sidewalk have no remedy until they have suffered injury. When the traveler does suffer injury he should have a right of action against either city or abutting occupant or owner as he may elect if such negligence is to give a cause of action to any one against such abutter. In the recent case of Willis v. Parker, 159 N. Y. Supp. 676, affirming the decision at Special Term, and decided by the Appellate Division, Fourth Department, not yet officially reported, the charter provision of the city of Auburn under consideration reads as follows:

> "The owner or occupant of lands fronting or abutting on any street, highway, travelled road, public lane, alley or square, shall make, maintain and repair the sidewalk adjoining his lands and shall keep such sidewalk and the gutter free and clear of and from snow, ice and all other obstructions. Such owner and occupant and each of them, shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk or to remove snow, ice or other obstructions therefrom, or for a violation or nonobservance of the ordinances relating to making, maintaining and repairing sidewalks and the removal of snow, ice and other obstructions from sidewalks, curbstones and gutters. Whenever the commissioner of public works, or a sidewalk inspector shall ascertain, have knowledge of, be notified or informed that a sidewalk or any part thereof is in a dangerous condition or in such condition that injury is liable to result from its use, from want of repair, failure to remove snow, ice or other obstruction therefrom or other cause, and such condition can, in his judgment, be remedied without laying a new walk, he shall properly guard the same, and as soon as practicable serve a written notice upon the owner or occupant of the abutting lot, if the same is occupied, requiring such owner or occupant to repair said walk or remove and remedy the dangerous or defective condition thereof, in the manner specified in said notice, within twenty-four hours after such notice."

The abutting owner was sued for negligence in not repairing, and the Special Term held there was no cause of action against him by the injured party growing out of a dangerous defect in the sidewalk, the result of want of repair, and that the provision quoted was enacted for the benefit of the city solely. This was affirmed on the authority of the Campbell Case, supra, opinion by Kruse, C. J., Lambert and De Angelis concurring, Foote and Merrell dissenting. As I am not hampered by any decision of the Circuit Court of Appeals in this the Second Circuit or by any holding of the Supreme Court of the United States and as the question under the charter of the city of Cortland has not been passed upon by the Court of Appeals of the state of New York, I concur in the dissenting opinion of Justice Foote which is logical and based on reason and not on precedent and apply it in the instant case. If the abutting owner or occupant is under duty to repair and liable for all damages resulting from neglect to perform this duty I am unable to comprehend why the injured party should first sue the city and then the city, if recovery is had against it, sue the abutting owner. This, however, may be *"simplified procedure."* The Legislature has neither said nor intimated that these provisions imposing liability on the abutting owner or occupant are solely for the benefit and protection of the city. As stated the fair inference is the contrary. Generally statutes imposing liability for negligence in not performing a duty enjoined thereby are intended for the benefit and protection of those directly injured by the negligence of those failing to observe them and who have an interest to prosecute.

It is conceded that abutting owners or occupants in the absence of a statute imposing the duty are not under any obligation to repair sidewalks. It is also conceded that when a statute imposing such duty provides conditions precedent to the creation of such obligation such conditions must be complied with or the liability does not arise. So of a statute making the abutting owner responsible in damages for negligence in not repairing. But in the instant case we have no such conditions precedent. The city has the right and power, if in its discretion it sees fit to exercise the power, to prescribe the mode and manner of making repairs, specify the materials to be used in making them and fix a time within which such repairs must be made, provided the time is reasonable, but there is not a word in the statute that indicates this action by the city is a condition precedent to the obligation of the abutting owner or occupant to make repairs or to his or her liability for negligence in not making them. I fail to discover any reason, if the abutting owner or occupant is to be liable to any one to make repairs to sidewalks, and liable in damages to a party injured by defects therein, if not made, why the cause of action should not be vested in the party injured and he or she allowed to prosecute and enforce the liability. The statute says:

"The owner or occupant of lands fronting or abutting on any street shall be liable for *any* injury or damages by reason of omission, failure or negligence to make, maintain or repair the sidewalk adjoining such lands."

And unless we interpolate the words "which the city has authorized and directed to be made and notified such owner or occupant to make," the construction claimed by the defendant here is inadmissible, while if we do interpolate such words in construing the statute there will be many cases where the city will not act, and the words of this statute "shall be liable for any injury or damages" will have been limited in their scope to "shall be liable for such injuries or damages as result from the negligence of the owner or occupant after he has been duly required and notified to make repairs in the manner hereinbefore specified." We have too much judicial legislation, and here is an instance where to give the meaning and construction to this charter of the city of Cortland contended for by the defendant we must add and interpolate more words than are found in the paragraph as enacted by the lawmaking body, while if we construe it as the plaintiff contends it should be construed we neither interpolate nor add nor subtract anything. If we leave this statute as we find it and as it was drafted and enacted into law by the lawmaking body of the state, and enforce it as it reads, susceptible of more than one construction though it be, this plaintiff is entitled to recover against the abutting lessee and occupant, this defendant. The statute says the abutting occupant shall be liable for *any* injury or damages *by reason of negligence* to repair the sidewalk adjoining his lands. To whom liable? Plainly to the person injured by the negligence. What neglience? Plainly negligence to repair the sidewalks or cause it to be done and not negligence in failing to comply with the direction of the board of public works as that is immediately provided for by added words. If action on the part of the city is required as preliminary to such repairs the burden is on the abutting owner or occupant to set the city in motion and obtain directions, and if none are given go on and do the work. I do not think the first part of section 80 of this charter of the city of Cortland was designed to delegate power to the board of public works of the city to create the liability of the abutting owner or occupant to repair sidewalks. The Legislature has created the obligation but vested in the board of public works directory powers as to the nature of the repairs, materials to be used, and time within which same shall be made if it elects to exercise them. The city may or may not, exercise this power through the board of public works, but the duty of the abutting owner or occupant is fixed as is his liability for damages in case he fails to perform the duty imposed by the law, not by the board of public works. In case the city does act and prescribe the mode and manner of doing the work, materials to be used and time within which the work is to be done, and the abutting owner or occupant fails to comply with the directions given, we have another provision in the charter following the one imposing liability for negligence which makes him liable "for a violation or nonobservance by him of a resolution or ordinance of the board of public works authorized by this section." Section 80. If the words "any injuries or damages by reason of omission, failure or negligence to make, maintain or repair the sidewalk" refer to injuries or damages resulting from a failure to repair when and in the manner directed by the board of public works only, and the abutting owner or occupant is not liable for other damages, why add "or for a violation or nonobservance by him of a resolution or ordinance of the board of public works?" As I read the charter of the city of Cortland, as amended, it imposes on the abutting owner or occupant the obligation to repair the sidewalks in front of his premises when he knows or is charged with knowledge that they are in a dangerous condition and need repair and makes him liable to an action by and responsible in damages to a person lawfully using same and injured by reason of his negligence in not repairing; authorizes the board of public works of the city, if it sees fit so to do, to control and direct such repairs, and prescribe the materials to be used, and the time within which such repairs must be made, and imposes liability on such abutting owner or occupant to the city in case he fails to observe and comply with its lawful directions; and permits the abutting owner or occupant before making repairs to notify the board of public works and obtain its directions, if such board sees fit to act and thus protect himself against doing the work a second time.

The motion to set aside the verdict and dismiss or grant a new trial is denied.

ACTIESELSKABET NEPTUN v. NEW YORK & BERMUDEZ CO. et al.

ORVIG DAMPSKIBSELSKAB ACTIESELSKABET v. SAME.

(District Court, E. D. New York. March 13, 1916.)

SHIPPING ⚿54—CHARTERS—LIABILITY FOR INJURY TO VESSEL.

Two Norwegian steamships, owned by libelants respectively, and under charter, were subchartered by time charters to respondent Hamburg-American Line, which loaded them with coal at Philadelphia after the commencement of the European war, with the purpose of delivering the coal to German cruisers at sea in the vicinity of the Cape Verde Islands. It placed a German supercargo on each vessel, who was expected to direct its movements. The vessels were cleared for Monrovia, Liberia, with Teneriffe, Canary Islands, as a port of call. It was not intended to go to Teneriffe, but the masters, who had full knowledge of the destination of the cargoes before leaving port, took the vessels there and cabled to the owners, who then assumed direction and refused to permit the vessels to leave that port. After some three months of negotiations between all parties, respondent sold the cargoes there, had them discharged, and paid the charter hire to that time. Before the discharge, however, the coal in each vessel had taken fire, and suits were brought by libelants against the Hamburg-American Line for resulting damage to the vessels. *Held*, that whether or not the dispatch of the vessels was in violation of the law of neutrality was immaterial, since, if so, the fact had no causal connection with the fires, the vessels having been withdrawn from such voyages long before they occurred by the action of the masters and libelants, and that respondent was not responsible for the long detention of the cargoes on board after libelants had assumed charge of the vessels, conceding, as claimed but not proved, that such detention was the cause of the fires.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. ⚿54.]

In Admiralty. Suits by Actieselskabet Neptun against the New York & Bermudez Company and Hamburg Amerikanische-Packetfahrt-Actien-Gesellschaft and the Orvig Dampskibselskab Actieselskabet against the same. Decrees for respondents.

See, also, 229 Fed. 293.

Ralph James M. Bullowa, of New York City (Ralph James M. Bullowa and Max Lowenthal, both of New York City, of counsel), for libelants.

Burlingham, Montgomery & Beecher, of New York City (Chas. C. Burlingham and Roscoe H. Hupper, both of New York City, of counsel), for New York & Bermudez Co.

Haight, Sandford & Smith, of New York City (Howard S. Gans and Edward Sandford, both of New York City, of counsel), for Hamburg-American Line.

VEEDER, District Judge. In these two libels the owners of the steamships John. Ludg. Mowinckel and Nepos seek to recover from the respondents compensation for damages resulting to the vessels from fire in the coal cargo about three months after their arrival at Teneriffe.

In brief, the allegations of the libels are that the respondents, who were, respectively, charterers and subcharterers of the two vessels, conspired, without the knowledge or consent of the libelants, to sublet the steamers for the purpose of carrying coal and provisions to belligerent cruisers of the German Empire, in violation of the acts of Congress and provisions of law of the United States, of the requirements for the preservation of neutrality imposed upon the United States by international law, and in violation of the laws and regulations of the Storthing of the kingdom of Norway; that pursuant to such conspiracy the vessels were falsely cleared for Monrovia, Liberia, the real object being to meet and supply a German cruiser at the Cape Verde Islands; that pursuant to the orders of the conspirators these steamships sailed from Philadelphia in August, 1914; that thereafter the masters withdrew said steamships from the service of the respondents and proceeded to Las Palmas, in the Canary Islands, where they arrived in September; that thereafter, failing to induce the masters to sail from Las Palmas pursuant to the conspiracy, they held the cargo on said vessels for an unreasonable period of time, so that the coal caught fire and damaged the ships. The libels also allege that the Hamburg-American Line expressly promised to pay the damages caused by fire.

I think that a comprehensive and orderly statement of the material facts disclosed by the evidence will indicate very clearly the true solution of the issues involved. The Mowinckel and Nepos were Norwegian steamships owned by the Orvig Dampskibselskab Actieselskabet and the Actieselskabet Neptun, respectively, and had been chartered by the owners to John. Ludg. Mowinckel, who had in turn chartered them for a term of about five years to the New York & Bermudez Company in October, 1913. On August 17, 1914, the Nepos, and on August 24, 1914, the Mowinckel, were chartered by the New York & Bermudez Company to the Hamburg Amerikanische-Packetfahrt-Actien-Gesellschaft, otherwise known as the Hamburg-American Line, under a time charter for not less than three calendar months and not exceeding six calendar months at charterer's option. It was the purpose of the Hamburg-American Line to use the vessels in supplying German warships on the high seas. Accordingly the vessels were directed to proceed from Perth Amboy to Philadelphia, where they took on cargoes consisting principally of coal. The execution of the charterer's purpose was intrusted to a German supercargo on each vessel. The plan, as developed in Philadelphia, was that the vessels should clear for Monrovia, Liberia, with Teneriffe, in the Canary Islands, as a port of call. Accordingly the manifests gave Monrovia as the destination of the cargo, which was consigned by W. J. Grandfield, of Philadelphia, to order. It was not really designed, however, to call at Teneriffe, but once at sea to proceed to the Cape Verde Islands and there cruise about on a prescribed course for 48 hours, when it was expected that German warships would appear and take off the cargoes. The evidence leaves no doubt that the masters of these vessels were aware before sailing of the real destination of the cargoes, although it does not appear that the details of the transaction were fully disclosed at that time. Both captains had been notified by the New York & Bermudez Company's agent that instructions had been given to allow them liberal gratuities for attending to the subcharterer's interests, and it was apparently expected that the supercargoes would be able to accomplish the desired result.

Before the Nepos sailed from Philadelphia on August 22, 1914, the real destination of the cargo was known not only to Capt. Nielsen and the mate, but had filtered down even to the cook. The officers refused to go; some of them went to see the Norwegian consul. Eventually they were brought to terms by the supercargo, Flohr. Flohr then promised Capt. Nielsen $1,000 to go to a point off the Cape Verde Islands and deliver the cargo to German warships. Nielsen refused, whereupon Flohr said they would clear for Monrovia. Nielsen knew that the course for Monrovia ran through the Cape Verde Islands, and he agreed to go only on condition that they call at Teneriffe. Meanwhile he cabled the owner on August 22d: "Left to-day Teneriffe for orders. Coal and general cargo. Expect your instructions on arrival." Once at sea Capt. Nielsen made straight for Teneriffe. Flohr said nothing further to him about going to the Cape Verde Islands, knowing, as the captain puts it, that "there was no use asking it." The Nepos arrived at Teneriffe on September 7th.

In the case of the Mowinckel, Capt. Frich testified that the supercargo, Maurer, spoke to him at Philadelphia about supplying German warships, and promised him "a good lot of money." He received $200 there. Frich consulted with the Norwegian consul, by whom he was advised to proceed to one of the ports named in his papers. The Mowinckel sailed on September 1st. Upon passing Delaware Breakwater Maurer gave Capt. Frich written directions as follows: "By orders received at the Delaware Breakwater you are advised to steer direct to Monrovia (Rep. Liberia) and omit Teneriffe (Canary Islands)." Although no such message could have been received at that place, since the ship had no wireless equipment, Capt. Frich put his course for Monrovia, which strikes about the Cape Verde Islands. He was then told by Maurer that the place where it was expected that the German warships would be met was a line between Rombos and Sao. Vicente, two of the Cape Verde Islands. At 4 o'clock on the morning of September 20th the Mowinckel arrived at what the supercargo was led to believe was the appointed meeting line, but which was in fact a point 15 or 20 miles west of that line, and there the Mowinckel steamed up and down for 18 hours. Capt. Frich testified that he at no time had any intention of going to the meeting line, nor of delivering the cargo to German warships. At 10 o'clock on the night of September 21st he extinguished his lights and made at full speed for Teneriffe, where he arrived on the 26th.

Capt. Frich immediately wired his arrival to his owners in Norway and to the New York & Bermudez Company's agent, Wrigley, in New York, and sent a letter to his owners in which he "explained everything." He says he received orders from his owners to stay there. When the Nepos arrived at Teneriffe Capt. Nielsen found no orders awaiting him. At the end of September his owners cabled him to inquire whether the Nepos had sailed. He answered, "Still waiting orders." In October the owners cabled him not to leave without their consent. On September 27th his supercargo wired the Hamburg-American Line's director in New York, Buenz: "Captain run here. Whole cargo on board. Will only with consent of owners follow orders from charterers. I protest in vain." Buenz replied on September 28th, "Wait for orders." Meanwhile the original charterer, Johann Ludwig Mowinckel, who was in New York, was apparently in touch with the situation. As early as August 25th Wrigley wrote the Hamburg-American Line that he had received the following cable (evidently from the owners): "Nepos sailed Teneriffe. Ascertain destination. Charterers must pay war risk. Telegraph Ludwig Mowinckel." To this Wrigley reported that he had replied that the steamer had sailed for Monrovia, and that there was no reason why any one should pay war risks between neutral countries. Counsel for the New York & Bermudez Company wrote Mowinckel, at the Hotel Plaza, on September 29th, that there was no possibility of the Mowinckel or Nepos leaving port, and that their cargoes would probably be ordered discharged. Koetter, superintending engineer of the Hamburg-American Line, also wrote Wrigley on September 30th they would communicate with him as soon as they reached a decision with reference to the Mowinckel. On October 1st counsel for the New York & Bermudez Company renewed his assurance to Mowinckel that there would be no trouble, and reported that he had been informed that orders had already been given to discharge the cargo of the Mowinckel. On the following day he again wrote to Mowinckel: "Our friends wish you to cable to the masters of the Johann Mowinckel and the Nepos not to leave port without orders from you." On October 2d Koetter cabled Maurer: "Have made arrangements selling cargo Mowinckel. Must remain there until you receive further orders." Meanwhile Grandfield & Co., the shippers, had cabled to Dekade, the German coal depot, and Hamilton & Co., at Teneriffe, on September 29th, September 30th, and October 2d, respectively: "Make best offer cargo laden Mowinckel. Reply." Hamilton & Co. replied on October 7th: "No offers." Thereupon, on October 9th, "Buenz Koetter" cabled Maurer: "Sell cargo best obtainable price. Inform Robert Flohr, Nepos, to do the same. Confirm receipt." On October 17th the Hamburg-American Line wrote to Johann Ludwig Mowinckel and the New York & Bermudez Company:

"As subcharterers of the steamers Johann Ludwig Mowinckel and Nepos, we request you to direct the masters of these steamers without production of bills of lading, to discharge all cargo thereon at Teneriffe as and when ordered to do so by the respective supercargoes on said steamers, and we guarantee to protect and save harmless you and the owners from any consequences arising from such delivery and from any claims which may be made thereafter under such bills of lading."

Mowinckel replied through counsel on the 19th that he was "prepared to cable to his home office in Bergen a request to instruct the masters of the two steamers in the sense requested," and on the following day the New York & Bermudez Company acquiesced in the procedure suggested. On October 25th Capt. Nielsen received directions from his owners: "Deliver cargo Teneriffe. Satisfactory guaranty given here." In November Dusterdieck, traveling inspector for the Hamburg-American Line, appeared at Teneriffe, stating that he had come over from America to sell the cargo. He told Capt. Nielsen that he had the bills of lading and would dispose of the cargo soon; but the supercargo, Flohr, disputed his authority to do so. Subsequently Dusterdieck told Capt. Frich that the German or Austrian consul at Las Palmas had taken the papers from him, so he could not sell the cargo. On November 23d Capt. Nielsen received a cable from his owners: "Cargo must not be disposed of in any way violating our neutrality." He answered on the following day: "Certainly not. Trust me. Will write." On November 28th he wired the owners: "Arrangements for discharge stranded. Propose that you take steps."

This brings the narrative down to the breaking out of fire in the cargoes. But before taking up that event, the relations meanwhile between the parties, particularly between the masters of these vessels and the supercargoes, require notice. Capt. Nielsen, of the Nepos, testified that the supercargo, Flohr, "asked him once if he wanted to go out and go to the Western Islands and hang off there." He replied that he did not. He testified in his first deposition that Flohr told him that he was going to get orders to go down somewhere around the Cape Verde Islands, and told him to keep up steam and have everything ready for the orders. But no orders came. At the hearing he said the reference to the Cape Verde Islands was incorrect; it should read the Western Islands, which he identified only as "north in the Atlantic." When his statement about the Western Islands was read to him from his deposition, he did not remember that he said it that way; "I can't remember because he never ordered me to go." The only reference made by Capt. Frich, of the Mowinckel, to this subject, is his statement that, "They asked me if I would go out, provided I got a bank guaranty for the value of the ship," to which question he says he answered, no. Both masters received funds, amounting to several thousand pesetas, from the supercargoes at Teneriffe for the ship's use, and all parties had notice of such payments. On November 18th Wrigley notified the New York & Bermudez Company of the receipt of $13,750 for hire of the Nepos for the month November 18th to December 18th.

On December 7th light smoke was discovered in No. 2 hold of the Mowinckel. Capt. Frich at once began pumping water in. When fire was first discovered he told his supercargo to get the cargo sold and discharged. On the 18th he informed the supercargo that if discharging was not begun immediately, he "would take people from shore and chuck the coal overboard." He then found out, he says, that the cargo had already been sold to the German Coal Depot. All formalities with the authorities having been settled, the discharging of the coal cargo began on December 20th and was completed January 28th. Meanwhile on January 8th, he had received from his owners this cable: "Inform charterers we consider them responsible full damage ship and time repair. Try get charterer's declaration that they will pay full, otherwise demand average bond cargo including our reservation full compensation damage tyne."

He had already received notice from the German Coal Depot that it was willing to partake in a general average, and cabled the owners:

"Have received average bond consignee and the money received for ships use pesetas 12,150 as guarantee from charterers is insurance satisfied that." The owners answered on January 15th: "If you consider guarantee sufficient I agree." On January 25th Maurer wrote Capt. Frich: "I beg to inform you that all damages and consequences caused by the fire and water in your ship will be paid by charterers."

In the case of the Nepos, Capt. Nielsen says he never thought of fire until it broke out in the Mowinckel's cargo on December 7th. Then he took the temperature and found that the heat was increasing. Fire was not discovered until December 30th. On cross-examination Capt. Nielsen added that, although he had prior to December 7th no fear of fire breaking out, "of course I had reason to expect it. We had already been there then over three months; the cargo had been in four months." "The cargo had been too long in the ship, that is all; it was overheated." When the other cargo caught fire he asked the supercargo if there was not any way of getting rid of the cargo. The supercargo said he would not discharge the cargo; there was no danger, and he wanted to keep the cargo in the ship by all means. When fire was discovered on December 30th he went ashore and told the supercargo that he would have to discharge the cargo then whether he wanted to or not. Flohr notified him, apparently on the same day, that the German Coal Depot had bought the coal, and promised that they would start discharging on the following day; but nothing was done. Thereupon, on the following day, he wrote Flohr:

"As you were mutually informed yesterday the cargo of coal in S/S Nepos is on fire and discharging must be effected immediately. If this is not carried out right away I must take steps myself to get the dangerous cargo out of the ship. Trusting that you will attend to this as it is absolutely necessary to save ship and cargo, Yours truly."

On January 3d he wrote to the German Coal Depot:

"I have been informed that you have bought the cargo of coal in the S/S Nepos. As you well know the coal cargo is on fire, and must be discharged as quick as possible for the safety of the ship as for the cargo itself. As there is sure to be some damage to ship from steam and water we had to pour down, and more so now I fear damage to ship's bottom from fire, I must according to international law demand from you a guaranty for your partaking in general average, that is to sign general average bond. I also want to point out to you that the damage is sure to increase and I will advise you to hurry up discharging to avoid further damage. Attached please find a copy of survey report held on board on the 31st Dec. last."

To this he received a reply that they were willing to partake in the general average.

It does not appear when discharging was begun, but the cargo was discharged on January 27th. On January 29th he and Flohr signed this agreement:

"Up to date received from R. Flohr, supercargo of S/S Nepos total sum of pesetas, seventeen thousand, say seventeen thousand pesetas. It is understood that this amount is to be 'a general average bond' as a guaranty from assignees of cargo at present on fire in S/S Nepos until final settlement."

This was the total of various sums received up to that time, and nothing was received thereafter. No general average statement was ever made up.

Both cargoes were discharged in surf boats belonging to German liners lying in the harbor. It appears that the German Coal Depot had no sufficient place to receive all of it, and sold part of it to Hamilton & Co., an English firm.

It may be added that on February 2d Wrigley wrote to Helliesen, Mowinckel's New York broker, that the subcharters of these two boats to the Hamburg-American Line had that day been canceled by agreement—

"and we have accepted redelivery of the steamers from the Hamburg-American Line at Teneriffe. We are cabling the captains advising them of the cancellation of the charters to the Hamburg-American Line and directing them to proceed immediately in ballast to Cape Henry for orders. We request that you communicate these orders to Mr. Mowinckel in order that there may be no delay in the carrying out of our instructions to the captains."

On the same day Koetter cabled Maurer of this cancellation and redelivery, and instructed him to notify the masters that they must follow the orders of the Bermudez Company. Flohr notified Capt. Nielsen on the 5th. On the 3d Wrigley cabled the masters: "Hamburg-American charter canceled by agreement. Proceed immediately under New York Bermudez charter in ballast to Cape Henry." But they did not sail until they had received orders from their owners February 9th; and when they arrived at Cape Henry they reported to the owners' agent there. It appears that the British government had been fully informed of the case, and, after commending the course pursued by the masters, had given instructions to its cruisers to permit the steamers to proceed without molestation.

It appears from the foregoing statement that it is unnecessary to decide whether the dispatch of these vessels from Philadelphia was a violation of the laws of the United States or of the law of nations, for, if it were, it would have no bearing upon the recovery sought in this case. What I take to have been the original plan of the Hamburg-American Line to clear the vessels for the Cape Verde Islands was evidently frustrated by the refusal of the masters, or at all events of Capt. Nielsen, to sail unless permitted to call at Teneriffe for orders. When that course was agreed upon the Nepos proceeded directly to Teneriffe without going anywhere near the appointed meeting line. In the case of the Mowinckel, it appears that Capt. Frich, notwithstanding his protestation that he at no time intended to comply with the supercargo's directions, must have been undecided, if not complaisant, in changing his course from Teneriffe to the Cape Verde Islands in compliance with the perfectly transparent artifice employed by the supercargo at Delaware Breakwater. But whatever his state of mind may have been, he did not actually cruise upon the appointed meeting line. Ultimately he made for Teneriffe and arrived there without meeting any German warships.

The voyage to Teneriffe was perfectly legal, whatever the respondent's intentions. Both masters knew before leaving Philadelphia that the cargoes were not destined for Teneriffe, but, instead of cabling their owners then, they chose to go to Teneriffe to get their owner's orders there. The libels expressly allege that the masters thereafter withdrew the steamships from the service of the respondents. As soon as the vessels arrived at Teneriffe the owners were fully informed of their masters' acts. They simply instructed the masters to remain there until further orders from them. Thereafter both masters made it plain, both by word and act, that they would take no orders from either of the respondents; and they did not. The owners had resumed possession of their vessels, with the subcharterer's cargo aboard.

In this situation negotiations began among all the parties concerned. Cables flew thick and fast. It is quite apparent many of them are not in evidence. But it is plain that the parties were dealing with one another on equal terms, and that each was playing for his own advantage. Indeed, if there was any disparity among the parties, it was in the case of the Hamburg-American Line with its cargo blocked in Teneriffe by English cruisers. Eventually an agreement was reached which involved a readjustment of relations. The vessels were restored by the owners to the New York & Bermudez Company at the expiration of the period for which they had been chartered to the Hamburg-American Line, and the New York & Bermudez Company received from the latter the hire in full.

Meanwhile, however, fire had broken out in both cargoes and damaged the vessels. No direct causal connection between that event and the voyage from Philadelphia is alleged in the libels. The allegation is that: "Failing to induce the masters to sail from Las Palmas pursuant to the conspiracy, they held the cargo on said vessel for an unreasonable period of time, so that the coal caught fire and caused the steamship to sustain damage." It may be assumed the Hamburg-American Line would have been glad to get its cargoes out of Teneriffe. But it was hopeless to expect that, for British cruisers were lying off the port all the time. This was recognized by the respondent. The testimony of the supercargoes is that they were ordered not to venture out, but to stay there. They merely broached the subject to the masters, and were met with prompt refusal to consider it. If this can be construed as an attempt to induce the masters to go out, then, as the libel alleges, it failed.

Did the respondents or their agents "hold the cargo on the said vessels for an unreasonable period of time, so that the coal caught fire and caused the steamship to sustain damage?" In the first place, the cargoes were not and could not be held on board the vessels which had been withdrawn from the service of the charterers, and over which the owners had resumed possession and direct control. Then the allegation concerning "detention for an unreasonable period of time so that the coal caught fire" presupposes a necessary connection between a certain period of time and combustion of a coal cargo. If there were any such certain period, surely the owners were equally chargeable with notice of it. But there is no proof of it. The evidence shows that neither master thought of fire until it appeared in the Mowinckel's cargo on December 7th. Capt. Nielsen, it is true, sought to modify his admission by adding that nevertheless he had reason to expect it because the cargo had been too long in the ship. If he had reason to expect it and gave no thought to it, then it was his fault. As a matter of fact the cargo had been on the Mowinckel a little over three months, and on the Nepos a little over four months, when fire was discovered. In the absence of proof it seems to be assumed that the fire arose from spontaneous combustion. But the only evidence in this case concerning spontaneous combustion is the testimony the Hamburg-American Line's superintending engineer gave that spontaneous combustion may occur in time if there is not sufficient ventilation. Both masters assert that these cargoes were properly ventilated. There is no intimation by anybody to the contrary.

The remaining claim of liability is based upon the fact that in the case of the Mowinckel the supercargo, Maurer, wrote Capt. Frich on January 25th that all damages and consequences caused by the fire and water in his ship would be paid by charterer. Presumably Maurer thereby undertook to speak for the last charterer, the Hamburg-American Line. But there is no proof of his authority to bind that respondent, and such authority may not be implied from the position which he occupied after arrival at Teneriffe. Moreover, at the date of this communication, January 25th, the coal on fire had evidently been discharged. Discharging had been going on since December 20th, and the coal was completely discharged on January 28th. There is no proof that there was any fire in or damage from the coal discharged during the last three days.

The libels are dismissed.

HAWKINS v. DANNENBERG CO. et al.

(District Court, S. D. Georgia. June 1, 1916.)

1. BANKRUPTCY ⚷293(2)—ACTIONS—JURISDICTION OF COURT OF BANKRUPTCY.
Under Bankr. Act July 1, 1898, c. 541, §§ 23b, 60b, 67e, 30 Stat. 552, 562, 564 (Comp. St. 1913, §§ 9607, 9644, 9651), a court of bankruptcy has jurisdiction to entertain a bill to set aside a mortgage executed by a bankrupt as being preferential and also fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⚷293(2).]

2. ELECTION OF REMEDIES ⚷12—ACTION IN STATE COURT—JURISDICTION OF COURT OF BANKRUPTCY.
Prior to bankruptcy, defendant instituted in an inferior state court a proceeding to foreclose a chattel mortgage given by the bankrupt, which was recorded less than a month before bankruptcy. After adjudication, the trustee intervened in the state court, setting up his claim that the mortgage was not only preferential, but was fraudulent. *Held*, that the trustee was not precluded, it appearing that, owing to the limitations on the jurisdiction of the state court, his rights could not therein be adjudicated, from instituting a plenary suit in the court of bankruptcy to set aside the mortgage and recover the proceeds, which the parties had agreed should stand in lieu of the mortgaged property, for the intervention in the state court was not an irrevocable election of remedies.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 15; Dec. Dig. ⚷12.]

3. BANKRUPTCY ⚷295—CITY COURTS IN GEORGIA—JURISDICTION.
A Georgia city court is without jurisdiction, it having no equitable jurisdiction other than to give effect to equitable defenses, to entertain an

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

intervention in foreclosure by the mortgagor's trustee in bankruptcy to set aside the mortgage as preferential and fraudulent and recover the proceeds from sale of the mortgaged chattels, which it had been agreed should stand in lieu thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 414, 417; Dec. Dig. ⚷ 295.]

4. CHATTEL MORTGAGES ⚷197(1)—WITHHOLDING FROM RECORD—VALIDITY AGAINST CREDITORS.

Where, for the purpose of enabling the mortgagor to obtain fictitious credit, mortgagee withholds from record a chattel mortgage, the mortgagor retaining possession, such mortgage is fraudulent as to subsequent creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 430-432; Dec. Dig. ⚷197(1).]

5. BANKRUPTCY ⚷184(2)—PREFERENCES—MORTGAGE LIEN—RECORDING.

It would seem that since the amendment of 1910, clothing a trustee in bankruptcy with the rights, remedies, and powers of the holder of a lien obtained by legal proceedings, a mortgage, under the Georgia law, is "required" to be recorded within the meaning of section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9644]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⚷184(2).]

In Equity. Bill by Robert T. Hawkins, trustee of the Warlick Bros. Company, bankrupt, against the Dannenberg Company and others. On motion to dismiss. Motion denied.

Complainant, Robert T. Hawkins, as trustee of the Warlick Bros. Company, bankrupt, brought a bill in equity in the United States District Court against the Dannenberg Company and C. W. Fuller, sheriff, in which he alleged that the said Warlick Bros. Company was adjudicated bankrupt on August 1, 1914; that said company had been engaged in the general merchandise business in Americus, Ga., and in January, 1914, executed to the Dannenberg Company a mortgage upon all its stock of goods in order to secure an indebtedness then existing, as well as for future purchases of goods; that the Dannenberg Company fraudulently withheld said mortgage from record by agreement until July 18, 1914, upon which date it made a demand upon the Warlick Bros. Company for immediate payment of the mortgage, and upon its failure to pay same the mortgage was recorded on said date, and on the same day was foreclosed in the city court of Americus, and the stock of goods was levied upon by the sheriff of that court. Complainant alleged that the mortgage was fraudulent and void, that the effect of same was to give a preference to the Dannenberg Company over other creditors, and that the failure of the mortgagee to record same, as provided by the Georgia statute, was fraudulent; that many persons had, subsequently to the execution of the mortgage and before its record, sold goods to the bankrupt under the assumption that it had an unincumbered title to its stock of merchandise, and that the failure to record the mortgage gave to the bankrupt a false and fictitious credit, to the injury of such subsequent creditors. The trustee, therefore, prayed for the cancellation of the mortgage as being fraudulent, and also as being preferential, and for an injunction against the sheriff selling said property under the foreclosure proceedings instituted in the city court of Americus. Subsequently, by agreement of counsel, the sheriff was allowed to sell the stock of goods under said foreclosure proceedings and to hold the funds in lieu of the property, and by a consent order the trustee was allowed to intervene in the city court of Americus for the purpose of asserting his rights to the fund derived from the proceeds of the sale of the stock of goods in question. The trustee thereupon filed his intervention in the city court of Americus attacking the mortgage upon the same grounds taken in his bill in the United States District Court. Thereafter he amended his bill in this court, and alleged that the city court of Americus was under the laws of the state of Georgia a court of limited jurisdiction and had no

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

equity jurisdiction, and therefore that he could not fully assert all his rights in that court, but that it was necessary for the District Court of the United States to proceed with his bill, so as to enforce his rights as trustee against the fund in question, and against the Dannenberg Company and the sheriff of the city court of Americus, who had such funds in his possession. The Dannenberg Company thereupon filed its motion to dismiss the bill in equity on the ground that complainant had elected to intervene in the state court and that this election was final, and on the further ground that the District Court of the United States should not take jurisdiction of the matter, as complainant could enforce all his rights, legal and equitable, in the intervention which he had filed in the state court, which had first taken jurisdiction of the mortgaged property.

Little, Powell, Smith & Goldstein, of Atlanta, Ga., and Ellis, Webb & Ellis, of Americus, Ga., for complainant.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for defendant Dannenberg Co.

LAMBDIN, District Judge (after stating the facts as above). This case is now before me upon motion made by the defendant the Dannenberg Company to dismiss complainant's bill upon the grounds above stated.

[1, 2] 1. Complainant by his bill seeks to set aside the mortgage held by the Dannenberg Company as being preferential, and as also being fraudulent, and his bill is therefore apparently brought under sections 60b and 67e of the national Bankruptcy Act. Under these sections, and under section 23b of the Bankruptcy Act, this court has jurisdiction to entertain the bill. It is contended by the Dannenberg Company that, inasmuch as complainant intervened in the proceedings in the city court of Americus and endeavored there to attack the mortgage in question, he cannot now come into the United States court and make the same attack. We do not think this contention is sound. If the complainant went into the state court under the idea that he could there enforce and assert all the rights which he claims against the mortgagee, but after so doing found that he was mistaken in his forum, and could not in that court fully protect himself and those he represents, we see no reason in law or equity why he should not be allowed to come into this court. The doctrine of the election of inconsistent remedies is not involved in such action. Board of Education v. Day, 128 Ga. 156, 57 S. E. 359.

[3] 2. This brings us to the consideration of the main question in the case, which is whether the city court of Americus affords to the complainant full, adequate, and complete relief. Under the laws of the state of Georgia, the city court of Americus is a court of law and has no equity jurisdiction; such jurisdiction being lodged exclusively in the superior courts of the state. While for defensive purposes it has been held that city courts may afford equitable relief, yet the decisions of our higher courts are uniform to the effect that the city courts of Georgia cannot afford affirmative equitable relief. This question is exhaustively discussed by the Supreme Court of Georgia in the leading case of Hecht v. Snook & Austin Furniture Co., 114 Ga. 921, 41 S. E. 74. The complainant in the bill before the court is seeking equitable relief, as may be seen from the brief analysis of the bill set out

above. The relief prayed for by the complainant is entirely equitable. It is true that, under section 5348 of the Code of Georgia of 1910, the courts, even city courts in this state, upon rules for the distribution of money, proceed upon equitable principles. However, this section of the Code seems to provide that, before a person can come into court under such a rule or proceeding and ask that money raised by process be awarded to him, he must have some lien upon the fund in question.

The complainant in this case does not have such a lien, but claims that the act of the mortgagee in withholding his mortgage from the record is a fraud upon subsequent creditors of the bankrupt, and that therefore the mortgagee is estopped from attempting to enforce the mortgage against these creditors. He also claims that the mortgage was made, and also withheld from record, for the purpose of hindering, delaying, and defrauding creditors, and he prays for a cancellation of the mortgage, and for a decree holding that the mortgage is void as a preference and as a fraud upon the creditors represented by him. All these matters are entirely of equitable cognizance, and, such being the case, inasmuch as the complainant has no lien upon the fund in question, and is asking for affirmative equitable relief against the Dannenberg Company, I am of the opinion that the city court of Americus cannot afford him the full and complete relief which he desires. At any rate, it is very doubtful. Counsel who submitted briefs on both sides of the question are attorneys of ability, and they utterly disagree on this point. Such being the case, is it proper for this court to send the complainant back to the city court of Americus, where his rights are doubtful, to say the least? The bankruptcy law is paramount, and since the bill before the court is a plenary bill in equity, where full effect can be given to the rights of all the parties interested, this court is of the opinion that it should retain the bill.

[4] It is well settled by the rulings of the courts of the United States that, where mortgages are withheld from record by agreement for the purpose of enabling the mortgagor to preserve his credit, such mortgages are fraudulent as against subsequent creditors. Collier on Bankruptcy (10th Ed.) 939; Clayton v. Exchange Bank of Macon (C. C. A. Fifth Circuit) 10 Am. Bankr. Rep. 173, 121 Fed. 630, 57 C. C. A. 656; In re Duggan, 25 Am. Bankr. Rep. 479, 183 Fed. 405, 106 C. C. A. 51. Since, therefore, the rights of complainant are well recognized in the courts of the United States, and as the court hardly thinks he can fully assert his rights in the city court of Americus, the motion to dismiss the bill will be overruled.

3. Before leaving the subject the court may be permitted to comment upon the question as to whether the mortgage which is attacked in this case may be considered as a preference under section 60b of the Bankruptcy Act. This court is bound on this question by the recent decision of the Court of Appeals of this circuit in the case of W. E. Martin, Jr., Trustee, v. Commercial National Bank of Macon, 228 Fed. 651, — C. C. A. —, 36 Am. Bankr. Rep. 25, which decision follows the prior decision of the same court in the case of Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240,

14 Am. Bankr. Rep. 477. The mortgage involved in this case was executed more than four months before the filing of the petition in bankruptcy, but was not recorded until within that period.

Under section 60b of the Bankruptcy Act, I am personally of the opinion that if, at the time of the record of this mortgage, the bankrupt was insolvent and the mortgage then operated as a preference, and the mortgagee then had reasonable cause to believe that the enforcement of the mortgage would effect a preference, the mortgage would be voidable by the trustee; but the court defers to the contrary ruling made by the Circuit Court of Appeals cited above. The reasons for the opinion I entertain on this question are as follows: Section 60b of the Bankruptcy Act, as amended in 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [Comp. St. 1913, § 9644]), provides that such a mortgage is voidable by the trustee where the preferential conditions which are named in said section existed, "if by law recording or registering thereof is required." The question, therefore, is whether the mortgage in question was "required" to be recorded by the laws of the state of Georgia. The law on the subject in Georgia is embodied in section 3260 of the Code of 1910, which is in the following language:

"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."

Under this section of the Code of Georgia, a mortgage is valid as between the mortgagor and mortgagee, although not recorded; but, if not recorded promptly it is not valid as to "all other liens created or obtained, or purchases made prior to the actual record of the mortgage." Therefore, as to such other liens created or obtained, or purchases made, the mortgage is "required" to be recorded by the Georgia law in order to retain its validity. A long line of decisions of the Supreme Court of the state illustrate this section of the Georgia Code, and hold that an unrecorded mortgage is invalid as against the holder of a judgment, with or without notice, which was obtained before the actual record of the mortgage, and also as against the holders of contract liens, without notice, created before such time. Hardaway v. Semmes, 24 Ga. 305; Smith v. Jordan, 25 Ga. 687; Richards & Brother et al. v. Meyers & Marcus et al., 63 Ga. 763; Thompson v. Morgan, 82 Ga. 548, 9 S. E. 534; New England Mortgage Security Co. v. Ober & Sons Co., 84 Ga. 294, 10 S. E. 625; Cabot v. Armstrong, 100 Ga. 438, 28 S. E. 123; Cambridge Tile Co. v. Scaife & Sons Co., 137 Ga. 281, 73 S. E. 492.

It is true that the mortgage in this case was actually recorded before the petition in bankruptcy was filed, and therefore before the trustee was vested with the lien which is given to him by the amendment of 1910 to the Bankruptcy Act, which is now embodied in section 47a of that act as amended. Therefore, if the mortgage in this case is to be held valid or invalid as determined by the terms of the Georgia law, the court would have to hold that under the Georgia law the mortgage was valid, because it was recorded before the petition in bankruptcy was filed.

But the question here is not one of the validity or invalidity of the mortgage, but the question is whether the mortgage became a preference or not on account of being withheld from the record until within the interdicted period of four months. The Georgia law cited above is relevant on this point only as determining whether the mortgage was "required" to be recorded by the law or not. If it was required to be recorded under the law, and was not recorded until within the period of four months before the petition was filed, and if at that time the bankrupt was insolvent, and the mortgage then operated as a preference, and the mortgagee then had reasonable cause to believe that the enforcement of the mortgage would effect a preference, then the mortgage would be preferential, and would be voidable by the trustee, under section 60b of the Bankruptcy Act as amended, although it might be valid under the Georgia statute. The Bankruptcy Act controls on this question of "preference," and, as stated above, the Georgia statute is only relevant as determining whether the mortgage was "required" to be recorded or not within the meaning of said section 60b.

[5] I am of the opinion that, within the meaning of section 60b of the Bankruptcy Act, a mortgage in Georgia is "required" to be recorded. At the time when the case of Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, was decided by our Circuit Court of Appeals, upon which case the recent decision in the case of W. E. Martin, Jr., Trustee, v. Commercial National Bank of Macon, 228 Fed. 651, — C. C. A. —, 36 Am. Bankr. Rep. 25, was based, the amendment of 1910, now to be found in section 47a of the Bankruptcy Act, had not been passed by Congress. But by the amendment of 1910 a trustee in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon," and therefore I am personally of the opinion that the passage of this amendment has changed the rule in Georgia, and that now under said amendment a mortgage is "required" in this state to be recorded, within the meaning of section 60b of the Bankruptcy Act. This seems clearly to be the view of the Supreme Court of the United States, as set forth in the opinion of the court rendered on March 13, 1916, in the case of Carey v. Donohue et al., 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, where in deciding a similar question arising under the statutes of the state of Ohio, which only required that mortgages in that state should be recorded as against bona fide purchasers, and not as against lienholders, the court held as follows:

"As Congress did not undertake in section 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and we think the intended, meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act. See Senate Report, No. 691, Sixty-First Congress (2d Sess.) p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors, or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the Bankruptcy Act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause 'if by law recording or registering thereof is required' had any reference to requirements in the interest of persons of this description. The limitaton of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, alio intuitu, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors—the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under section 60."

The Supreme Court of the United States, in the above quotation from its opinion in the case cited, construes the provision of section 60 under consideration and clearly lays down the rule that, if the transfer (or mortgage) is "required" to be recorded in order to render same valid "as against those concerned in the distribution of the insolvent estate—that is, as against creditors, including those whose position the trustee is entitled to take"—then such instrument is "required" to be recorded within the meaning of the Bankruptcy Act. Under the provisions of the Georgia Code governing the matter, such transfers (or mortgages) are "required" to be recorded in order that same should be valid as against all "liens created or obtained, or purchases made, prior to the actual record" thereof; and the trustee under the amendment of 1910 is now clothed with the rights, remedies, and powers of the holder of a lien obtained by legal proceedings, and therefore, under the rule laid down by the United States Supreme Court, I am clearly of the opinion that under the Georgia law the mortgage in question was "required" to be recorded within the meaning of section 60b of the Bankruptcy Act.

The same rule seems to be recognized in the late case of Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814, decided by the Supreme Court of the United States on November 29, 1915. Reference may also be had to the reasoning of the District Court of Arkansas in Re T. H. Bunch Commission Company, 225 Fed. 243, where, under the statute of Arkansas, very similar to the statute of Georgia, governing the record of mortgages, that court held that the mortgage there involved was "required" to be recorded within the meaning of section 60b of the Bankruptcy Act, in view of the amendment of 1910 to section 47a, which provides that trustees shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, etc. See also the case of In re Hunt (D. C.) 139 Fed. 283.

However, I understand that the case of W. E. Martin, Jr., Trustee, v. Commercial National Bank of Macon, recently decided by our Court of Appeals, as above mentioned, is now before the Supreme Court of the United States upon certiorari, and therefore it may be that the rule laid down by the Circuit Court of Appeals on the subject is not final. Had the decision of the Supreme Court of the United States in the case of Carey v. Donohue, Trustee, cited above, been rendered at the time, it is possible that the decision of the Court of Appeals might have been different. The question here discussed is not involved in the motion to dismiss complainant's bill under consideration, but was argued before me by counsel, and therefore the views expressed above are given in response to such argument, and pending the final decision of the question by the Supreme Court of the United States. Of course, there is no evidence before the court, and therefore the court cannot say, whether, even under the opinion and rule above set out, the mortgage in question is a preference or not.

CARLISLE v. SMITH et al.

(District Court, N. D. Georgia. July 17, 1916.)

No. 28.

1. EQUITY ⊂⊃410(7)—FINDING BY MASTER—EFFECT—CONFLICTING TESTIMONY.

There is a presumption in favor of the report of the master based on conflicting testimony.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 916-919; Dec. Dig. ⊂⊃410(7).]

2. CONTRACTS ⊂⊃121—VALIDITY.

A contract whereby an officer of a corporation agreed for compensation to assist others to gain control of the company by buying in the stock is unenforceable, being in conflict with the duty which he owed the shareholders as an officer, and this is so regardless of the purity of his motives and his good faith.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 504; Dec. Dig. ⊂⊃121.]

3. CONTRACTS ⊂⊃140—ILLEGAL CONTRACTS—EFFECT OF.

An officer of a corporation entered into a contract to assist third persons to gain control of a company. After the contract was carried out, he rendered other services for such persons in connection with the consolidation of that corporation with others. *Held*, that while no recovery could be had under the contract which was illegal, recovery on the quantum meruit might be had for services rendered thereafter, for they were independent of the invalid contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 713-721; Dec. Dig. ⊂⊃140.]

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

4. WORK AND LABOR ⟹29(2)—RECOVERY—QUANTUM MERUIT.

Where a contract for an officer of a corporation to assist defendants to obtain control was invalid because of his official relation, and after defendants had obtained control, the former officer rendered services assisting them in consolidating such corporation with others, the limit of his recovery for such services is their value, taking into consideration his fitness for the work, its nature and his diligence, but the profits received by defendants cannot be considered.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 57; Dec. Dig. ⟹29(2).]

In Equity. Suit by W. A. Carlisle against C. Elmer Smith and others. On report of master. Decree in part for complainant.

See, also, 224 Fed. 231.

Anderson & Rountree, of Atlanta, Ga., and W. C. Wright, of Newnan, Ga., for plaintiff.

H. H. Dean, of Gainesville, Ga., and Robt. C. & Philip H. Alston, of Atlanta, Ga., for defendants.

NEWMAN, District Judge. The business of the court is such and my time is so occupied with official business that I cannot go as extensively into the facts and law of this case as perhaps the character of the case and the rather extensive argument of counsel and the voluminous briefs furnished me would justify. I simply state my conclusions briefly but, I trust, so that they may be understood. These conclusions are:

[1] First: The conclusion of the special master that there was no agreement between Carlisle and Smith and Ashley by which they entered into a partnership or "joint adventure," to divide among them any profits that might arise from the reorganization or rehabilitation of the North Georgia Electric Company, must be upheld.

The evidence in the case is sharply conflicting, and the special master, after hearing it all and weighing it, decided favorably to Smith and Ashley. Under any rule with reference to the weight to be given a master's report I think the court would be required to sustain the master in this respect. No attempt is made anywhere to impeach any of the witnesses testifying on this subject. Ashley and Smith are apparently business men of good standing where they live, and Carlisle is a man of excellent repute in this state. It is to be hoped that expressions here and there in the many conversations between the parties were misinterpreted and that all of them are trying to tell the truth about the thing as they understood it. It is hard to believe that men like these would willfully and deliberately swear to a falsehood to make money, and I do not think it is necessary to find that they did that, nor can I see that any of them willfully testified to anything they did not believe to be true at the time.

Of course the presumption in any case of reference such as this is in favor of the master's report, especially where he finds on conflicting testimony. All of the exceptions to the findings of the master with reference to this, therefore, are overruled.

[2] Second: I am satisfied that, under the law, with Carlisle's re-

lation to the North Georgia Electric Company, being most of the time during which these transactions occurred the president and for a short time vice president, and all the time being officially related in some way to the company, a contract between him and other people, to do work for and accept compensation from other parties dealing with his company, the dealings on behalf of the third parties seeming to be antagonistic to the rights of the electric company, would be illegal and nonenforceable. It is claimed here, as I understand it, that what Carlisle did, while he was purchasing the stock of the North Georgia Electric Company for other people and for interests represented by Smith and Ashley, was really benefiting the stockholders of that company because the company was in such a situation at the time the dealings were entered into that their stock was valueless, and that he really gave them more for their stock than they could have expected to realize otherwise. Even if this should be true and conceding it, it is not what really occurred in a transaction like this, where an officer of a corporation undertakes to assist parties who are dealing with the corporation, but it is the principle which controls; it is what the sanctioning of such transactions could lead to and necessarily in many, if not in most, cases would lead to. That is to say, where a person is an officer of a corporation and undertakes to assist others who are attempting to acquire control of the corporation, whether the results are beneficial to the stockholders or not, the consideration is what the result of sanctioning such transactions would be.

In the opinion in McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, the part I am referring to being on page 647 of 174 U. S., on page 842 of 19 Sup. Ct., 43 L. Ed. 1117, Mr. Justice Peckham says:

"The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made between the parties; and that tendency or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made."

In Richardson v. Crandall, 48 N. Y. 348, 362, the court said, as quoted by Mr. Justice Peckham in McMullen v. Hoffman:

"In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate"—citing Atcheson v. Mallon, 43 N. Y. 147.

The case of McMullen v. Hoffman was a case in which McMullen undertook to recover from Hoffman a share in the profit which Hoffman had made and received on a contract with the city of Portland, Or., for the manufacturing and laying of certain pipe in the construction of waterworks for the city of Portland. McMullen and Hoffman entered into an agreement that they should both bid for the work for which the city was receiving bids, and that they should jointly do the work and share the profits or loss. McMullen's company bid $50,000 more for the work than Hoffman's company. The way the bids were put in is described by the court in the opinion in this way (174 U. S. 645, 19 Sup. Ct. 841, 43 L. Ed. 1117):

"The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and all bids were to be put in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly $50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a bona fide bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, viz., that relating to the partnership, was reduced to writing, and is set out."

It is then stated, in substance, that the effect of the bid of McMullen's company would be to cause the water committee of the city, who were considering the bids, to think that that company, bidding in good faith, considered the work worth nearly $50,000 more than Hoffman's company had bid, and in this way would deceive the committee acting for the city.

Further along in the opinion the court says, in reference to the right to recover in a case like this (174 U. S. 654, 19 Sup. Ct. 845, 43 L. Ed. 1117):

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is Potior est conditio defendentis."

The court then cites, considers, and discusses a number of cases bearing upon the question of the right of McMullen to recover his share of the profits made by Hoffman's company under the contract referred to, among the cases being several which have been cited here for the plaintiff. Perhaps the principal one of these cases relied upon by the plaintiff is that of Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. Ed. 732. The first headnote will show what was decided in that case. It is this:

"After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms—the result of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

In the opinion in McMullen v. Hoffman, in discussing the case of Brooks v. Martin, supra, this is said:

"There is a difference between the case" before this court and that case, "because in the latter case the fact existed that the transactions, in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated. We think it should not control the decision of the case now before us."

Concluding this case of McMullen v. Hoffman, the court says:

"It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

"We must therefore come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

This case of McMullen v. Hoffman has been cited in a large number of cases and clearly states the law in reference to the right of one partner to recover from another the profits of an illegal transaction. Vandegrift v. Vandegrift, 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404; 18 Am. & Eng. Ann. Cas., to which an interesting note is attached; Central Trust & Safe Deposit Co. v. Respass, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317, in which latter citation there is an extensive note on the question involved here; Kennedy

v. Lonabaugh, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133; 30 Amer. & Eng. Ann. Cas. 133.

In Rowley's "Modern Law of Partnership," § 175, it is said:

"As shown in the preceding sections the courts generally will not recognize a partnership contract to carry on an illegal business or to conduct a legal business in an unlawful manner, and will not enforce its claims against third parties nor compel an accounting or contribution between the parties."

It may be conceded that there are contrary authorities, like Brooks v. Martin, supra, in which it is held that where the illegal transaction is completed one party may recover from the other his portion of the profits arising from the illegal transaction. The federal courts, however, must be controlled by the doctrine announced by the Supreme Court of the United States and that, I think, is fully stated and must be gathered from the decision in McMullen v. Hoffman, supra. I think I was inclined to have the contrary view of the law at the time the application for injunction was heard and passed upon in this case, but I am satisfied now, after a careful examination of the authorities, that if I had such an opinion at that time I was in error about it, and that the law is as I have endeavored to state it briefly herein.

It is claimed on behalf of the plaintiff here, and in reply to this legal proposition of the defendants, that Carlisle's work under the contract between Carlisle on the one part and Smith and Ashley on the other, by which Smith and Ashley were endeavoring to obtain control of the North Georgia Electric Company's stock, being with the stockholders of the North Georgia Electric Company and not with the company itself, as I understand their contention, that therefore the contract is not illegal. I am unable to agree to this under the facts in this case. Carlisle was, as I have stated, either president or vice president of this company during the whole time these transactions were going on, and his agreement with Smith and Ashley, if he had such an agreement, was to obtain control of the company by obtaining all of the stock. Therefore the rule as stated above would, it seems to me, clearly apply.

As I have stated that it is impossible for me to disagree with the master's conclusions under any recognized rule as to the weight to be given such conclusions, it may not be very material what the law is as to this, but inasmuch as it has been argued here that it has an important bearing upon this case, I have stated my conclusions about it.

[3] Third: After the agreement of June 3, 1909, was signed by the stockholders of the North Georgia Electric Company and the Etowah Power Company, by which they agreed to receive stock of the new company in certain proportions for their old stock, Carlisle had completed the work which he did for Smith and Ashley for which it is clear, I think, that no recovery can be had by him, either based upon the express agreement which he says existed or on quantum meruit. And the question which has given me more trouble than any other is whether Carlisle can recover for work he did in furthering the interests of Smith and Ashley, mainly in obtaining property rights and in general work for them in connection with the bringing together of the properties which went into the corporations of the Georgia Power

Company and the Atlanta Power Company, from which corporations the profits made by Smith and Ashley came. That Carlisle did much work for Smith and Ashley which was of great benefit to them and aided them in carrying out their plans for the organization of these new corporations and in getting together the properties which they acquired is beyond question. And unless he is debarred from such recovery because such work was done under what has been held to be an illegal agreement with Smith and Ashley, he would, it seems to me, be entitled to recover the value of his services after his work under the illegal agreement was all completed. I understand the rule laid down in all the cases on the subject of the right to a recovery in a case like this that the test is whether it is necessary to invoke the illegal agreement as the basis of such recovery. In this case, for the work done by Carlisle after July 1, 1909, I think he may recover without setting up the alleged agreement with Smith and Ashley. Clearly from the correspondence in evidence here they called on him repeatedly and continually, after the agreement of June 3, 1909, had been perfected, to do much work in obtaining property and water rights for their benefit. On June 18, 1909, Carlisle wrote to C. Elmer Smith that he had over 65 per cent. of the North Georgia Electric Company and Etowah Power Company stock subscribed to the agreement. It seems entirely probable, therefore (while I have been unable to find anything which shows the date exactly), that this subscription was practically completed by July 1, 1909. After that the correspondence shows that Smith and Ashley were continually calling on Carlisle and Carlisle was continually making reports to them of what he was doing about obtaining property which was necessary for water rights for the development of the properties already obtained and new properties which might be developed if it was thought necessary. And all of this correspondence shows, I think, that they called upon him in such way as to indicate that he was considered to be in their service and employ and that they had the right to call upon him for his services in connection with the work he was doing.

I am not overlooking the fact that the new stock given for the old stock was not actually delivered until long after July 1, 1909, but I do not see that that makes any difference because all of Carlisle's work in obtaining the assent of the stockholders to this arrangement was completed, as I have stated, about the middle of 1909, probably by July 1st.

It is almost impossible to go over all the correspondence between Smith and Ashley on the one side and Carlisle on the other in reference to what he was to do in acquiring property, etc. The first letter I find after July 1st is dated July 6, 1909, from Ashley to Carlisle, in which he was writing him in reference to the Moss agreement, which was connected with the purchase of property at Tallulah Falls. The next is from Smith to Carlisle, of July 7, 1909, with reference to acquiring some rights from the Southern Railway. In this letter Smith refers to the signing of the new agreement, evidently by the stockholders, and it would appear that at that time, so far as Smith knew, the signing was not completed. On July 12, 1909, Smith is still writing to

Carlisle about Tallulah Falls and Southern Railway matters, and asks him again when the stockholders' agreement will be in shape to turn over to him. On August 16th, Smith writes Carlisle with reference to some interests at Buford, and about certain Looper properties. Letter from Smith to Carlisle August 23, 1909, in reference again to the Moss option at Tallulah Falls. On August 24th, another letter from Smith to Carlisle with reference to the Moss property. A letter from Ashley to Carlisle on October 16, 1909, with reference to a certain underwriting agreement. Letter of December 2d, from Ashley to Carlisle, in reference to some transaction with a Mr. Buist. In that, among other things, Mr. Ashley says: "I suggest that you take the matter up with Mr. Buist at once," etc. Letter from Mr. Smith to Carlisle, dated December 16, 1909, in reference to some dealings with a Miss White and her attorney, which I understand to be with reference to some Tallulah Falls property. In this letter Mr. Smith uses the expression: "In the meantime I trust, however, you will not leave this White matter rest." Letter from Smith to Carlisle of December 20, 1909, in reference mainly to arrangements for the purchase of the properties of Miss White and Mrs. Cartledge, also referring to the Moss property, and an expression in that letter is: "Whatever you do, try to get the payments strung out as far as possible," etc. Letter from Ashley to Carlisle of December 21, 1909, with reference to some meeting with Miss White and Mr. Buist, at Tallulah Falls on the 27th. In that Mr. Ashley uses the expression: "Mr. Smith has instructed you with reference to these negotiations and I will write him today informing him of your meeting and asking him to give you further instructions." Letter from Smith to Carlisle of December 23, 1909, in which he mentions several negotiations which they were carrying on, mainly, I believe, with reference to Tallulah Falls properties. In this letter are a number of instructions by Smith to Carlisle. A letter of February 2, 1910, from Ashley to Carlisle relative to some negotiations with the city council of Gainesville. Letter from Ashley to Carlisle of February 18, 1910, about some rights of way along the Louisville & Nashville and the Central of Georgia railroads.

These letters continue all through 1910, and to all of them there were replies from Carlisle and some letters from Carlisle which were answered by Smith and Ashley. They show conclusively that Carlisle was doing work for Smith and Ashley at their instance and request. The character of the requests and often of instructions and express directions, and the apparent acquiescence by Carlisle in all these suggestions and instructions is such that they seem to be unquestionably the basis for an implied assumpsit; that is, an intention on the part of Smith and Ashley and expectation on the part of Carlisle that he would be paid for this work.

I do not think there is anything in this case which authorizes a recovery by Carlisle of a part of the profits made by Smith and Ashley in this matter as such. That is to say, he claims in his suit, as I have stated, that there was a partnership or joint adventure between himself on the one hand and Smith and Ashley on the other, for an interest in the profits of the enterprise. This, as I have stated, he cannot recover, because I think the finding of the master on that subject must be sustained, and for the further reason that any such contract, even if made, would, in my opinion, be illegal.

So the matter comes in my mind to this: That after the agreement which Carlisle could not have legally made as an officer of the North Georgia Electric Company (and, which I have not mentioned, also an officer of the Etowah Power Company), for obtaining control of the North Georgia Electric Company and the Etowah Power Company for another company, was ended and complete, Carlisle did work for them as to which, from the correspondence and the transactions, and all the facts surrounding the matter, an implied assumpsit must be raised in favor of Carlisle; that is, an implied promise on the part of Smith and Ashley to pay him for his services.

[4] I think the extent of any such recovery must be what Carlisle's services were worth, considering his ability, his especial fitness for the work in which he was engaged, his familiarity with the matters intrusted to him, and the diligence and earnestness with which he pursued them, as well as his success therein. I do not think his recovery is to be judged by the large profits said to have been realized by Smith and Ashley, after Moore and Stevenson came into the matter and after the enterprise assumed a much larger shape than any one could have contemplated at the time the most of the work by Carlisle was being done. Smith and Ashley had put themselves in such advantageous position, by furnishing money and acquiring properties, and putting themselves in such relation to properties, as enabled them to receive very large returns in the way of profits therefrom.

Carlisle must, as I have stated, stand upon the value of his services, and that value must be found in a proper way. The amount to which he is entitled should be ascertained by a reference of the same to a master, or, if it is preferable to the parties, by the court, after hearing from counsel.

Mr. Carlisle has received, as the record shows, $100,000 in the common stock of the Georgia Railway & Power Company from Mr. Moore, and he could only have received this as due him for services in this matter, otherwise it would be the mere purchase of his agreement not to interfere with the consolidation with the Georgia Railway & Power Company. This latter he will hardly insist upon, and the value of this stock must be considered in determining the amount to which he is entitled. No recovery can be had for anything done after January 1, 1911, at which time Carlisle's employment by the Northern Contracting Company began at a salary of $5,000 per annum, as shown by the record.

THE LOUISE RUGGE et al.

(District Court, D. New Jersey. June 21, 1916.)

No. 1561.

1. NAVIGABLE WATERS ⚷20(8)—TOWAGE ⚷11(7)—BRIDGES—INJURY TO TOW FROM OPERATION OF DRAW—NEGLIGENCE OF TENDER.

A tug with a mast and derrick lighter in tow close astern, passing up the Passaic river at night, signaled for the opening of the draw of a temporary bridge, and when closer stopped and again signaled. It was not customary to give any response signal from the bridge other than the raising of the draw which was indicated by the lights. The tug, seeing the lights rise, proceeded, but the top of the lighter's mast struck the draw, which had been stopped before reaching its full height, the mast was broken, and the vessel otherwise injured. *Held*, that the tug was not in fault, but that the collision was due solely to the negligence of those in charge of the draw in failing to raise it to full height.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⚷20(8); Towage, Cent. Dig. § 19; Dec. Dig. ⚷11(7).]

2. TOWAGE ⚷11(7)—DRAWBRIDGES—DUTY OF TUG.

It is not the duty of the master of a tug with a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that it has been fully and sufficiently operated, but, having given the usual customary signal, he has the right to assume, unless otherwise warned by signal, that the draw will be seasonably opened by those whose duty it is to operate it.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 19; Dec. Dig. ⚷11(7).]

3. MASTER AND SERVANT ⚷301(4)—LIABILITY FOR NEGLIGENCE OF SERVANT—SERVANT HIRED TO ANOTHER.

A contractor for replacing a public drawbridge across a navigable river, owned jointly by the counties lying on either side, was required by its contract to maintain and operate a temporary bridge while the new bridge was being built and to assume all responsibility for the safety of the public and for accidents of any kind in its operation. During the operation of such temporary bridge a vessel was injured in passing through the draw through the negligence of those charged with its operation. These were employés of the two counties who had previously operated the draw of the old bridge, and who were retained and paid by the counties, but with funds supplied by the contractor. *Held*, that, in the absence of proof of any agreement by the counties to assume charge of the operation of the temporary bridge, contrary to the terms of the contract, such employés were, while so working, servants of the contractor for whose negligence it was responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1213, 1214; Dec. Dig. ⚷301(4).]

4. ADMIRALTY ⚷79—DISMISSAL—INSUFFICIENCY OF EVIDENCE.

Mere insufficiency of the evidence, taken in support of a libel in admiralty, is not ground for dismissal of the suit if the evidence in support of the answer supplies the deficiency.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 592–594; Dec. Dig. ⚷79.]

5. NAVIGABLE WATERS ⚷20(4)—BRIDGES—TEMPORARY STRUCTURE BY BUILDING CONTRACTOR—LIABILITY FOR NEGLIGENT OPERATION.

A private corporation, contracting with public authorities for the building of a bridge across a navigable stream, may erect and maintain a temporary bridge, provided due care is taken not to impede navigation, and it cannot shift the responsibility for a violation of such duty upon the public authorities on the ground that their duty to keep the waterway clear for navigation cannot be delegated.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 86–89; Dec. Dig. ⟹20(4).]

In Admiralty. Suit by the Clyde Steamship Company against the Louise Rugge, the Board of Chosen Freeholders of the County of Essex, the Board of Chosen Freeholders of the County of Hudson, and the Snare & Triest Company. Decree for libelant against the Snare & Triest Company.

Burlingham, Montgomery & Beecher, of New York City, for libelant.
Park & Mattison, of New York City, for The Louise Rugge.
Herbert R. Taylor, for Board of Chosen Freeholders of Essex County.
James J. Murphy, of Jersey City, N. J., for Board of Chosen Freeholders of Hudson County.
Hitchings & Burdick, of New York City, for Snare & Triest Co.

ORR, District Judge. The libelant seeks to recover damages for injuries to a lighter, The Boston, which was owned by it at the time of the collision, was in tow by the Louise Rugge at that time, and was injured by its mast coming in contact with the draw of a temporary bridge, which had been erected by the Snare & Triest Company upon the Passaic river for the chosen freeholders of Essex and Hudson counties, respectively.

The bridge was of the ordinary bascule type, and was intended to be used, and was used, during the erection of a bridge intended to be permanent, and to connect Bridge street in the city of Newark with Harrison avenue in the town of Harrison. A written contract between the Snare & Triest Company and the chosen freeholders of the respective counties, acting through a joint committee, provided for the erection of both a temporary bridge and a permanent bridge, and by its terms required the Snare & Triest Company to operate the temporary bridge and to be responsible for accident, as appears by the following provision in said contract:

"The temporary bridge is to be operated and kept in first-class serviceable condition and repair by the contractor during the progress of the entire work, and to the satisfaction of the engineers in charge. The contractor must assume all responsibility for the safety of the traveling public and will be solely responsible for accidents of any kind that may occur during the continuance of this work."

The Boston, a hand-winch mast and derrick lighter, without power of its own, square at each end, was proceeding up the Passaic river with a load of lumber in tow of the steam tug at about 9 o'clock on the night of August 14, 1912. Its mast, which was 60 feet high, struck the draw span of the temporary bridge about 1 foot from the top of the mast. This caused the mast to fall, and caused such other injuries to the lighter that a new mast, deck planks, and other repairs were required to be made. The boat was out of service, while the repairs were being made, 12 days, excluding one Sunday. The repairs, dockage, towing, and demurrage make the aggregate of defendants' damages $826.25. Indeed the amount of the damage was not seriously contested. It is plain at the outstart that the libelant is entitled to recover damages from some one, but in ascertaining who may be responsible various questions must be considered.

[1, 2] Naturally, because the Boston was compelled to go where the tug took it, the first question which arises is whether the Louise Rugge and its owners should be held responsible. The tug and tow proceeding from the bay up the Passaic river were required to pass through a number of bridges. The night was clear yet dark, but lights and objects were visible. The tide was very nearly flood, and there was little, if any, wind. The draw span had lights to mark its position when open, and these lights were clearly visible, and were seen by those upon the tug. The tug and tow each had proper lights showing at the time of the accident. The Boston was being towed stern first by short lines from the tug's stern to each corner of the end of the lighter, and the distance between the tug and the tow was in the neighborhood of 10 or 12 feet. The tow readily followed the tug, and at the time of the collision had not touched or dangerously approached either side of the draw. While passing through the Center street draw about 2,000 feet down stream from the temporary bridge, the tug gave the proper signals and reduced her speed, and when about 1,500 feet from the temporary bridge the tug again signaled and stopped its engines and waited. A few minutes later the draw of the temporary bridge was seen to open, and the lights were seen to rise. The tug thereupon proceeded at slow speed and passed through the draw. The bridge at no time gave a signal to come ahead. It is also a fact which must be found from the evidence that those in charge of the temporary bridge did not give any signal to vessels intending to pass through the draw to come ahead other than to raise the draw span. Before the tug and tow went through the draw, those in charge of the draw span stopped their work, and when the mast and the draw span came in contact, those in charge of the draw span began again to raise it, and, so far as appears, for the first time raised it to its full height. When the draw span was raised to its full height the amount of overhand upon the channel would be 9 feet. The light on the end of the draw span, even if raised to its full height, would still be over the water. Therefore there was no duty upon those in charge of the tug to wait before proceeding through the draw until the light on the draw span had ceased to be over the water. That the change of the draw from its position when the mast came in contact with it would have to be slight to give clearance is shown by the fact that the 60-foot mast was struck at only about a foot from the top. Moreover, as the draw span had stopped in its rise before the tug and tow proceeded, the captain of the tug was justified by reason of that fact, as well as by his observation of the light on the draw, in proceeding. It is not the duty of the captain of a tug in charge of a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that the same has been fully and sufficiently operated by those

whose duty it is to operate the same. In City of Chicago v. Mullen et al., 116 Fed. 292, 54 C. C. A. 94, it is suggested by Judge Jenkins, in delivering the opinion of the Court of Appeals of the Seventh Circuit, that common sense does not demand—

"that vessels navigating the river shall heave to at each of the numerous bridges that span the river, and critically examine whether the bridge has been swung and whether it has been locked."

Nor is it required to delay proceeding until it receive some special signal from those in charge of the bridge to proceed. The usual customary signal is all that is required; and, if the only signal to proceed is the raising of the draw, the captain of the tug cannot be deemed negligent if he proceeded, although those in charge of the draw be required by law to give some other signal. It is the duty of those in charge of a draw to obviate any unnecessary delay to passing vessels. Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 59 Fed. 192, 8 C. C. A. 86. In the opinion of the case last cited there is a suggestion that those in charge of the tug had a right to suppose "that the draw would be opened seasonably to permit the tug and her tow to pass." There seems to be no doubt of the law as stated in Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271–273, 59 C. C. A. 289, 291, in relation to bridges across navigable streams:

"If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She * * * may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened."

Under all the circumstances and in the light of the testimony viewed in every aspect, this court cannot find that there was any negligence on the part of those in charge of the steam tug which would make her or her owners responsible in this case.

[3] It is plain from the facts hereinbefore found and the law as stated that those in charge of the bridge must have been guilty of negligence. Here it is proper to observe that no one of those who were in charge of the bridge on the night of the collision was called as a witness on behalf of any of the respondents. The evidence shows that there were three shifts of three men each during each 24 hours while this temporary bridge was in operation. No attempt has been made to account for the failure to call any one of the three men composing the shift on duty on the night of the collision. An inference, therefore, must be drawn that, had they been called, their evidence would have been unfavorable either to the contractor who had undertaken to operate the bridge or to the joint committee of the chosen freeholders of the respective counties to whom the contractor had obligated himself to maintain and operate the bridge. The evidence discloses that the men employed in the operation of the bridge

were men who had been employed by the freeholders of the respective counties in the operation of the former bridge which the new construction was to supplant, and that the contractor furnished to the freeholders of said respective counties certain sums of money to be used by such freeholders in paying the wages of the men actually operating the temporary bridge. The evidence does not disclose that there was any written contract with respect to the employment of these men, or that there was any modification or amendment to the original contract entered into for the construction of both the temporary and the permanent bridges. The contractor insists that the men were employés of the joint committee of the chosen freeholders of the respective counties, while the chosen freeholders of the respective counties insist that the men were employés of the contractor. The contractor bases its contention upon the fact that the men in charge of the bridge did not receive their wages from it, but from the chosen freeholders, and that they were neither hired nor discharged by the contractor.

The court is not satisfied that any arrangement was made between the contractor and the boards of chosen freeholders of either county whereby the duty imposed upon the contractor to operate the temporary bridge and to assume responsibility for accidents was in any way diminished. The retention of those formerly employed in the operation of the bridge to be supplanted by the new structure would probably be of some advantage to both parties. All the testimony upon this point warrants the inference that this is a case where the servants of one party are hired or loaned to another. The law is, in such a case, that they become the servants of the latter for the time being. In Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388, Judge Shipman, delivering the decision of the Court of Appeals of the Second Circuit, uses this language:

> "The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment, * * * or whether the owner can discharge the subordinate workmen, and not to regard as essential, or an absolute test, so much what the owner actually did when the work was being done, as what he had a right to do."

In 2 Cooley on Torts, star page 624, there is this language:

> "If the servants of a man are sent to work upon the property or the premises of another, they will become the servants of the latter if they work under his direction or control; otherwise not; and, where the servants of one person are hired or loaned to another, they become the servants of the latter for the time being."

In the case at bar, the Snare & Triest Company stood in the relation of an owner of the bridge which it had agreed to build and operate until the completion of the permanent bridge. It borrowed or hired, as the case may be, men in the employ of the boards of chosen freeholders. It was not bound to retain them if they neglected their duty. They were under its control. It cannot shift the responsibility for their negligent acts upon the boards of chosen freeholders of the respective counties, or either of them. The conclusion is therefore reached that the respondent the Snare & Triest Company is alone answerable to the libelant for the injuries to the Boston as the result of the collision.

[4, 5] A motion to dismiss the libel was made on behalf of the Snare & Triest Company, both at the close of the argument on behalf of the libelant and at the end of the hearing. This motion was based upon two reasons: First, that the evidence taken on the part of the libelant did not disclose negligence on the part of the Snare & Triest Company; and, second, because there was an inherent duty upon the boards of chosen freeholders of the respective counties to keep the waterways clear for navigation, and that such duty could not be delegated to a private person or corporation. The court refused to dismiss the libel because both reasons upon which the motion rested appeared to be unsound. With respect to the first, the entire testimony was taken by a commissioner appointed by the court, and the entire testimony was considered to be before the court from the beginning to the end of the argument of the case. The testimony as a whole clearly discloses liability on the part of the Snare & Triest Company. The mere insufficiency of the evidence, taken in support of the averments of a libel in admiralty or of a bill in equity, has never been ground for the dismissal of the suit if the evidence in support of the answer supplies a deficiency which may exist in the evidence offered by the opposite party. With respect to the second, there seems to be abundant authority that private persons and corporations may temporarily, if not permanently, erect and maintain bridges across navigable streams, provided due care is taken not to impede navigation. It is not possible for such person, maintaining a private structure and violating his duty to navigators to shift responsibility for such breach of duty upon the governing bodies by whose act or sufferance such bridge is maintained.

There having been serious doubt as to who was the party responsible for the collision, the joinder of the respondents in this case was not improper. It therefore follows that the libelant should not be answerable for any of the costs. It also follows that those in charge of the steam tug Rugge were not in fault, and that the respective boards of chosen freeholders of the respective counties were free from fault, and therefore should not be made to pay the costs, but rather to recover them. Therefore the court, under all the circumstances, is of the opinion that the libelant recover of the respondent the Snare & Triest Company the sum of $826.25, with interest to be added from March 1, 1913, and that costs be taxed against the Snare & Triest Company, and that the libel should be dismissed as to the Louise Rugge, with costs to be taxed against the Snare & Triest Company, and, further, that the libel should be dismissed as to the board of chosen freeholders of the county of Essex and the board of chosen freeholders of the county of Hudson, with costs to be taxed against the Snare & Triest Company.

Let a decree be drawn.

WRIGHT & COBB LIGHTERAGE CO. v. SNARE & TRIEST CO. et al.

(District Court, D. New Jersey. June 23, 1916.)

NAVIGABLE WATERS ⚷20(7)—BRIDGES—INJURY FROM OPERATION OF DRAW—NEGLIGENCE OF TENDER.

The steam lighter Pioneer, passing up the Passaic river, signaled for the opening of the draw of a temporary bridge operated by a contractor while building a new permanent bridge. The draw swung open, and the Pioneer proceeded, but, when part way through, the draw began to close, and struck and injured the vessel. In fact the draw was opened to permit the passing of a down-bound vessel through the other channel, and those in charge did not observe the Pioneer. *Held*, that the injury was due solely to their negligence, and that the contractor, which was required by its contract to maintain and operate the temporary bridge and to assume all responsibility for the safety of the public and for accidents of any kind, was liable therefor.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 92–95, 97; Dec. Dig. ⚷20(7).]

In Admiralty. Suit by the Wright & Cobb Lighterage Company, owner of the steam lighter Pioneer, against the Snare & Triest Company, the Board of Chosen Freeholders of the County of Hudson, and the Board of Chosen Freeholders of the County of Essex. Decree for libelant against the Snare & Triest Company.

Foley & Martin, of New York City, for libelant.

Herbert R. Taylor, for Board of Chosen Freeholders of Essex County.

James J. Murphy, of Jersey City, N. J., for Board of Chosen Freeholders of Hudson County.

Hitchings & Burdick, of New York City, for Snare & Triest Co.

ORR, District Judge. The libelant, which is a corporation of the state of New York, was the owner of the steam lighter Pioneer, which came into collision with the draw span of a temporary bridge on the Passaic river on the 24th day of November, 1911.

On one side of the river is the county of Hudson and on the other side is the county of Essex, in the state of New Jersey. The board of chosen freeholders of each county jointly had maintained a bridge, commonly known as the "Plank Road Bridge" across said river, at or near the city of Newark. It being deemed advisable by the respective boards that a new bridge should be constructed in place of the old one, a contract was entered into on December 14, 1909, by a joint committee of the respective boards, with the Snare & Triest Company, whereby the latter undertook to remove the old bridge and construct a new permanent bridge in place thereof, and to build a temporary bridge for use during the construction of a permanent bridge.

It is unnecessary to refer in detail to the many terms of the contract, as two provisions alone which relate to the temporary bridge have to do with this case. They are as follows:

"A temporary bridge for the use of team and trolley traffic will be constructed across the Passaic river and terminating as shown on the plans. It will consist of a pile trestle with steel draw span and embanked roadway, to

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

be used during the dismantling of the present bridge and the construction of the new bridge.

"It is to be operated and kept in first-class serviceable condition and repair by the contractor during the progress of the entire work, and to the satisfaction of the engineers in charge. The contractor must assume all responsibility for the safety of the traveling public and will be solely responsible for accidents of any kind that may occur during the continuance of this work."

The steel draw span upon the temporary bridge had been in use for a considerable time before the collision. The Pioneer, for some time prior to the collision had made about two trips per day from New York to Newark, passing by the temporary bridge. The bridge was a swinging drawbridge, controlled by electric power and operated by an engineer at the center, where it rested upon a pier in the center of the river. When the draw was closed, both channels were covered by the bridge. When the draw was open, both channels were clear of the bridge. The bridge in question was one of a number of bridges across the river.

The Pioneer, which is 140 feet long and 34-foot beam on the outside, blew the customary signal for the draw to open when, perhaps, three-quarters of a mile away. The bridge swung open. The Pioneer proceeded with due care up the river, taking the right-hand channel, but when opposite the center of the draw, the bridge began to close, and the end of the bridge to the south overtook and struck the house upon the Pioneer, and injured the same and other parts of the vessel. Those in charge of the bridge had opened the draw to permit the passage of a vessel down the river, which took the channel other than that taken by the Pioneer, and as that boat passed down the river in that channel, those operating the bridge started to close the draw without observing that there was any vessel in the other channel. Those in charge were not accustomed to give any signal to vessels passing up and down the river other than to open the draw.

It is unnecessary to consider what was done by those in charge of the Pioneer when they observed that the draw was about to close. It was then too late to avoid collision. The fact that the permanent bridge was approaching completion and lay directly down the river a few feet from the temporary bridge, thus perhaps interfering with the view of those in charge of the latter, does not excuse those in charge of the bridge from observing whether any vessels had accepted the invitation of the open draw and were in danger of being injured if the draw were closed. Those in charge of the draw were negligent, and as a result of their negligence the injuries happened.

As between the respondents, the liability must be placed upon the Snare & Triest Company. The contract had not been fully performed, and the duty of the contractor as specified in the contract had not ceased. It is true those operating the bridge were on the pay rolls of the respective boards of chosen freeholders, but they were paid out of moneys contributed wholly or in part, at least, by the contractor. Such arrangement was not intended to diminish the duty placed upon the contractor under the terms of the contract. Indeed the relation is exactly similar to the relation which existed between the same parties and which was under consideration in Clyde Steamship Company v. Snare & Triest Company et al., in an opinion handed down herewith. For the reasons therein expressed, the Snare & Triest Company must be held answerable for the damages sustained by the libelant.

The amount of the damages has not been seriously disputed. They include items paid for repairs, two days' demurrage, survey fees, and an item of merchandise carried as freight, and which was knocked overboard when the house was struck by the drawbridge. The expenses were proper and reasonable, and the libelant should receive the amount thereof, to wit, $620.71, to which interest should be added from the 29th day of December, 1911, as damages, with costs to be taxed against the Snare & Triest Company.

The joinder of the respondents was proper because of the uncertainty as to who should be held responsible. Inasmuch as all the parties were before the court, the court will ascertain, not only the rights of the libelant, but also the relative rights and obligations of the respondent. The libel should be dismissed as to the board of chosen freeholders of the county of Essex and the board of chosen freeholders of the county of Hudson, with costs to be taxed against the Snare & Triest Company.

Let a decree be drawn.

In re McCRACKEN.

(District Court, S. D. California, S. D. July 3, 1916.)

No. 2035.

1. BANKRUPTCY ⟹288(1)—POWER OF REFEREE—SMALL VALUE OF PROPERTY.
That the value of real property in controversy was small will not warrant the referee in summarily determining the title thereto; the matter being one as to which a plenary suit should be instituted.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟹288(1).]

2. BANKRUPTCY ⟹288(1)—SUMMARY JURISDICTION—POSSESSION.
Where a bankrupt had contracted for the sale of land on installments, and the purchaser was in possession, the purchaser cannot be deemed merely an occupant, and the trustee to be in constructive possession, so that the referee may summarily determine the title to the property.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟹288(1).]

3. BANKRUPTCY ⟹288(1)—JURISDICTION—SUMMARY JURISDICTION—"ADVERSE CLAIMANT."
A vendor having sold land under an installment contract, and the purchaser having gone into possession, the former became bankrupt. The purchaser paid all the installments up to the vendor's adjudication in bankruptcy, and thereafter, it appearing that the vendor had mortgaged the premises for a greater sum than was agreed upon, refused to make further payments; the trustee demanding that the entire indebtedness be at once discharged. *Held*, that as the purchaser was in possession, asserting equities under his contract, his rights could not be determined in a summary proceeding before the referee, but recourse must be had to a plenary suit; the purchaser being an "adverse claimant," within Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552, providing for plenary

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

suits to adjudicate controversies which had been between bankrupts and adverse claimants.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288(1).

For other definitions, see Words and Phrases, Second Series, Adverse Claimant.]

In Bankruptcy. In the matter of the bankruptcy of W. B. McCracken. Petition by one Albrecht for a review of the order and judgment of the referee. Order and judgment set aside, with directions.

In the above bankruptcy proceeding the trustee on December 24, 1915, filed a petition with the referee, asking for an order to show cause why a certain contract of sale of real estate, entered into between the bankrupt, as vendor, and one Albrecht, as vendee, should not be surrendered into court, canceled, and annulled, and the possession of the premises therein described be surrendered to the said trustee, and also to show cause why the said vendee should not pay into court the sum of $160, being the reasonable rental value of the premises referred to in the contract of sale mentioned in said petition. The petition further asks that, upon the hearing of the order to show cause, the court (the referee) should make an order decreeing that the trustee was the owner and entitled to the possession of the premises in question, that the said Albrecht has no right, title or interest to any part thereof, and also that he pay the said sum of $160, the rental value of the premises, and that petitioner have such other and further relief as may seem just to the court.

The facts alleged in the petition, and upon which the above-mentioned relief was prayed for, were briefly: That in April, 1914, the bankrupt had entered into a written contract of purchase and sale with the said Albrecht, by the terms of which the bankrupt agreed to sell and Albrecht agreed to buy certain real property for a certain stipulated price, $1,750, payable $100 down and installments of $25 on the 20th day of each month thereafter. That it was further provided in said agreement that upon payment of the sum of $750 the vendor would execute a deed to the premises, free from all incumbrances, save a mortgage of $1,000. That on the day of execution of said agreement the vendee thereof entered into possession of said premises, and ever since said time has been and now is in the possession of the same. It was further alleged that the petitioner was informed and believes that the said Albrecht duly performed the terms of the said agreement until the 25th day of April, 1915, but that since said date he had made no payments whatever upon the contract; that by the terms of the contract it was provided that time should be of the essence. The petition also contains appropriate allegations with respect to a demand made by petitioner in October, 1915, for a compliance with the terms of the contract, and of a refusal by the vendee therein to comply as required.

An order to show cause as prayed for in the petition was issued, and upon the return day thereof the respondent therein, the said Albrecht, objected to the proceeding and challenged the jurisdiction of the court, on the ground that it had no jurisdiction of the subject-matter or of the person of the claimant, and alleged that the said claimant was in the legal and lawful possession of the property at all times mentioned, and at and prior to the filing of the bankruptcy petition in the proceeding, and claimed a substantial, equitable, and legal interest and lien in and to said property. This objection was further amplified by a written statement of facts filed by and on behalf of the said claimant and respondent, verified by his oath, in support of his claim of a substantial adverse interest in and to the real property in question, to the effect that he was at no time in default on his contract to purchase, but that he was ready and willing to perform each and every obligation and condition thereof, and that the only demand made upon him by the trustee was an alternative one that he should make "an offer for a deed or by completing payments upon the contract." He further alleged that on or about June

25, 1915, which was subsequent to the initiation of the bankruptcy proceedings and to the appointment of the trustee, the trustee had notified him not to make any payments on the contract in question, but to make him an offer of some lump sum for a deed to the property; that one Cook held a mortgage on the property, and was threatening to foreclose, and would foreclose and take the property, unless claimant would make some arrangement with him to take care of the mortgage; that said trustee advised him then and there, and many times afterwards, to see the said mortgagee and arrange with him to take care of the mortgage; that negotiations were pending between said Cook and the claimant, as directed by said trustee, when said trustee suddenly notified claimant of the forfeiture of said contract by letter dated November 16, 1915. Claimant also alleged that he had performed all the conditions, and made all the payments due under his said contract up to the time the bankrupt filed his petition in bankruptcy; that said Cook had filed suit to foreclose his mortgage on the premises, demanding judgment for $1,250, together with interest, attorney fees, etc. He also alleged that said contract was in full force and effect, that he was not in default, that he was entitled to remain in possession and complete the performance of his contract, and that he was entitled to have his rights thereunder adjudicated in a plenary action.

Notwithstanding the challenge of the jurisdiction of the court, the referee proceeded to hear the petition and return on the order to show cause, took evidence and made findings of fact. These findings set up the contract of sale entered into; the fact that upon the execution of said contract in April, 1914, the buyer entered into the possession of said premises, and ever since said time has occupied and still does occupy the same under the said contract of purchase and sale. It was also found that every payment due up to the 20th day of April, 1915, had been made as required; that no payments have since been made, and that on the 8th day of May, 1915, the petition in bankruptcy was filed; and that on the 28th day of May, 1915, the trustee was regularly appointed. It was also found that on the 20th of October the trustee had demanded of said Albrecht that he make the payments due and unpaid, but that Albrecht had refused so to do, and that there remained due and unpaid upon said contract the sum of $1,410, together with interest.

As conclusions of law the referee decided that the claim of Albrecht, that he had a right to the use, occupation, and possession of the premises, was not "an actual or substantial claim, made in good faith, but a merely fictitious and colorable one, as defined and described in the cases of Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and similar cases." He also decided that the premises in question, "in contemplation of law, are in the possession of said trustee; that said Albrecht is not a bona fide adverse claimant thereto; that said Albrecht has forfeited all right under the contract, and it is no longer in force or effect as against the trustee." Wherefore it was ordered and decreed by the referee that the trustee "is vested with the possession of and title to said premises, with the power to sell the same and convey title thereto"; "that the said Albrecht has forfeited all right, title, and interest under said contract, and that the said Albrecht surrender the use and occupation of said premises to the trustee." Thereupon said Albrecht asked for a review of the order and judgment of the referee.

J. W. Satterwhite, of Los Angeles, Cal., for petitioner.
Daly & Daly, of Long Beach, Cal., for trustee.
Force Parker, of Los Angeles, Cal., referee in bankruptcy.

BLEDSOE, District Judge (after stating the facts as above). [1-3] It is obvious that the so-called order and decree of the referee is at once, in its substantial aspects, a writ of ejectment and a decree canceling a contract of sale and quieting title to real estate. If it be the fact that the referee has the authority to enter this sort of a judgment in a summary proceeding, or even at all, it will be a matter of some surprise as well as concern to the profession generally, who have not understood that possession of real property could thus be transferred summarily, without the verdict of a jury, if demanded, or that cancellation of an instrument could be had without the application of the usual equitable principles and forms of procedure in a forum of appropriate jurisdiction.

After very careful consideration of the matters involved herein, I can come to no other conclusion than that the referee, doubtless in a commendable desire to expedite the business of his court, has transgressed his jurisdiction and assumed functions which have not been given to him, and, giving due consideration to the rights of private property, ought not to be given to him, or to any other tribunal to be exercised in such summary fashion as they were exercised herein. As I read the case, the very decision cited by the referee, Shea v. Lewis, supra, is in itself a determination that the jurisdiction asserted herein is not possessed by the referee. That case holds, in conformity with the general current of authority, that if the bankruptcy court has not possession of the property involved, and if the claim asserted is an actual and substantial one, as distinguished from one merely colorable and fictitious, the referee has no function save to decline to adjudicate the merits of the controversy. The principle is well stated, in my judgment, in section 1652 of Remington on Bankruptcy, where it is said:

"Third parties having at the time of the bankruptcy possession of the tangible property or funds involved, and under claim of a beneficial or adverse interest therein, cannot be obliged to surrender them, nor can third parties, owing debts to the bankrupt at the time of the bankruptcy, be obliged to pay the debts, nor can such parties be obliged to submit their rights in such property, funds, or debts for determination to the bankruptcy court, by summary proceedings in the bankruptcy proceedings, even on notice and hearing. Such property, funds, or debts, thus owed or adversely held, are to be reached only by instituting plenary suits, in which the parties may be brought into court by due service, summons, or subpœna, pleadings may be filed, issue joined, and trial had in accordance with the usual forms of procedure."

This statement of the law finds ample authority in the adjudicated cases.

The referee has filed an opinion herein, in which he seems to lay some stress on the fact that the contract does not by its terms vest the vendee with any right of possession. I apprehend this is an immaterial circumstance. Under and pursuant to the contract, and doubtless in accordance with the oral agreement of the parties, the vendee went into possession, and has since remained in that possession. This gives him rights which cannot be summarily taken from him on a mere order to show cause. The referee seems to indulge in the suggestion that the value of the equity in the property would not "justify extensive or costly litigation on the part of the trustee," meaning thereby, I assume, that, because of the small worth of the equity, the trustee could not afford to institute a plenary suit for its recovery. However that might be, the courts of the land could hardly afford to permit property to be taken from one person and given to another without an observance of the requirements of the law, however little might be involved. The rights of private property and the respect which is accorded to those rights are not determinable by a consideration of the mere amounts which may be involved.

The referee also suggests that the vendee was merely in "occupancy" of the premises, but that he did not have the "possession" thereof, within the definition of that term in a juridical sense, but that "the trustee, as the representative of the bankrupt's estate, is in the potential or constructive 'possession' of the real estate which is wrongfully and illegally occupied by Albrecht." The referee cites no authority in support of this, and I would be surprised if he could find one. If this statement be true, then the trustee in every bankruptcy proceeding is constructively in "possession" of all property which may be claimed by the bankrupt or by the trustee as belonging to the bankrupt estate, and consequently there never could arise any controversy with respect to the "possession" of property as between a trustee and a third person. Suffice it to say that the books are full of cases with respect to the rights of one who is in possession of property as against the trustee of a bankrupt's estate. In addition, the precise point here made was raised and passed upon adversely to the conclusion of the referee in the Case of Rathman, 183 Fed. 913, at page 925, 106 C. C. A. 253, which case is cited in Shea v. Lewis as a basis of the decision therein.

It might be true that mere possession of property claimed by the trustee would not suffice to require the trustee to institute a plenary suit for its recovery. The untenability of the claim might be so palpable, or the third person might be holding the property merely as the agent of the bankrupt, and admittedly without right, in such fashion as that the referee would be justified summarily in decreeing that the possession should be transferred to the rightful holder thereof, the trustee of the bankrupt's estate. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. However, in the present case, it appears that the third person in possession of the property, who was an entire stranger to the bankruptcy proceeding, for a valuable consideration, acquired his rights to the property under and pursuant to a lawful contract, entered into more than a year previous to the inception of the bankruptcy proceeding, and that he had complied with the contract in every respect up to the time his vendor was adjudicated a bankrupt. Thereupon it was his duty to refuse to make payments to the bankrupt, and it was the duty of the trustee to arrange for him to make succeeding payments to the trustee, or possibly to effect a sale of the so-called equity in the property then remaining in the bankrupt estate.

It is apparent from the verified claim of the respondent, as well as from the evidence adduced at the summary hearing, that the contract entered into by him with the vendor had not been performed by the vendor, in that, the vendor had incumbered the property with a mortgage of $1,250, instead of $1,000, as agreed in the contract. In addition, the trustee does not seem ever to have demanded any of the monthly payments, but to have been insisting upon a complete satisfaction of claimant's obligation under the contract. In this state of the case it could not be expected that the vendee should make the payments as required by the contract, and thereby be compelled to take the property at a higher valuation than he and his vendor had agreed should be the consideration. It is most obvious that his claim to and right in the property, and his right to have an equitable adjustment of the obligations as between himself and his vendor, and his vendor's mortgagee, constituted him an adverse claimant to the property within any reasonable construction of section 23 et seq. of the Bankruptcy Act. Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620.

It follows, therefore, that the referee acted in excess of his jurisdiction; that his summary hearing, and the order and decree based thereon, were without authority in law; and that the only order he had jurisdiction to make in the premises was one dismissing the petition, without prejudice to the right of the trustee to institute such plenary action or take such other step as in his judgment might be deemed meet and proper. This the referee is directed to do.

PENNSYLVANIA R. CO. v. PEDDRICK et al.

(District Court, N. D. New York. July 24, 1916.)

1. CORPORATIONS ⚷333—LIABILITY OF OFFICERS—TRANSFER OF PROPERTY—"LOSS."

By the transfer of an insolvent corporation's property to give a preference, in violation of Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, whereby it is put beyond the reach of a judgment creditor by any ordinary legal means, he suffers "loss," within the provision that every officer or director concerned in violation of the section shall be liable to its creditors for any loss they may respectively sustain by the loss; and this though the section declares the transfer void, and though the property could be recovered by suit of the trustee in bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⚷333.

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

2. COURTS ⚷366(2)—FOLLOWING DECISION—STATE AND FEDERAL COURTS.

The decision of the highest court of a state construing its statute is binding on a federal court; the Supreme Court of the United States not having passed on it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 954; Dec. Dig. ⚷366(2).]

3. CORPORATIONS ⚷342—LIABILITY OF OFFICERS—TRANSFER OF PROPERTY—"CONCERNED IN."

Directors who, knowing the facts, vote for a preferential transfer of an insolvent corporation's property, are "concerned in" the illegal transfer, so as to be liable under Stock Corporation Law N. Y. § 66, to corporation's creditors for their loss therefrom.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1486–1488; Dec. Dig. ⚷342.]

4. CORPORATIONS ⚷353—LIABILITY OF OFFICERS—ACTIONS—ACCOUNTING.

Before a creditor of an insolvent corporation can sue its directors, under Stock Corporation Law N. Y. § 66, for his loss from their illegal trans-

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

fer of its property, an accounting to ascertain the loss is not necessary; but the loss can be proved on the trial.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⚷353.]

5. CORPORATIONS ⚷333—LIABILITY OF OFFICERS—TRANSFER OF PROPERTY—AMOUNT OF LOSS.

The loss by a creditor of an insolvent corporation from its illegal transfer of its property, which, under Stock Corporation Law N. Y. § 66, he can recover of its directors and officers participating therein, is what he would have received, had the corporation been wound up and its property converted to money and applied to payment of its debts pro rata.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⚷333.]

At Law. Action by the Pennsylvania Railroad Company against Charles H. Peddrick, Jr., and others. Verdict for plaintiff, and defendants apply for an order setting it aside. Denied.

Hun & Parker and Michael D. Reilly, all of Albany, N. Y., for plaintiff.

John T. Norton and H. D. Bailey, both of Troy, N. Y., and Wm. L. Bennett, of Saratoga Springs, N. Y., for defendants.

RAY, District Judge. This matter was before this court on a motion to enjoin and restrain the plaintiff from further prosecuting the action and to bring in other parties and instruct the trustee in bankruptcy of Security Steel & Iron Company, of which defendants were directors, and the motion was denied, the court writing an opinion. 222 Fed. 75. Later the action was tried before the court and a jury, and resulted in a verdict in favor of the plaintiff against all the defendants for $9,493.99. On the trial there was a motion to dismiss, profuse objections to evidence, motions to direct a verdict, etc., raising every possible question involved. The opinion referred to covers the main propositions in the case, viz., that the plaintiff's remedy, if any, is by an action in equity and for an accounting, and to set aside the transfers of property, etc.

[1] Both on the trial and now the defendants presented and present another proposition, viz., that as the transfers, if made as alleged in the complaint and found by the jury, were void under the statute, and as the property was transferred indirectly, to a perfectly solvent bank, which presumably now has the proceeds, and same may be recovered from the bank by the trustee in bankruptcy of the Security Steel & Iron Company (that corporation being the owner of the property transferred at the time of the transfer), and distributed to all creditors, including the plaintiff, pro rata, the plaintiff has not suffered any "loss" within the meaning of the statute of the state of New York under which this action was brought, section 66 of the Stock Corporation Law of the state of New York. That section reads as follows:

"No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the Banking, Insurance or Railroad Law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void. No conveyance, assignment or transfer of any property of a corporation formed under or subject to the Banking Law, exceeding in value one thousand dollars, shall be made by such corporation, or by any officer or director thereof, unless authorized by previous resolution of its board of directors, except promissory notes or other evidences of debt issued or received by the officers of the corporation in the transaction of its ordinary business, and except payments in specie or other current money or in bank bills made by such officers. No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice. Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

The complainant alleges a violation of that section by defendants in that they, being directors of Security Steel & Iron Company, a New York corporation, and the corporation being insolvent, or its insolvency imminent, "with the intent of giving a preference to any (a) particular creditor," and incidentally to themselves, they (except one or two) being indorsers on the notes of said corporation held by a bank or banks, etc., transferred all the property of such corporation to pay the notes representing the said indebtedness and a few other local creditors to the exclusion of the plaintiff and other creditors and that the property and its proceeds were so applied. That all the defendants took part in or were "concerned in" so transferring such property. The action was brought and prosecuted particularly under the last clause of the section quoted, which reads as follows:

"Every director or officer of a corporation who shall violate or be concerned in violating any provisions of this section, shall be personally liable to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of any loss they may respectively sustain by such violation."

The said Security Steel & Iron Company was indebted to various creditors in the sum of about $94,000 or $96,000, including the debt due the plaintiff, about $18,000, and had property of the value of about $62,000. The plaintiff pressed for payment for some time and finally brought suit. No answer was put in, but there was some delay, and finally judgment was obtained, and execution thereon was issued and returned wholly unsatisfied. Inquiry was made for property of Mr. Peddrick, the president of the corporation, by the sheriff, who informed him that the corporation had no property. It was developed in certain proper preliminary proceedings that after the Pennsylvania Railroad Company commenced pressing for payment of its claim the said Security Steel & Iron Company paid or caused to be paid certain of its local creditors, and then transferred all of its remaining property to secure an indorser on its notes, to a large amount in the aggregate, having changed its time notes, or most of them, to notes due on demand, and obtained this new indorser thereon, on an arrangement to secure him by turning out the property of the corporation as security. By this process, to a large extent, at least, the directors were released from their liability as indorsers on such notes, and all the property of the Security Steel & Iron Company was used to pay the bank holding the notes and a few other creditors. The jury found that these transfers of property were made by the directors, defendants here, with knowledge that the corporation was insolvent, or that its insolvency was imminent, and with the intent of giving a preference to particular creditors.

The complaint alleged that the plaintiff lost its entire judgment, about $18,000, and demanded a judgment for that sum; but the court held that plaintiff could only recover as its "loss" the amount it would have received, had the property of the corporation been reduced to money (instead of being transferred, as it was, to pay a few creditors) and applied pro rata to the payment of all creditors. The defendants, while insisting that a single creditor cannot maintain an action to recover his loss, inasmuch as the statute, they contend, contemplates an equity action and the presence of all creditors, insisted on the trial and now insist that the defendant sustained no loss, even if the allegations of the complaint and the findings of the jury and the holding of the court be otherwise correct, inasmuch as the transfers were absolutely void and passed no title to the transferee, and such transferee is perfectly solvent, as is the bank which received the proceeds, and that all the trustee in bankruptcy has to do is to bring suit and recover the property or its proceeds and distribute same; that when matters are in this situation there has been no "loss" sustained within the intent and meaning of the statute quoted.

With this contention this court is unable to agree. This is a remedial statute, and was intended to give a direct cause of action for the loss sustained by him to any creditor of a corporation against the directors thereof who should, under the circumstances stated and in the manner described, with the necessary intent and knowledge, transfer the property of the corporation to any of its officers, directors, or stockholders directly or indirectly for the payment of any debt, or to any other person to give a preference to a particular creditor over the other creditors of the corporation, or who are concerned—that is, take part in—doing such acts. After prohibiting certain acts and transfers of property, and declaring certain transfers void, and declaring that "every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to the creditors or stockholders or other trustees," etc., the statute finally, in a separate paragraph, says:

"Every director or officer of a corporation who shall violate or *be concerned* in violating any provision of this section shall be *personally* liabe to the creditors and stockholders of the corporation of which he shall be director or an officer to the full extent of *any loss* they may *respectively* sustain by such violation."

In my judgment it is idle to say that a creditor of a corporation, who has reduced his claim to judgment and who has pursued his legal remedy by issuing execution, which had been returned wholly unsatisfied, the president and manager of such corporation asserting the corporation has no property, has not sustained a "loss," when he finds that the directors and officers of such corporation have, either in anticipation of such judgment and execution, or following it, and knowing its insolvency or the imminence of the insolvency of the corporation, and intending to pay one or more of its creditors in preference to another, or others, have transferred its property, directly or indirectly, for the purpose of paying such preferred creditors. The act of the director or officer of the corporation is consummated. The property of the corporation by their act has been put beyond the reach of the judgment creditor by any ordinary legal process. Such property is lost to him. True, the creditors or stockholders may bring an action in equity for an accounting against the person or persons receiving such preference, who must account therefor; but this is not the only remedy, nor is such an action and failure to recover therein or thereby a prerequisite to the maintenance of an action direct against such directors or officers of the corporation.

[2] It seems to me that the decision in Caesar v. Bernard, 156 App. Div. 724, 141 N. Y. Supp. 659, affirmed by the New York Court of Appeals on the opinion of Laughlin, J., rendered in the court below, 209 N. Y. 570, 103 N. E. 1122, is not only decisive in this case, but binding on this court. The Supreme Court of the United States, in construing a statute of a state, always follows the decisions of the highest court of the state enacting the statute, if one has been made before the question comes to the Supreme Court. If one has not been made, then it construes the statute for itself, and thereafter adheres to its own decision, whatever the state court may thereafter decide. The Supreme Court of the United States has not passed on this statute in question here, but the Court of Appeals has. That decision I felt bound to follow on the trial of the cause, and am bound to follow it now. Hence the judgment of the Pennsylvania Railroad Company against the Security Steel & Iron Company was competent evidence in this case against the directors, and, quoting from the opinion of Judge Laughlin, adopted by the Court of Appeals:

"The Legislature by the section in question extended the doctrine, administered by courts of chancery, that the assets of a corporation constitute a trust fund for the benefit of its creditors. Darcy v. Brooklyn & N. Y. Ferry Co., 196 N. Y. 99 [89 N. E. 461, 26 L. R. A. (N. S.) 267, 134 Am. St. Rep. 827]; Cullen v. Friedland, 152 App. Div. 124 [136 N. Y. Supp. 659]. The liability created by this statute against directors and officers is for the *loss* sustained by creditors through wrongful acts of directors and officers, *by which the funds of the corporation have been depleted*, and instead of requiring that the action shall be brought by, or in the right of, the corporation to restore its funds, the Legislature gave a cause of action to the creditors and stockholders in their own right to recover the damages sustained."

[3] In Caesar v. Bernard, supra, the respondent, defendant, was both a director and president of the company making the transfers, and so far as appears had no personal interest in the matter, but "voted to authorize the transactions of which complaint is [was] made." It was held that this made him liable under this statute. In the instant case two of the defendant directors were not indorsers on the notes of the company and had no personal interest to serve, but they voted for the resolutions authorizing the transactions complained of, the transfer of the property of the corporation to make the preferential payments, and did this with knowledge that the corporation was in fact insolvent, and with the intent of giving a preference. The jury so found. This made these defendants "concerned in" the illegal transfers of the property of the corporation and liable with those who did have personal pecuniary interests to serve. The questions involved, some of them new even in the light of the Caesar Case, have been presented with great ability, but I am not satisfied that error was committed in allowing the case to go to the jury, or in the findings of the jury.

It was contended on the trial, and is now contended, that title to certain of the property of the Security Steel & Iron Company of considerable value was not transferred, but was now capable of being taken by the trustee in bankruptcy and applied to the payment of creditors pro rata. The jury was told to exclude such property, if any, in making up the amount and value of property transferred and fixing the loss sustained by this plaintiff. All the evidence was before the court and jury, and I do not find that substantial or prejudicial error was committed on the trial in the admission or rejection of evidence or in the charge.

[4, 5] The defendants contend that, before plaintiff could maintain its action to recover its "loss" from the directors, there must have been an accounting to ascertain such loss, and that the "loss" could not be proved by evidence taken on this trial. I cannot so construe this statute. There is always difficulty in proving the damages in such a case, but I think the "loss" sustained was the sum plaintiff would have received, had the corporation been wound up and its property, so far as improperly transferred, converted to money and applied to the payment of its debts pro rata.

The motion to set aside the verdict and for a new trial is therefore denied.

GAINES v. BALTIMORE & C. S. S. CO.

(District Court, E. D. South Carolina. July 26, 1916.)

1. COURTS ⚷280—JURISDICTION—OBJECTIONS—NECESSITY OF RAISING.

Where a suit in a federal court for mandatory injunction involved public questions, the court may on its own motion, though not urged by defendant, raise the questions whether the amount in controversy was within its jurisdictional limit and whether complainant had an adequate remedy at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⚷280.]

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

2. INJUNCTION ⚷5—ISSUANCE—MANDATORY INJUNCTION.
A mandatory injunction will not ordinarily be issued to require defendant to perform some act which exposes it to prosecution for violation of criminal laws; such injunctions usually being issued only to compel defendant to do some act which will restore the status quo.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. ⚷5.]

3. CONSTITUTIONAL LAW ⚷70(3)—WISDOM OF LAW—JUDICIAL REVIEW.
The wisdom of a sumptuary statute regulating the acquisition of intoxicating liquors is not a question for the court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. ⚷70(3).]

4. INJUNCTION ⚷5—MANDATORY INJUNCTION—VALIDITY OF STATUTE.
Act S. C. Feb. 20, 1915 (29 St. at Large, p. 140), regulating shipments of intoxicating liquors into the state, forbids the delivery to any person by any carrier into the state of more than one gallon of intoxicating liquors during any calendar month. Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. 1913, § 8739), prohibits the shipment or transportation of intoxicating liquors from one state into another where such liquors are intended to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state wherein they are shipped. Complainant ordered from a point without the state a considerable quantity of intoxicating liquor, and on the carrier refusing to make delivery prayed a mandatory injunction requiring it. *Held* that, as complainant was not entitled to delivery of the liquor unless the South Carolina act be unconstitutional, as infringing some essential right which under the federal Constitution may not be infringed either by state Constitution or statute as it is not invalid as an interference with interstate commerce, an injunction will not by a court of the first instance be granted on the theory that such statute was invalid; that question being at least doubtful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. ⚷5.]

In Equity. Bill by W. F. Gaines against the Baltimore & Carolina Steamship Company. Bill dismissed.

George F. Von Kolnitz, Jr., of Spartanburg, S. C., for plaintiff.
Alfred Huger, of Charleston, S. C., for defendant.

SMITH, District Judge. The bill of complaint in equity in this case was filed on the 8th of July, 1916. The defendant has answered, and the case has come up for final hearing on the merits upon the pleadings and upon an agreed statement of facts. Counsel for both sides have appeared and the case has been duly heard. The bill of complaint is filed for the purpose of obtaining nominally an injunction against the defendant to enjoin it from interfering with any ales, beers, wines, or other intoxicating liquors imported into the state of South Carolina by the complainant. The pleadings and the facts, however, show that the complainant is a citizen of the state of South Carolina residing in Charleston, who purchased outside of the state of South Carolina a barrel containing an intoxicating liquor, viz., 60 pint bottles of beer, which was shipped on the steamboat of the defendant, to be transported from the city of Baltimore in the state of Maryland to the city of Charleston, the residence of the complainant. On its arrival in Charleston the complainant demanded of the carrier that the

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

carrier, the defendant, deliver to the complainant the barrel of beer, and this the carrier refused to do, on the ground that it was forbidden to make the delivery by the provisions of the statute of the state of South Carolina approved February 20, 1915, which forbids the delivery by any carrier to any person into this state of more than one gallon of any spirituous, vinous, fermented, or malted liquors in any calendar month.

[1] Upon the pleadings and the testimony there appear several, certainly two, questions of a preliminary character as to the jurisdiction of this court. The first is as to the amount in controversy, which depends upon the allegation and statement of the complainant that the value of the ale, wine, beer, and other liquors intended to be imported by him from other states hereafter for his own use and consumption exceeds the sum or value of $3,000, to which may be added the loss of the pleasure (whatever may be the value to him) of his individual consumption thereof. It is not contended that the value of this particular package in question, the delivery of which is refused, is $3,000, and it is a matter of serious doubt whether or not this court should hold that it can infer that the loss of the right to import liquors of the same character in the future for the individual consumption of the plaintiff could in the reasonable future amount in value to $3,000, or whether the loss of the pleasure of the consumption of intoxicating liquors by him individually should be valued at that sum. It may be that in an action at law, in which, in addition to the actual damages, there is sought to be recovered that intensification of the damages, termed exemplary or punitive damages, for the willful deprivation of the complainant of any innocent pleasure in life he was legally entitled to enjoy, there would be some foundation for placing the value of the amount in controversy at an amount so excessively above the value of the actual package or actual article, the detention of which deprived the plaintiff of his legal pleasure. The present case, however, is not an action at law, but a suit in equity, to enjoin the doing of certain specific acts, and in this case the specific act is the refusal to deliver a package of the character mentioned in the bill of complaint. It is very questionable whether in such a case this court will consider in estimating the value of the amount in controversy any exemplary or punitive damages.

The next preliminary question is whether or not the complainant has not got an adequate and complete remedy at law. It would not appear that there is anything to prevent the complainant under the Code of Procedure of the state of South Carolina from bringing an action of claim and delivery for the package in question, analogous to the common-law remedy of replevin, and by giving a proper bond, or carrying the cause to judgment, obtain his package of liquors. If, after once obtaining judgment in his behalf on the question of legal right, the defendant should continue arbitrarily to refuse to deliver packages of like character, the complainant could either sue in like manner for the recovery of the possession of such other packages, joining to his actual damages an application for punitive damages for the continued willful, malicious, and unlawful detention of property belonging to the complainant, after an adjudication of his legal right thereto, or, the legal right having been adjudicated, he might then be in a position to claim the benefit of the equitable doctrine of a multiplicity of actions, so as to give him the enforcement in an equitable proceeding of the legal right already adjudicated. Even if neither of these questions are pressed by the defendant in this case, yet, where the jurisdiction of the court depends upon the existence of certain conditions, as does the jurisdiction of this court, it is incumbent upon the court, especially in a cause involving the adjudication of public questions, to see that those conditions exist, whether or not the parties to the cause may waive objection or acquiesce in the statement that those conditions do exist.

[2] In addition to this, it appears from the pleadings and agreed statement of facts that, although the bill of complaint nominally asks for an injunction, yet in effect the remedy sought is a decree of a mandatory character which will compel the defendant to perform an act which will subject it to criminal prosecution. Whilst a court of equity will mould its orders so as to suit the exigencies of the case, and in proper cases issue injunctions, commonly called mandatory injunctions, which will require action on the part of the defendant, in order to obtain the benefit to the complainant of the injunction asked, yet ordinarily such mandatory injunctions are confined to cases where it is necessary thereby to restore the status by requiring the defendant to do some act which will restore the parties to a status which existed before the act was done, and which, if the injunction had been asked for earlier, would have been granted, so as to prevent a change of that status by the defendant. It is very rarely, if ever, that a court of equity will grant a decree or order of this mandatory character, which will require the defendant to do an act, the doing of which will under the statutes of the jurisdiction subject the defendant to criminal prosecution.

[3, 4] Apart, however, from these grave preliminary questions, attaching both to the jurisdiction of the court as a federal court and as a court of equity, as well as to the exercise of the discretion of a court of equity, in the issuing of an injunction of the character asked for, there exists the question upon the merits that the complainant's right depends upon the court's declaring the statute of the state of South Carolina before referred to, approved the 20th day of February, 1915, and styled "An act to regulate the shipment of spirituous, vinous, fermented, or malt liquors or beverages into this state, and to provide penalties for the violation of this act," to be of no force and effect. The ground for its being declared invalid, as is contended for by the complainant, is that there is no law whatsoever which forbids a citizen of the state of South Carolina drinking or having in his possession spirituous liquors of an intoxicating character to any amount, provided if in his use of them he does not violate any law of the state of South Carolina, or commit any breach of the peace, or infringe upon any rights of his fellow citizens. This being, as the complainant contends, the law of the state of South Carolina, he further contends that the regulation of the importation and delivery of such liquors to citi-

zens of the state of South Carolina from places outside the jurisdiction is wholly a matter for congressional legislation, and in no statute passed by Congress has it forbidden the transportation of such liquors, and their delivery to citizens of the state for purposes not forbidden by the law of the state of South Carolina, such as for individual consumption. The statute of the state of South Carolina referred to expressly forbids any common carrier to transport from any point without the state of South Carolina and deliver to any person within the state of South Carolina any such liquors exceeding the quantity of one gallon within any calendar month. There is, therefore, an express statutory provision of the state of South Carolina forbidding a carrier to transport from without the state to a point within the state and there deliver to a person living in the state liquors of the character contained in the package mentioned in the bill of complaint to a quantity exceeding one gallon within any calendar month. If the carrier in this case made the delivery which it is sought to have him compelled to make by the bill of complaint, he would subject himself under the terms of this statute to a prosecution for fine or imprisonment for an infraction of the law of the state.

The statute of Congress commonly known as the Webb-Kenyon Act, approved March 1, 1913, declares that the shipment or transportation in any manner or by any means of any spirituous, vinous, malted, fermented, or other intoxicating liquors from one state, territory, or District of the United States into any state, territory, or District of the United States, of such spirituous, vinous, malted, fermented, or other intoxicating liquors, intended to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or District of the United States, is prohibited. The question on this statute would be whether the liquor transported by the defendant from the city of Baltimore to the state of South Carolina, to be there delivered to a citizen of the state of South Carolina, was to be received, possessed, or in any manner used in violation of the statute of the state of South Carolina; that is, whether the words "receive, possess or use," would apply to the act of delivery by the carrier, as well as to the reception and possession by the party to whom it was delivered in any way as accepted by him in a quantity in excess of the amount permitted by the statute. In the case of State of West Virginia v. Adams Express Co. (decided by the Circuit Court of Appeals of this circuit on January 13, 1915) 219 Fed. p. 794, 135 C. C. A. 464, that tribunal practically decides that the Webb-Kenyon Act applies to a delivery by the carrier at the place of destination of such liquors in contravention of the law of the state of destination, and upholds it as having that effect. The case of Adams Express Co. v. Kentucky (decided by the Supreme Court of the United States, June 14, 1915) 238 U. S. p. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167, decides that the Webb-Kenyon statute applied only when the liquor shipped is to be dealt with in violation of the law of the state into which it is shipped, and where there was no law of the state of Kentucky which forbade the delivery of liquor to any extent to a person for personal use, that it did not appear, therefore, that the shipment of liquor in that case was to be used in violation of laws of that state, and the Webb-Kenyon Act had no effect to change the general rule, that the state could not regulate commerce which is wholly interstate. The statute of the state of South Carolina, however, contains a provision which apparently was not contained in the Kentucky statute, limiting the quantity of liquor which may be delivered to a consignee, and if the state has the power to limit the quantity of liquor which within its jurisdiction can be delivered to a consignee, then under the reasoning of both of these cases the Webb-Kenyon statute would apply in this case, and the provision of the statute of South Carolina would be of force.

This would leave the question to turn upon the constitutionality of the statute of South Carolina, and not upon the application to the state of facts disclosed in this cause of the provisions of the Webb-Kenyon Act. The constitutionality of the act of South Carólina complained of would, under the elimination of all questions, depend upon the right of the state to restrict or inhibit the consumption of intoxicating liquors by its citizens. In the case from Kentucky the Court of Appeals of Kentucky held that:

"The declaration under its Bill of Rights, which declared that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. * * * Therefore the question of what a man would drink, or eat, or own, provided the rights of others is not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life, and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty, the exercise of which will not directly injure society."

Whether in the view of this interpretation of the inalienable rights of the freemen of a republic this statute of South Carolina is constitutional under the Constitution of the state of South Carolina is a matter for the decision of the Supreme Court of the state of South Carolina. The statute is not in terms a total prohibition of the consumption of intoxicating liquors, but a limitation of the amount of intoxicating liquors which can be imported or possessed. The question of its constitutionality under the state Constitution is, however, not a federal question, unless the state Constitution itself, if the act be thereunder constitutional, would by authorizing the statute infringe upon any of the rights which under the terms of the federal Constitution the respective states may not invade. The wisdom or folly of such sumptuary laws is not for the court. The only question for this court would be, assuming that the statute of the state of South Carolina bore the interpretation that it was intended to forbid the consumption by a free citizen of the state of South Carolina of liquor, when in so doing he neither offended the laws of decency nor exercised any act which infringed the rights of others or directly injured society, Is it an infringement upon those essential rights which under the terms of the federal

Constitution may not be infringed either by a state Constitution or a state statute?

On that point it may be said to be a matter of doubtful law as at present existing. This, however, is a court of first instance, and the general rule is that a superior court of first instance will not in doubtful cases declare a statute of the state or of the United States unconstitutional, except where it is imperatively called for, for the relief of the individual, where his life or his liberty or the possession of his property is threatened or invaded. Where an individual is confined, and deprived of his liberty, or threatened with execution for alleged crime, or about to be deprived of the possession of his property, or of any of the vital essential rights to the enjoyment of life in a free country, the court, although only a court of first instance, will not hesitate, and indeed is bound, to go to his relief, and, if necessary, declare unconstitutional any statute, by whatsoever legislative body enacted.

In the case at bar the question presented, however, is no invasion of any of those essential rights to such a degree as to be in any way vital to his rights as a free citizen. The only question here is whether or not a common carrier shall be permitted to deliver to the consignee a package of beer or other intoxicating liquors for his private pleasure in its consumption in excess of the quantity allowed by the statute. Under these circumstances the wiser course would be for this court to adhere to the general rule that it will not in such cases declare a public statute passed by a state in pursuance of a general public policy unconstitutional, but leave that question to be decided by a court of higher jurisdiction.

It is therefore ordered, adjudged, and decreed that the bill of complaint in this case be and the same is hereby dismissed, with costs against the complainant.

In re ASTOROGA PAPER CO.

SHALL v. NEWBERRY.

(District Court, N. D. New York. August 7, 1916.)

1. BANKRUPTCY ⚷316(3)—CLAIMS—CONTINGENT CLAIMS.

   The surety of an indorser for a bankrupt whose liability is contingent cannot prove a claim of his own by reason of such liability, for it is only the creditor's claim which is provable.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 475; Dec. Dig. ⚷316(3).]

2. BANKRUPTCY ⚷315(1)—CLAIMS—RIGHT TO PROVE.

   To secure indorsers of its notes, a bankrupt executed its bonds secured by a mortgage to a trustee, and delivered the bonds to the indorsers. The notes were paid by the indorsers, the mortgage foreclosed, but the proceeds of the mortgage proved insufficient to satisfy the claims of the indorsers, and they assigned the notes which they had paid to a third person who proved them against the estate of the bankrupt. *Held*, that the indorsers were not entitled to prove against the bankrupt's estate a deficiency judgment rendered on foreclosure, for there was only one

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

debt, and until the indorsers paid the notes, they had no right to prove any claim against the bankrupt's estate, nor was the trustee named in such trust mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 491; Dec. Dig. ⊂⊃315(1).]

3. BANKRUPTCY ⊂⊃323—CLAIMS—PRESENTMENT.

In such case, the indorsers are entitled to prove the face value of the notes, regardless of any payment received by reason of the security mortgage, and apply the proceeds of the mortgage on the balance of his claim, or on the deficiency judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⊂⊃323.]

In Bankruptcy. In the matter of the bankruptcy of the Astoroga Paper Company. Proceeding by Frank H. Shall, as trustee under a trust mortgage, against Samuel H. Newberry, as trustee in bankruptcy, to review order of referee disallowing the claim of petitioner. Order affirmed.

This is the review of an order of the referee in bankruptcy disallowing the claim of Frank A. Shall as trustee under a mortgage executed by the Astoroga Paper Company, now bankrupt, and which claim is based on a judgment for deficiency awarded by a judgment and decree of the Supreme Court of the state of New York for $50,061.91 on foreclosure of such mortgage, which was executed by said Astoroga Paper Company to such trustee to secure the payment of an issue of bonds of the aggregate par value of $50,000, consisting of 50 bonds of $1,000 each and which bonds were issued and delivered by said Astoroga Paper Company to George W. Sanborn, William F. Lansing, and W. F. Rathbun in consideration of and to secure them for their indorsement on certain promissory notes of the Astoroga Paper Company aggregating $77,500, and which notes have not been paid by the bankrupt.

Bronner & Ward, of Little Falls, N. Y., for claimant.

Samuel H. Newberry, of Little Falls, N. Y., in pro. per.

Geo. F. Handel, of New York City (A. M. Mills, of Little Falls, N. Y., of counsel), for creditors.

RAY, District Judge (after stating the facts as above). On the 15th day of January, 1913, an involuntary petition in bankruptcy was filed against the Astoroga Paper Company, and April 19, 1913, it was duly adjudicated a bankrupt accordingly. Prior to such bankruptcy and about July 31, 1911, the said Astoroga Paper Company executed and delivered to said Frank H. Shall, as trustee, a trust mortgage to secure the payment of an issue of 50 bonds for $1,000 each, and which were issued and delivered to George W. Sanborn, William F. Lansing, and W. F. Rathbun in consideration of and to secure them for their indorsements on certain promissory notes of said Astoroga Paper Company duly executed and issued and which are outstanding and aggregate $77,500. The mortgage was executed and delivered with the consent of the stockholders. On nonpayment of such notes the liability of the indorsers was duly fixed. The mortgage was duly recorded and covered all or nearly all the real estate, fixtures, etc., of said Astoroga Paper Company.

After the adjudication in bankruptcy application was made to the bankruptcy court for leave to foreclose such trust mortgage in the state court, and leave was granted and judgment of foreclosure and sale obtained and entered, and the mortgaged property was sold pursuant to and by virtue thereof for the sum of $5,000, such sale of such property being made subject to a prior mortgage of $25,000, which was a lien thereon, and on such sale said William F. Lansing, one of such indorsers and bondholders, became the purchaser of the mortgaged property. This sale was duly confirmed by the state court and September 13, 1913, a judgment of deficiency for $49,582.41, with interest thereon from July 17, 1913, in all, $50,061.71, was authorized and directed by the Supreme Court of the state of New York in such action and was duly entered and docketed accordingly in favor of said Shall as trustee and against the bankrupt. This judgment has not been vacated or set aside or paid. September 18, 1913, said Frank H. Shall as trustee under such mortgage filed his proof of claim on and based on such deficiency judgment with the referee in bankruptcy for $50,-061.71, and by order made after hearing dated September 15, 1915, this claim was rejected and disallowed by the referee.

D. H. Burrill & Co., National Herkimer City Bank, Little Falls National Bank, and William F. Lansing, the owners of such notes, filed claims on such notes as unsecured creditors, but such claims were thereafter assigned to D. H. Burrill and are now owned by him, the indorsers having paid them and directed such transfer. Burrill advanced money to the indorsers to pay such notes and really holds them as collateral security.

So far as appears the ownership of the bonds has not been divorced from the ownership of such notes and of the claims filed based thereon. Hence D. H. Burrill now owns the notes and the bonds, and the trustee under the mortgage in effect holds the judgment for deficiency as security for the payment of such bonds which are held as security for the payment of such notes, or, rather, in place of them.

The proceeds of the sale of the mortgaged property has been applied on the bonds, and hence indirectly to reduce the notes. There is but one debt, viz., the claims or debts arising on the notes. The bonds were issued as collateral security for the indorsers on the notes and the mortgage was collateral to the bonds. Both the bonds and the notes were the obligations of the Astoroga Paper Company, now bankrupt, and were intended to secure the payment of the same debts. But the obligation and liability of the indorsers Sanborn, Lansing, and Rathbun arose on their contract of indorsement, and the bonds as stated were issued and delivered as security to them for their indorsements.

The referee finds that the mortgaged property was of the fair value of $30,000, and that it was subject to a prior mortgage of $25,000, which was assumed by the purchaser, and that on such foreclosure sale the property sold for $5,000, over and above such prior mortgage. After payment of taxes and costs the balance of the said $5,000 has been applied as stated on such bonds held by the owner of such notes bearing such indorsements.

Until the indorsers should pay such notes their liability was contingent; that is, they were liable to pay such notes if the Astoroga Paper Company did not. The owner and holder or owners and holders of such notes had and have a claim on such notes against the estate in bankruptcy and are entitled to prove same and have same allowed and receive their dividend. The indorsers being liable to the holders for the amount of the entire indebtedness created by the notes are entitled to the benefit of their security and promises to pay evidenced by the bonds and deficiency judgment, and the question is: Is this a provable and allowable claim in their favor or in favor of the holder of the notes, in addition to the proof and allowance of the claim of the present holder of the notes? The evidence shows that the indorser Lansing has taken up and paid all of such notes on which he was indorser as aforesaid. As stated such notes and the claims made and filed based thereon have been assigned to D. H. Burrill, but the fact stands out clearly that the indorsers paid the notes and caused them to be assigned to the present holder. It follows that really the indorsers or their assignee hold the notes and also the deficiency judgment founded on the bonds given to them as collateral for their indorsements. That is, having taken up the notes, and the proceeds of the mortgaged premises having been applied in reduction thereof by being applied on the bonds, such indorsers, through Shall, as trustee, who acts for their benefit and holds such judgment for their benefit as indorsers only, and has no other right to or in same, seek to have their claim on the notes allowed as a provable claim, and also their claim on the bonds held as collateral, and which in fact are the deficiency judgment, such deficiency judgment having been obtained thereon. The referee holds that to allow both would constitute a double filing and allowance of the same claim, in effect, to the same party or claimant.

[1, 2] A surety or an indorser for the bankrupt, whose liability is contingent, cannot prove a claim of his own by reason of such liability. It is only the creditor's claim which is provable. Insley v. Garside (C. C. A.) 121 Fed. 699, 58 C. C. A. 119; In re Dr. Voorhees Awning Hood Co. (D. C.) 187 Fed. 611, 633; In re Manhattan Brush Mfg. Co. (D. C.) 209 Fed. 997; Phillips v. Dreher Shoe Co. (D. C.) 7 Am. Bankr. Rep. 326, 112 Fed. 404.

The bankrupt corporation was liable over to the indorsers irrespective of the issue of bonds secured by the mortgage in case they paid the notes. The indorsers were and are entitled to the benefit of the mortgage held by the trustee, but the mortgaged property has been sold and the proceeds applied on the bonds held by the indorsers. They have had the benefit of their security so far as the mortgaged property is concerned. The holders of the notes have proved their claims thereon and such claims have been allowed reduced by the proceeds of the mortgaged property. The deficiency judgment represents the difference between the value of the mortgaged property and a part of the debts for which such indorsers were liable, and they hold the promise of the now bankrupt corporation to pay such difference, and such promise is evidenced by the bonds. The issue of these bonds was not a mere second promise of the company made to the holders of the notes to pay, but a new obligation to the indorsers on the notes secured by mortgage, but the security of the mortgaged property was inadequate.

The trustee under the mortgage has no independent interest. He represents the indorsers and can recover only for their benefit. If the bonds had been given directly to the indorsers as collateral for their indorsements and payment thereof secured by a mortgage to the indorsers, the situation and remedies in legal effect would be the same as now. The trustee under the mortgage has no greater rights than have the indorsers. But it seems to me that the claim of the present holder is not based on the indorsement merely, but on the promise of the Astoroga Paper Company to pay such bonds in case the indorsers paid such notes. As the indorsers have paid the notes the original holders of such notes cannot maintain their claims based thereon. If the indorsers had not paid then they could not prove a claim unless in effect, on the bonds, the independent obligation of the Astoroga Paper Company entered into for the benefit and protection of such indorsers.

If A. indorses the note of B., receiving a written promise of the maker of the note to pay him in case he is compelled to pay and which promise is secured by mortgage, and B. fails to pay and A. takes up the note and realizes on his mortgage 50 per cent. of what he paid, and B. goes into bankruptcy, can A. prove and have allowed his claim on the note and also a claim on the written promise? It seems to me that this cannot be done. Clearly not under the decisions unless in this case the execution of the bonds created a new and an independent debt based on a new consideration provable and allowable against the estate of the bankrupt for the benefit of the indorsers, thus giving them a double dividend from the funds of the estate available for distribution to general creditors. The assignment of the notes and claims based thereon to a third party has not added to the rights of the indorsers or increased the liability of the estate of the bankrupt.

I do not understand that the indorser on the note of a bankrupt who pays the note can prove up his claim on the note so paid and also on the implied promise of the bankrupt made at the time of the indorsement to repay him in case he is compelled to pay such note. I cannot see that the rights of the indorser against this estate are increased by taking from the maker of the note his bond or a written promise of indemnity to secure him for such indorsement. True when the indorser takes up the note he becomes its owner and may enforce his claim against the maker or his estate in bankruptcy. But if such indorser pays such note and has it assigned or transferred to a third person, and such third person proves his claim thereon against the estate in bankruptcy of the maker, it seems clear to me that the indorser holding collateral cannot also prove up another claim based on his indorsement of the note and such promise. He may enforce his collateral so far as necessary to pay any difference between the dividend received by the holder of the note on the entire claim and the amount of such claim, but this will not warrant the proof of a claim and a dividend on such difference or deficiency, as this would be a second dividend from the same fund on the same debt, or a part of it. I think In re Knickerbocker Trust Co. (D. C.) 188 Fed. 445, and In re Waterloo Organ Co., 159 Fed. 426, 86 C. C. A. 406, while not in point, throw light on the question involved.

I know of no case and am not pointed to one where it is held that the secured indorser on a note of a corporation or individual, later bankrupt, and who is compelled to take up and pay such note, may prove and have allowed a claim on the note and also a claim on the promise of such bankrupt accompanying the security to reimburse the indorser. These bonds and this deficiency judgment are not held by a bona fide purchaser for value, but in trust for the benefit of the indorsers, and the only consideration for their issue and delivery to the indorsers was their indorsement of the notes. The consideration for the indorsement was the bonds, promises of the maker of the notes, secured by mortgage on real estate, etc. The pledge was of that particular mortgaged property and not of all the estate of the now bankrupt or of any part of his other property. The promise contained in the bonds is not based on a new and an independent consideration, but on the liability of the indorsers created by his indorsement. Their payment of the notes indorsed by them give them the right to prove their claim thereon and collect of the maker or his estate and also enforce their collateral, but does not entitle them to a second dividend on that liability from the general estate.

[3] This court is of the opinion that the referee was right in disallowing the claim of Shall as trustee on the deficiency judgment, but thinks that the claim on the notes should have been allowed without deduction on account of the enforcement of the collateral. On taking up the notes the indorsers were entitled to prove their claim for the full amount thereof and receive a dividend on the full amount of such claim and then apply the proceeds of the mortgaged property applicable to the payment of the balance of the claim on the bonds or deficiency judgment. People v. E. Remington & Sons, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458; Lewis, Trustee, v. United States, 92 U. S. 618, 623, 23 L. Ed. 513; 8 Cyc. 325, and cases there cited. If the dividend should equal the claim or claims, that would end the matter and the deficiency judgment could not be enforced. If less than the claims then the collateral is to be applied, but the second promise found in the bonds is but a reiteration of the implied undertaking of the maker of the notes to reimburse the indorser in case he was compelled to pay.

When the indorsers indorsed the notes in question there was an implied promise on the part of the maker to pay them any sum they should be obligated and compelled to pay by reason of such indorsement. M'Lemore v. Powell, 12 Wheat. 555, 556 (6 L. Ed. 726), where it is said:

"In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties."

See, also, Morgan v. Reintzel, 7 Cranch, 273, 3 L. Ed. 340.

A second promise to pay accompanying the pledge of property as collateral security for the indorsement does not give the right to a second dividend from the estate of a bankrupt on the same debt. In 8 Cyc. 325, it is said:

"The holder of a note to whom the insolvent maker has indorsed another note as collateral cannot prove both notes against the insolvent estate"—citing In re Sherry, 101 Wis. 11, 76 N. W. 611.

There will be an order affirming the order of the referee disallowing and rejecting the claim on the deficiency judgment.

In re HUFFMAN-SALVAR ROOFING PAINT CO.

(District Court, N. D. Alabama, S. D. July 25, 1916.)

No. 13,680.

BANKRUPTCY ⊙⟹145(2)—ADMINISTRATION—PROPERTY VESTING IN TRUSTEE—RIGHTS OF ACTION—STOCKHOLDER'S LIABILITY.

The liability of stockholders of an Alabama corporation for payment of stock subscriptions by transfer of property fraudulently overvalued cannot be enforced by its trustee in bankruptcy, since under Alabama law the right to enforce such liability is not a property right or asset of the corporation which prior to bankruptcy it could enforce as part of a "trust fund" for the benefit of all its creditors, but is an independent right of action existing alone in favor of creditors defrauded thereby, who have an exclusive remedy under Code Ala. 1907, § 3744, providing that judgment creditors of a corporation having executions returned "no property found" may, in equity, subject the unpaid stock subscription of one or more stockholders, without joining other stockholders and without regard to whether the corporation has called for such subscription or could maintain suit therefor; and therefore the trustee takes no title to such stockholders' liability as an asset of the bankrupt, under Bankruptcy Act, § 70 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), which enumerates all the classes of property which the trustee acquires, nor under Bankruptcy Act, § 47, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), vesting trustees with rights of a judgment creditor in all "property not in the custody of the bankruptcy court."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 205; Dec. Dig. ⊙⟹145(2).]

In Bankruptcy. In the matter of the Huffman-Salvar Roofing Paint Company, bankrupt. On petition of trustee to enforce stockholders' liability. Petition dismissed.

A. Leo Oberdorfer and Benj. Leader, both of Birmingham, Ala., for trustee.

Henry Fitts, of Birmingham, Ala., for respondents.

GRUBB, District Judge. This proceeding is based on a petition filed by the trustee in bankruptcy in the bankruptcy proceeding, to enforce against the respondents the liability created by the Constitution and laws of Alabama of stockholders, where subscriptions to the capital stock of the corporation are paid by the transfer of property, alleged to have been fraudulently overvalued. The bankrupt has insufficient assets to satisfy its debts, apart from the alleged stockholders' liability. The stock was paid for by the transfer to the corporation of a supposed secret formula for the manufacture of fireproof paint. It may be conceded that there was a fraudulent overvaluation of the secret formula, shown by the proof, which was transferred to pay the bankrupt for the stock issue.

The first question presented is the right of the trustee to maintain an action to enforce the liability against the respondent stockholders.

In order that the trustee be vested with such right of action, the liability must have been at some time an asset of the bankrupt. Section 70 of the Bankrupt Act of 1898 enumerates the classes of property which the trustee acquires, and those enumerated are exclusive. Subdivision 4 vests in the trustee "property transferred by him (the bankrupt) in fraud of creditors"; subdivision 5 "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him"; and subdivision 6 "rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The trustee, if vested with the right to enforce the liability at all, must be so vested by virtue of one of the three mentioned subdivisions. If the liability could be enforced by the bankrupt against the stockholder, it is clear that the trustee could enforce it, under the first or last of the three mentioned classes. If the stockholder had agreed with the bankrupt to pay the full par value of his shares, and had failed to do so, the bankrupt corporation, after call, could have enforced the payment, before bankruptcy, and its trustee could have done so, after bankruptcy.

So, if the stockholder had originally agreed to pay in full for his shares, and had been subsequently released, without consideration moving to the bankrupt, from his liability by the bankrupt corporation, before bankruptcy, while the bankrupt could not, after and because of such release, enforce the unpaid subscription against the stockholder, the trustee, after bankruptcy, could recover it, as "property transferred by him (the bankrupt) in fraud of creditors" under subdivision 4 of section 70.

In each of these instances the liability could have been at some time at or before the filing of the petition an asset of the bankrupt and would so come under some one of the classifications of section 70, and hence the trustee could enforce it.

In this case the liability is based upon a payment in property alleged to have been fraudulently overvalued. Whether the liability is enforceable by the trustee depends upon whether or not it ever constituted a property right of the bankrupt corporation, which could have been enforced by it before bankruptcy intervened. If it did not, then the right to enforce it did not pass to the trustee under any subdivision of section 70, and hence not at all.

Whether or not the liability was ever an asset of the bankrupt depends upon the Constitution, laws, and decisions of Alabama relating to the stockholder's liability for a stock subscription paid by the transfer of fraudulently overvalued property. If the Constitution and statutes of Alabama, as construed by the Supreme Court, have created a right of action in favor of the corporation for the enforcement of such liability, then the trustee's right to enforce it is clear. On the other hand, if the liability exists alone in favor of the creditors of the corporation and is not enforceable by the corporation in favor of itself or its creditors, and if it does not constitute property transferred by the corporation in fraud of its creditors, then the trustee in bankruptcy has no right to enforce it.

This seems clear from the terms of the Bankrupt Act, and is sustained by authority. In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641; Courtney v. Georger (D. C.) 221 Fed. 502; Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257.

In some states (Missouri and others) the liability is construed to exist in favor of the corporation, as part of its capital, which constitutes the trust fund for payment of its debts. In such states the trustee's right to recover is sustained. Babbitt v. Read (D. C.) 215 Fed. 395-412; In re Remington Auto & Motor Co., 153 Fed. 345, 82 C. C. A. 421.

In other states (Minnesota and others) the liability is construed to exist in favor of the creditors only, upon the theory that the misrepresentation of the value of the property made by the subscriber to the creditors, when relied upon by the creditor, constitutes a fraud upon the creditor, which the creditor is entitled to have redressed in his own name and right against the stockholder. In states where this doctrine obtains, the courts have held that the right of action is in the creditor alone and not in the trustee of the bankrupt corporation. In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641; Courtney v. Georger (D. C.) 221 Fed. 502; Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257.

The solution of the case depends, accordingly, upon what is the holding of the Alabama courts as to whether, under its constitutional and statutory provisions, the liability is one existing in favor of the corporation and which passes to its trustee in bankruptcy, or one existing independently of the corporation in favor of the defrauded creditor, to whom the false representation as to the full paid character of the stock is held to have been made. Three cases in Alabama are important. In the case of Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65, the Supreme Court of Alabama decided the liability of a subscriber to stock paid by fraudulently overvalued property to creditors and intimated a doubt as to the right of a creditor, who knew or participated in the transaction, to complain of it. The opinion in this case is equally consistent with the idea that the ruling was attributed to the trust fund theory as to the fraud theory. In the case of Nicrosi v. Irvine, 102 Ala. 648, 15 South. 429, 48 Am. St. Rep. 92, the Supreme Court said:

> "The capital of a corporation is regarded as a trust fund for its creditors; and upon the theory that the difference between the face value of the shares in such capital and the value of the property which has been conveyed to the corporation for such shares at an overvaluation belongs to and constitutes in part such trust fund, a court of chancery will, at the instance of creditors, conserve the integrity of the fund by decreeing the payment of such difference by the subscriber."

This would seem to support the trust fund doctrine as the applicable one. But the Supreme Court immediately says:

"But this right in the creditors is purely an equitable one and not enforceable at law at all, and enforceable in equity on the independent standing of creditors in relation to the capital stock, and not through any supposed legal or equitable right the corporation itself has to demand payment of such difference for its own benefit in any forum, for it has no such right."

This would seem to exclude the idea that the corporation or its trustee could complain.

The case of Lea et al. v. Iron Belt Mercantile Co., 147 Ala. 421, 425, 42 South. 415, 416 (8 L. R. A. [N. S.] 279, 119 Am. St. Rep. 93), seems decisive of the Alabama rule. The Supreme Court reasserts the liability of a stockholder to creditors for unpaid stock, purporting to have been fully paid, but by fraudulently overvalued property. The stockholder Lea set up as in defense that the complaining creditor knew of the overvaluation. Of this defense, the court said:

"The question presented for our determination, in view of the fact that there was an overvaluation, is whether the fact of knowledge by complainant of the overvaluation, if true, is a good defense, and whether this defense is supported by the evidence. The complainant was organized in 1891, and made the loan, the basis of the judgment sought to be enforced, in 1894 or 1895. It therefore became a creditor of the debtor corporation after that corporation had accepted the lands in discharge of the subscription obligations at the overvaluation complained of. It cannot be doubted that if complainant had notice of the actual state of affairs, being a subsequent creditor, it cannot disturb the arrangement between the company and its stockholders. It is impossible, with notice of the character and value of the land, for complainant to have acted on and trusted appearances, rather than the true condition of affairs, and, therefore, to have been deceived. This seems to be the universal doctrine of the courts. This principle, as well as the one upon which the equity of the bill must rest, are ably discussed by Messrs. Clark & Marshall in their work on Private Corporations, at page 2327. These authors, after showing that assets of a corporation are not a trust fund for creditors in any proper sense, say: 'It has been repeatedly held, in the absence of special statutory provisions, that where a corporation issues stock as bonus, or for less than its par value in cash, or for property taken for an overvaluation, the transaction cannot be assailed, and full payment by the stockholders required, by or for the benefit of persons who became creditors before the stock was so issued or who participated in the transaction, or who afterwards dealt with the corporation and became creditors with knowledge, for in neither of these cases is there any fraud as against them.' 'It is difficult, if not impossible,' said the Minnesota Supreme Court, 'to explain or reconcile these cases upon the trust fund doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which the stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have the right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of bonus stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the trust fund doctrine has involved it; and we think that, even where the trust fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.' * * * This principle does not seem to be controverted, but is sought to be avoided only by a denial of the fact of notice."

The quoted language is inconsistent with the idea that the basis of the Alabama rule is the trust fund doctrine. That doctrine, as controlling the decision, is expressly repudiated, and the court rests its decision upon the fraud doctrine, as in the Minnesota cases. Nor is the discussion obiter. The defense of notice of the complaining creditor of the overvaluation, at the time credit was extended, would have no place where the trust fund doctrine was the basis of the liability. If the difference between the true and exaggerated value is an asset of the corporation, then all classes of its creditors should share in it—prior creditors, subsequent creditors with notice, and creditors who participated in the transaction. All these are eliminated by this decision of the Alabama Supreme Court from a share in the recovery, and this could only be so upon the idea that the fraud doctrine obtained, and that the mentioned classes could not have been defrauded, since they did not rely upon the false representation as to value in extending credit. A choice between the adoption of the trust fund and of the fraud doctrine was necessary to a decision of Lea's liability as a stockholder to the complaining creditor, since his defense was that the complaining creditor had notice of the overvaluation. This could only constitute a defense in the event the fraud doctrine was adopted. The court held it to be a complete defense. On page 431 of 147 Ala., on page 418 of 42 South. (8 L. R. A. [N. S.] 279, 119 Am. St. Rep. 93), the court said:

"It would, therefore, necessarily follow that, complainant being chargeable, at the time of the creation of its debt, with notice of the overvaluation of the land accepted by the debtor corporation in discharge of the stock subscription, it cannot maintain this bill to charge respondent Lea on his subscription."

This case commits the Alabama courts to the fraud doctrine with its necessary incidents. One of these is that creditors whose debts were incurred before the stock issue complained of, or those whose debts were incurred after, but with notice of the overvaluation, cannot complain of the overvaluation. Another is that the corporation never could have enforced the liability, as it never constituted a liability to the corporation, but only to the creditors thereof, and hence that its trustee in bankruptcy could not enforce it.

This is also the doctrine adopted by the Supreme Court of the United States in Coit v. Gold Amalgamating Co., 119 U. S. 343, 347, 7 Sup. Ct. 231, 232 (30 L. Ed. 420), in which the court said:

"If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. Boynton v. Hatch, 47 N. Y. 225; Van Cott v. Van Brunt, 82 N. Y. 535; Le Fevre v. Carr, 27 Pa. 413."

The case of Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968, was not one of fraudulent overvaluation, but of partial payment, with an agreement that the stock, as against the corporation, should be fully paid.

No subsequent Alabama case has been cited overruling the Lea Case. The case of Hundley v. Hewitt (Ala.) 71 South. 419, is clearly distinguishable. In that case the subscriber gave notes for the payment of his stock subscription, which he procured thereafter, upon the insolvency of the corporation, to be canceled and surrendered to him, without consideration. The notes were assets of the corporation and the effect of the voluntary cancellation of them was to transfer property of the corporation in fraud of its creditors. A right of action for their recovery would therefore clearly vest in a receiver representing creditors or in a trustee in bankruptcy. No such fraudulent transfer can be predicated on the facts of the transaction which is the basis of this proceeding, since the corporation agreed to receive the formula in full payment of respondents' stock purchase, and there was never a liability on the part of respondents to the corporation for more, and so nothing on which to base a fraudulent retransfer or surrender, as in the case of Hundley v. Hewitt. The additional liability of the respondent stockholders was alone to subsequent creditors of the corporation, who did not know of the overvaluation.

The same reason shows the inapplicability of the amendment of 1910 to section 47 of the Bankruptcy Act. The part relied upon by the trustee as conferring the right to maintain the suit is as follows:

"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."

The words "property not in the custody of the bankruptcy court" means property of the estate in bankruptcy, as appears from its previous use in the section. The liability of the stockholders upon an overvaluation is to creditors and not to the corporation, and hence is not property of the bankrupt estate. The amendment is therefore inapplicable.

The statute of Alabama, section 3744, Code 1907, provides a remedy in favor of judgment creditors of a corporation having executions returned "no property found" by bill in equity to subject the unpaid stock subscriptions of one or more stockholders in the corporation, without joining the other stockholders and without regard to whether the corporation has called for such subscription or could maintain suit therefor against the stockholder, which seems to be adequate and exclusive of the right of a trustee in bankruptcy, at least where the unpaid subscription is due to an alleged fraudulent overvaluation of property transferred to the corporation in payment of the subscription.

For these reasons, I think the trustee in bankruptcy had no right to maintain the petition against the respondents, and the petition for review is granted, and the petition of the trustee ordered dismissed at his costs.

AUNT JEMIMA MILLS CO. v. RIGNEY & CO.

(District Court, E. D. New York. July 26, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟹61—INFRINGEMENT OF TRADE-MARK—WHAT CONSTITUTES.

A trade-mark may be appropriated solely by affixing it to an article of merchandise as a mark, and as such alone will it be protected, therefore, complainant cannot complain that defendant, which sold syrup, appropriated its flour trade-mark; the two articles being wholly distinctive.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 76; Dec. Dig. ⟹61.]

2. TRADE-MARKS AND TRADE-NAMES ⟹78—UNFAIR COMPETITION—WHAT CONSTITUTES.

While the avowed purpose of the law of unfair competition is to protect the honest and punish the dishonest trader, as well as to protect the public from deception, the mere fact that a defendant is guilty of fraudulent conduct deceiving the public, will not, where complainant is not injured, warrant relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. ⟹78.]

3. TRADE-MARKS AND TRADE-NAMES ⟹68—UNFAIR COMPETITION—RELIEF.

As a private injury is necessary to relief under the law of unfair competition, complainant, which manufactured flour, can be granted no relief because defendant labeled its syrup with complainant's trade-mark, the two articles not being in competitive classes; this being so though the public was led to believe that complainant manufactured the syrup.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⟹68.]

4. TRADE-MARKS AND TRADE-NAMES ⟹73(2)—USE OF NAME.

Some years after complainant knew that defendant had begun to sell syrup under the name by which complainant designated its flour, complainant's adoption of such name as part of its corporate title gives it no added rights.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⟹73(2).]

5. TRADE-MARKS AND TRADE-NAMES ⟹78—UNFAIR COMPETITION—RELIEF.

Though complainant by extensive advertising created a market for its flour known as "Aunt Jemima's" it cannot complain that defendant, which sold syrup under the same name, reaped the benefit from such advertising; no injury being apparent.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. ⟹78.]

6. TRADE-MARKS AND TRADE-NAMES ⚿68—RELIEF—PROSPECTIVE INJURY.

Equitable relief cannot be granted on the suggestion of a possible injury, so where defendant sold syrup under the same name that complainant sold flour, complainant will not, though it had a trade-mark in such name, be granted relief on the theory that defendant, by disposing of inferior syrup, might possibly prejudice the trade against complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⚿68.]

In Equity. Bill by the Aunt Jemima Mills Company against Rigney & Co. Bill dismissed.

Hugo Mock, of New York City, for complainant.

Owen, Owen & Crampton, of Toledo, Ohio (F. F. Crampton, of Toledo, Ohio, of counsel), for defendant.

VEEDER, District Judge. This is a suit for infringement of a registered trade-mark and for unfair competition. It appears that the Davis Milling Company, a Missouri corporation engaged at St. Joseph in the manufacture and sale of various kinds of flour, adopted about 1890 the name "Aunt Jemima's," together with a fanciful picture of a colored woman, as a mark for its pancake flour. On April 3, 1906, a certificate of registration was granted to it by the Patent Office for this mark as a "trade-mark for self-rising flour." In 1914 the Davis Milling Company was reorganized as the Aunt Jemima Mills Company, to which the foregoing trade-mark was duly assigned. Meanwhile, Rigney & Co., a New York corporation engaged in the manufacture of syrups, rock candy, etc., in the Borough of Brooklyn, adopted in February, 1908, a similar mark for a pancake syrup made by it. On December 29, 1908, a certificate of registration was granted to it by the Patent Office for this mark as a "trade-mark for pancake syrup and sugar cream." Upon its adoption of this mark for its pancake syrup the defendant notified the Davis Milling Company, and suggested a scheme of co-operation. This suggestion was eventually rejected, but the complainant did nothing to challenge the defendant's right to its use of the mark until this suit was instituted, November 15, 1915.

[1] There is no trade-mark infringement here. To sustain a charge of infringement, the owner must have used it on goods of the same descriptive properties as the goods sold by the alleged infringer. The complainant's predecessor in title applied for and was granted this mark for use on flour. Two years later the defendant applied for and was granted a similar mark for use on syrup. The question under the statute is whether these articles have the same descriptive properties. A mark may be said to be appropriated to merchandise of the same descriptive qualities when the essential characteristics of the goods are the same. Phœnix Paint & Varnish Co. v. John T. Lewis & Bros., 32 App. D. C. 285. Unless this be true, the mere similarity of the marks becomes immaterial. The law places no inhibition upon the use of the same mark by different persons, so long as the goods to which it is applied are so distinctive in their essential characteristics as to preclude the probability of confusion in trade. G. J. Tire Co. v.

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

G. J. G. Motor Car Co., 39 App. D. C. 508. Flour and syrup are so distinctive. The complainant is limited to its registration for flour. It could not extend its registration to syrup; for, never having made syrup, it had not in fact used the mark on syrup. Valid registration of a trade-mark is acquired, not by the invention or adoption of a word or symbol, but solely by affixing it to an article of merchandise as a mark; it is the trade, not the mark, that is protected. In other words, a registrant is entitled to prima facie ownership only of the field which he has actually appropriated. Hump Hairpin Co. v. De Long Hook & Eye Co., 39 App. D. C. 484.

[2, 3] The same considerations are practically decisive of the issue of unfair competition. The objects of the law of unfair competition as stated by the Circuit Court of Appeals of this circuit in Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565, are:

"First, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader who is taking his competitor's business away by unfair means; and, third, to protect the public from deception."

The fundamental basis of the private remedy is, however, not the protection of the public from imposition, but injury to the complainant. That the public is deceived may be evidence of the fact that the original proprietor's rights are being invaded. If, however, the rights of the original proprietor are in no wise interfered with, the deception of the public is no concern of a court of chancery. So, although fraudulent conduct which is calculated to deceive the public is a necessary element, it is the private loss of the complainant that is to be prevented, not the public injury arising to others. This is in conformity with general principles. A court of equity cannot enforce as such the police power of the state. It is not sufficient, therefore, that the use of a mark by a subsequent appropriator is calculated to deceive the public into believing that his goods are the goods of, that is, made by, the original proprietor of the mark. These principles were fully formulated by Lord Chancellor Westbury so long ago as the case of Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523. See the statement by Circuit Judge (now Mr. Justice) Day in the leading case of American Washboard Co. v. Saginaw Mfg. Co. (C. C.) 103 Fed. 281, and by Judge Swayze in the recent case of Munn & Co. v. Americana Co., 83 N. J. Eq. 309, 91 Atl. 87. Also Borden's Condensed Milk Co. v. Borden Ice Cream Co. (C. C.) 201 Fed. 510, Borthwick v. The Evening Post, 37 Ch. D. 449, and Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

The nature of the private injury essential to the maintenance of the action is expressed in the title of the offense in terms of competition. Hence it is sometimes stated that where there is no competition there can be no action. Simplex Automobile Co. v. Kahnweiler, 162 App. Div. 480, 147 N. Y. Supp. 617. Doubtless this is usually a sufficient statement. If two articles differ in their descriptive qualities so that one is not likely to be taken by consumers for the other, then there is no direct competition in trade and ordinarily no injury. But I prefer to define the action in broad terms as resting upon injury arising from the act of the subsequent appropriator of a mark. For there may be injury other than that arising from direct competition in the sale of the product to which a mark is attached; as, for instance, in the case of British-American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915B, 363, where the court relied in part upon the probable confusion in the market in the stocks and securities of two corporations.

So, also, with respect to "unfairness." The mere fact of damage or probability of damage is not conclusive, since damage may result from lawful acts, such as legitimate competition. Fraudulent conduct on the part of the defendant is a necessary element, but fraudulent conduct without injury to the complainant does not suffice. Munn v. Americana Co., supra; Borthwick v. The Evening Post, supra. That is to say, it is a question of fact, not merely of intention. Unless the defendant has adopted means calculated to injure the complainant through unfair competition, the intention is immaterial. G. W. Cole Co. v. American Cement & Oil Co., 130 Fed. 703, 65 C. C. A. 105.

Applying these principles to the facts of this case, it is apparent that there can be no direct competition in trade between flour and syrup, for their descriptive qualities are dissimilar. Although the question whether articles belong to competitive classes is a question of fact rather than of law, the reports are replete with illustrations of the principle. In the following cases the articles mentioned were held to be of different descriptive qualities or classes: George v. Smith (C. C.) 52 Fed. 830 (canned salmon and canned tomatoes and peaches); Borden's Condensed Milk Co. v. Borden Ice Cream Co. (C. C.) 201 Fed. 510 (ice cream and milk); Lawrence v. P. E. Sharpless Co. (D. C.) 203 Fed. 762 (butter and cheese); Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002 (the title of a periodical devoted to fiction and the name of a personage shown on a moving picture film); Simplex Automobile Co. v. Kahnweiler, 162 App. Div. 480, 147 N. Y. Supp. 617 (automobiles and fire extinguishers); Anglo-Swiss Condensed Milk Co. v. Metcalf, 31 Ch. D. 454 (condensed milk and butterine and eggs); Borthwick v. The Evening Post, 37 Ch. D. 449 (Morning Post and Evening Post, as titles for newspapers). To the same effect are the following decisions of the Court of Appeals of the District of Columbia on issues of interference in trade-mark registration: Peter Schoenhofen Brewing Co. v. John Sexton & Co., 41 App. D. C. 510 (grape juice and lager beer); G. J. Tire Co. v. G. J. G. Motor Car Co., 39 App. D. C. 508 (automobiles and rubber tires); Hump Hairpin Co. v. De Long Hook & Eye Co., 39 App. D. C. 484 (hairpins and hooks and eyes); Johnson Educator Food Co. v. Sylvanus Smith & Co., Inc., 37 App. D. C. 107 (crackers, biscuits, bread, and breakfast cereals, and salt, smoked, pickled, and canned fish); Muralo Co. v. National Lead Co., 36 App. D. C. 541 (kalsomine and white lead). On the other hand, in the following cases in this circuit the use of similar marks has been enjoined: Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565 (toilet brushes and tooth brushes); British-American Tobacco Co., Ltd., v. British-American Cigar Stores Co., 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915B, 363 (wholesale and retail dealers in tobacco); American Tobacco Co. v. Polacsek (C. C.) 170 Fed. 117 (smoking and chewing tobacco and cigarettes); Van Zile v. Noruh Mfg. Co. (D. C.) 228 Fed. 829 (a laundry washing aid and a germicide and cleansing powder for use in sweeping).

[4] The essential characteristics of flour and syrup are dissimilar. It is true that both are designed for human consumption as articles of food. But in other respects they differ as a hat or a glove differs from a shoe, though both are articles of wearing apparel. No one desiring to purchase flour would accept syrup without knowing the difference. That is the test. Muralo Co. v. National Lead Co., 36 App. D. C. 541; Johnson Educator Food Co. v. Sylvanus Smith & Co., Inc., 37 App. D. C. 107, and cases above cited. If a consumer familiar with the mark used on the complainant's flour should conclude upon seeing the same mark on the defendant's syrup that the complainant had extended its business to sugar, it would be because of no confusion in his mind between the two articles. To regard the trade-mark right as including both would be to give it the effect of a trade-name upon all goods made by a particular company, instead of the effect of a trade-mark used upon particular goods. The complainant is here relying upon a trade-mark, not a trade-name. Of course, it can derive no adventitious advantage from its adoption of part of its mark as its corporate name six years after the known adoption and continuous use by the defendant of the mark upon its own product.

[5] Indeed, I do not understand that the complainant argues seriously that there is any competition between flour and syrup. It does, however, assert a right to relief on two other grounds: First, that the defendant is deceiving the public into believing that its syrup is made by the complainant, and thereby unlawfully availing itself of the complainant's reputation and extensive advertising; and, second, that the complainant has been, or at all events may be, injured by the sale by the defendant of an inferior product.

The first contention may be answered in the language of Lord Justice Bowen in Borthwick v. The Evening Post, supra, where the proprietors of a morning newspaper sought to enjoin the use by an evening newspaper of the same name:

"I do not hesitate to draw the inference that the title was taken to deceive somebody. But that is not enough. Is it calculated to deceive the public in a way which would injure the Morning Post? It may be that it is taken to deceive the public without injuring the Morning Post. In my opinion that is exactly what has happened in this case."

"Care must be taken in these cases," as Vice Chancellor Garrison said in Perlberg v. Smith, 70 N. J. Eq. 638, 62 Atl. 442, "not to extend the meaning of the word 'unfair' to that which may be unethical but not illegal. It may be unethical for one trader to take advantage of the advertising of his neighbor, but his so doing would in many cases be entirely legal."

Such is the case here. Doubtless it is deceptive, and therefore morally wrong, for the defendant to suggest or intimate that his goods are made by the complainant. But this does not give rise to a private right of action, because no interference with the complainant's trade is shown. To punish an immoral, or even a dishonest, trader, without such proof, would be to enforce the police power of the state. The defendant may well, and does, assert that co-operative or joint association in the exploitation and sale of two food products consumed together tends to increase the sale of each. The defendant may, and probably does, profit by the use of this mark, but there is no proof of injury to the complainant.

[6] With respect to the remaining contention, the bill alleges injury to the complainant by reason of the fact that the defendant's syrup is of an inferior quality and unfit for use. There is no proof which warrants any such finding, nor any indicating any probability that such will be the fact. It is urged, however, that the possibility remains. But a court of equity may not act upon a suggestion of possible injury; there must be proof at least of reasonable probability of injury.

The complaint is dismissed, but, under the circumstances, without costs to the defendant.

UNION TRUST CO. OF NEW YORK et al. v. ST. LOUIS, I. M. & S. RY. CO.

BUSH et al. v. METROPOLITAN TRUST CO. OF CITY OF NEW YORK et al.

(District Court, S. D. New York. May 8, 1916.)

RAILROADS ⚷209—RECEIVERS—RIGHTS UNDER MORTGAGE.

Where a railroad mortgage provided for the creation in the hands of the trustee of an "improvement and equipment fund," to be used to reimburse the mortgagor for expenditures made for certain classes of additions, improvements, and betterments, a receiver appointed for the property, at the suit of junior creditors, the company not being in default under the mortgage, succeeds to the right of the company to use such fund for the purposes designated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692–695; Dec. Dig. ⚷209.]

In Equity. Suit by the Union Trust Company of New York and Benjamin F. Edwards, as trustees, against the St. Louis, Iron Mountain & Southern Railway Company. On ancillary bill by defendant railway company and B. F. Bush, its receiver, against the Metropolitan Trust Company of the City of New York and Walker Hill, trustees. Decree for complainants.

This suit comes on for hearing on bill and answer. All of the material allegations in the bill, other than certain conclusions of fact, are admitted by the answers of the defendants. The Commonwealth Steel Company brought a creditors' bill against St. Louis, Iron Mountain & Southern Railway Company (hereinafter called the Iron Mountain Company) in the District Court of the United States within and for the Eastern Division of the Eastern District of Missouri, and plaintiff Bush, on August 19, 1915, was duly appointed and qualified as receiver of the railroad, property, and assets of said Iron Mountain Company. Thereafter a foreclosure suit was instituted in said court by Union Trust Company of New York and Benjamin F. Edwards, as trustees of the first and refunding mortgage of said Iron Mountain Company (a mortgage in all respects subsequent and junior to the unifying and refunding mortgage hereinafter referred to), and the said two suits were consolidated, and plaintiff Bush was duly appointed, and qualified as, receiver in said consolidated cause. An ancillary bill was meanwhile filed in this court by Commonwealth Steel Company, and later an ancillary bill in foreclosure was brought by the trustees. These two ancillary suits were duly consolidated, and, by order of this court entered herein on the 14th day of December, 1915, plaintiff Bush was appointed, and duly qualified as, receiver of all property, assets, and income derived therefrom, of said Iron Mountain Company, within the territorial jurisdiction of this court. He is now acting as receiver as above set forth and as such is entitled to, and is in, possession and control of all the railroad, property, and assets of said Iron Mountain Company.

The defendants, Metropolitan Trust Company of the City of New York and Walker Hill, are sued herein as trustees under the unifying and refunding mortgage of said Iron Mountain Company, dated July 1, 1899, securing its issue of $40,000,000 4 per cent. Gold Bonds maturing July 1, 1929, upon which bonds no default in the payment of principal or interest has occurred. As collateral security for the debt evidenced by said 4 per cent. Gold Bonds, said Iron Mountain Company pledged with said Trust Company, as trustee under said unifying and refunding mortgage, certain corporate stocks and bonds, and among others 5,435 6 per cent. debenture series B Bonds, of $1,000 each of the Wabash Railroad Company. In 1906, pursuant to the provisions of the mortgage, these bonds were exchanged, in accordance with the plan of reorganization of the Wabash Railroad Company, for 28,262 shares of preferred stock, 28,262 shares of common stock, and $3,913,000 face value of first refunding and extensions mortgage bonds of the Wabash Railroad Company.

On or about the 25th day of June, 1909, upon due request of the Iron Mountain Company, pursuant to the provisions of said mortgage, the defendant Trust Company released $1,000,000 face value of the said $3,913,000 of bonds, which had been sold by the Iron Mountain Company, and the proceeds thereof were deposited with said Trust Company to the credit of the improvement and equipment fund established under said mortgage, and thereafter were withdrawn by said Iron Mountain Company to reimburse expenditures made in accordance with the provisions thereof. The remaining $2,913,000 of said bonds were deposited by said Trust Company under a deposit agreement prepared by a committee representing the holders of said bonds in proceedings to foreclose upon them under a default which occurred January 1, 1912, and said Trust Company received against such deposit, an appropriate certificate from the depositary.

Thereafter, pursuant to the terms of a reorganization agreement of said the Wabash Railroad Company, duly approved and adopted by said committee, an assessment of $654.82 in respect of each $1,000 face value of said $2,913,000 of bonds was levied against said bonds. Upon application of plaintiff receiver he was directed by said District Court for the Eastern Division of the Eastern District of Missouri, in said principal suit, to advance to the defendant trustee $190,749.07, being the initial 10 per cent. of said assessment of $654.82 in respect of each such bond for the purpose of paying the said first installment of said assessment, and said plaintiff receiver was also directed to sell all of said certificates of deposit, representing said bonds at such prices and upon such terms as he might authorize and determine, and to cause the proceeds of all such sales to be deposited with said defendant Trust Company under the unifying and refunding mortgage to be applied first to the repayment of such advances made by a plaintiff receiver, with interest thereon, and any balance thereof to be held by said Trust Company in the so-called "improvement and equipment fund" created under and pursuant to the terms of said unifying and refunding mortgage. In pursuance of the authority and direction of the said court, and of resolutions of the board of directors of the Iron Mountain Company, and with the consent of said defendant Trust Company, plaintiff receiver thereafter sold the interest of the Iron Mountain Company in said $2,913,000 of bonds represented by said certificates of deposit; and the purchase price thereof, after the deduction by said plaintiff receiver of the said sum of $190.749.07, previously advanced by him, with interest, namely, the sum of $892,643.42, was delivered to said defendant Trust Company, and said sum is now held by it under and pursuant to the terms and conditions of said unifying and refunding mortgage, as a part of the improvement and equipment fund thereunder.

By the provisions of the unifying and refunding mortgage creating said improvement and equipment fund (section 2 of article 5) it is provided that "all moneys received by the trustee or by the Trust Company under any provision of this indenture, unless expressly reserved or appropriated by this indenture to some other purpose, shall be received by the Trust Company, and be by it set apart as a cash improvement and equipment fund to be used and paid over as hereinafter provided." The purposes for which the moneys held in said fund are to be used are stated to be, among others, "to reimburse the railway company for any expenditures which shall have been made by it after the date of this indenture out of its other funds for any of the purposes mentioned in sections 3 and 4 of article 2 of this indenture." The purposes mentioned in section 3 of article 2 therein referred to are to reimburse the Railway Company for expenditures made by it after July 1, 1899, for the acquisition of new branch lines or other additions or for specified betterments or improvements upon any of the railroad property subject to the unifying and refunding mortgage.

In the administration of the receivership of the railroad and property of the Iron Mountain Company under the direction of the court in said principal suit, it has been necessary for plaintiff receiver from time to time to make, and he has made, by order and direction of the court in the principal consolidated cause, certain expenditures for improvements, betterments, and equipment upon and in connection with the lines of railway and property of said Iron Mountain Company, which expenditures have been made for one or more of the purposes for which it is provided by the terms of said mortgage that the said improvement and equipment fund may be used in reimbursement of said expenditures.

After the making of the said expenditures, plaintiff receiver notified said defendant Trust Company thereof, and represented to it that the said expenditures had been made after the date of the said unifying and refunding mortgage and subsequent to the appointment of plaintiff as such receiver on August 19, 1915, and that they were of the character and for one or more of the purposes for which under the terms of said mortgage the said improvement and equipment fund may be used and applied in reimbursement thereof, and thereupon demanded of said defendant Trust Company that it pay over to plaintiff as receiver, in reimbursement for said expenditures, the sum of $114,769, out of said improvement and equipment fund, and at the same time offered and agreed to deliver to said defendant Trust Company all copies of resolutions and certificates required by the terms of said mortgage, and to comply with all the terms and conditions of said mortgage in respect of the reimbursement of plaintiff as such receiver for the said expenditures so made. Thereupon said defendant Trust Company refused said demand of plaintiff receiver, and notified him that it did not and would not recognize his right as such receiver to reimbursement, for said expenditures, out of said improvement and equipment fund, unless and until it should be adjudged and decreed by order of court that plaintiff, as such receiver, is entitled to such reimbursement, and that said defendant Trust Company, by such adjudication and decree, be ordered and directed to make the same.

Plaintiff receiver has been authorized and instructed by the court in the principal consolidated cause to make sundry other betterments and improvements, aggregating in amount approximately $1,200,000, upon the property which is subject to the lien of the unifying and refunding mortgage, and for one or more of the purposes for which it is provided by the terms of said mortgage that the improvement and equipment fund may be used and applied in reimbursement of expenditures made; but plaintiff receiver is without funds applicable to the making of such expenditures directed to be made by said orders, unless he can obtain some reimbursement therefor from some source other than the revenue and income of the property which he is operating as receiver. Plaintiff receiver is anxious and willing to comply with the orders directing him to make such expenditures, but in order to enable him to proceed under said orders, and in view of the position taken by the defendant Trust Company, and its refusal to permit his reimbursement out of the improvement and equipment fund, he deems it necessary for the proper and economical administration of the receivership that he be assured in advance of his right to reimbursement for such proposed expenditures, prior to incurring obligations in connection therewith. He asserts that his right to rely, under the terms and conditions of the unifying and refunding mortgage, upon the reimbursement of these proposed expenditures, as a subsisting and effective right prior to the actual completion thereof, is essential to his interest as such receiver and to the interests of the said Iron Mountain Company.

The question now presented is therefore whether, according to the intent and the terms and conditions of the unifying and refunding mortgage, plaintiff receiver has succeeded to the rights of the Iron Mountain Company to reimbursement out of the improvement and equipment fund established thereunder, and is entitled upon delivering to said defendant Trust Company the resolutions and certificates called for by said mortgage, and upon compliance with all the other terms and conditions thereof to be reimbursed by said defendant Trust Company out of said fund, and interest thereon, for expenditures for any of the purposes which are included within the terms of said mortgage as purposes for which said improvement and equipment fund is to be used and applied. If the receiver is found to be so entitled, the amount of such reimbursement must be determined.

Edward J. White and Carl A. De Gersdorff, both of New York City (Carl A. De Gersdorff, of New York City, of counsel), for receiver Bush.

Walter H. Merritt, of New York City, for trustee Hill.

Carter, Ledyard & Milburn, of New York City (Walter F. Taylor, of New York City, of counsel), for trustee Metropolitan Trust Co.

MAYER, District Judge (after stating the facts as above). The terms and conditions of the unifying and refunding mortgage do not inhibit by implication or otherwise the reimbursement of a receiver of the railroad and property of the Iron Mountain Company by the trustee out of the improvement and equipment fund. In several instances the mortgage provides that, upon the appointment of a receiver, the Iron Mountain Company (or, in effect, its receiver) shall ipso facto lose certain of its rights in the property. Thus in article 4, section 2 (page 46), it is provided that the trustees shall not be entitled to collect the principal or interest of any bonds or other obligations pledged under the mortgage, unless a receiver or the trustees shall have entered into possession of the mortgaged railroad; and in section 4 of the same article (page 48) there is a provision that, unless a receiver or the trustees shall have entered into possession, the Iron Mountain Company shall have the right to vote upon the shares of stock pledged under the mortgage. Provisions as to the rights of a receiver are also contained in section 1 of article 6 (page 61) and article 7 (page 73). There is no provision, however, in any way limiting or modifying the right of the Iron Mountain Company (or its receiver) to the improvement and equipment fund, upon the appointment of a receiver, or authorizing the trustees to deal with that fund after such appointment in any other way than was permitted prior thereto.

The fact that in some instances a receiver's taking possession of the mortgaged property operates to divest specified rights reserved to the Iron Mountain Company does not support the contention that other rights therein were similarly affected. On the contrary, the mortgage contemplates the operation of the railroad by a receiver, and it would seem that it was intended that he should exercise the full rights of the Iron Mountain Company pertaining to its maintenance and operation, which would include the rights to the improvement and equipment fund.

The reason for the clauses terminating, on the appointment of a receiver, rights to receive income, vote stock, etc., evidently is that the exercise of such rights might imperil the security of the mortgage when the company was in the doubtful situation indicated by the appointment of a receiver, and that in such an event it was deemed necessary that the income from the mortgaged securities should no longer be used or dissipated, and the stock should no longer be voted, by the railway company, as it saw fit, as it otherwise had a right to do under the mortgage, but should thereupon be used, and voted, to preserve or enhance the value of the mortgaged premises. On the other hand, the purposes for which expenditures can be made and reimbursement therefor secured out of the improvement and equipment fund are carefully chosen and restricted, and are specifically designated in the mortgage, and reimbursement is made dependent upon the performance of stipulated conditions precedent, with the very object in view of preserving the security of the bondholders. Upon the appointment of a receiver of the mortgaged property, therefore, it is evident that there is no need for any rule for the disposition of that fund, in order to furnish additional safeguards to the bondholders, other than that already in force. Undoubtedly it is for this reason that nothing is found in the mortgage modifying or limiting the disposition of the improvement and equipment fund as it is provided in section 2, article 5 thereof.

It is clear to me that the receiver has the identical rights to the property and contracts which the Iron Mountain Company itself had. It would destroy the very purpose and intention of the parties to the mortgage if the receiver were not able to do precisely what is conceded could have been done by the corporation in connection with necessary betterments and the like. The property is the same, the corporate entity is still alive, and the receiver is merely the instrument of the court in carrying out, in such manner and within such limitations as the court may deem proper, what the parties intended should be done in this regard. While there is no reported case which covers the precise question here presented, citation of cases involving analogous principles of construction need not be made, because the question must be resolved upon what is found to be the intent of the parties, as gathered from the instrument.

As the receiver is entitled, under the orders of this court, to enforce, for his benefit as receiver, the rights of the Iron Mountain Company in the improvement and equipment fund under the terms of the mortgage, I am of opinion that he is entitled to a decree as prayed for.

As the trustees very properly defended, there will be no costs against them.

KEVER v. PHILADELPHIA & READING COAL & IRON CO.

(District Court, E. D. New York. July 15, 1916.)

1. DEATH ⟹31(6)—ACTION—MAINTAINABLE BY WIDOW ALONE.
The cause of action given by statute to widow and children for death of the husband and father is in practice maintainable in her name alone as widow, without recital in the title that it is brought on behalf of herself and children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 41, 42; Dec. Dig. ⟹31(6).]

2. COURTS ⟹311—FEDERAL COURTS—JURISDICTION.
The jurisdiction of federal court over an action for death maintainable by widow alone depends on place of residence and citizenship of the widow.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. ⟹311.]

3. JURY ⟹12(1)—FEDERAL COURTS—JURISDICTION.
Questions as to the jurisdiction of federal courts on diversity of citizenship may be disposed of on motion, when they depend upon questions of law from facts appearing in the record; but where they depend on contested facts, arising on a plea presenting the defense, that plaintiff is an alien, and defendant's residence is in another district in a different state, plaintiff may insist that such a plea be tried as one of the essential elements of the cause of action, as to which a jury trial is a matter of right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 27; Dec. Dig. ⟹12(1).]

4. COURTS ⟹37(3)—FEDERAL COURTS—JURISDICTION—WAIVER OF OBJECTIONS.
A defendant, raising a plea of jurisdiction upon evidence coming out during the course of a trial, must withdraw his general answer and submit to determination of the case upon his plea; and if he wishes to have an issue of negligence submitted to the jury upon the merits without regard to the plea, this will be considered a waiver of the jurisdictional question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 149, 151; Dec. Dig. ⟹37(3).]

5. COURTS ⟹280—FEDERAL COURTS—QUESTION OF JURISDICTION—FIRST DISCLOSED AT TRIAL.
When the jurisdictional question is presented for the first time upon the trial, if the defendant then elects to plead it, the court should proceed to determine the facts governing it; and if the question is decided against defendant, or if he has waived his right to object, the court may proceed with the trial on the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⟹280.]

6. COURTS ⟹37(3)—FEDERAL COURTS—JURISDICTION—WAIVER OF OBJECTION.
Defendant will not be allowed to stand upon its plea to the jurisdiction and also contest the issue upon the merits, unless, to avoid a second trial, the court compels the defendant to go on, and thus leaves the issue on the merits to the jury, conditional upon the finding by the jury in favor of plaintiff upon the jurisdictional question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 149, 151; Dec. Dig. ⟹37(3).]

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7. COURTS ⟹325—FEDERAL COURTS—JURISDICTION.

In a widow's action to recover for the benefit of herself and her minor children damages provided for by statute for the death of her husband, the defendant appeared generally and answered. Thereafter defendant moved to withdraw its appearance and answer, and file a plea to the jurisdiction on the ground that the District Court, in which suit was had, was without jurisdiction, because defendant resided in another district in a different state and the widow was an alien. *Held* that, as a plea to the merits waives objections to the jurisdiction, defendant, while entitled to withdraw its answer, could not file a plea to the jurisdiction, and at the same time answer to the merits of the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. ⟹325.]

At Law. Action by Katherin Kever, widow of George Kever, deceased, against the Philadelphia & Reading Coal & Iron Company. On the trial the jury disagreed, and the case was set down for new trial. Upon the evidence at the trial the defendant now moves to withdraw its answer and interpose a plea. Motion granted, and hearing to be disposed of in accordance with plaintiff's demand for jury trial.

Baltrus S. Yankaus, of New York City, for plaintiff.

Macklin, Brown & Purdy, of New York City, for defendant.

CHATFIELD, District Judge. [1, 2] The plaintiff is in court alleging that she is a citizen of the United States and a resident of the state of New York. She is maintaining a cause of action which is given by statute to herself and to her six children, who were all born in the United States and are citizens. This cause of action, however, seems in practice to be maintainable in her name alone, as widow, without recital in the title that it is brought on behalf of herself and the children. It has been treated by both parties as if the total rights of the seven individuals were vested in the plaintiff as representative of them all. It would seem to follow, therefore, that the jurisdiction of the court would depend upon the place of residence and citizenship of the widow.

It has already been held that the defendant has waived the right to oppose the maintenance of the action in the United States court in this district, as long as it was brought in the residence of either the plaintiff or the defendant upon the ground of diversity of citizenship. The defendant raised by answer an issue as to the allegation of citizenship by the plaintiff, and in spite of the rights of the six citizen children the defendant seeks now to withdraw its general appearance and answer, and to make an application upon a hearing as if upon a special plea, asking that the suit be dismissed if the plaintiff be found to be an alien, and therefore to be seeking to maintain an action in this district against a citizen and resident of the state of Pennsylvania and of one of the districts of that state. The plaintiff objects to such a course and demands a trial by jury upon the question of citizenship.

[3] While questions of jurisdiction may be disposed of upon motion, when they depend upon questions of law from facts appearing in the

record, it would seem that either party should be entitled to demand a jury trial as to any issue which substantially goes to the merits of a cause of action, which must be tried by a jury, if either of the parties so demand. While, therefore, the question of citizenship might be a conclusion of law, if the facts are admitted or settled, nevertheless, in the present condition of the case, it would seem that the plaintiff has a right to insist that a plea of this nature be tried as one of the essential elements of the cause of action, as to which a jury trial is a matter of right.

[4] It was held in the case of Yensavage v. Lehigh Valley Coal Company (unreported), affirmed 218 Fed. 547, 134 C. C. A. 275, that a defendant, raising a plea of jurisdiction upon evidence coming out during the course of a trial, must withdraw his general answer and submit to a determination of the case upon his plea, and that, if the defendant wished to have the issue of negligence submitted to the jury upon the merits without regard to the plea, it would be considered a waiver of the jurisdictional question.

[5] It has since been stated in the case of Lehigh Valley Coal Co. v. Washko, 231 Fed. 42, — C. C. A. — (Second Circuit, February 15, 1916), that if the defendant elects to plead the jurisdictional question, when this is raised for the first time upon the trial, the court should proceed to a determination of the facts from which the question of jurisdiction should be judged. If that question is decided against the defendant, or if he be held to have waived his right to object, the court may then proceed with the trial of the action upon the merits. Thus the court may leave the issue on the merits to the jury, conditional upon the finding by the jury in favor of the plaintiff upon the jurisdictional question.

[6] By this, if the jury find the facts (upon which the issue of jurisdiction is to be determined) in favor of the plaintiff, a trial upon the merits would be had. If the jury find these facts against the plaintiff, and should so indicate by their verdict, then the balance of the trial would be without effect, and the jury could not render a verdict upon the merits. If there be no issue of fact, then the question of jurisdiction must necessarily be determined as a matter of law. Ruling on the question of law might be reserved, but it would seem that the defendant could not and should not be allowed to stand upon its plea to the jurisdiction, and also be allowed to contest the issue upon the merits, unless the court (as indicated in the Washko Case, supra) compelled the defendant to go on, so as to avoid a second trial.

[7] Upon the present motion, the defendant asks leave to interpose a plea, which cannot be determined, in the face of the plaintiff's demand for a jury trial, until such time as the action upon the merits might also be tried. The defendant's motion should be granted, to the extent of allowing it to withdraw its answer and to interpose a plea. The court does not see how the defendant can at the same time interpose an answer upon the merits, for the opportunity is now given, without compulsion, to elect whether it will waive its right to object to suit in this district.

The hearing of the plea will be disposed of according to the plaintiff's action in demanding a jury trial thereof.

BERG v. ERICKSON (two cases).

(Circuit Court of Appeals, Eighth Circuit. July 8, 1916.)

Nos. 4518, 4519.

(Syllabus by the Court.)

1. CONTRACTS ⚿303(3)—PERFORMANCE—EFFECT OF IMPOSSIBILITY.

E., a resident of Kansas, in April, 1913, showed to B., a resident of Texas, who had had no experience of Kansas grass, or of the effects upon it of droughts, which were not unusual in some parts of Kansas, certain pastures in which he proposed to put, and into which he afterwards did put, B.'s cattle. Thereupon, on April 16, 1913, E. made a written contract with B. to furnish about 1,000 of his cattle plenty of good grass, salt, and water during the grazing season of 1913, and B. agreed to pay him therefor $7 a head. An act of God, the worst drought that had ever been known in Kansas, made it impossible for E. to furnish plenty of good grass in July, August, September, and October of that year, to the damage of B. in the sum of $20,000, but did not prevent him from furnishing plenty of good grass during May and June, and sufficient grass to keep the cattle alive and maintain their weight during the remainder of the season.

Held, E. was not absolved from his liability to furnish plenty of good grass, or to pay the damages for his failure so to do, by the act of God, the unprecedented drought.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1412–1416; Dec. Dig. ⚿303(3).]

2. CONTRACTS ⚿303(3)—PERFORMANCE—EFFECT OF IMPOSSIBILITY.

Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible without his fault by an act of God, or an unavoidable accident. But this rule is not generally applicable to contract obligations.

Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for its nonperformance by a subsequent impossibility of performance without his fault, caused by an act of God or an unavoidable accident, depends upon the true construction of his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1412–1416; Dec. Dig. ⚿303(3).]

3. CONTRACTS ⚿303(3)—PERFORMANCE—EFFECT OF IMPOSSIBILITY.

The general rule is that one, who makes a positive agreement to do a lawful act, is not absolved from liability for the failure to do it by a subsequent impossibility of performance, caused by an act of God or an unavoidable accident, for the reason that he voluntarily contracts to perform it, without reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive agreement, to enter into and become bound by the contract, and while courts may enforce, they may not avoid contracts, in the absence of fraud or some similar ground.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1412–1416; Dec. Dig. ⚿303(3).]

4. CONTRACTS ⚿303(1)—PERFORMANCE—EFFECT OF IMPOSSIBILITY.

Where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of marriage, or in a contract for personal service, as of a singer or artist, should be living at the time for the performance of the

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

contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible without his fault by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like conditions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1409; Dec. Dig. ⚷303(1).]

5. PERFORMANCE OF CONTRACT—EFFECT OF IMPOSSIBILITY.

There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract that they must have known when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence should continue until the time of performance, or unless an indispensable thing, or condition of things, not then in existence should come into existence before and be in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition that if that thing or condition is destroyed or prevented without fault of the obligor by the act of God, or by unavoidable accident, the obligor shall be absolved from liability for his failure to perform.

6. CONTRACTS ⚷303(1)—PERFORMANCE—EFFECT OF IMPOSSIBILITY.

The decisions of the federal courts do not go so far. The rule declared by the Supreme Court is that, although general words which cannot be reasonably supposed to have been used with reference to the possibility of an event may not be held to bind one, yet where one at the time of making his contract must have known, or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so, or pay the damages resulting from his failure so to do.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1409; Dec. Dig. ⚷303(1).]

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

Action by J. C. Berg against John Erickson. Judgment for defendant, and plaintiff brings error. Suit in equity by John Erickson against J. C. Berg. From a decree for complainant, respondent appeals. Reversed, and remanded for new trial.

C. H. Brooks, of Wichita, Kan. (J. D. Houston, of Wichita, Kan., on the brief), for appellant and plaintiff in error.

J. T. Lafferty, of Kansas City, Mo. (W. P. Hackney, of Winfield, Kan., Aikman & Aikman, of Eldorado, Kan., and L. D. Moore, of Winfield, Kan., on the brief), for appellee and defendant in error.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

SANBORN, Circuit Judge. John Erickson, a resident of Kansas, made a written contract with J. C. Berg, a resident of St. Francis, Texas, on April 16, 1913, to pasture for him 1,000 steers and to "furnish plenty of good grass, water, and salt during the grazing season of 1913" to them for $7 per head, which Berg agreed to pay. Erickson furnished the grass, water, and salt to them during May and June, but the most severe drought which had been known in that part of

Kansas subsequently prevailed, and on account of that drought it was impossible for Erickson to furnish, and he failed to furnish, plenty of good grass for the cattle during July, August, and September, to the damage of Berg in the sum of about $20,000; and the main question in this case is whether Erickson is liable to pay these damages to Berg on account of his breach of his contract, or is absolved from liability for them by the impossibility of performance which resulted from the drought after the contract was made. The question was presented in this way: At the end of the grazing season Erickson claimed an agister's lien on the cattle for the agreed price of the pasturing, $7 per head, and refused to deliver them until that price was paid. Thereupon Berg replevied the cattle upon a complaint in which he alleged his ownership and right to the possession of them, and that by the failure of Erickson to furnish the agreed grass the cattle were worth $33,000 less than they would have been if Erickson had performed his contract. Erickson denied liability for the damage to the cattle, on the ground that it was caused by the drought, an act of God, and pleaded his agister's lien and his right to the possession of the cattle thereunder. He also brought a suit in equity against Berg, in which he set forth and prayed the adjudication of his agister's lien for the $7 a head, and asked further relief. Berg in his answer to this complaint denied the existence of any agister's lien, alleged Erickson's breach of his contract and his damage in the sum of $33,000, pleaded a counterclaim for these damages, and asked a judgment for their recovery.

The action in replevin and the suit in equity were tried together by the court below without a jury by consent of the parties. The court decided that Erickson had an agister's lien upon the cattle for the value of the grass furnished in the months of May and June, and for certain expenses which he incurred and the value of certain services which he rendered in caring for the cattle when they were ill, and in feeding them at the end of the grazing season, to the amount of $2,999.41, and rendered a judgment in the action in replevin for the return to him of the cattle, or for the payment to him of that amount. The court also held that Erickson was absolved from liability for his breach of his contract to furnish plenty of good grass by the unusual drought, and it rendered a decree in the suit in equity that Berg was indebted to Erickson in the sum of $2,999.41, that Erickson should have judgment for this amount in his action in replevin, and that Berg should take nothing on account of the damages he sustained by reason of Erickson's breach of his contract. Berg challenges the judgment by writ of error, and the decree by an appeal.

Erickson agreed to furnish plenty of good grass to the cattle throughout the grazing season of 1913. He failed to perform this contract, to the damage of Berg in the sum of $20,000, because the unprecedent drought made it impossible for him so to do. Did this impossibility of performance, which arose subsequent to the making of the contract, out of the unusual drought, the act of God, relieve Erickson from liability for the damages inflicted upon Berg by his failure to perform his contract?

[1, 2] An examination of the authorities and reflection have satisfied that the answer to this question must be deduced from a correct construction of the agreement of these parties under the following principles of law, which, notwithstanding the fact that there are confusing and conflicting decisions on cognate questions in the books, are established by the more convincing reasons and the greater weight of authority:

Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible without his fault, by an act of God or an unavoidable accident. But this rule is not generally applicable to contract obligations.

[3] Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for his nonperformance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one, who makes a positive agreement to do a lawful act, is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive covenant to enter into and become bound by the contract, and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense. 9 Cyc. 627, par. 5; Paradine v. Jayne, Allyn, 26; Central Trust Co. v. Wabash, St. Louis & P. Ry. Co. (C. C.) 31 Fed. 440, 441; Robson v. Mississippi River Logging Co. (C. C.) 61 Fed. 893, 900; Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642; Stees v. Leonard, 20 Minn. 494 (Gil. 448); McGehee v. Hill, 4 Port. (Ala.) 170, 29 Am. Dec. 277, 278; School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371, 372, 374; Dermott v. Jones, 2 Wall. 1, 7, 8, 17 L. Ed. 762; The Harriman, 9 Wall. 161, 172, 173, 19 L. Ed. 629; Chicago, etc., Railway Co. v. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625; Jones v. United States, 96 U. S. 24, 29, 24 L. Ed. 644; Jacksonville, etc., Ry. Co. v. Hooper, 160 U. S. 514, 528, 16 Sup. Ct. 379, 40 L. Ed. 515; Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 466, 467, 25 Sup. Ct. 84, 49 L. Ed. 269; Link Belt Engineering Co. v. United States (C. C.) 142 Fed. 243, 247; Meriwether v. Lowndes County, 89 Ala. 362, 7 South. 198, 199; Ferguson v. Omaha S. W. R. Co., 227 Fed. 513, 523, 142 C. C. A. 145; Hoy v. Holt, 91 Pa. 88, 91, 92, 36 Am. Rep. 659; Adams v. Nichols, 19 Pick. (Mass.) 275, 277, 278, 31 Am. Dec. 137; Rowe v. Town of Peabody, 207 Mass. 226, 93 N. E. 604, 605, 606; Beach v. Crain, 2 N. Y. (2 Comst.) 86, 93, 49 Am. Dec. 369; Summers v. Hibbard, etc., & Co., 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872.

[4] But where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they

must have known that its performance would be impossible unless a person or persons, as in a contract of intermarriage, or in a contract for the personal service of an artist, such as a singer, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible without his fault, by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like condition.

[5] There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract that they must have known when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence should exist at the time of performance, or unless an indispensable thing or condition of things not then in existence should come into existence before and remain in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition of the contract that, if that thing or condition is destroyed or prevented from coming into existence before the time for the performance of the contract without fault of the obligor, either by the act of God, or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. 9 Cyc. 631, 632, 633; Taylor v. Caldwell, 3 Best & Smith, 826, 833, 839; Howell v. Coupland, L. R. 1 Q. B. Div. 258; Baily v. De Crespigny, L. R. 4 Q. B. 180, 185; Dexter v. Norton, 47 N. Y. 62, 64, 65, 7 Am. Rep. 415; Ontario Deciduous Fruit Growers' Ass'n v. Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 29, 30, 53 L. R. A. 681, 86 Am. St. Rep. 231; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 596, 14 L. R. A. 215; Wells v. Sutphin, 64 Kan. 873, 68 Pac. 648; Krause v. Bd. of Trustees, 162 Ind. 278, 70 N. E. 264, 267, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460. But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.

[6] It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure.

Thus in Jones v. United States, 96 U. S. 24, 29, 24 L. Ed. 644, a contractor agreed to deliver a certain kind and quantity of cloth to the United States in specified installments at fixed times. After he had delivered some of the installments, the factory which was making the cloth burned without his fault, and this made it impossible for him to deliver the remainder of the cloth at the specified times, although he, at great expense, caused it to be manufactured and tendered it to the government later. The government refused to accept it, because it came too late. The market price of cloth had fallen, and the contractor sued the United States for the damages he sustained, on the ground that he was absolved from performance at the times specified by the act of God, the unforeseen fire. The Supreme Court denied a recovery and said:

"Impossible conditions cannot be performed, and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. Chitty, Contr. 663; Jervis v. Tompkinson, 1 H. & N. 208."

In Chicago, Milwaukee, etc., Ry. Co. v. Hoyt, 149 U. S. at page 14, 13 Sup. Ct. at page 784, 37 L. Ed. 625, the Supreme Court states the rule on this subject in this way:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens."

In Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 466, 467, 25 Sup. Ct. 84, 49 L. Ed. 269, the railway company, during the Chinese-Japanese War, made a contract with a shipper to carry from Newark, N. J., to Japan by a specific steamer leaving Tacoma at a certain day, 2,000 tons of lead, which was contraband of war. Time was of the essence of this contract. The company carried the lead to Tacoma and put it in the steamship in time, but the subcollector of the port unlawfully refused to give the ship its clearance on the ground that the lead was contraband, and the master unloaded it, took his clearance, and sailed. The result was that the lead did not reach Japan until six weeks after it would have arrived there, if it had gone on the specified ship. When it arrived, the war had ceased and the price of lead had fallen. The shipper sued for damages, and the defense was that the railway company was absolved from liability by the unforeseen impossibility of performance caused without its fault by the act of the subcollector. The Supreme Court construed the contract to have been an unqualified undertaking to ship the lead by the steamship named, and held the railway company liable for the damages which resulted from the unauthorized and unforeseen act of the subcollector. It said:

"This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war. * * * Under these circumstances it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the nonperformance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract; but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and in substance ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it."

In the light of these principles of law and authorities, the decisive question in this case becomes: Was the contract of these parties an absolute agreement by Erickson to furnish plenty of good grass to the cattle during the grazing season of 1913, or a contract to furnish good grass unless by an unprecedented drought it should become impossible for him to do so? Basic rules for the construction of contracts are: The purpose of every agreement is to record the intention of the parties when their minds met, and the object of all construction is to ascertain and enforce that intention. The court should, so far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, of its purpose, and of the circumstances which condition its making, endeavor to ascertain what they intended to agree to do, upon what sense and meaning of the terms they used their minds actually met. Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 41, 42, 64 Fed. 70, 74; Salt Lake City v. Smith, 104 Fed. 457, 462, 43 C. C. A. 637, 643; Fitzgerald v. First National Bank, 52 C. C. A. 276, 284, 114 Fed. 474, 482; American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357. Where, in the application of a contract to its subject-matter, an ambiguity or uncertainty arises, which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made, and of statements made in the negotiations which preceded it, may be admitted to resolve the ambiguity and to prove the real intention of the parties. Kilby Mfg. Co. v. Hinchmann-Renton Fire Proofing Co., 132 Fed. 957, 961, 66 C. C. A. 67, 71; Stoops v. Smith, 100 Mass. 63, 66, 67, 1 Am. Rep. 85, 97 Am. Dec. 76; Foster v. Woods, 16 Mass. 116, 117; Sargent v. Adams, 3 Gray (Mass.) 72, 77, 63 Am. Dec. 718; Mumford v. Gething, 7 C. B. (N. S.) 305, 321; First National Bank v. North, 2 S. D. 480, 486, 51 N. W. 96; Herring v. Boston Iron Co., 1 Gray (Mass.) 134, 138; Hinnemann v. Rosenback, 39 N. Y. 98, 101, 102; Proctor v. Hartigan, 139 Mass. 554, 556, 2 N. E. 99; Thorington v. Smith, 8 Wall. 1, 13, 19 L. Ed. 361; Lonergan v. Buford, 148 U. S. 581, 588, 13 Sup. Ct. 684, 37 L. Ed. 569.

Let us apply these rules to the interpretation of this contract. On its face it is free from ambiguity. By it Erickson agrees, without exception or qualification, to furnish plenty of good grass for the cattle during the grazing season of 1913. His counsel argue that his real agreement was that he would furnish plenty of good grass during the season unless an unprecedented drought should make it impossible for him so to do, and that in that case he should be absolved from liability to perform, and they appeal to the oral testimony to import this exception into the contract. That testimony disclosed these facts: The contract was made on April 16, 1913. Berg was a resident of St. Francis, Tex. He had never had any experience of Kansas grass. He sought pasturing for 1,000 cattle. He went from Texas to Kansas and applied to Erickson for this pasturing. Before the contract was made Erickson showed him the pastures into which he proposed to put the cattle and into which they were subsequently driven. Berg looked at the pastures and made no objection to them. Erickson told him he would guarantee the pastures. After this inspection and conversation Erickson made the contract to furnish plenty of good grass to the cattle during the grazing season of 1913. Droughts are not, and have not been for many years, unusual in parts of Kansas. There had been many before the drought of 1913. It is common knowledge that droughts decrease the production of grass in varying amounts, according to their severity and the character of the land they affect. The drought of 1913 was the most severe ever known in the region where these pastures are. There was no rain from May until September, but it did not prevent the growth of all grass on the pastures. They produced sufficient to keep the cattle alive, and at the end of the season, when they were taken out in November, they weighed as much as, or even more than, when they were placed in the pastures; but the cattle failed to make the gain in flesh and weight which they would have made if Erickson had furnished them plenty of good grass.

In view of these facts, the situation of these parties when this contract was made, the circumstances surrounding them, and the unqualified undertaking of Erickson expressed in the agreement converge with compelling power to force the mind to the conclusion that the minds of these contracting parties met in the intention that Erickson should, and that he did, guarantee plenty of good grass for these cattle in these pastures where he put them during the entire grazing season, without exempting or intending to exempt himself from liability in the case of any impossibility of performance that might result from unprecedented drought, fire, or other act of God or accident. It was common knowledge that droughts were not unusual in Kansas. It was common knowledge that they decreased the growth of grass. It was common knowledge that one could not tell by the examination of pastures in Kansas, of which he had no previous knowledge, in the spring of the year before the 13th of April, whether or not they would produce sufficient grass for 1,000 cattle throughout the coming summer. Berg knew nothing of their productive capacity; Erickson knew all about it. The question whether or not the pastures would produce plenty of grass for 1,000 head of cattle throughout the season, and whether or not the droughts that visited some parts of Kansas would be so severe as to prevent such production, could not have failed to be present in the minds of each of these parties when they made this contract. Those were the crucial questions before them, and the unprecedented drought which prevented the performance of the contract, "the event," in the words of the Supreme Court, "which causes the impossibility, might have been anticipated and guarded against in the contract." Erickson inserted no provision in the contract exempting himself from liability on the happening of that event, but, on the other hand, promised Berg that he would guarantee the pastures before the written contract was signed, and then made the unqualified undertaking therein to furnish plenty of good grass to the cattle throughout the grazing season. What is more natural or probable than that Erickson, who knew the climate, the pastures, and their productivity, induced Berg, who knew nothing upon this subject and could learn little by an inspection of the pastures in April, to agree to pay the $7 a head for the pasturing of the cattle by making this absolute covenant that he would furnish plenty of good grass to the cattle throughout the season? The proof in this case has satisfied that it was the intention of the parties to this contract that Erickson should thereby make, and that he did make, an absolute covenant with Berg to furnish plenty of good grass for the cattle throughout the entire grazing season without exempting himself from liability in case of drought, fire, or other act of God or accident that might make his performance impossible, that he took the risk of such an event (195 U. S. 467, 25 Sup. Ct. 84, 49 L. Ed. 269), and that he is not absolved from liability for the damages which Berg sustained by reason of Erickson's failure to perform his covenant, although that failure was caused by the unprecedented drought which made his performance impossible.

This conclusion makes it unnecessary to consider or decide the question, discussed in the arguments and the briefs, whether or not, if Erickson was absolved by the act of God from his liability on account of his failure to furnish plenty of grass in July, August, September, and October, he could recover compensation for furnishing it in May and June; for on the next trial he will be credited with the entire contract price of the pasturing, because the measure of Berg's damages is the difference between the value of his cattle as they would have been at the end of the grazing season, if Erickson had furnished plenty of good grass, less the contract price he would have been required to pay, and their value as they actually were at that time. Erickson will also be entitled to an allowance for those expenses he incurred and those services he rendered caring for and feeding the cattle, which his contract to furnish plenty of good grass and his duty to prevent, as far as possible, damages on account of his failure so to do, did not require him to incur or render.

Counsel for Berg argue that this court should find these amounts from the evidence before it and render a judgment for the proper amount in his favor. It is not denied that, as the action at law and the suit in equity were tried together by the court without a jury under a stipulation waiving the latter, this court may have the power as a court of equity so to do. But it is certain that it has the power to direct a new trial of the action at law, and that it ought to do so, because all the evidence upon the amount of Berg's damages appears from the record in hand to have been introduced on his behalf. The court announced its decision that Erickson was absolved from liability for Berg's damages by the drought while Berg was introducing his evidence, and the record fails to show that Erickson presented any evidence upon the question of the amount of the damages. The reason why he did not do so may have been, and probably was, that he was led to refrain from producing evidence upon that subject because the court had ruled that it was immaterial, and, if so, an assessment of Berg's damages on the evidence before the court at this time might be, and probably would be, inequitable.

The judgment in the action at law and the decree in the suit in equity must therefore be reversed, with costs against Erickson, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

BRUNSON v. GEORGIA CHEMICAL WORKS.

(Circuit Court of Appeals, Fourth Circuit. July 8, 1916.)

No. 1451.

FRAUDULENT CONVEYANCES ⚷300(1)—SUIT BY CREDITOR—EVIDENCE—SOURCE OF CONSIDERATION.

In a suit by creditor to subject to the payment of debts property conveyed by an insolvent debtor, uncontradicted evidence that the purchase price thereof was saved by grantee from her earnings and an inheritance, it appearing that the debtor had disposed of the great bulk of his property honestly, *held* not to warrant a decree setting aside deeds for fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 896; Dec. Dig. ⚷300(1).]

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

Suit by Georgia Chemical Works against W. F. Cummings, the Carolina Land & Lumber Company, and Julia E. Brunson. Complaint dismissed as to respondent Carolina Land & Lumber Company. From a decree for complainant, respondent Julia E. Brunson appeals. Reversed, with directions.

S. G. Mayfield, of Denmark, S. C. (Mayfield & Free, of Bamberg, S. C., on the brief), for appellant.

Julian Mitchell, of Charleston, S. C. (Mitchell & Smith, of Charleston, S. C., on the brief), for appellee.

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

JOHNSON, District Judge. On January 5, 1916, the Georgia Chemical Works, complainant, filed its bill in equity in the District Court for the Eastern District of South Carolina against W. F. Cummings, the Carolina Land & Lumber Company, and Julia E. Brunson, defendants. The complainant's bill contains 17 sections which charge in substance that W. F. Cummings, until some time in the year 1913, owned and possessed a large amount of property, and was considered

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

one of the most responsible and wealthy men in Hampton county, with excellent credit; that on October —, 1912, said W. F. Cummings conveyed to Julia E. Brunson a tract of 225 acres of land for an alleged consideration of $1,300, but that the said conveyance was without consideration, and that deed of conveyance was not recorded until February 9, 1914; that in order to carry out a general scheme of fraud the said W. F. Cummings caused to be incorporated the Carolina Land & Lumber Company on August 27, 1913, with a capital of $50,000, with himself as president thereof, in order that he might convey to said corporation all of his property and get it beyond the reach of his creditors; that on September 20, 1913, Cummings conveyed to said corporation for an alleged consideration of $17,500 all his real estate, except 70 acres, worth about $700, but that said conveyance was without consideration, and was made to divest himself of all of his property and get it beyond the reach of his creditors; that on the 21st day of August, 1915, the Carolina Land & Lumber Company conveyed to Julia E. Brunson 220 acres of land for an alleged consideration of $3,000, but that said conveyance was in fact without any consideration, and though made by the Carolina Land & Lumber Company, was in fact the deed of W. F. Cummings, acting through the hand of the corporation in furtherance of his general scheme of fraud; that save and except the small parcel of land conveyed by the lumber company to Julia E. Brunson, the property all stood in the name of the Carolina Land & Lumber Company, but was in fact the property of W. F. Cummings. It thus appears that the complainants sought to subject to the payment of W. F. Cummings' debts large properties standing in the name of the Carolina Land & Lumber Company, and two small tracts of land standing in the name of Julia E. Brunson.

On the trial of the cause the District Court held that the allegations of fraud as to the Carolina Land & Lumber Company had not been sustained; that the conveyance by Cummings to the said corporation was upon fair consideration; was honest and in good faith. The complaint was dismissed as to the Carolina Land & Lumber Company. From this part of the decree there is no appeal, and the evidence touching that part of the transaction is not in the record. As to the two tracts of land conveyed to Julia E. Brunson, the court set aside the deeds on the ground of fraud and adjudged the property to belong to W. F. Cummings. The record does not show the witnesses examined touching the large transactions by and between Cummings and the Carolina Land & Lumber Company, except that W. F. Cummings was examined. What he said we do not know, but the court has found as a fact that there was no fraud in these transactions involving the transfer of practically all of his property. His explanation must have been satisfactory to the court. It is very remarkable, but the record does not show that Cummings was asked a question concerning the smaller transactions with Julia E. Brunson. Inasmuch as this case turns upon a question of fact, it is but fair to the District Judge that the evidence in the transcript of the record should be set out. It is as follows:

"The testimony of the defendant W. F. Cummings shows that on the 1st of January, 1913, as far as disclosed by the public records, he was possessed of both of the lots of land, the conveyances of which to Mrs. Brunson were set aside, and that he owned a great deal of other real and personal property, but disposed of all the real and personal property owned by him except the stock in a lumber road, all of which has been pledged, and he owed debts to a very large amount, and far in excess of the value of the two farms which were adjudged herein to be subject to his debts; that the husband of Mrs. Julia E. Brunson had been working for him for over 20 years, and lived in one of the operative's houses belonging to Cummings' sawmill, and his wages were $9.50 per week, and that every day when Cummings went to the mill, he took dinner at the Brunson's, and, if he stayed overnight, spent the night in their home."

We are unable to see in this statement any prima facie showing of fraud, or any circumstance that calls for explanation. If a deed was executed in October, 1912, and not recorded until February, 1914, of course the public records in meantime would show the land still in the grantor. That means nothing at all. The only testimony about the Brunsons is that Brunson had been working for Cummings for more than 20 years at $9.50 a week, and that every day when Cummings was at the sawmill, he took dinner at the Brunsons, and, if he stayed overnight, spent the night in their home. The District Judge says:

"It is difficult to conceive how Mrs. Brunson could have acquired this comparatively large amount of money in comparatively so short a time save by donations from Cummings. The evidence is sufficient to warrant the inference that only in this way could she have acquired it, and to require some sufficient definite explanation from her, and this explanation her testimony fails to make. Her testimony, so far from meeting the case, is most general, indefinite, and improbable, with apparent unwillingness to make a full discovery. She has had full opportunity to refute the inference and evidence the bona fides and justification of her purchase, and, in the opinion of the court, she has failed. The court is impelled to the conclusion that these deeds represent either voluntary donations from Cummings which are null and void as to his creditors, or were made to hinder, delay, and defraud the creditors."

Other than the statement above set out there were only two witnesses, Mrs. Brunson and the cashier of the Carolina Savings Bank, who produced the bank account of Mrs. Brunson in said bank. These witnesses were produced and sworn in behalf of the complainant. We set out from the testimony of Mrs. Brunson every question and answer that seemed to throw any light whatever on this transaction.

"Q. It was testified this morning your husband's salary is $9.50 a week. Did you do anything yourself? A. Why, certainly I did. Do you expect me to set down and not earn a living? Q. What did you do? A. I taken (took) in boarders and hired teams; also I raised stock more or less and sold it. I farmed and done different things to make money. Q. Where did you farm before you bought this place? A. I farmed other people's places. Q. You rented, you mean? A. Yes, sir. Q. Whom did you rent from? A. I rented the last few years from Mr. Cummings. Q. What place did you rent from Mr. Cummings? A. The Fechtig place. There I made a good crop. Q. You mean the place you bought from him? A. No, sir, I never bought that place, and I do not know that it is his land. I rented it from him. Q. This deed from Mr. W. F. Cummings to yourself, dated on the —— day of October, 1912, was for a consideration of $1,300? A. Yes, sir. Q. Did you pay that $1,300 in a check or in cash, or how did you pay it? A. I paid it in cash, $400. Q. When was the balance paid? A. It was paid along from time to time as

I got the money, till 1912. Q. When was the first payment made on this land? A. Well, it was in 1908. Q. Did you give Mr. Cummings any kind of security at all when you went into possession of the place? A. Well, when I first bought the place, well I am an uneducated woman and know very little business, and I can hardly tell you how it was, but anyhow I paid $400 in 1908, and he was to make me a title and take a mortgage on the place, and I told him no, that I preferred paying from time to time until I paid for it. Till 1912 we have been paying for the place, when he gave us the title. Q. Have you been planting that place that you bought from Mr. Cummings or renting it? A. I have been renting it. Q. How much rent do you get a year for it? A. Well, I rented it, I think, 6 years for $75 a year, and the renter improved the place. Q. How much rent did you get in 1914? A. I got $75 and improvements. Q. Did you get it in cash or in cotton? A. I got it in cash. Q. And you had the same tenant there? A. For 6 years. Q. Was that the same tenant Mr. Cummings had there when he owned the place? A. If he ever had any there, I do not know it. Q. You put that tenant there after you got the place? A. Yes, sir. Q. I understand you started to pay on this place in 1908? A. Yes, sir. Q. When was the first year you rented it and got the $75? A. That must have been in 1908. Q. What was the name of that tenant? A. J. E. Anderson. Q. You talked of hiring teams; those teams belong to you or your husband? A. They belonged to my husband. Q. How many teams did he have? A. Had two. Q. How many horses? A. Had two horses and two buggies. Q. Did you have them as far back as 1911? A. I had them from, as well as I can remember, I had them from 1901. Q. And neither you nor your husband returned them for taxation? A. No, sir; I did not know it. Q. And during that time you bought a lot in the town of Hampton, did you not? A. Yes, sir; I bought a lot in Hampton; I don't know the exact time. Q. About 1910, was it not? A. I do not know. Q. From whom did you buy it? A. I bought it from W. T. Johns. Q. What did you pay him? A. I gave him a check on the Charleston bank for it. Q. What bank in Charleston have you an account in? A. More than one bank in Charleston. I don't see why you should want to know that; not going to tell you. (Mr. Michell asked the master to instruct the witness to answer the question.)

"Witness: This check was given on the Carolina Savings Bank.

"Q. And how much did you pay Johns for that land? A. Well, that is none of your business.

"The Court: You will have to answer the question.

"Witness: I paid him a thousand dollars for it.

"Q. Where did you get the thousand dollars you paid? A. That don't make any difference to you where I got it.

"Q. Do you decline to say where you got it? A. That don't make any difference. Q. Did you get it from Mr. Cummings? A. No, I positively did not. Q. What suggested to you opening an account in the Carolina Savings Bank? A. Because I heard citizens of Hampton, S. C., say it was the best bank in the world, and so that is why I put my savings there. Q. Did you keep any bank account at Hampton at all? A. Very little. Q. What bank in Hampton did you keep your money in? A. Bank of Hampton. Q. In 1915 you bought the other farm, what did you pay for it? A. I paid $3,000 for it. Q. Did you pay cash or check? A. Check. Q. On Carolina Savings Bank? A. Yes, sir. Q. Where did the money come from to pay the $3,000? Did you make that keeping horses? A. Well, I made it in different ways. My husband worked, I worked, and we saved what little we could along until we saved it. I think we ought to save up something; we have been married 24 years. If people don't save anything by that time, they never will. Q. You have a family to support, have you not? A. Yes, sir. Q. How many children have you? A. Three. Q. This money you had in the Carolina Savings Bank, was that the accumulation of small amounts been going on for some time? A. Well, some of it was, until the last time I sent money there I sent a big amount; I sent $1,000. Q. That was just before you bought this land from the Carolina Land & Lumber Company, was it not? A. Yes, sir; not very long before I bought it. Q. Where did that thousand dollars come from? A.

Well, I got some of it from my mother's estate, and I got some of it from J. E. Anderson, and some from S. F. Crew. Q. You mean you borrowed it? A. Well, they were owing it to me, and my mother she died, and I got some from her estate. Q. What did Crew and the other party you mentioned, for what did they owe you the money? A. Well, Mr. Crew, owed me—I don't feel disposed to tell you anything like that—but he owed me for a piano. Q. Did you have any account in Charleston outside of the Carolina Savings Bank? A. No, sir; I did not have any at all. Q. How would you make these deposits in the Carolina Savings Bank; did you come here and deposit the money? A. No, sir; I never was here in my life until I came down now. Sometimes I would send it and sometimes I would send a check, and now and then Mr. Cummings was going down and I would send it by him. Q. Mr. Cummings would make the deposits? A. Yes, sir; off and on, if he was going. There was not much saved, but every little that was saved was a help."

The testimony shows that Mrs. Brunson was an uneducated woman who had never been in a courthouse in her life until she testified in this case. Instead of her testimony being evasive or unsatisfactory, it seems to be very reasonable and truthful. It is true that once or twice she did not seem to want to answer the question, evidently because she could not understand why a lawyer wanted to ask her about her affairs, and she could not see the relevancy of the questions to the case. But in every instance when the court told her to answer the question, she answered promptly, and, what is more, answered truthfully. She tells the court that she worked, kept boarders, farmed, raised stock, and hired teams. Not a witness was put on the stand to show that she did not keep a boarding house, or that she did not hire teams, or that she did not farm, or that she did not raise stock. She tells the court that she went into the possession of the first tract of 225 acres of land in 1908 and rented it for $75 a year and improvements, and that J. E. Anderson was her tenant. She gave names and dates and stated tangible, visible facts, and if this testimony was not true, it was in the power of the complainant to show that it was not true. He did not offer a word of testimony to contradict it. She told how she made her money, and with that testimony uncontradicted, it is hard to see how the court can find that she had no money unless it was a donation from Cummings. When she was asked about the savings account in Charleston, she was asked if this account represented the accumulation of small savings for a long time, and she answered that it did, but that at one time she sent a big sum; that she sent a thousand dollars. When asked where she got the thousand dollars, she answered that she got it from J. E. Anderson, S. F. Crew, and her mother's estate. When asked what S. F. Crew owed her for, she said he owed her for a piano. Here again is a statement giving names and the sources from which she got a thousand dollars which she sent to the Carolina Savings Bank. If this testimony was false, the complainant should have shown that Crew did not owe her for a piano, or that Anderson did not owe her, or that her mother did not leave her any estate. No witness has testified that Cummings ever gave Mrs. Brunson any property or money whatever, and there is no circumstance in this case from which such an inference can be drawn.

Attention should be called to the fact that Mrs. Brunson's bank account was introduced by the complainant. Mrs. Brunson had been examined and had gone home. She did not know that the bank account would be introduced, and it is not probable that she had the remotest idea how a sheet from a bank book would look or what it would show. The bank sheet, though mute, is eloquent and convincing proof of the thrift of Julia E. Brunson. During the life of the account of more than 8 years there were 63 credit entries, and she drew only two checks, and in each instance the check was drawn to make a wise, permanent, real estate investment. From June 25, 1907, to January, 1909, she made no deposit. That circumstance corroborates her testimony that in 1908 she bought the land from Cummings and paid him $400 in cash the first time. Evidently the savings from 1907 until 1909 were paid to Cummings on the land purchase. Cummings being a constant visitor, it was perfectly natural for her to pay him the actual cash as she saved it from keeping boarders, hiring teams, and so forth. The truthfulness of Mrs. Brunson's testimony, corroborated in so many particulars by the bank sheet, stands out like a mountain peak. An analysis of her testimony shows that it was not vague, indefinite, and improbable, but it is clear, definite, reasonable, convincing, truthful. The learned District Judge said that Mrs. Brunson bought $5,300 worth of property in the short space of 3 years. He is in error. The bank account was opened June 25, 1907, by a deposit of $500 and the last deed was executed on August 21, 1915, more than 8 years thereafter. The testimony further shows that she purchased and went into the possession of the Cummings tract of land in 1908, and made a payment of $400 thereon. But even if we take the narrow view that the purchases must be considered as of the date of the title deeds, the District Court was in error. The deed from Johns was dated November 1, 1910, and the deed from the Carolina Land & Lumber Company August 21, 1915, 4 years and 10 months thereafter. In Mrs. Brunson's examination she said she paid Johns a thousand dollars for the lot at Hampton and gave a check on the Carolina Savings Bank. The bank sheet corroborates her. She said when she bought the land from the Carolina Land & Lumber Company she gave a check for $3,000. Again the bank sheet shows that her testimony was true. She said the account was made up of savings for a long time, except that at one time she sent a thousand dollars, which she explained came from her mother's estate, from J. E. Anderson, and S. F. Crew. The bank sheet shows the big deposit of $1,000 about which she testified.

If there is any circumstance in this case from which it could even be suspected that Cummings ever gave Mrs Brunson any money, it is the fact that the bank sheet shows that certain deposits were made by Cummings. The fact that one person steps into a bank and makes a deposit of money in the name of a friend or neighbor certainly furnishes no evidence that the deposit is a donation. Look at the record for a moment:

"Q. How would you make these deposits in the Carolina Savings Bank? Did you come and deposit the money? A. No, sir; I never was here in my life until I came down now. Sometimes I would send it, and sometimes I would send a check, and now and then Mr. Cummings would go down and I would send it by him. Q. Mr. Cummings would make the deposit? A. Yes, sir; off and on, if he was going."

The bank sheet shows that 26 deposits were made from June 25, 1907, until August 20, 1915, when she bought the tract of land from the lumber company. Of these deposits 23 were sent by mail and 3 by Cummings. Again the bank sheet corroborates Mrs. Brunson. She was asked on her examination particularly about the thousand dollars deposit which appears to have been sent down by Cummings, and she explained the sources from which she got the money. She was not asked about the other deposits. No doubt if she had been, she would have explained.

Let us analyze these deposits made by Cummings. One was for $500, made June 25, 1907. That was more than 8 years before Mrs. Brunson purchased the land, which has been taken from her on the ground of fraud. Did one of the wealthiest and most responsible citizens of Hampton county, with excellent credit, who so continued until some time in the year 1913, as far back as June, 1907, give to Julia E. Brunson the sum of $500 in order, more than 8 years thereafter, to defraud his creditors? There is not a scintilla of evidence that he gave her the money, nor is there one scintilla of evidence he owed a dollar at that time, or within 6 years thereafter. The next deposit made by Cummings was on January 8, 1913, for $40. Does that indicate that this wealthy and responsible citizen was depositing his money in the name of somebody else in order to defraud his creditors, or does it corroborate the testimony of the hard-working Julia E. Brunson, who said that sometimes she sent the money by Mr. Cummings? The question admits of but one answer: Why suggest fraud when every circumstance bears out the truthfulness, as well as the reasonableness, of this woman's testimony?

There is not a word of testimony to impeach the deed of October, 1912. It was not recorded until February 9, 1914. The circumstance that it was not recorded negatives the idea of fraud, because if this wealthy and responsible, and evidently intelligent, citizen of Hampton county was preparing to get his land beyond the reach of his creditors, he would have seen to it that the deed was recorded.

Only one other circumstance will be referred to, and that is the remarkable, inexplicable fact that W. F. Cummings is declared by the District Court to have honestly disposed of the great bulk of his property which made him one of the wealthiest men in Hampton county, but as to a mere pittance of it he has been guilty of fraud. It is hard to believe that a man of character and standing, in the heyday of his prosperity and wealth, committed a fraud as to an infinitesimal part of his property, and thereafter, when misfortune overtook him, disposed of his great and extensive possessions honestly and for the benefit of his creditors. Fraud will not be presumed. The evidence in this case does not prove it. So much of the decree of the District Court as sets aside the deed of W. F. Cummings to Julia E. Brunson, dated October —, 1912, for fraud, and so much thereof as sets aside the deed of the Carolina Land & Lumber Company to Julia E. Brunson, dated August 21, 1915, for fraud, is reversed. The complaint as to Julia E. Brunson is retained for the sole purpose of ascertaining what creditors, if any, of W. F. Cummings have claims on the land conveyed in October, 1912, by reason of the failure to record the deed until February 9, 1914. Such creditors, after exhausting their remedies against the property of W. F. Cummings, will be entitled to subject such land to their debts. In all other respects the decree as to Julia E. Brunson is reversed, with costs.

Reversed.

WOODS, Circuit Judge (concurring). I concur in the result. The direct testimony, the circumstances of the parties, and the manner in which Mrs. Brunson testified, are enough to produce a strong suspicion that Cummings deposited from his own funds at least the chief credits on the bank account of Mrs. Brunson, and that such consideration as was paid for the conveyances of the land to Mrs. Brunson was furnished by Cummings. I do not think, however, that the plaintiff has sustained the burden of proving the fraud alleged by the preponderance of the evidence.

PECKETT et al. v. WOOD et al.

(Circuit Court of Appeals, Third Circuit. June 8, 1916.)

No. 2120.

1. CORPORATIONS ⚷627—INSOLVENCY—PROVABLE CLAIMS—INDEBTEDNESS TO STOCKHOLDERS.

Claims against a corporation for money advanced to it by its sole stockholders, for which notes were given, some of which were secured by collateral, *held*, under the evidence, provable against it in a suit to wind up its affairs, on an equality with other general debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2476; Dec. Dig. ⚷627.]

2. CORPORATIONS ⚷1—INDEBTEDNESS TO STOCKHOLDERS—DISREGARDING CORPORATE ENTITY.

Although under some circumstances corporate entity may be disregarded in equity, it is only when necessary to circumvent fraud, or in cases which proceed on the theory of estoppel, or where a corporation is merely an agency of another, and it is sought to enforce debts of the latter against property ostensibly owned by the corporation, or debts of the corporation against its owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6; Dec. Dig. ⚷1.]

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in equity by Charles R. Wood and others against the Florence Iron Works. From an order allowing claims of Walter Wood and the estate of Stuart Wood, Leonard Peckett, Edward L. Herndon, and W. Howard Ramsay, as a creditors' committee, appeal. Affirmed.

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

Henry P. Brown and W. B. Bodine, Jr., both of Philadelphia, Pa., for appellants.

Wm. A. Glasgow, Jr., J. H. R. Acker, and Conlen, Brinton & Acker, all of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the matter of the receivership of the Florence Iron Works the court below entered a decree confirming the master's report and findings that the claims of Walter Wood for $461,255.88, of R. Francis Wood for $64,664.86, and of Stuart Wood's executors for $101,552.50, "be allowed and added to the list of claims heretofore approved by the receiver and confirmed by the court." Assuming, but without deciding, such decree was one from which an appeal lay to this court, all parties have acquiesced in that view, and a committee of the creditors of the Florence Iron Company have taken this appeal.

[1, 2] The facts of the case have been heretofore set forth in the opinion of the court below, which is given in full on the margin.[1] As there stated, the case finally narrows to two questions of fact, summarized in that opinion as follows:

"The only reasons urged as to why the special master's report should not be confirmed and the claim allowed are: (1) That the moneys advanced by the claimants, upon which their claims are based, were not loans to the corporation, but rather were payments in advance for its capital stock to be thereafter issued; and (2) that the relationship existing between the claimants and the corporation was such that the claims of the former, in any event, should be postponed in payment to the claims of the other creditors."

On those two questions this court has had the enlightening help of a very thorough discussion of the proofs by the master in his elaborate report, of the court below in its careful review of the master's work, and of the earnest argument of counsel for the creditors' committee, challenging both the master's report and the court's opinion. After a careful examination on our own part of the proofs, and on due consideration had, we are led to concur in the findings of fact and the conclusions reached below, and to hold that the court committed no error in its decree. In view of the elaborate opinion rendered both by the master and that court, and of the expressed desire of all parties for a decision in timely advance of a pending sale of the company's plant, we restrict our opinion to simply announcing our conclusion as above stated, feeling as we do that anything said further by this court would in the nature of things be but a repetition of what has already been said by the master and elaborated by the court.

We may add that, with a view to its early decision, this case was taken up the first on the list, and all the proofs have had the careful personal attention of each of the judges. We deem it proper to make this statement, so that the promptness of the decision and the brevity

[1] See note at end of case.

of the opinion shall not be regarded as indicating a lack of that due consideration which the case deserves and has had.

NOTE.—The following is the opinion of Haight, District Judge, on exceptions to the report of Harold B. Wells receiver of Florence Iron Works, as special master, recommending the allowance of the claims presented against the defendant corporation by Walter Wood, individually and as trustee, and the estate of Stuart Wood:

HAIGHT, District Judge. The only reasons urged as to why the special master's report should not be confirmed and the claim allowed are: (1) That the moneys advanced by the claimants, upon which their claims are based, were not loans to the corporation, but rather were payments in advance for its capital stock to be thereafter issued; and (2) that the relationship existing between the claimants and the corporation was such that the claims of the former, in any event, should be postponed in payment to the claims of the other creditors. After carefully reading all of the evidence and exhibits presented to the special master, and considering the arguments of the respective counsel, I have reached the conclusion that the special master's determination is correct, both in respect to the existence of valid and enforceable obligations of the claimants against the corporation, as well as their right to share proportionately with the other creditors in the distribution of its assets.

The Florence Iron Works was incorporated under the laws of New Jersey in 1873. Only 1,250 shares of its authorized stock, of the par value of $100 each, were issued. All of these shares, at the time the bill in this case was filed, as has been the fact for some time previous thereto, were owned by Walter and Stuart Wood, with the exception of a very few, which were distributed among other persons, admittedly for the purpose of qualifying the latter to act as directors. Walter had about three times as many shares as Stuart. The board of directors were five in number, two of whom were Stuart and Walter. The other directors, I think, may be properly considered, as they are commonly termed, 'dummies.' The corporation, which was originally formed for the purpose of distributing the real estate belonging to R. D. Wood among his heirs, had been for many years engaged in manufacturing various iron products, all of which had always been marketed through or by the firm of R. D. Wood & Co. The latter was a partnership composed, during a number of years preceding the filing of the bill in this cause, of Walter Wood and Stuart Wood, although at various times previously there had been other members. There had for a great many years existed between this firm and the corporation an arrangement whereby the latter paid the former's expenses of selling its product and purchasing its supplies, and the former received one-half of the profits realized by the corporation from its business, and bore one-half of the losses, if in any given year losses were sustained. From time to time, as the business of the corporation expanded and necessitated more working capital, moneys were advanced by Stuart Wood and Walter Wood and by the trust estate of Juliana R. Wood. These moneys are the basis of the three claims in controversy. In each case, as the advances were made, demand promissory notes of the corporation, bearing interest, were delivered. Certain securities were pledged for the payment of two of the notes given to Walter Wood, individually, as was the case in respect to all of the moneys advanced by the estate of Juliana Wood. All of the notes given to Stuart Wood were indorsed by either Walter Wood or R. D. Wood & Co. From time to time payments were made on account of the principal of the moneys so advanced by Walter Wood and Stuart Wood, and all of the interest which accrued was likewise paid, sometimes in the form of new notes. The notes were always carried on the books of the corporation among the "bills payable."

The evidence upon which the exceptants rely to support their contention—that the moneys so advanced were not loans—consists of certain testimony given by Walter Wood during a trial of a controversy between himself and the executors of Stuart Wood in the common pleas court No. 2 for the county of Philadelphia, certain averments in an answer filed by him in that suit, and certain statements made by him to a representative of a commercial agency. As to the latter it should be noted that there is no evidence whatever that any creditor was misled thereby. In fact, it is difficult to see how any creditor could have been misled, even if the evidence showed that the mercantile report had been brought to his attention prior to the time he extended his credit. All that the report shows is that two of these claims—that is to say, the individual claim of Walter Wood and that of Stuart Wood—are referred to as "contributions to capital." They were listed among the liabilities and went to make up the total thereof. The capital stock which was issued was not so listed. I think, therefore, that any creditor examining this report would undoubtedly consider these claims as subsisting liabilities of the corporation, and not in the category of capital stock. There is no competent testimony to overcome the presumption of indebtedness to the estate of Stuart Wood, which arises from the existence of the notes upon which the claim is based. The statements made by Walter Wood before mentioned are, of course, not competent evidence against the estate of Stuart Wood. This is not disputed. I think the same may be said of the claim filed by Walter Wood as trustee. Consequently, in so far as these claims are concerned, the objection now under consideration may be eliminated.

It would be difficult, however, to reconcile the averments of the answer in the suit before mentioned, if the same stood alone, with the evidence of a debt due from the corporation to Walter Wood individually. But it must be borne in mind that this answer, although admissible as evidence against Walter Wood, because it was under oath (Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393), was prepared by counsel in legal verbiage as a pleading, and should not, therefore, be given the same weight in determining a fact as Mr. Wood's sworn testimony, and that it must be considered in connection with and in the light of such testimony, as well as that of all the other facts and circumstances. The answer was verified on December 12, 1914; yet nearly two months before that time Mr. Wood had made an affidavit in this proceeding that both he and Stuart Wood were creditors of the corporation to the extent of the claims now in question. Mr. Wood's previous history and appearance does not admit of the belief that he is either a fool or a willful perjurer, and it would be necessary to find that he is one or the other, if the averments of the answer in the Pennsylvania suit are to be taken literally. At practically the same time that he made the affidavit in this suit he testified at length in the Pennsylvania suit regarding these claims. Without attempting to review that testimony, its purport, taken as a whole, is, as I construe it, that these averments were made to provide money which the necessities of the corporation's business, due no doubt to its growth, required, with the idea eventually that they could and might be liquidated by the issuance of stock. All of his references to "contributions to capital" must be construed in the light of the existing circumstances. It is quite manifest that a concern, doing the volume and character of business that this corporation was, would require more capital than $125,000. There were two ways of providing such additional capital: One to issue capital stock, and the other to borrow money upon securities or otherwise. Of course, if the latter means was adopted, it was necessary that the corporation should not be required to repay the loans in short periods of time.

This latter course was followed, rather than that of issuing capital stock; and, considering that practically all of the capital stock of the corporation was owned by Walter Wood and Stuart Wood, it is not difficult to understand why. They probably had in mind that at some future time it might be necessary or advisable to liquidate the indebtedness by issuing capital stock. This is exactly what Walter Wood tried to induce the executors of Stuart Wood to consent to at the two stockholders' meetings held during the summer of 1914. The latter declined to do so, and thereupon, according to the minutes of the last of those meetings, Walter Wood took the position that it might be necessary for him to take steps to procure the payment of his own indebtedness. Nowhere in the minutes of those meetings does there appear a suggestion that there was an agreement or understanding that these moneys were advanced on account of the purchase price of stock to be thereafter issued. The very fact that the notes were given, that interest was paid thereon, that in some cases payments were made on account of principal, that collateral was pledged as security for some of the loans, and that security by way of indorsements were given to Stuart, seems to me to indicate, without any reasonable doubt, that there was no such agreement, but, at the most, that there was a mere understanding, as Mr. Wood testified in Philadelphia, that the indebtedness "could be converted into stock." And this is in accordance with Mr. Wood's testimony in this case, and it seems to me that it has every consideration of reason and probability to support it. In reaching this conclusion I have not been influenced by the lack of evidence that the corporation, as a separate and distinct entity from Walter and Stuart Wood, formally acquiesced in an agreement such as the exceptants contend was made. I place my decision squarely on the proposition that I cannot find that there was ever any definite agreement or understanding between any of the parties that the moneys which were advanced, and for which the corporation issued its promissory notes, were not to constitute a valid indebtedness of the corporation to those to whom the notes were issued.

It remains to consider the exceptants' second proposition. In doing so it must be primarily borne in mind that this is not a case where the creditors of the corporation are seeking to collect their claims from R. D. Wood & Co.; nor are we concerned with the question as to whether the validity of the contracts between the corporation and R. D. Wood & Co. may be challenged by a creditor, under the general rule as laid down in Stewart v. Lehigh Valley R. R., 38 N. J. Law, 505, and Thomas v. Brownville R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018, because the members of the firm of R. D. Wood & Co. were also directors of the corporation. The exceptants contend, in the first place, that there existed in fact, as distinguished from estoppel, a partnership between the firm of R. D. Wood & Co., its individual members, and the corporation, and hence that none of the partners can be repaid advances until the firm creditors are paid. They rely upon the decision of the Circuit Court of Appeals of this Circuit in Wallerstein v. Ervin, 112 Fed. 125, 50 C. C. A. 129 (affirming that of Judge McPherson, reported in Re Ervin [D. C.] 109 Fed. 135), to overcome the difficulty which is presented by the general rule that a corporation is without power to enter into a partnership, and that all contracts to that end are ultra vires and void. But, clearly, neither the principle which that case recognizes and applies, nor the basic one of partnership law, before mentioned, which exceptants invoke, is applicable unless a partnership did exist. The latter question has been determined against the exceptants by the special master. His report on this phase of the case contains a very careful and satisfactory analysis of the facts and law. I see no necessity, especially in view of the urgency of a prompt decision, for reiterating or attempting to add anything to what he has so well stated.

In the next place the exceptants urge that the corporation was but an adjunct or agency of R. D. Wood & Co., and hence that the legal entity of the corporation should be disregarded, and the claims in question postponed in payment to those of other creditors, because they in reality represent advances made to one branch of a partnership by its members. In support of these contentions exceptants rely upon the following cases: In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530 (C. C. A. 2d Cir.), In re Rieger, Kapner & Altmark, 157 Fed. 609 (D. C. S. D. Ohio), and Hunter v. Baker Motor Vehicle Co., 225 Fed. 1006 (D. C. N. D. N. Y.). In considering these cases it should be noticed that no claim is made in this case that the corporation was formed for any fraudulent purpose, or that there was any fraud in the dealings between it and R. D. Wood & Co. In the Muncie Pulp Company Case it was found that property ostensibly owned by a corporation had been transferred to it by the bankrupt corporation without consideration and merely for the purpose of better enabling the latter to handle the same. There were no creditors of the first corporation. Its stock had been issued to the two persons who owned and controlled all of the stock in the bankrupt company, also without consideration, as a matter of form and convenience, and all of its assets came from the bankrupt. Under these circumstances it was held that the first corporation had no claim to the property in controversy, but that it held it in trust for the bankrupt. Likewise in the Rieger, Kapner & Altmark Case the relief sought and granted was to bring under the administration of the court, in which the affairs of the bankrupts were being settled, property of a corporation the capital stock of which was absolutely owned and controlled by the bankrupts, on the theory that such property, because of such ownership of the stock of the corporation, in reality belonged to the bankrupts, and that it would be a fraud on the creditors of the bankrupts to permit it to remain in the latter's possession. The question of the respective rights of the creditors of the corporation and those of the bankrupts in the property of the former was reserved. It is thus apparent that those cases fall far short of being authorities for the broad proposition for which exceptants cite them. In Hunter v. Baker Motor Vehicle Company, it was held, in effect, that a creditor of one corporation, under the peculiar facts of that case, might sue another, because the former (the ostensible debtor) was, in reality, merely an instrumentality or adjunct of the latter.

The only principle, I think, upon which these otherwise valid claims may be postponed in payment to those of other creditors is one which would at the same time permit the other creditors of the corporation to collect their claims from R. D. Wood & Co. In re Watertown Paper Company, 169 Fed. 252, 94 C. C. A. 528 (C. C. A. 2d Cir.). Such being the test, can it be that the creditors of this corporation could recover against R. D. Wood & Co. on the facts in this case? I think, clearly, they could not. As set forth in the special master's report, credit was extended to the Florence Iron Works, contracts were made and business conducted in its name, and prospective creditors were notified that the corporation was alone responsible. R. D. Wood & Co. acted merely as selling, and in some cases purchasing, agents for the corporation, as well as for others in which the individual members of the firm were interested as stockholders and otherwise. Their respective affairs, books, and accounts were kept separate and distinct; each had its own book account and paid its own bills; their creditors were different, and their business generally conducted as though they were entirely separate concerns with close business or financial relations. In fact, the relationship and method of conducting business was by no means unusual. Although, as was said in the Watertown Paper Company Case, supra, in some cases, when necessary for the furtherance of justice in one way or another, corporate entity may be disregarded where the corporation is so organized and controlled and its affairs are so conducted as to make it merely as instrumentality or adjunct of another concern, yet this is an exception to the general rule and fundamental principle that a corporation is an entity, separate and distinct from its stockholders, and from other concerns with which it may be connected. Instances where the exception has been held applicable may be found in some of the before-mentioned cases. An instance where the exception was held not applicable, and which, because of similarity of facts, is pertinent to the case at bar, is In re Watertown Paper Co., supra. The facts in that case are more favorable to exceptants' contention than the facts in this. Except in cases where it is necessary to circumvent fraud, or in cases which proceed on the theory of estoppel, or those where it is sought to take possession of property ostensibly belonging to a corporation entirely controlled and owned by the principal debtor, for the purpose of protecting the creditors of the latter, as well as the former, it will be found that the instances are rare indeed where the general and settled rule of separate corporate identity is disregarded. This is not, as I conceive it, such a case.

The exceptions to the special master's report will accordingly be overruled, and the report confirmed, but without prejudice to the right hereafter of either the receiver or any creditor, before any dividends are paid upon the claims in question, to have any offsets, to which the claims may be subject, deducted therefrom.

BRIGHT et al. v. VIRGINIA & GOLD HILL WATER CO.

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

No. 2587.

1. WATERS AND WATER COURSES ⚷158½(1)—IRRIGATION CONTRACTS—ACTIONS—PLEADING—SUFFICIENCY.

Complaint alleging oral contract of plaintiff's predecessor in title to permit overflow of irrigation waters in consideration of right to use such waters, acted upon for over 40 years by expenditure of money in orchards, etc., and breach thereof by defendant who cut off the overflow when such waters were not needed elsewhere, is good as against demurrer, being based on cutting off overflow and not failure to divert waters so as to create an overflow.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. ⚷158½(1).]

2. WATERS AND WATER COURSES ⚷158(2)—IRRIGATION CONTRACTS—BREACH—LIABILITY.

Defendant who made oral contract giving plaintiff's predecessor of title right to use overflow waters in consideration of his permitting overflow on his land, could not, after 40 years of such use and expenditure of money in development of orchards, etc., cut off the water during irrigating season without becoming liable for consequent damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 187; Dec. Dig. ⚷158(2).]

In Error to the District Court of the United States for the District of Nevada; E. S. Farrington, Judge.

Action by Rose Bright and others against the Virginia & Gold Hill Water Company, a corporation. Judgment for defendant, on plaintiff's refusal to amend further after demurrer to the third amended complaint was sustained, and plaintiffs bring error. Reversed and remanded, with directions to overrule demurrer with leave to defendant to answer.

Sweeney & Morehouse, of Carson City, Nev., for plaintiffs in error.

Cheney, Downer, Price & Hawkins, of Reno, Nev., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The question in this case is whether or not the third amended complaint states a cause of action; the court having sustained a demurrer thereto and the plaintiffs declining further to amend. Judgment accordingly passed for the defendant. The plaintiffs thereupon sued out this writ of error.

In substance the allegations of the complaint are that during all of the times therein mentioned the defendant company was a California corporation engaged in business in Ormsby county, state of Nevada, "as a water company impounding, ditching, fluming, storing, and distributing water for the purposes of irrigation and domestic uses for pay," and that years before the plaintiffs in the action acquired their alleged interest in the land described in the complaint one Gara-

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

vanta was the owner thereof, onto and over which the defendant company permitted a part of the waters that it had by means of dams, ditches, flumes, and pipes diverted and impounded from Marlette Lake in Nevada, for mining, agricultural, and domestic uses, to overflow and wash and injure the said land of the said Garavanta and his crops thereon, by reason of which acts of the defendant company the said Garavanta prepared to bring suit against it for such injuries, whereupon he and the defendant company entered into an oral agreement to the effect that Garavanta would permit the overflow waters from the defendant company's works to flow to and across his said land during the whole time it should be engaged in furnishing water pursuant to its articles of incorporation, in consideration of which Garavanta and his successors in interest should have the right to divert such overflow waters and use the same to irrigate the said land—

"to the extent in which the said overflow water then and there ran, as long as said defendant was engaged in the business of its incorporation and conducted and carried on its said business as hereinbefore averred. And that the said Joe Garavanta, and his successors in interest, should have all of said overflow waters continuously and without interference, for the irrigation of the said lands and premises free of charge, *and the same should be permitted to overflow.*" (Italics ours.)

The complaint also alleges that in pursuance of that agreement and in consideration of the use of the overflow waters upon his land, Garavanta waived his right of action for damages for the injuries he had theretofore sustained from the overflow of such waters, and granted the defendant company a right of way therefor through his said land; that in pursuance of the alleged agreement Garavanta thereupon commenced the use upon his land of such overflow waters, irrigating not less than 100 acres thereof in the irrigating season during his ownership and occupancy of the land, which extended not less than 7 years, during which time he planted an orchard, vines, and various annual crops, expending in doing so large sums of money and much labor, by means of which the land was greatly increased in value; that at the end of about 7 years he sold the land to one Raffetto, from whom it passed by mesne conveyances to the plaintiffs in the action, together with the right to use the said overflow and waste waters.

The complaint further alleges:

"That since the aforesaid agreement down to and including the year 1913, and continuously, the said plaintiffs, their predecessors and grantors, in pursuance of said agreement have used the said overflow waters and the same have overflowed and continued to overflow, and the said defendant has permitted the same in harmony with said agreement to overflow, for the purposes of irrigation of said land and premises aforesaid."

That the land is arid and that crops cannot be grown thereon without irrigation, but that with irrigation large and valuable crops of various specified kinds can be, have been, and are being grown by the plaintiffs upon the land, and that all of the said overflow waters are necessary for its proper irrigation and cultivation, and that said waters—

"have been for more than 40 years last past, in pursuance of said understanding and agreement aforesaid, continuously used upon said lands for irrigation purposes with the full consent and knowledge of said defendant, and at all the times herein mentioned said overflow waters continued to overflow and were permitted to overflow by said defendant, and were not needed elsewhere or at all."

That in the year 1913 the plaintiffs planted upon the land various specified crops, and then had thereon various kinds of orchard trees of great value, necessarily expending in the cost of labor thereon $1,953.96, which crops so planted and cultivated were in good growing condition by reason of the use by the plaintiffs of the said overflow waters of which there was a plenteous supply with "no loss or reduction of the quantity of water for the uses and purposes of said defendant and to enable it to keep its agreement," and that defendant nevertheless on or about June 24, 1913, wrongfully and unlawfully "cut off, diverted, and stopped the said overflow of waters as aforesaid, and wholly deprived the said plaintiffs of the use thereof, in violation of its said agreement, during the cropping season" of the year named, thereby destroying the said crops, to the plaintiffs' damage in the sum of $14,823, for which, with costs, judgment is prayed.

The court below in sustaining the demurrer construed the complaint as being based upon an allegation that the defendant "failed to divert enough water from Marlette Lake to create an overflow and a waste which would run down to plaintiffs' premises."

[1, 2] But there is no such allegation in the complaint, nor any equivalent thereof. On the contrary, the allegations are in effect that the agreement between the defendant company and the predecessor in interest of the plaintiffs was that Garavanta should permit the overflow waters from the company's works to flow to and across his land during the whole time the company should be engaged in furnishing water pursuant to its articles of incorporation, in consideration of which Garavanta and his successors in interest should have the right to divert and use such overflow waters "continuously and without interference for the irrigation of the said lands and premises free of charge, and (that) the same should be permitted to overflow"; that the agreement was based upon a valid consideration, and that from the time it was made it was acted upon by Garavanta and his successors in interest, and that the plaintiffs were in the execution of the agreement by using such overflow waters from the defendant's works in the irrigation of their trees, vines, and growing crops when in the year 1913 the defendant company "diverted and stopped the said overflow of water."

Whether or not in the event that there existed no such overflow the defendant would be under obligation or liability to the plaintiffs is a question that does not arise at this time, but certainly if it be true as alleged that the defendant by agreement with the plaintiffs' predecessor in interest acquired the right to run its waste waters onto and through the land in question in consideration of the right on the part of the latter and his successors in interest to use such overflow in its irrigation, and that agreement, though oral, was regularly executed for 40 and more years, and in the execution of which the plaintiffs and their predecessors in interest expended labor and money in the planting of trees, vines, and crops essentially dependent upon such waters for their successful growing, the defendant could not divert and stop such overflow in the midst of the irrigating season without becoming liable for the consequent damages; the said overflow waters, according to the allegations of the complaint, continuing to overflow and being permitted to overflow by the defendant and not being "needed elsewhere or at all."

In Lee v. McLeod, 12 Nev. 280, 285, the Supreme Court of that state, where the present case arose, said:

"The principle that expending money or labor in consequence of a license to divert a water course, or use a water power, in a particular way, has the effect of turning such a license into an agreement that will be enforced in equity, has been frequently announced by the courts. In all such cases the execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds. Woodbury v. Parshley, 7 N. H. 237, 26 Am. Dec. 739; Snowden v. Wilas, 19 Ind. 14, 81 Am. Dec. 370; Stephens v. Benson, 19 Ind. 369; Lane v. Miller et al., 27 Ind. 537; Raritan Water-Power Co. v. Vegthe, 21 N. J. Eq. 463; Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439; Campbell v. McCoy et al., 31 Pa. 264; Prince v. Case, 2 Am. Lead. Cases, 560, 561; Ameriscoggin Bridge v. Bragg, 11 N. H. 108.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer with leave to the defendant to answer.

SALAS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 24, 1916.)

No. 170.

1. CRIMINAL LAW ⟹1—OFFENSES—NECESSITY OF STATUTE.
An agreement to give an agent a share of the profits on goods sold to his principal, however immoral, is not a crime, unless so declared by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 2; Dec. Dig. ⟹1.]

2. CONSPIRACY ⟹33—DEFRAUDING GOVERNMENT.
When the United States enters into commercial business, it abandons its sovereign capacity, and is to be treated like any other corporation; therefore, though it absolutely owns the Panama Railroad Company, and is the only one profiting or losing by the railroad company's activities, a conspiracy to defraud the railroad company is not a conspiracy to defraud the United States, denounced by Penal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), and in such case the United States can gain redress only by suit by the railroad company to recover damages.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⟹33.]

3. CONSPIRACY ⟹33—OFFENSES—NATURE.
Under Penal Code, § 37, declaring that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such

parties do any act to effect the conspiracy, each shall be punished, an intent to defraud the United States is essential to a conviction.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⚷33.]

4. CRIMINAL LAW ⚷113—VENUE—OVERT ACT.

Accused agreed with the manager of the commissary department of the Panama Railroad Company to divide the profits on tobacco sold to the company. Drafts representing the manager's share of the profits were delivered to him, and were ultimately paid in New York City; one being deposited to the manager's account in a Panama bank, and another being deposited to his account in an Indiana bank to take up an overdraft. Judicial Code (Act March 3, 1911, c. 231) § 42, 36 Stat. 1100 (Comp. St. 1913, § 1024), declares that, when an offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either. *Held* that, as there was no agreement whereby title to the draft remained in accused, title passed to the banks in which he deposited them; therefore payment of the drafts in New York did not constitute an overt act in connection with the conspiracy, and hence the New York District Court was without jurisdiction in a prosecution therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⚷113.]

Chatfield, District Judge, dissenting.

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

Jacob L. Salas was convicted of conspiracy to defraud the United States, demurrer to the indictment having been overruled (United States v. Burke, 221 Fed. 1014), and brings error. Reversed.

William Rand, Jr., of New York City (Phanor J. Eder, of New York City, of counsel, and Vine H. Smith, of New York City, on the brief), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (F. E. Carstarphen and Harold Harper, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

WARD, Circuit Judge. This is a writ of error to a judgment convicting the defendant Salas of conspiring with one Bermudez and one Burke to defraud the United States under section 37 of the Penal Code, which reads:

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

Burke was called as a witness by the government, the case severed, and Salas tried alone. He did not take the stand. Burke was a citizen of the United States, residing at Cristobal, Isthmus of Panama, and manager of the commissary department of the Panama Railroad Company, a corporation of the state of New York, while Bermudez and Salas were Spanish-Americans, residing and carrying on business at Colon in the republic of Panama.

The government proved that these three persons entered into an agreement at Colon to share equally in the profits to be made from sales of a certain brand of tobacco by Salas and Bermudez to the Panama Railroad Company. Burke, as manager of the department, was to order and pass upon the tobacco and approve the vouchers to be issued by the railroad company in payment for it. Between May 27, 1908, and February 9, 1914, such tobacco was sold to the value of about $200,000. Burke received his share of the profits made by the sellers in the form of drafts drawn in Colon upon firms or banks in New York City. These drafts are the overt acts pleaded in the indictment as intended to effect the object of the conspiracy.

[1] No actual loss is proved to have been sustained in the purchase of the tobacco. The price paid was not shown to be unfair and it was all subsequently sold at a profit. An agreement to give an agent a share of the fair profits in goods sold to his principal, however indelicate or even immoral, is not a crime unless made so by statute. There is no pretense that there is any such statute in the republic of Panama. If, however, the conspiracy was to defraud the United States, as the government contends, then there was enough evidence of constructive fraud to justify conviction under section 37 of the Penal Code, provided the conspiracy, though formed in the republic of Panama, was effected in the United States. Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

[2] The theory of the United States is that the Panama Railroad Company is a governmental department, and Burke, though on the pay roll of and paid by that company, was an officer of the United States. The trial judge so held as matter of law. The Isthmian Canal Commission was an agency of the United States under the supervision of the War Department, having complete control of the building of the canal. The United States was also the owner of the whole capital stock of the railroad company, absolutely dominating it and solely interested in its profits or losses. The government, however, continued the original corporate organization of the railroad company for its own purposes, among others to avoid the restrictions of certain laws of the United States applicable to the Commission. Accordingly there was created a department called the "subsistence department," composed of the labor, quarters, and subsistence department of the Commission, which furnished all food supplies to the employés on the Isthmus and the commissary department of the Panama Railroad Company, which bought, carried, and furnished all other merchandise and supplies. Burke was the manager of the latter. When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. Bank of United States v. Planters Bank, 9 Wheat. 904, 6 L. Ed. 244. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and

is sued just like any other corporation, in its own name. If this tobacco had been deficient in quality, the railroad company could have sued Salas to recover the damages, and if it had not been paid for Salas could have sued the railroad company for the price. Therefore we are of opinion that the combination proved did not defraud or intend to defraud the United States.

[3] If, however, it be conceded that Burke, though on the pay roll of and paid by the railroad company, was an officer of the United States and acting as such in the purchase of tobacco, the agreement as proved did not, in our opinion, satisfy the requirements of the case. The statute clearly contemplates that the parties shall intend to defraud the United States and the indictment charged such an intent. The government offered in evidence a large mass of documents to prove the relations of the railroad company and the Commission and that the railroad company was a mere governmental department. We discover nothing in the evidence to justify the jury in finding, at least beyond a reasonable doubt, that Salas knew anything about these complicated relations, or that the United States was buying this tobacco through the railroad company. Indeed, Burke himself, who testified as a witness for the government, said that he considered himself to be an employé of the railroad company and not of the United States.

[4] We come now to consider the overt acts. As the indictment was filed March 15, 1915, only two of the Colon drafts which are relied on are within the statute of limitations. Exhibits 29 and 31 are as follows:

Government's Exhibit 29.

"Draft of International Banking Corporation No. 12/10127, dated Colon, R. P., May 15, 1912, for $2,500, directed to International Banking Corporation, 60 Wall street, New York City, to the order of Banque d'Hochelaga, marked on face, 'B 1/8' and 'R-48258' and 'no protest,' and perforated 'Paid 6—6—12,' Indorsed, 'S. M. White.' For identification only 'L. D. Smith.' Stamped, Banque d'Hochelaga, Winnipeg, May 20, 1912, [blank] Receiving Teller.' Stamped, 'Pay Banque d'Hochelaga, Montreal, or order. E. Belair, Acting Manager.' Stampêd, 'Pay National Park Bank, New York, or order, prior indorsements guaranteed. Banque d'Hochelaga, F. G. Leduc, Manager.' Stamped, 'Received payment. National Park Bank of New York, June 6, 1912.' "

Government's Exhibit 31.

"Draft of Bank of Canal Zone, dated July 2, 1913, to the order of Fletcher Savings & Trust Company for $1,200, directed to Knauth, Nachod & Kuhne, New York, indorsed 'C/A John B. & Ida Burke,' indorsed by the Fletcher Savings & Trust Company and by the Fletcher American National Bank of Indianapolis, and stamped 'City Collection Department, paid July 12, 1913. National City Bank of New York,' and perforated 'Paid 7/12/13.' "

The theory of the government is that these drafts were given to effect the object of the conspiracy and being finally paid in New York constitute overt acts committed by Burke, one of the parties to the conspiracy, in the Southern district of New York, and so give jurisdiction to the court under section 42 of the Judicial Code which reads:

"Sec. 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

It may be admitted that payment of his share of the profits to Burke was an element of the conspiracy to defraud the United States, conceding that there was one, and that if made to him in New York City would have given the court jurisdiction. It seems to us, however, that in this division of profits between the three persons interested, no one of them owed anything to the others. Burke was not receiving the drafts on account of any debt. No one was owing or paying an obligation to the other but each was receiving his one-third of the profits. When, therefore, Burke accepted drafts in Colon payable in New York, he then and there received his share, and the conspiracy was not only conceived, but completed in the republic of Panama where it was contrary to no law.

To go one step further, and consider the disputed question whether a depositor who gets credit in his account for a draft deposited owns the draft or whether the bank owns it. The importance of this question is that, if the bank owned the two drafts in question, then Burke was paid when he got credit for them in Hochelaga and Indianapolis, respectively, and the final payment in New York was not to him, but to the banks. The trial judge held as matter of law that the drafts belonged to Burke when paid. Of course, if a draft be indorsed for collection, which used to be commonly the case, or if there be an understanding that the bank is to collect only, the depositor is the owner of the draft deposited and so remains until it is paid. If, however, the draft be given by the depositor in payment of an overdraft, as was the case with the Indianapolis draft for $1,200, obviously the bank becomes the owner. Or, if nothing whatever be said upon the subject, then as matter of law the bank is the owner of a draft for which the depositor is given credit. The Supreme Court considered this subject in Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. There the defendant was indicted in St. Louis under Rev. Stat. U. S. § 1782, for the crime of receiving compensation for services rendered by him while a senator of the United States, in a proceeding before the Post Office Department. The check in question was for $500 drawn on a St. Louis bank and forwarded to the defendant in Washington who deposited it in his own bank there. The jurisdiction of the court depended upon the place where the defendant was paid, and Mr. Justice Peckham said:

"A careful scrutiny of the evidence with relation to this charge to the jury shows that there was no foundation for submitting to the jury the question of what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank and their proceeds placed to the credit of the defendant. There was no agreement or understanding of any kind other than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. The learned judge in his charge to the jury did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury."

There being no evidence of an agreement to the contrary, it follows that both these drafts when deposited, the first in the Hochelaga Bank in Canada and the second in the Fletcher Savings & Trust Company of Indianapolis, ceased to be Burke's and became the property of the banks, respectively, so that, if this indictment were properly found to be one to defraud the United States, still the payments in New York City were not payments to Burke, and cannot be treated as overt acts to effect the object of the conspiracy.

The judgment is reversed.

CHATFIELD, District Judge (dissenting). While agreeing with the propositions of law stated in the opinion of the majority of the court, I must dissent from the conclusion.

The evidence showed a conspiracy to divide profits which otherwise would have gone and should have gone to the United States, if Burke had done his duty. This was defrauding the United States, even though there was an intermediate party in the form of a corporation representing the United States as agent for the government business. Burke was also a government official and failed (through the effects of this conspiracy) to do his duty, even though the acts by which he directly carried out the conspiracy were done in Panama for the agent corporation and while he was a civil employé thereof.

The conspiracy as charged and proven was to get profits and to divide and send out of observation the share of each man. In so doing the use of drafts payable in the United States was contemplated, and if any of the conspirators actually carried out the division by using New York funds, so as to get his share of the spoils available in a New York bank, then jurisdiction could be laid in the Southern district of New York.

These questions were left to the jury, and I see no error of sufficient moment to reverse.

RANSOM & RANDOLPH CO. v. PINCHES.

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

No. 284.

1. BROKERS ⚷49(3)—COMMISSIONS—RIGHT TO.

Plaintiff was authorized to negotiate with American firms for a general agency to represent in the United States and Canada a German company manufacturing dental supplies. The draft agreement sent by the German firm to plaintiff provided for a five-year agency and fixed the minimum quantity of artificial enamel which should be purchased during those years. Defendant agreed to pay plaintiff the sum of $20,000, should he secure for them an exclusive agency for North America, and, if possible, the West Indies, Central America, and South America. The agreement between plaintiff and defendant provided that plaintiff should not com-

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

pete in the sale of dental supplies for a period of 10 years, and left the amounts of the purchase to be agreed upon. *Held*, that defendant could not escape payment of the commission, where it appeared that plaintiff would have been able to secure the contract, had defendant not secured it through another agent, on the ground of slight and minute differences between the proposed agreement and the draft agreement, particularly as defendant made no objection to the contract actually procured, which practically followed the terms of the draft agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 72; Dec. Dig. ⟹49(3).]

2. BROKERS ⟹7—COMMISSIONS—RIGHT TO.

Where defendant agreed to compensate plaintiff upon his securing a satisfactory contract giving defendant the exclusive agency for dental supplies manufactured by a German firm, recovery will not be denied on the ground that the contract between plaintiff and defendant was indefinite, where plaintiff could have secured a satisfactory contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8; Dec. Dig. ⟹7.]

3. BROKERS ⟹88(4)—COMPENSATION—ACTIONS—JURY QUESTION.

In an action to recover under an agreement whereby defendant was to compensate plaintiff if he should procure for it a satisfactory agency contract to represent a German firm, *held*, that the question whether plaintiff could have secured a satisfactory contract was for the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. ⟹88(4).]

4. DAMAGES ⟹59—MEASURE—BREACH OF CONTRACT.

Possibility of plaintiff's future breach of covenants which were conditions subsequent cannot be measured in damages, so as to reduce plaintiff's recovery in an action for breach of contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 108–112, 114, 117, 118; Dec. Dig. ⟹59.]

5. BROKERS ⟹87—COMPENSATION—COMMISSIONS.

Where defendant agreed to pay plaintiff a fixed sum if he should procure for it the agency to represent a German firm manufacturing dental supplies, and the agreement provided that if the agency was procured the expense of plaintiff's trip to Europe, advanced by defendant, should be deducted from the compensation, plaintiff, defendant having breached its contract, is not entitled to recover the full amount but the expenses should be deducted.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 131; Dec. Dig. ⟹87.]

6. APPEAL AND ERROR ⟹274(5)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—SUFFICIENCY.

In such case an exception to the charge that plaintiff was entitled to the full amount, coupled with a request to charge that there was no evidence under which any verdict could be returned for plaintiff, did not present the question whether the expense of such trip should be deducted from plaintiff's recovery, and hence a judgment for the full amount cannot be attacked on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1631; Dec. Dig. ⟹274(5); Trial, Cent. Dig. § 691.]

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

Action by Conrad H. Pinches against the Ransom & Randolph Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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

C. F. Brown and Graham & L'Amoreaux, all of New York City (George S. Graham, Ralph Polk Buell, and Charles Voetsch, all of New York City, of counsel), for plaintiff in error.

G. B. Covington, Bernard G. Heyn, and Herbert A. Heyn, all of New York City, for defendant in error.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. The plaintiff was engaged in buying and selling dental supplies, and had for some time conducted a selling agency for the United States of an article known as "Ascher's Enamel" and other dental articles manufactured by the General Dental Manufacturing Company of Berlin. That company had also given him the following authority to continue until May 15, 1914, to negotiate with others for the agency in this country:

"We herewith authorize you to negotiate with firms whom you consider competent, regarding our general agency for the United States of America under the inclosed terms and conditions as set forth in the inclosed draft of agreement."

This letter was accompanied by a draft agreement, the material parts of which were as follows:

"(1) The General Dental Manufacturing Company mit beschrankter Haftung of Berlin shall grant to the agent and the agent shall accept the sole and exclusive agency for the sale in the United States of America and Canada of Ascher's Artificial Enamel and other dental articles now handled by the said company. As regards any new inventions the company grants the agent the right to acquire the agency thereof under the same conditions as may be offered to the company by third parties. * * *

"(5) The price payable by the agent for Ascher's Artificial Enamel is the present detail price of the German lists with a deduction of 72% (seventy-two per cent.) rebate. For new inventions the price is to be agreed upon.

"(6) The agent agrees to take delivery of a minimum quantum of Aschers' Artificial Enamel at the net value of Mk. 70,000 (seventy thousand marks) during the first year, at the value of Mk. 85,000 (eighty-five thousand marks) during the second year, and at the value of Mk. 100,000 (one hundred thousand marks) in all subsequent years. Regarding the other articles the quantum to be taken requires a special agreement."

With these documents in hand the plaintiff began a negotiation with the defendant for the agency. The defendant was satisfied to negotiate on the lines of the draft agreement as changed by it and thereupon the following agreement was entered into:

"Toledo, April 9, 1914.

"Mr. C. H. Pinches, at present in Toledo, Ohio: Agreeable to our verbal conference and with reference to the authority vested in you by the General Dental Manufacturing Company of Berlin, we state as follows:

"Upon our acquiring the exclusive agency for Ascher's Enamel and their other products for North America, and, if possible, West Indies, Central America, and South America, according to a mutually satisfactory contract, the furnishing of certified statements showing the volume of business which you have done in previous years in this line, and furnishing such other evidences as may be required, that they and other statements which you have made are in accordance with facts, we hereby agree to accept said agency, paying you therefor the sum of twenty thousand dollars ($20,000.00) as follows:

"Two hundred fifty dollars ($250.00) as evidence of good faith on our part at the acceptance of this agreement and the remainder to be paid on demand after the consummation of the closing of the contract with the General Dental Manufacturing Company.

"In the meantime it is understood that you will accompany our Mr. Bigelow to a trip to Germany in the interest of this deal and shall receive therefor a salary of fifty dollars ($50.00) a week, and in addition we will pay your traveling and other expenses; the traveling and other expenses, however, to be deducted from the balance that will be due you should the contract between the General Dental Manufacturing Company and ourselves be entered into along the lines of our conversation and the tentative contract that has been drawn up.

"It is understood, of course, that you will turn over to us all right, title, and interest in every way that you may now have or that you may acquire from the General Dental Manufacturing Company; also that you will not engage in any competing branch of the dental supply business within the territory covered by the contract that shall be made for a period of ten years from this date, and further, that should you acquire in any way any formulas or rights that would compete with this line within the period of ten years they shall automatically come to us.

"We also accept your suggestion that in the event of desiring your services for a limited period that you will do your utmost to give us temporary help by payment of expenses only.

"Trusting that this is in accordance with your understanding, we are

"Yours very truly, The Ransom & Randolph Co.,

"C. S. Bigelow, Pres.

"Your signature at the end of this clause shall constitute this letter a contract. C. H. Pinches."

Bigelow, the president of the defendant, not being able to go to Berlin, sent Crandell, its secretary and treasurer, to New York with arrangements to sail with the plaintiff on the evening of April 20th. On that day, however, Crandell was advised that one De Sanno had the authority from the German company to dispose of the agency, and after an interview with De Sanno's son and seeing some cables from Germany, he told the plaintiff that it would be a fool's errand to go to Berlin, that he would not do so, and that he was through with the Ascher's Enamel and would have nothing more to do with it. Instead of this he began a negotiation with De Sanno without the plaintiff's knowledge and subsequently went to Berlin with De Sanno's son, where on May 14th, the German company made a contract with De Sanno, to take effect May 16th, under and by virtue of which the defendant became the distributing agents of the German company in the United States and Canada.

[1] The defendant points out some differences between the agreement of April 9th and the draft agreement, which we do not think entitled to serious consideration. The former speaks of the territory to be covered as "North America," whereas the latter mentions only the "United States and Canada." The jury might well have concluded that the parties meant the United States and Canada when they used the words North America. At all events the defendant took no objection to the territory as described in the draft agreement accompanying the authority from the German company or in the agreement which that company subsequently made with De Sanno. It is also said that the agreement of April 9th calls for a term of 10 years, but we think the language as to ten years applies, not to the term of the agency, but to the period during which the plaintiff agrees not to com-

pete. Were this not so, the draft agreement calls for a term of five years and the defendant took no exception to it.

So the differences between the agreement of the German company with De Sanno and the draft agreement approved by the defendant are not very serious. The draft agreement calls for the agency for the United States and Canada for "Ascher's Artificial Enamel and other dental articles now handled by the said company," whereas the other calls for an agency for the same territory for the enamel and providing that the agency for other articles is to be subsequently agreed upon. The draft agreement provides that the price for the enamel to be paid was 66⅔ per cent. off the German company's lists, whereas the second sets forth the prices for the various styles of enamel specifically. The draft agreement calls for a term of five years, the value of enamel to be taken in the first year to be 70,000 marks, in the second 85,000 marks, and for the third, fourth, and fifth years 100,000 marks each, whereas the other calls for the value of 150,000 marks for the first eighteen months and thereafter indefinitely for 100,000 marks a year. In the draft agreement nothing is said about the price to be paid for or quantity to be taken by the agent of other dental articles manufactured by the German company which were evidently to be subsequently agreed upon. The other contract provides that the agency for these articles is to be subsequently agreed upon.

When Crandell on April 20, 1914, refused to have anything further to do with the Ascher matter, he asked the plaintiff to sign a memorandum which he had written on the agreement of April 9th canceling it. The plaintiff refused to do so, and thereupon Crandell charged him with refusing in order to "hang onto" the $250. The plaintiff replied:

"That isn't the idea at all, and if you feel that way about it I will return the $250 to you. You either owe me the whole amount or nothing at all, and I know that you are perfectly good for the $250, and you can have your money; but I won't sign any release, and won't relinquish any of my rights."

Subsequently the plaintiff, without knowledge that the defendant was negotiating through De Sanno with the German company, wrote some letters to the defendant which are supposed to indicate that he regarded the negotiation with the defendant as off and ended. This question whether the agreement of April 9th was canceled with mutual consent was fairly submitted to the jury, and they have found in favor of the plaintiff.

[2, 3] The defendant makes several objections as sustaining its motion for the direction of a verdict in favor of the defendant. It is said that the contract of April 9th was too indefinite and uncertain to be enforced at all. The only uncertainty was whether the German company would give an agency contract along the lines of the draft agreement which would be satisfactory to the defendant. Of course, such an agreement as between the German company and the defendant would have to be certain, but any agreement satisfactory to it which the defendant should obtain through the plaintiff would have made the agreement of April 9th perfectly definite on this point. The defendant did get an agreement which was satisfactory to it through De

Sanno, and it was for the jury to say whether the plaintiff could not have got the same contract, and whether the defendant had not wrongfully prevented him from doing so. The evidence justified the jury in finding that the contract actually made between De Sanno and the German company was made for the benefit of the defendant and was satisfactory to it. May 15th Crandell, then in Berlin, notified the trade in the United States as follows:

"Gentlemen: With unusual satisfaction I wish to announce the successful conclusion of negotiations between my company and the Ascher Laboratories, Berlin, by which the distribution of Ascher's New Artificial Enamel throughout the United States and Canada passes under the control of the house that I represent. * * *"

On the same day the president of the defendant wrote from Toledo to the German company:

"Dear Sirs: We are in receipt of your letter of May 2d, and while at one time we regretted the occurrence to which you refer, we are just in receipt of a cablegram from our Mr. Crandell to the effect that he has made a satisfactory arrangement for the handling of your material, and—'All's well that ends well.' * * *"

While Crandell was working at Berlin to get the contract through De Sanno, the defendant kept the plaintiff in the dark. The president wrote to De Sanno on May 4th a letter which concluded:

"Will do nothing about Mr. Pinches until Mr. Crandell comes back. I had hoped you would advise me what to write him. Would it do at this time for me to tell him the true situation? * * *"

What the plaintiff could have accomplished if the defendant had given him a fair opportunity is of course not susceptible of positive proof. A conclusion is to be drawn from all the facts. We think there was evidence enough to justify the jury in finding that the plaintiff could have obtained exactly the same contract as De Sanno did, or at least a contract that would have been equally satisfactory to the defendant and the German company on the lines of the draft agreement approved by the defendant, which was the substantial thing he was required to do under the contract of April 9th.

Judge Veeder concluded his charge by saying:

"If you find for the plaintiff, the plaintiff is entitled to his bargain, namely, $20,000, together with interest from the time that he was prevented from performance of his contract, which has been computed, subject to correction, at $1,950, making in all the sum of $21,950. If, on the other hand, you find for the defendant, you will simply report that you so find."

[4] The defendant objects that there should have been deducted from the consideration agreed upon in the contract of April 9th the value of various covenants of the plaintiff, viz., that he would not compete in the dental business for ten years and that he would give the defendant temporary help for his expenses only; these covenants were conditions subsequent and the possibility of a future breach thereof could not have been proved nor measured in damages. So the same is true of his covenant to turn over any right, title, or interest which he now has (of which there is no evidence) or may hereafter acquire from

the German company and any formulas or rights he might hereafter acquire which would compete in this line.

[5, 6] Finally, the expenses which were to be incurred on the European trip were not incurred, and the defendant alleges that recovery for the full amount results in an overpayment. This point seems to be a good one, but we do not think it was sufficiently called to the attention of the trial judge. The exception was follows:

"I except to that portion of your honor's charge where you say that the plaintiff is entitled to the full amount, and ask your honor to charge that there is no evidence in this case upon which any verdict could be computed under the pleadings."

We do not think that this request brought to the court's attention the point now raised. The expenses were probably not very substantial, in view of the sum sued for, and it is probable that the parties did not think anything about them at the time. The exception does not seem to us to justify a new trial.

The judgment is affirmed.

HANSON v. HANSON.

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

No. 282.

1. INSANE PERSONS ⟹26—ADJUDICATION—COLLATERAL ATTACK.

Code Civ. Proc. N. Y. § 2329, declares that each commissioner appointed in a proceeding to adjudge one an incompetent shall take a prescribed oath, and if he becomes incompetent, or neglects or refuses to serve, or removes from the state, the court may remove him, and shall from time to time fill any vacancy. Section 2331 declares that all the commissioners must attend and preside at the hearing, and a majority of them shall have all the power and authority of a judge of the court holding a Trial Term. Of the three commissioners appointed in a proceeding to secure a committee for an alleged incompetent, one resigned, and the two remaining, without the vacancy having been filled, proceeded to act, making a finding of incompetency and appointing a committee. *Held* that, as the functions of the commissioners are judicial, and a part do not constitute the commission, the judgment of incompetency was void, and may be collaterally attacked.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. ⟹26.]

2. EVIDENCE ⟹63—PRESUMPTIONS—COMPETENCY.

There is a presumption that one suing in his own right is competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. ⟹63.]

3. COURTS ⟹322(2)—FEDERAL COURTS—JURISDICTION.

Where complainant, who resided in California, averred that he was a citizen of that state, a federal court sitting in that district of New York in which defendant resided, had jurisdiction of the suit on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 878, 879; Dec. Dig. ⟹322(2).]

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4. COURTS ⚷325—JURISDICTION—FEDERAL COURTS—WAIVER.
Where a suit was brought in the federal court on the ground of diversity of citizenship, defendant, who appeared generally, pleaded to the bill, and offered some proof, waived any objection on the ground that she was not a citizen of the district alleged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. ⚷325.]

5. JUDGMENT ⚷570(1)—BAR—DISCONTINUANCE—JUDGMENT ON THE MERITS.
Where a suit is discontinued, the order is not and cannot be a judgment on the merits, barring a subsequent suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028, 1036, 1165; Dec. Dig. ⚷570(1).]

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

Bill by Walter J. Hanson against Aimee L. Hanson. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Rounds, Hatch, Dillingham & Debevoise, of New York City (R. S. Rounds, of New York City, and George S. Brengle, of White Plains, N. Y., of counsel), for appellant.

Rockwood & McKelvey, of Saratoga Springs, N. Y. (L. B. McKelvey, of Saratoga Springs, N. Y., of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. Walter L. Hanson filed this bill in equity against his mother, alleging her to be a citizen of New York, residing in the Eastern District thereof, and himself to be a citizen of California. The bill further alleges that after his father's death the complainant became entitled to receive one-fourth part of his grandfather's estate; being securities of the value of about $40,000; that immediately after his father's funeral, and when he had just come of age, he was fraudulently induced to execute an assignment of said interest to his mother, upon the representation of herself and her attorney that he was executing a deed of trust of the property for his own benefit, he to receive the income thereof and the principal upon demand; that thereafter the defendant refused upon his demand to pay over to him the income or the principal of the said securities; that thereupon he brought suit in the Supreme Court of the state of New York for the county of New York against his mother and her attorney, praying that the assignment might be declared null and void and the defendant required to account to him for the securities and the income thereof; that subsequently he was persuaded by his mother and her attorney to discontinue said suit upon her promise that she would pay to him the sum of $4,000 a year; that the defendant has neglected and refused to make any payment to him as agreed, and subsequently had him declared an incompetent and a committee of his person and property appointed in a proceeding in the Supreme Court of New York for Saratoga county, which court had no jurisdiction either of his person or of the subject-matter of the action. The prayer for relief is that the assignment be declared null and void, be directed to be canceled, and that the defendant be required to account for the said securities and the income thereof.

The answer denies that the complainant is a citizen and resident of California, alleging on the contrary that both he and the defendant are residents of the state of New York, residing in the Northern district thereof. It further denies all the allegations of fraud and asserts, in bar of the action, first, the discontinuance of the complainant's suit in the Supreme Court for the county of New York by a consent order reading to be "on the merits" and for a further defense that the complainant has been declared to be an incompetent in the proceeding in the Supreme Court of New York for Saratoga county, and a committee of his person and property appointed, because of which he has no legal right to maintain this action; the only person being qualified to do so being his committee.

After much testimony had been taken, the District Judge, without passing upon the merits, dismissed the bill on the ground that, the incompetency proceedings not being void on their face, the court had no jurisdiction, the committee being a citizen of New York and the complainant having no standing to maintain the suit, and, further, that the discontinuance of the complainant's prior suit in the Supreme Court of New York county "on the merits" was a legal bar. We cannot agree in either conclusion.

[1-4] The Supreme Court of Saratoga County appointed three commissioners, each of whom filed his oath. When the jury was summoned and met at the hearing before the commissioners, the complainant was not present either in person or by attorney; but, on the objection of counsel for the complainant's wife, one of the commissioners resigned and subsequently at the same hearing, the vacancy not having been filled, the jury returned their verdict to the commission that "Walter L. Hanson should have a committee over his person and estate."

Section 2329 of the Code of Civil Procedure provides:

"Each commissioner, before entering upon the execution of his duties, must subscribe and take, before one of the officers specified in section 842 of this act, and file with the clerk, an oath faithfully, honestly, and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the state, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal or resignation."

And section 2331 provides:

"All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. * * *"

The authority in the premises was given by the court to three persons who constituted the commission. Their functions were judicial, and although a majority of them, all being present, had all the power of a court holding Trial Term, when only two acted there was no commission at all. The defect was a jurisdictional one, which may be availed of collaterally, and not a mere irregularity, as the court below held in Re Bischoff, 80 App. Div. 326, 80 N. Y. Supp. 917. There is nothing to the contrary in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, or Chaloner v. Sherman, 215 Fed. 867, 132 C. C. A. 96, because in them only irregularities were in question. The whole proceeding being void on its face, the presumption is that the complainant is competent and as he resides in California, and declares himself to be a citizen of that state, the court had jurisdiction, provided the defendant resided in the Eastern district of New York. As she appeared generally, pleaded to the bill, and offered some proof, any objection on this point was waived.

[5] As to the second ground there can be no such thing as a discontinuance on the merits, because on discontinuance the merits are not in issue or determined. Such an order is not a judgment nor a bar. The decree is reversed and the case remanded with directions to the court below to dispose of it on the merits.

UNITED STATES v. ONE CASE, NO. 1,577.

(Circuit Court of Appeals, Second Circuit. June 19, 1916.)

No. 295.

1. CUSTOMS DUTIES ⚷130—FRAUD ON CUSTOMS—FORFEITURE OF IMPORTS.
   Where the consignee of laces, before entering them, raised the valuation recited in the consular invoice prepared by the foreign seller, and the laces were appraised at the increased price and duties paid on that basis, they cannot be seized, under Tariff Act Oct. 3, 1913, c. 16, § III, H, 38 Stat. 183 (Comp. St. 1913, § 5526), on the ground that the consignor and consignee had attempted to enter them under a false invoice, tending to deprive the United States of duties.
   [Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⚷130.]

2. CUSTOMS DUTIES ⚷130—FRAUD ON CUSTOMS—INCREASE OF VALUATION.
   Where the consignee, the importer of goods, increased the values recited in the consular invoice prepared by the exporter, and the goods were entered under such increased valuation, at which they were appraised, they cannot be forfeited, under Tariff Act Oct. 3, 1913, c. 16, § III, I, 38 Stat. 184 (Comp. St. 1913, § 5527), if the appraised value did not exceed the declared value by 75 per cent.
   [Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⚷130.]

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

Proceeding by the United States for the forfeiture of one case of laces, etc., consigned to Cobden & Co. Forfeiture was denied, and the United States bring error. Affirmed.

H. Snowden Marshall, U. S. Atty., and J. E. Walker, Sp. Asst. U. S. Atty., both of New York City.

Arthur Mayer, of New York City, for defendant in error.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

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

WARD, Circuit Judge. The government filed this libel for the forfeiture of a case of laces seized by the collector, which was consigned by the owner, Brantvogel, in Germany to Cobden & Co. at New York. Subsection H of section III of the Tariff Act of October 3, 1913, 38 Stat. page 183 (Comp. St. 1913, § 5526), reads as follows:

"H. That if any consignor, seller, owner, importer, consignee, agent, or other person or persons shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. That the arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this paragraph, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered."

The material chronology of the case is as follows: January 12, 1914, Brantvogel verified the consular invoice for the case in question at Plauen. January 17 he verified the consular invoice for another shipment of laces to John Wanamaker & Co. January 23 the General Appraiser raised the invoice values of some of the laces in previous shipments by Brantvogel. January 26 the steamer bringing this particular case arrived at New York. January 29 Cobden & Co., the consignees, increased the values of the invoice in question so as to make it conform to values fixed by the General Appraiser in the prior shipments and entered the goods in the custom house. January 30 Cobden & Co. paid duties on the amended invoice on which the laces were actually entered. February 6 the collector seized the case. February 13 the examiner passed Cobden & Co.'s amended invoice and entry as correct.

The claimant relied upon subsection I (section 5527), the material parts of which are as follows:

"I. That the owner, consignee, or agent of any imported merchandise may, at the time when he shall make entry of such merchandise, but not after either the invoice or the merchandise has come under the observation of the appraiser, make such addition in the entry to or such deduction from the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total appraised value thereof for each 1 per centum that such appraised value exceeds the value declared in the entry: * * * Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than 75 per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding other than a criminal prosecution that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued. * * *"

[1, 2] Conceding for the purposes of argument only that the slight variations between three items of laces contained in both of Brantvogel's invoices of January 12 and 17 showed that the invoice of January 12 was fraudulent, still in our opinion Cobden & Co. did not accept the invoice of January 12 within the meaning of subsection H, but, on the contrary, amended it under subsection I, so as to make it conform to the higher values which the General Appraiser had fixed in prior shipments of similar articles. Therefore neither the consignor nor the consignee entered or attempted to enter the merchandise by means of a fraudulent invoice, and the case should not be forfeited under subsection H. Nor should it be forfeited under subsection I because the examiner appraised the merchandise at the amended values so that the appraised values did not exceed the declared values by more than 75 per cent.

We cannot agree with the government's contention that the right given the consignee to raise the values at the time of entry and before the merchandise or invoice has come under the observation of the appraiser is intended only to protect him from paying under subsection I the additional duties on any advance by the appraiser over the invoice values or the value of the merchandise under subsection H or from fine and imprisonment under subsection G (section 5524). The provision in our opinion also protects the consignor against forfeiture of his goods.

The decree is affirmed.

C. F. HARMS CO. v. UPPER HUDSON STONE CO. et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 231.

1. SHIPPING ⚷54—CHARTERS—LIABILITY OF CHARTERER FOR INJURY TO VESSEL.

A time charterer of a scow, under a charter party containing no covenant for her return in good order and condition, can be held liable for her injury only on the ground of negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. ⚷54.]

2. WHARVES ⚷20(2)—INJURY TO VESSEL AT WHARF—LIABILITY OF WHARFINGER.

The lessee and manager of a wharf, who directed the placing of a scow alongside while waiting for a discharging berth, *held* solely liable for her injury by settling on a lump on the bottom with the falling tide; none of those connected with her navigation having knowledge of the obstruction.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 36; Dec. Dig. ⚷20(2).]

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

Suit in admiralty by the C. F. Harms Company, owner of the scow Castor, against the Upper Hudson Stone Company, Paladino & Bros., Henry Crew, Alfred Grant, and David E. Love, as owners of the tug H. B. Moore, Jr., and John J. Guinan, impleaded. Decree for libelant against Guinan, who appeals. Modified and affirmed.

For opinion below, see 225 Fed. 630.

A. Leo Everett and Everett, Clarke & Benedict, all of New York City, for appellant.

Mark Ash and Alexander & Ash, all of New York City, for appellee Hudson Stone Co.

G. V. A. McCloskey, William J. Martin, and Foley & Martin, all of New York City, for appellees Crew and others.

F. V. Barns and James J. Macklin, both of New York City, for appellee C. F. Harms Co.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. The libelant, Harms Company, owner of the scow Castor, chartered her to the respondent Upper Hudson Company under a time charter. The Hudson Company loaded her with stone consigned to Paladino Bros. alongside the bulkhead of John J. Guinan in Coney Island creek, between West Twenty-Second and Twenty-Third streets, Brooklyn, and directed the tug H. B. Moore, Jr., to tow her there. The scow arrived at the bulkhead at 5 p. m. at half flood tide and, the discharging berth being occupied, Guinan's agent directed her to be made fast at the bulkhead astern of the boat that was unloading, which was done. Early the following morning, as the tide fell, the starboard quarter grounded on a lump, and, the rest of the scow continuing to fall with the tide, she was badly twisted and strained. Her owner filed this libel against the charterer to recover his damages on the ground that it had ordered her to an unsafe berth.

[1] The charter party containing no covenant to return in good order and condition and the claim being in tort, the charterer can be held only for negligence. It brought in Paladino Bros., the consignee, Crew and others, owners of the tug, and John J. Guinan, the wharfinger, as parties defendant, under the fifty-ninth rule. Paladino Bros. defaulted. The District Judge entered a decree in favor of the libelant, with costs, against Guinan, dismissed the libel as to the Upper Hudson Company and also as to Paladino Bros., without costs, and as to Crew and others, with costs to be taxed against the Upper Hudson Company. Guinan appealed, and the libelant, having sought affirmative relief in this court, is to be treated as appealing also. The S. V. Luckenbach, 197 Fed. 893, 117 C. C. A. 214.

[2] Careful soundings after the accident showed that the bottom shelves out from the bulkhead and that there is a lump opposite and some 10 to 15 feet outside of it. The master of the scow was employed by her owner, the libelant, and testified that he was ordered by the wharfinger's agent to make fast in the place where he did and to breast over the stern some 8 feet, while the agent says he told him to breast over 10 to 15 feet. However, he did breast over a distance estimated by the various witnesses at from 8 to 20 feet. He also on arrival made soundings with a pike pole, which indicated no danger, but which, as the boat was 31 feet in beam, would, of course, not have discovered the lump, then somewhere under her bottom.

The president of the charterer, before sending the boat to the wharf, had a conversation with Guinan, who assured him that there was 12 feet of water there. Although it was generally known that at low tide loaded boats would take the bottom, the master of the tug did not know of this lump, and did not leave until the boat had been made fast in the place where the wharfinger's agent directed.

Under these circumstances we discover no negligence in the master of the scow, the charterer of the scow, or the master of the tug, and think Judge Chatfield was clearly right in laying the responsibility for what happened on the wharfinger. He was lessee of the whole bulkhead, discharged the boats which came there, and collected wharfage while they stayed. It was his duty to know the character of the bottom, and to see that boats coming there should be adequately informed of any and all dangers. We do not understand the principle on which costs were taxed in the District Court, and direct the court to enter a decree in favor of the libelant for its damages, with costs of the District Court, and, as it also appealed, with half costs of this court against Guinan; dismissing the libel as to the Upper Hudson Stone Company, with costs of the District Court and one-half costs of this court against the libelant, the other half of the costs of this court to be taxed against Guinan; dismissing the libel against Crew and others, owners of the tug Moore, with costs of both courts against the Upper Hudson Company, which brought them in; and dismissing the libel against Paladino Bros., who defaulted, without costs.

THE JOHN RUGGE.

THE PERTH AMBOY.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 244.

1. COLLISION ⚷90—NAVIGATION RULES—SPECIAL CIRCUMSTANCES.

The steering and sailing rules apply to vessels navigating on steady courses, and where one of them is maneuvering merely, as, for instance, to get into or out of a dock, or turning around in harbor waters to get on her course, the situation is one of special circumstances, under article 27 of the Inland Rules (Act June 7, 1897, c. 4, § 1, art. 27, 30 Stat. 102 [Comp. St. 1913, § 7901]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181-186, 196; Dec. Dig. ⚷90.]

2. COLLISION ⚷102—TUGS WITH TOWS—MUTUAL FAULTS.

A collision in the Arthur Kill between a tug, with a tow, and a lighter in tow of another tug, being the second of two boats tandem, which were leaving a dock and being maneuvered to regain their course, *held* due to faults on the part of both tugs; the departing tug being in fault for not waiting for the other to pass with her tow, and the latter for not keeping an efficient lookout, which would have enabled her to avoid the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⚷102.]

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

Suit in admiralty for collision by Karan Feeney and Adele Harris, owners of the derrick lighter Karan Feeney, against the steam tug John Rugge, John Rugge and another, claimants, and the steam tug Perth Amboy, the Lehigh Valley Transportation Company, claimant. Decree for libelants against the Perth Amboy, and her claimant appeals. Modified.

Burlingham, Montgomery & Beecher, of New York City (C. I. Clark and Charles C. Burlingham, both of New York City, of counsel), for appellant.

H. E. Mattison and Park & Mattison, all of New York City, for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. March 13, 1914, at about 1 a. m. the tug John Rugge, with the derrick lighter Karan Feeney and three other boats in tow in two tiers on a hawser, rounded to in the Arthur Kill on the ebb tide, and landed the two port boats at the wharf of the Liebig Fertilizer Works, Cartaret, on the New Jersey side. As she

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

started away again from the wharf with the boat Wellington, and after her the lighter Feeney tandem, her witnesses say they saw, half a mile above, the side lights of the tug Perth Amboy coming down on the Jersey side of the Kill with towing lights, showing that she had a hawser tow. Notwithstanding this the Rugge continued to round to for the purpose of straightening out on her course down the Kill. Her whole tow, being 300 feet long, took up a large part of the navigable water, which is there from 500 to 600 feet wide. The Perth Amboy had a tow of five light barges in two tiers 100 feet wide on a hawser of 30 fathoms. Her master and pilot in the pilothouse saw the Rugge lying at the pier showing both side lights. Then they say that, when within 600 to 700 feet away, they saw the green light shut in and the red light appear. Thereupon they slowed, and did not discover that the Rugge had a tow until they were within 300 feet of it, whereupon they ported to go between it and the Jersey shore, and reversed. Notwithstanding this the Perth Amboy ran into the port side of the Feeney, which was so badly injured that she had to be beached, and her owner filed this libel against both the tugs. The District Judge directed a decree against the Perth Amboy and discharged the Rugge, from which the claimant of the Perth Amboy appeals.

[1, 2] The libel charged that the Perth Amboy was at fault for violating the starboard hand rule governing crossing courses, whereas the court held her at fault for violating the overtaking rule. We cannot agree to either view. The steering and sailing rules apply to vessels navigating on steady courses. Where one of them is maneuvering merely, as, for instance, to get into or out of a dock, or, as in this case, winding around to get on her course, the situation is one of special circumstances, under article 27 of the Inland Regulations, which requires each vessel to act prudently. The Servia, 149 U. S. 144, 13 Sup. Ct. 877, 37 L. Ed. 681; Monk v. The Englis, 176 Fed. 723, 100 C. C. A. 579; River & Harbor Transportation Co. v. Transfer No. 19, 194 Fed. 77, 114 C. C. A. 155. While the Rugge was rounding to for the purpose of getting on her course, the situation was not governed by either rule. The witnesses from the Rugge say that when she started from her wharf the Perth Amboy was half a mile above, while those from the Perth Amboy say that she was not over 700 feet. Without attempting to fix the distance, it is quite obvious that the time and distance must have been very short, because the stern of the Feeney had not got more than 30 feet away from the wharf when the collision occurred.

It seems to us that common prudence should have caused the master of the Rugge to postpone his maneuver in these narrow waters until the Perth Amboy had passed. He did not know how long or how wide her tow was, and he did know that, being on a hawser, it would be most difficult to handle on an ebb tide if any emergency arose. On the other hand, we think the Perth Amboy to blame for keeping a bad lookout. If she had any lookout forward at all, about which there is room for doubt, he was not produced. The master and pilot, who were both in the pilothouse, should have seen the lights of the

Rugge before they did, and should have seen by her towing lights that she had a hawser tow, and navigated accordingly. We are quite satisfied, notwithstanding the testimony of the witnesses from the Perth Amboy to the effect that the Rugge's towing lights must have been put up after the collision, that they were properly set and burning and should have been seen.

The decree is modified, by directing that both vessels be held at fault, and the libelant given the usual decree against them.

In re INTEROCEAN TRANSP. CO. OF AMERICA, Inc.

LEVIS v. AMERICAN TRADING CO.

(Circuit Court of Appeals, Second Circuit. June 9, 1916.)

No. 269.

BANKRUPTCY ⚷140(2)—MISREPRESENTATIONS—RECLAMATION OF FUNDS.

The bankrupt agreed to furnish the charterer of a steamship a full cargo for a lump freight; the charter party providing that payment of charter money should be "direct to the owners of the ship upon issuance of bills of lading, or to the authorized agent of the ship upon signed bills of lading signed by the captain, which would constitute a lien." Claimant engaged room from the bankrupt for steel for transportation on the ship, delivered it, and was notified by the bankrupt to pay the freight against the bill of lading; the bankrupt delivering a bill of lading signed by it. *Held* that, as the bankrupt was unable to pay the lump freight, and could not obtain a bill of lading signed by the master, and as its execution of the bill of lading was an assertion that it was an agent of the steamship, claimant might, the assertion being false, rescind and reclaim the sum it paid as freight from the bankrupt's receiver.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. ⚷140(2).]

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

In the matter of the bankruptcy of Interocean Transportation Company of America, Incorporated. Petition by the American Trading Company to reclaim moneys paid the bankrupt. From an order in favor of petitioner, Robert P. Levis, as receiver, appeals. Affirmed.

C. L. Greenhall, of New York City, for appellant.

Stetson, Jennings & Russell, of New York City (J. H. Auchincloss, of New York City, of counsel), for appellee.

Before COXE and WARD, Circuit Judges, and HOUGH, District Judge.

WARD, Circuit Judge. August 9, 1915, the American Trading Company engaged through a freight broker room for 80 tons of steel sheets to be transported from New York to Marseilles by the Interocean Transportation Company of America. September 3, 1915, the Transportation Company agreed with one Monahan, charterer of the Swedish steamship Ada, to furnish a full cargo for a port in the Mediterranean not east of the west coast of Italy, for a lump freight of $37,500, or to two ports for $39,000:

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

"Payment of charter money is to be paid directly to the owners of the ship upon issuance of bills of lading or to the authorized agent of the ship upon signed bills of lading signed by the captain which bills of lading will constitute a lien upon the ship."

The Trading Company, under permit from the Transportation Company, delivered the steel to the steamship September 10 and 13, and was notified September 15, to pay for the freight $1,060.38 against the bill of lading, on which day the Transportation Company received the freight and delivered a bill of lading to the Trading Company, which was signed as follows:

"In witness whereof the master or agent of the steamship hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.
"Interocean Transportation Co. of America, Inc.,
"By Guert G. Jackson."

The Transportation Company, not being the master, thus asserted itself to be the agent of the steamship. In point of fact, the Transportation Company was not able to pay its freight money to Monahan and could not obtain a bill of lading signed by the master of the steamship, as its agreement with Monahan required, or any bill of lading binding either the ship, the owners, or the charterer. It therefore had no authority whatever to issue a bill of lading as agent of the ship. Such a document was perfectly invalid as a contract of carriage. The Transportation Company kept this check, along with similar checks of other shippers, separate and uncollected until September 17, when it delivered the same to a receiver who had been appointed in an involuntary proceeding in bankruptcy begun against it. September 18 the receiver deposited and collected the check.

We think it quite clear that the transportation company in signing the bill of lading represented itself to be the agent of the steamship, and that, such representation being as to an existing fact and false, although not fraudulently made, the Trading Company had the right to rescind and reclaim the sum it paid as freight now in the hands of the receiver.

The order is affirmed.

THE FLEMINGTON.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 223.

COLLISION ⚷100(2)—STEAM VESSELS MEETING IN FOG—FAILURE TO SOUND FOG SIGNALS.

A ferryboat passing down and across North River from Weehawken in a fog *held* in fault for a collision with a car float in tow alongside of a tug passing up a short distance outside the New York piers, on the ground that she was not sounding the fog signals required by the rules.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 214, 215; Dec. Dig. ⚷100(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 the West Shore Railroad Company, owner of the ferryboat Syracuse, against the steam tug Flemington; the Central Railroad of New Jersey, claimant. Decree for libelant, and claimant appeals. Reversed.

F. V. Barns and James J. Machlin, both of New York City, for appellant.

E. Farwell, James K. Symmers, and Barry, Wainwright, Thacher & Symmers, all of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

COXE, Circuit Judge. This is an appeal from a final decree of the District Court for the Southern District of New York holding the steam tug Flemington solely liable for a collision between a car float in tow of the tug and the ferryboat Syracuse. The collision occurred, in a dense fog, between Piers 21 and 22 North River about 400 feet from the pier line. The tide was ebb. The tug, with the float on her port side, proceeded across the river and because of the thick fog tied up at Pier No. 10 on the New York side. The fog lifting soon after, the master of the tug decided to proceed to his destination and started up the river, going slowly and sounding the whistle at intervals. The Syracuse was bound down the river from Weehawken to Cortlandt street blowing her whistle at intervals. The tide was the slack of ebb but there was a freshet running in the river.

We think the evidence shows that the Syracuse did not sound the regulation fog signals. She did blow a series of short toots, but the law does not provide for such signals and the absence of the regulation long blast signals may well have confused and misled the master of the Flemington. Certainly the burden was on the Syracuse to show that the failure to blow the long blasts, as required by law, did not contribute to the injury. We do not see how we can say that this clear violation of the rules might not have caused or contributed to the collision. As was said by the Supreme Court in The Pennsylvania, 19 Wall. 125, at page 136, 22 L. Ed. 148:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

If it were the duty of the Flemington to slow down it was equally the duty of the Syracuse to do the same, especially as she was coming down on the freshet tide. Even if not under steam, she should, at least, by backing have maintained her position and not drifted down the river.

We think that the decree should be reversed with costs of this court and the case remanded with instructions to enter a decree dividing the damages and costs of the District Court.

In re KAPLAN et al.

KAPLAN v. DREVENO et al.

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

No. 2271.

1. BANKRUPTCY ⚷69—ADJUDICATION—PARTNERSHIP.

Before one can be adjudicated a bankrupt as a member of a firm, it must appear that he was a partner, and the mere fact that he had held himself out to some creditors as a partner, while raising an estoppel in their favor, is insufficient to predicate an adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51–53, 56; Dec. Dig. ⚷69.]

2. BANKRUPTCY ⚷449—APPEALS—PRACTICE.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), appeals are taken as in equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⚷449.]

3. BANKRUPTCY ⚷467—REVIEW—FINDINGS.

An order adjudging appellant a bankrupt as a member of a firm, based on conflicting evidence, will not be disturbed on appeal, notwithstanding such appeal presents the controversy for determination de novo, unless the record discloses a misapprehension of the testimony.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⚷467.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of Benjamin Kaplan, Charles Kaplan, and Samuel Kaplán, doing business as the Kaplan Savings Bank, bankrupt. From an order adjudging Samuel Kaplan and others bankrupts as partners, on the petition of Meyer Dreveno and others, Samuel Kaplan appeals. Affirmed.

Max Luster, of Chicago, Ill., for appellant.

Herman Frank, of Chicago, Ill., and Harry J. Laurie, for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. Appellees filed a petition seeking to have Benjamin, Charles, and Samuel Kaplan adjudged bankrupts as partners. From an order so adjudging them, Samuel Kaplan appeals.

[1] To justify the adjudication there must be evidence from which the court could properly find as a fact that Samuel Kaplan was a partner. It would not be enough that to various creditors he had held himself out as a partner, because, while an estoppel might give rights to those who were misled, in order to give rights to all creditors he must have been in fact a partner.

[2, 3] The contention has been earnestly made that the evidence is not sufficient to warrant the conclusion that Samuel was in fact a partner. From the printed record we might have considerable difficulty in determining the truth as between contradictory witnesses. But the trial judge had the advantage of estimating their credibility by consid-

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

ering their manner and conduct as witnesses. This is an appeal "as in equity" under section 25a. In equity cases, under the new rules, appeals present the controversy for determination de novo as under the old rules; but where the trial judge has heard the testimony in open court, his finding of fact should not be disturbed, unless the record very clearly discloses either a misapprehension of the testimony or a mistaken application of the law. American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129.

In this case we find in the record sufficient evidence to warrant the finding that Samuel Kaplan was in fact a member of the partnership, and that there was no error in acting on this evidence.

The order is affirmed.

HOPKINS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 6, 1916.)

No. 303.

1. Criminal Law ⚷1054(1)—Appeal—Assignments of Error.
   Rulings on the admission of evidence, as to which no exceptions were taken, cannot be reviewed.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2662; Dec. Dig. ⚷1054(1).]

2. Bankruptcy ⚷495—Offenses—False Oaths—Evidence.
   In a prosecution for making false oaths in a proceeding in bankruptcy, the judgment roll in a previous action, to which defendant was a party, is properly admitted in evidence as bearing on defendant's motive and the reason for his testimony in the bankruptcy proceeding.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ⚷495.]

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

Clarence E. Hopkins was convicted of having made false oaths in a bankruptcy proceeding, and he brings error. Affirmed.

J. Grattan MacMahon, of Brooklyn, N. Y., for plaintiff in error.
Melville J. France, of Brooklyn, N. Y., for the United States.

Before COXE and WARD, Circuit Judges.

COXE, Circuit Judge. The indictment charged the defendant with having sworn falsely in seven distinct instances in bankruptcy proceedings in violation of the provisions of the Bankruptcy Act.

Section 29, subdivision b (2), provides that:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently * * * made a false oath or account in, or in relation to, any proceeding in bankruptcy."

[1] The defendant has filed seven assignments of error. Assignment No. II relates to the admission of the judgment roll in the suit of Edward A. Mager v. Clarence E. Hopkins, but no exception was

taken by the defendant to the ruling of the court. The same is true of all the rulings of which error is predicated except as to the rulings pointed out in the first and sixth assignments of error, which relate respectively to the admission of the judgment roll in the case of Helena Lindner against Clarence E. Hopkins and the admission of the testimony of Edward A. Mager that his earnings did not exceed $1,500 annually.

[2] Regarding the admission of the judgment roll in Lindner v. Hopkins, we think no reversible error was made; it was admissible as bearing upon the defendant's motive and the reason for his testimony in the bankruptcy proceedings.

The testimony of Mager which was objected to was proper as bearing upon the probability of his making a loan to the bankrupt of $1,900.

Within the rule laid down by this court in Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494, we think that the conviction of the defendant was amply sustained by the proof.

The judgment is affirmed.

UNITED STATES EXPANSION BOLT CO. v. H. G. KRONCKE HARDWARE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

Nos. 2320, 2331.

1. COURTS ⚷263—SUIT FOR INFRINGEMENT—COUNTERCLAIM.
The right of a defendant in an infringement suit to set up in his answer a counterclaim for infringement of other patents, as authorized by equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), does not depend on whether or not he could have maintained an original suit thereon in that district; any objection on that ground having been waived by complainant by bringing the suit.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. ⚷263.]

2. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—EXPANSION BOLT.
The McCreery and McCreery patent, No. 623,809, the Cook patent, No. 685,820, and the Pleister patent, No. 973,559, all for expansion bolts, each held valid, but for minor improvements and of narrow scope and not infringed.

3. COURTS ⚷263—JURISDICTION OF FEDERAL COURTS—COUNTERCLAIM.
In an infringement suit where a defendant is a citizen of the same state as complainant and the court has jurisdiction only because of the nature of the suit, it is without jurisdiction to adjudicate a counterclaim for unfair competition, set up by such defendant in his answer, together with a counterclaim for infringement of other patents which is not sustained.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. ⚷263.]

Appeals from the District Court of the United States for the Western District of Wisconsin.

Suit in equity by the United States Expansion Bolt Company against

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the H. G. Kroncke Hardware Company, the Diamond Expansion Bolt Company, and Henry B. Newhall. Decree for defendants, and complainant appeals. Affirmed in part, and reversed in part.

For opinion below, see 225 Fed. 383.

In case No. 2320:

Banning & Banning, of Chicago, Ill., and Vincent P. Donihee, of New York City, for appellant.

Alan M. Johnson, of New York City, and Thomas F. Sheridan, of Chicago, Ill., for appellee.

In case No. 2331:

Alan M. Johnson, of New York City, and Thomas F. Sheridan, of Chicago, Ill., for appellant.

Banning & Banning, of Chicago, Ill., and Vincent P. Donihee, of New York City, for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge. On May 8, 1914, appellant, a corporation of the state of New York, brought this suit against one of the appellees, H. G. Kroncke Hardware Company, a Wisconsin corporation, to restrain infringement of claims 1, 2, and 3 of letters patent No. 623,809, granted April 25, 1899, to K. and V. McCreery for an expansion bolt. On May 9, 1914, appellant's counsel advised Alan M. Johnson, whom it knew to be counsel for the Diamond Expansion Bolt Company, a New York corporation and one of the appellees, manufacturer of the diamond screw anchors handled by the Kroncke Hardware Company and charged to be an infringement of said claims, that such suit had been commenced, inclosing a copy of the bill and saying:

"We presume that your clients will undertake the defense of this suit and accordingly inclose herewith a copy of the bill of complaint for your files."

On May 28, 1914, the hardware company filed its answer, traversing the bill and setting up title in the Diamond Expansion Bolt Company of certain hereinafter named patents alleged to cover the diamond screw anchors. On August 6, 1914, the Diamond Expansion Bolt Company filed its petition to be made a formal party. This, appellant contested. On hearing had, August 10, 1914, the District Court granted such leave, in accordance with its opinion (216 Fed. 186). This leave the Diamond Company has availed itself of by joining in the answer of the Kroncke Company filed May 28, 1914, wherein they set up infringement of two patents owned or controlled by them, to wit, Cook patent, No. 685,820, granted November 5, 1901, for an expansion shield, and Pleister patent, No. 973,559 granted October 25, 1910, for an expansion bolt, and also acts of unfair competition on the part of appellant. Thereafter Newhall, licensor of the Pleister patent, a citizen of the state of New Hampshire, also joined in said answer and cross-petition. This answer propounded several questions to appellant. The answer thereupon proceeds, upon the authority of equity rule 30, 198 Fed. xxvi, 115 C. C. A. xxvi, to ask injunction and accounting as to the last-named three items, to wit, the Cook and Pleister patents and the unfair competition. Appellant's motion to dismiss the patent counterclaims was denied on August 10, 1914—(see [D. C.] 216 Fed. 186). With regard to the jurisdiction of the court to consider these matters, appellant strenuously contended that the Diamond Company, having come into the case for the purpose of defending the suit as brought, might not inject into it matters which would not, as original claims, be enforceable against it in the féderal court for the Western district of Wisconsin, and which were therefore not fairly to be deemed available counterclaims within the meaning of equity rule 30. These matters were also covered by the court in its order of August 10, 1914 (see opinion [D. C.] 216 Fed. 186).

There is also embraced within the suit a counterclaim brought by the United States Expansion Bolt Company against the Diamond Company for damages growing out of alleged injury to the former's trade. As no evidence was offered to this claim, it will not be further considered.

The appellant, after the decision of the court last named, proceeded to make reply to the appellee's counterclaims and interrogatories. From the latter it appears that appellant made no sales of any of the articles alleged to infringe appellee's patents, except one sale of about 100 lead anchors made in the Western district of Wisconsin. It does not appear that appellant had any established place of business in that district. The reply traverses the substance of the counterclaims of appellee. A vast amount of testimony was taken. On argument heard, such further proceedings were had that the court sustained all three of the patents and a certain prior use, but found that none of the patents was infringed. Appellee's charge of unfair competition was also sustained, and damages and an accounting awarded, without costs to either party, and the bill was dismissed as to Kroncke. These several orders of the court are assigned as errors, including the order permitting the Diamond Expansion Bolt Company and Newhall to file counterclaims.

[1] The question which first demands attention is that of jurisdiction. Assuming the decision of the District Court as to infringement of the McCreery patent to be correct, had the District Court power to adjudicate upon appellees' two patents and the counterclaim for unfair competition on the facts as presented? There can be no doubt that, as was said in Peninsular Iron Company v. Stone, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020:

> "It is therefore a suit to which citizens of Ohio are parties on one side and a citizen of Ohio a party on the other, with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute."

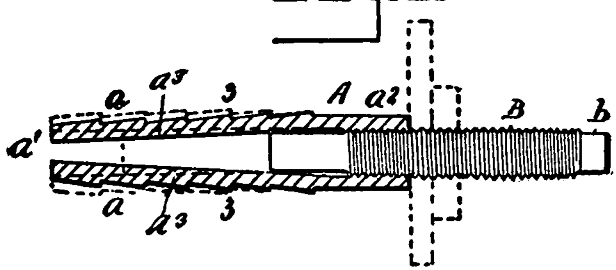
To all intents and purposes, so far as the counterclaims are concerned, appellant was a defendant and entitled to have the question of infringement in the Pleister and Cook patents tried in the district in which it was an inhabitant or in any district in which it had infringed, and where it had an established place of business, provided it did not waive its right thereto. First National Bank v. Morgan, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282.

While suit could not, in the first instance, have been maintained in Wisconsin by the Diamond Expansion Bolt Company against appellant over its objection upon either the Pleister or the Cook patent, we have no doubt but that appellant waived that objection by its action in bringing the suit in the Wisconsin district as well as by statements of counsel shown on pages 1085 and 1087 of the record in the premises with regard to the patents of the counterclaims. The proceeding was one for infringement of a patent in each case. Of such a case some federal court had jurisdiction. So that no question of federal jurisdiction is involved. Appellant had the right to waive the question of privilege, and did so. We think the District Court proceeded properly to treat those matters as coming within the provisions of new equity rule 30 as pertaining to the matter of jurisdiction in equity and not to federal jurisdiction.

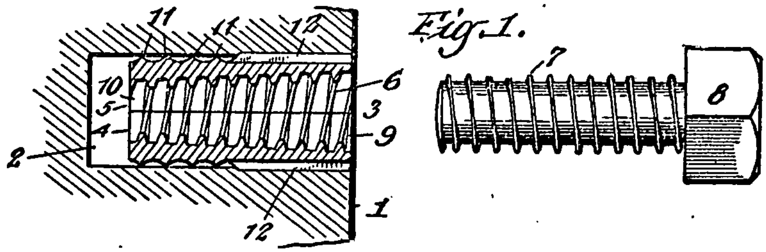
[2] We proceed now to a consideration of the merits of the counterclaim for infringement. The opinion of the District Court on final hearing is found in (D. C.) 225 Fed. 383, wherein the court fully discusses the merits of the three patents in suit, holding as above stated, that while each is valid, none of them is infringed. A careful review of the evidence leads us to concur in the decision of the District Court as to these patents and also as to the question of prior public use. The field is very narrow. The prior art discloses the general principles which pervade each of the devices, and the latter must depend upon minor improvements for the disclosure of invention.

The McCreery patent contains the interior tapering opening longitudinally through the shield, whereby the inside or initially inserted end of the shield is expanded to a greater degree than other portions thereof by the advancing screw. True, it discloses a large iron expansion device, but the principles are there except the exterior longitudinal guides which serve to direct and steady the inward progress of the expansion bolt or shield and keep it from turning. These guides were found to have been added to the device of the McCreery patent in the prior public use expansion bolts made by appellant, taken from the Colonial Arcade and Colonial Building in Cleveland, Ohio. Fig. 2 of the device of the McCreery patent is herewith reproduced:

Fig. 2.



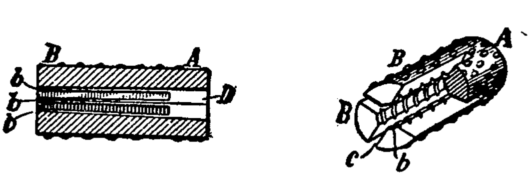
The later devices are, of course, improvements on McCreery and the public use bolts. They disclose more elaborate expansion bolts with somewhat different exterior ribs or projections. These may be, and probably are more convenient and more ornamental. But the improvements are at most very narrowly patentable. The old iron McCreery expansion bolt, with the longitudinal guide flange or rib additions of the prior public use device, tells the whole story, though roughly. For instance, in the alleged infringed device of the Pleister patent, Fig. 1 of which is herewith reproduced, it will be seen that



the principal difference is in the varying proportions of the horizontal ribs on the exterior of the bolt. These, it is claimed, serve also to keep the shields of the expansion bolt from turning with the action of the screw when it is forced in. The two part feature, per se, was not new.

The Cook expansion shield is practically the same thing as the Pleister device, made from some "soft ductile material." It has the tapering bore of McCreery, the circumferential ribs or what is equivalent thereto, but differs, as the District Court says, in respect to the slots between the parts of the shield. The following cut is a reproduction of Figs. 1 and 4 thereof:

Fig. 1 Fig. 4



These two patents, Cook and Pleister, while differing in minor respects from McCreery and the prior art, do not differ essentially, but only in detail, in respect to the general features embraced within the McCreery patent as modified by the prior use devices. Whatever invention they possess must be found in features not used by appellant.

We therefore hold the three patents in suit to be valid but not infringed, and that portion of the decree of the District Court which so holds is affirmed.

[3] With regard to the counterclaim for unfair competition, a different situation arises. As to that, the federal court as such had no original jurisdiction, there being in it no federal question or diversity of citizenship. The District Court took jurisdiction under rule 30. But that rule pertains only to equitable jurisdiction. It can-

not, and was not intended to, confer federal jurisdiction. Geneva Furniture Co. v. Karpen, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295; Mecky v. Grabowski (C. C.) 177 Fed. 591. The facts of the present case, we think, bring it within the reasoning and language of the Geneva furniture case. There the District Court dismissed the bill for want of jurisdiction. The defendants in that suit were charged, as appears from the opinion of the court: (a) With contributing to the infringement of letters patent belonging to the plaintiff by wrongfully inducing and persuading designated licensees of the plaintiff to make, use, and sell devices embodying the inventions of the patents in circumstances not authorized or permitted by their licenses; (b) with wrongfully procuring such licensees to violate their license contracts in designated particulars, some of which have no bearing on the charge of infringement; and (c) with refusing to perform stipulations whereby the defendants agreed to assign to the plaintiff certain other letters patent. The prayer is for an injunction and accounting in respect of the contributory infringement, for an injunction and damages in respect of the procured breach of the licensees' contractual obligations, and for the specific performance of the stipulations to assign the other letters patent. The plaintiff is described as a New York corporation, one of the defendants as a West Virginia corporation, another as an Illinois corporation, and the third as an individual citizen of the latter state. The West Virginia company is alleged to have a regular and established place of business in the Northern district of Illinois, and the acts of infringement and contributory infringement are charged to have been committed in that district.

The court found it had jurisdiction of the matter involved in the charge of infringement, as arising under the patent laws of the United States and as to such matters reversed the decree of the District Court, dismissing the bill for want of equity.

"But the other portions of the bill," says the court, "stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices embodying the inventions of the plaintiff's patent, but resting only upon a breach of contractual obligations—do not arise under the patent laws. New Marshall Co. v. Marshall Engine Co., 223 U. S. 473, 32 Sup. Ct. 238, 56 L. Ed. 513; Henry v. Dick Co., 224 U. S. 1, 14, 15, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. As to them no federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff (Jud. Code [Act March 3, 1911, c. 231] § 51, 36 Stat. 1101 [Comp. St. 1913, § 1033]); and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute. Thus the West Virginia company's objection, while not good as to the entire bill, was good as to the causes of action not arising under the patent laws. Whether these causes of action can be retained as against the other defendants, after they are eliminated so far as the West Virginia company is concerned, is not open to consideration now. It is not a question of federal jurisdiction within the meaning of Jud. Code, § 238 (Comp. St. 1913, § 1215) but only one of general equity jurisdiction and practice applicable as well to state as to federal courts. Bogart v. Southern Pacific Co., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768, and cases cited.

"The decree of dismissal is reversed, and the cause is remanded for further proceedings in conformity with this opinion."

It is said in Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, where a suit had been brought against a Missouri corporation by a West Virginia corporation in the Eastern judicial district of Missouri to restrain infringement of a trade-mark and for unfair competition, in which suit the trade-mark was not upheld:

"The opposite parties to the suit are citizens of different states; and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trade-mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

In Ludwigs Mfg. Co. v. Ludwigs, 206 Fed. 64, 124 C. C. A. 194, this court held, in a case brought for infringement of a patent and for unfair competition, by one citizen of Illinois against another citizen of Illinois, that, having sustained the patent and infringement thereof, it would entertain the charges of unfair competition, "which, though in one aspect arising from fraud in trade, in a fairer aspect are aggravations of the infringement." Inasmuch, however, as, in the present case, the infringement is not sustained, there are no damages to be aggravated. There are a number of cases which hold that the charge as to which there is jurisdiction being found by the court to be not sustained, whether because of invalidity of the patent or want of infringement, the court cannot adjudicate other charges jurisdiction over which depended alone upon the jurisdiction acquired through the main or original charge of the bill. Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 667, 21 Sup. Ct. 270, 45 L. Ed. 365; Leschen Rope Co. v. Broderick, 201 U. S. 166, 172, 26 Sup. Ct. 425, 50 L. Ed. 710; Hutchinson, Pierce & Co. v. Loewy, 163 Fed. 42, 90 C. C. A. 1; Burt et al. v. Smith, 71 Fed. 163, 17 C. C. A. 573; Sprigg v. Fisher (D. C.) 222 Fed. 964; Bernstein v. Danwitz (C. C.) 190 Fed. 604; Mecky v. Grabowski, supra; Cushman v. Atlantis Fountain Pen Co. et al. (C. C.) 164 Fed. 95. To the same effect are Warner v. Searle & Hereth Co., 191 U. S. 195, 24 Sup. Ct. 79, 48 L. Ed. 145, and Schiebel Toy & Novelty Co. v. Clark, 217 Fed. 760, 133 C. C. A. 490, in which latter case it is explained that the records disclose that in both Globe Wernicke Co. v. Macey Co., 119 Fed. 696, 56 C. C. A. 304, and Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 128 C. C. A. 203, L. R. A. 1915F, 1107, decided in the Sixth Circuit, diversity of citizenship existed.

The case of Siler v. L. & N. R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753, is cited in support of the jurisdiction of the District Court herein. The bill in that case attacked the validity of an act of the Legislature of Kentucky as in violation of section 1 of the Fourteenth Amendment and on other grounds, among which was the charge that it violated the federal Constitution by reason of the enormous fines and penalties therein provided for a violation of any of the provisions of the act. The bill also charged that the order of the commission created by the act was invalid as violating the federal

Constitution if it was authorized by the statute, and also that it was unauthorized by the statute, the latter a local question. In its desire to avoid the decision of a constitutional question, the court proceeded to investigate this last question, holding that it had jurisdiction so to do as had the circuit court because of the jurisdiction upon the other allegations of the bill, and, finding that the commission had exceeded its authority, affirmed the decision of the circuit court. But while the grounds of attack both on the order and the statute were separate and distinct, the subject-matter over which the federal court had jurisdiction, their alleged invalidity was a single one. And as that charge of invalidity was held to have been based, in good faith, on a violation of the federal Constitution, the case holds only that under such circumstances the court may determine the question of its validity as well on other grounds—grounds which, if they alone had been alleged, would not have brought the controversy within the jurisdiction of the federal courts. We do not deem this case on the facts presented authority for the proposition contended for in the present case, especially in view of the other decisions of the Supreme Court above referred to. The counterclaims herein are distinct and independent causes of action, not merely separate grounds for a single cause of action, and that of unfair competition may not be dealt with by the federal court in the absence of diversity of citizenship. Appellees cite Foster's Federal Practice (4th Ed.), vol. 1, p. 193, where it is said:

"After a federal court has acquired jurisdiction, through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same state, and there is no other ground of federal jurisdiction."

An examination of the authorities cited by the author for the text shows that in every one of them reference is made to some special facts—such as the death of a party and substitution of an administrator, or other change in parties, which facts would not oust jurisdiction; or where the res is in the federal court, as a judgment or decree attacked, or property in regard to which suit is brought, or some situation exists in which suit would not be effective outside the particular federal court whose jurisdiction would be involved. The excerpt is not, nor was it intended by the author to be, an argument in support of the jurisdiction of the federal courts in cases such as those here presented.

For the reasons above stated, that part of the decree of the District Court which finds unfair competition and orders an accounting is reversed, with direction to the District Court to dismiss the counterclaim for unfair competition for want of jurisdiction, and tax the costs one-third to appellant and two-thirds to appellees.

RACINE ENGINE & MACHINERY CO. v. CONFECTIONERS' MACHINERY & MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916.)

No. 2284.

1. PATENTS ⚷324(6)—SUIT FOR INFRINGEMENT—APPEAL FROM INTERLOCUTORY DECREE—EFFECT OF AFFIRMANCE.

On the general affirmance on appeal of an interlocutory decree in a patent case, sustaining the patent, finding infringement, and awarding an injunction, such issues were conclusively settled; but so much of decree as relates to the accounting remains purely interlocutory, and subject to modification by the District Court until final decree.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 600; Dec. Dig. ⚷324(6).]

2. CORPORATIONS ⚷590(4)—LIABILITY FOR INFRINGEMENT—SUCCEEDING CORPORATION.

A corporation, purchasing all the property of another corporation, does not thereby become liable for the obligations of the latter, and in the absence of an express agreement therefor cannot be held to account for its infringement of a patent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2365; Dec. Dig. ⚷590(4).]

3 PATENTS ⚷318(3)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting by an infringer for profits made on the sale of infringing machines, it should not be charged with the agreed price at which old machines were taken in exchange, where it appears that they were scrapped and nothing was realized therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 570, 571, 575; Dec. Dig. ⚷318(3).]

4. PATENTS ⚷318(4)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.

Where the patented elements give the entire value to an infringing machine, without which it would not be marketable, the complainant is entitled to recover all the profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 572, 573; Dec. Dig. ⚷318(4).]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by the Confectioners' Machinery & Manufacturing Company against the Racine Engine & Machinery Company. From final decree, defendant appeals. Reversed.

The amended bill of complaint, filed January 18, 1908, charges appellant with infringement of patent to Clacher, No. 449,688, April 7, 1891, for improvement in separating and filling machines for confectioners' use, and asks for an injunction and accounting for damages and profits. It is charged that on April 3, 1903, appellee brought suit in the federal Circuit Court for Massachusetts against Kibbe Bros. Company, charging infringement of said patent through the use of a machine which the bill here alleges was made by appellants, and which suit in Massachusetts resulted in a decree entered November 27, 1905, sustaining the patent and adjudging Kibbe Bros. Company to have infringed it. It is alleged that the defense of the Massachusetts suit was assumed, conducted, and paid for by appellant, and that appellant is bound by the decree therein, and is estopped to contest or deny the validity of the letters patent.

July 14, 1908, the District Court entered an interlocutory decree in this cause, finding that appellant was estopped to deny the validity of the patent,

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

and that it infringed same, and enjoining appellant from selling or disposing of any infringing machines which were made by appellant prior to April 7, 1908, the date of expiration of the patent, and referring the cause to a master for accounting of damages and profits. 163 Fed. 914. On appeal by appellant this decree was on April 15, 1909, affirmed, without opinion, by this court.

In the interlocutory decree it is provided that appellee recover from appellant profits, gains, and advantages which appellant derived on account of the infringement from November 27, 1905, to April 7, 1908. After the hearing had begun before the master, upon motion of appellee and over objection of appellant the District Court on February 1, 1910, entered an order amending the interlocutory decree by changing the date therein provided for the accounting to commence, viz. November 27, 1905 (which is the date of entry of the Massachusetts decree), to April 3, 1903 (which is the date of the commencement of the Massachusetts suit). The accounting was accordingly taken beginning April 3, 1903, but the master in his report separated it into three periods, which periods, and the amount of net profits on sale of infringing machines during each period were reported as follows: (a) November 27, 1905, to April 7, 1908, $3,093.76; (b) April 15, 1905, to November 27, 1908, $236.76; and (c) April 3, 1903, to April 15, 1905, $386.82. To the total of these amounts the master added two items, one of $275 (accruing during the second period above designated), and one of $2,502.43 (accruing during the third period), which represented the prices at which old machines had from time to time been taken back in exchange for new ones, and which prices had been deducted on the books in estimating the items of net profits as above stated. The final decree was for an aggregate, including the items for old machines, of $6,494.77, with interest from date of filing of master's report.

It appears that appellant was incorporated April 15, 1905. It then succeeded to the business of the Racine Manufacturing Company whose assets (consisting mainly, if not entirely, of its good will) appellant purchased, and whose stockholders were largely the same as those of appellant. Appellant contends that the court erred in amending the decree in respect to the date for commencing of the accounting, and in requiring appellant to account for profits which accrued to its predecessor, prior to appellant's incorporation, and in charging as profits the amounts at which old machines were taken back, and in allowing to appellee the entire profits on the machines, whereas appellant claims that substantial features of the machines entering into their construction and marketability were not covered by the patent, and that there should have been an apportionment of the profits derived from the sale of the machines.

John B. Simmons, of Racine, Wis., and F. E. Dennett, of Milwaukee, Wis., for appellant.

William Quinby, of Boston, Mass., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] But for the Act of Congress of March 3, 1891, c. 517, 26 Stat. 828, creating the Court of Appeals, and section 7 of said act (Comp. St. 1913, § 1121), giving right of appeal from an interlocutory decree granting an injunction—

"an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause." Smith v. Vulcan Iron Works, 165 U. S. 518, 524, 17 Sup. Ct. 407, 410 (41 L. Ed. 810), and cases there cited.

In the recent work of Whitehouse on Equity Practice, vol. 1, § 393, it is said:

"According to the modern practice, at the final hearing all interlocutory orders made at any previous stages of the proceedings are before the court and may be modified, altered or vacated as justice may require."

The cases there cited fully sustain the text.

Prior to the decision in Smith v. Vulcan Iron Works there was a contrariety of opinion among the Courts of Appeals as to whether, upon an appeal from a decree granting a preliminary injunction, the merits of the controversy upon which the right to the injunction is predicated could be finally settled. In that case this was determined in the affirmative, and has since been the general rule; and so if and after hearing the patent is sustained, infringement found and injunction awarded, upon appeal this court may finally determine the validity of the patent, and its determination is binding on the District Court. But as to so much of the decree as affects the accounting only, and bears no necessary relation to the merits of the injunction, the statute providing for appeal in case of injunction has no application, and the decree in this respect remains purely interlocutory, subject to modification by the District Court until entry of final decree. Affirmance generally of the interlocutory decree would not as to the accounting, make final that which, but for the appeal, would be interlocutory only. Over the accounting and all its incidents the District Court retains jurisdiction until final decree thereon is entered. We find no error in the order permitting the interlocutory decree to be amended by fixing an earlier date for the accounting to begin.

[2] But the record discloses that the earlier date thus fixed by the amendment would require appellant to account for profits for nearly two years before the date of its corporate organization. To meet this situation, it is stated in appellee's brief that "the present defendant is the successor of its predecessor," and calls attention to evidence in the record showing "formal adoption of the prior suit by the defendant's immediate predecessor," and "voucher showing payment of counsel fees and court costs, and that in such vouchers it is shown that the present defendant was such successor, and that 95 per cent. of appellant's stock was owned by its president, who was in practical control of the predecessor." Assuming all this to be warranted by the record, it would not make appellant liable to account for damages or profits growing out of infringement by its predecessor. These facts were material on the issue here as to the binding force of the Massachusetts decree, but are not sufficient to make appellant answerable for the torts or even the contracts of its business predecessor.

It is stated in appellee's brief, and authorities are cited in support, "that the present defendant was a merger or consolidation of two other corporations," including the predecessor corporation, and therefore becomes liable for the debts of such merging or consolidating corporations. But the record does not show any merger or consolidation. It appears from Mr. Peil's uncontradicted testimony that appellant purchased the good will of the predecessor, which had no other assets; but that for his stock in the new corporation (about 95 per cent. of the total) he paid par in cash. The record discloses nothing by way of agreement or otherwise to warrant the conclusion that appellant undertook to become liable for any obligation of its predecessor for damages or profits growing out of the latter's infringement of appellee's patent.

A corporation purchasing all the property of another corporation does not thereby become liable for the obligations of the latter. 5 Thompson, Corp. c. 148; 2 Cook, Corp. § 673. It follows that, notwithstanding the amendment, the accounting as to appellant should not begin prior to the date of its organization, April 15, 1905.

[3] There was no evidence of damages, but only of the profits on the infringing machines, as to which appellant's books constituted the only evidence offered. The master reported the profits for the period beginning April 15, 1905 (date of appellant's organization), and ending April 7, 1908 (date of expiration of patent), to be $3,330.50, of which $236.76 is for the period between April 15, 1905, and November 27, 1905. To these profits as ascertained from the books the master added items, $2,502.43 and $275, which the books showed were for old machines taken in exchange. The first of these items appears in the account as prior to April 15, 1905, and is therefore not in any event to be considered as against appellant. The item of $275 appears in the account from April 15, 1905, to November 27, 1905; but as to this item, as well as the larger item, it was testified that the old machines taken in exchange were in most instances scrapped, and realized nothing to appellant nor to its predecessor. We conclude from the record that this item of $275 should not be added to the profits to be accounted for by appellant.

[4] It is earnestly contended for appellant that in the infringing machines are combined material elements, patented and unpatented, aside from the Clacher invention, and that appellant should not be required to account for the entire profit shown to have been made on the infringing machines, but that the profits should be apportioned. The master reported that:

"Without the elements of the Clacher invention claims 1, 2, 3, 4, and 5 in the defendant's No. 3 Starch Buck, which it is admitted is the infringing machine, it would not be a marketable article, or salable structure. The employment of the infringing elements in this No. 3 Starch Buck is the life of the machine."

This conclusion is, we believe, warranted from the record. Attempt was made to show some sales of certain parts of the machine without the Clacher device; but the evidence thereon is unsatisfactory, and does not in our judgment afford sufficient basis for an apportionment of the profits. We feel justified in following here the course indicated by this court in Orr & Lockett Hardware Co. v. Murray, 163 Fed. 54, 89 C. C. A. 492, where under quite similar circumstances a decree for the entire profit shown to have been realized on the infringing article was affirmed. This is also in consonance with the rules laid down in the leading case of Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U. S. 604, 614, 32 Sup. Ct. 691, 694 (56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), in which the Supreme Court said:

"Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits."

The decree of the District Court is reversed, with direction to enter a decree against appellant and in favor of appellee for $3,330.52, with interest at 6 per cent. per annum from date of filing the report of the master to date of entry of the decree, such decree to be in other respects like the decree from which this appeal is prosecuted; each party to pay one-half of the costs of printing transcript of record on this appeal.

LUTEN v. SHARP et al.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1916.)

No. 4378.

1. APPEAL AND ERROR ⚷1011(1)—REVIEW—FINDINGS OF FACT.
Where the chancellor has considered and determined an issue of fact on conflicting testimony, the presumption is that his conclusion was correct, and an appellate court will not reverse it, unless the evidence clearly proves that he has made a serious mistake in his finding upon the question of fact, or has fallen into a controlling error of law.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⚷1011(1).]

2. PATENTS ⚷240—INFRINGEMENT—IMPROVEMENT PATENTS.
One who makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or colorable evasions thereof.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⚷240.]

3. PATENTS ⚷328—INFRINGEMENT—REINFORCED CONCRETE BRIDGES.
The Luten patents, No. 830,483, claim 18, No. 853,183, claims 20 and 21, No. 853,203, claims 6, 8, 9, 10, and 11, No. 853,204, claim 18, and No. 989,272, claims 3 and 4, all for improvements in the construction of reinforced concrete bridges construed, and *held* not infringed.

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

Suit in equity by Daniel B. Luten against Walter Sharp and Harry I. Jones. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 217 Fed. 76.

Russell T. MacFall, of Indianapolis, Ind. (Arthur M. Hood, of Indianapolis, Ind., and Stanley, Vermilion, Evans & Carey, of Wichita, Kan., on the brief), for appellant.

S. A. Smith, of Winfield, Kan., J. T. Lafferty, of Kansas City, Mo., and W. P. Hackney of Winfield, Kan., for appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

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

SANBORN, Circuit Judge. Daniel B. Luten appeals to this court from a decree which dismissed his complaint against Walter Sharp and Harry I. Jones for their alleged infringement of his letters patent for certain improvements in the reinforcement of cement girders, upright members, parapets, and floors of bridges over streams by placing therein, in the ways specified in his patents, steel rods, wire mesh, expanded metal, etc., to strengthen the various members of the structures. The validity of his patents was not decided, but the court below dismissed his suit on the ground that the defendants had not infringed them.

[1, 2] The use of steel and iron rods, wire mesh, expanded metal, and like articles embedded in different ways in cement girders, beams floors, posts, and other articles made of cement, to strengthen and reinforce them, was old, well known, and had long been practiced before the patented inventions of Luten here in question were discovered, and the question for review is one of fact. It is the question whether or not any of the plaintiff's patented monopolies have been infringed by the defendants. In this court, therefore, the case is governed by these rules: First, where the chancellor has considered and determined an issue of fact on conflicting testimony, the presumption is that his conclusion was correct, and an appellate court will not reverse it unless the evidence clearly proves that he has made a serious mistake in his finding upon the question of fact, or has fallen into a controlling error of law; and, second, one who makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or colorable evasions thereof.

[3] The alleged infringements of the defendants consist in the construction of a single bridge of two spans, one 40 feet and the other 20 feet in length, of cement girders or beams placed 4 feet apart upon piers, and extending from one pier to another, reinforced with steel rods embedded in the girders about 2 to 4 inches above the lower surface thereof, and extending on a level from end to end of each girder. These girders were about 2½ feet high; those on the sides of the bridge were higher, and extended a foot or 2 above the floor of the bridge and formed parapets. The floor was made of cement in which hog wire—that is to say, such mesh wire as is commonly used to fence hogs—was embedded throughout the length and breadth of the floor near its upper surface and up into the parapets. The claims which plaintiff insists are infringed by this structure must be treated separately, and they are the following:

Claim 18 of patent No. 830,483, issued to Daniel B. Luten September 4, 1906, is:

"A girder, beam or arch with reinforcing members following closely a portion of the unloaded surface, and then crossing to the loaded surface, and other roughened members following one surface closely."

The device of this patent was the combination of a primary system of reinforcing girders by the use of smooth steel rods extending lengthwise through them near the lower or unloaded surface and curving and extending upward towards the loaded surface at their ends, and a secondary system consisting of "some efficient non-slipping section, such as wire mesh, twisted, corrugated, or other irregular rods, expanded metal," etc., placed adjacent to the smooth rods of the primary system throughout the region of greatest tension; that is to say, throughout the space about midway between the piers. It is this secondary system that is referred to in the claim as "other roughened members following one surface closely." Because the defendant did not use this secondary system, which is an essential element of the device claimed, and because he did not curve and extend upward the ends of his smooth tension rods, he did not infringe this eighteenth claim.

Claims 20 and 21 of patent No. 853,183 to Mr. Luten, issued May 7, 1907, are:

"20. A bridge of concrete or similar material with ribs projecting above and below, and with tension members having shearing members attached thereto embedded in the lower ribs.

"21. A bridge of concrete or the like with ribs projecting both above and below and with a roadway between the upper ribs and having reinforcing members in the lower ribs."

The specifications and drawings of this patent disclose an arch with a rib beneath the tensional region at the crown of the arch, but no rib above the crown, and with ribs on the exterior of the arch for a short distance along the tensional regions about half-way from the crown to the abutments of the arch with reinforcing rods suitably anchored in the exterior ribs crossing the ring of the arch in the region of the non-bending movement and hooked around or otherwise attached to the interior rib under the crown of the arch. After describing this arrangement of ribs and reinforcement the patentee closed his specification with these words:

"I claim broadly, therefore, the arrangement of reinforcing rods and ribs along the regions of tension with the rods crossing the rib and joining at the regions between. I claim the arrangement of rods and ribs on alternately opposite sides of an arch rib, the rods crossing the rib and joining the alternate rods between the regions of tension."

And he then made 35 claims, the twentieth and twenty-first of which, quoted above, he insists are infringed. But the bridge which the defendant constructed had no such exterior or interior ribs to its alleged arches, no reinforcing rods anchored in the exterior ribs, crossing the rib of the arch in the non-tension regions and hooked or secured to the interior rib under the crown, nor any of the other specific novel devices portrayed in the specification and drawings and secured by the twentieth and twenty-first claims. And if these claims are not strictly limited to such devices, if they are broadly construed, so as to cover the alleged arches of the defendant, they become utterly void, for there could be no novelty at the time these devices were discovered in placing the ends of cement girders on piers, extending the outside girders a few inches or feet above the floor of the bridge to make parapets, reinforcing the girders with steel rods embedded therein near their unloaded surfaces and extending throughout their length, and there was no error in the finding of the court below that claims 20 and 21 of this patent were not infringed.

Counsel for Mr. Luten argue that claims 6, 8, 9, 10, and 11 of patent No. 853,203, issued to him May 7, 1907, are infringed by the bridge of the defendants. Claim 8 is for—

"a concrete bridge consisting of a floor with walls at each side and reinforcing members embedded transversely of the floor and extending upward into the walls."

Claims 6, 9, 10, and 11 are similar, but less descriptive of the defendants' structure, and unless claim 8 is infringed none of these claims is. If claim 8 should be construed literally and broadly without reference to the state of the art, or to the specification and drawings of the patent, or to the characer and purpose of the specific device it describes, this claim might be held to cover the defendants' structure for hog wire is embedded in their floor near its upper surface throughout its length and breadth, and it extends upward into the parapet. When, however, the specification is read and the drawings are examined, the discovery is made that the hog wire was not embedded in the floor for the purpose and it does not perform the function of the reinforcing members of the patent "embedded transversely of the floor and extending upward into the walls." The patentee writes in his specification that he has found that tension rods sometimes break through the underlying portions of the ribs of arches when strains are applied normally to them at and adjacent to their crowns, thus weakening the ribs and putting them in danger of breaking through longitudinally.

"My present invention," he continues, "is designed to provide a means whereby the beneficial effect of the tension rods may be preserved without subjecting the arch to the danger above referred to; and in its preferred form this means consists of one or more wires or straps embedded in the material of the arch at or near the crown, running in the direction of the axis of the arch, that is, transversely to the span and to the main tension members, and woven back and forth crosswise of the material and beneath the tension members to bond the material securely in transverse direction, these bonding members, where the arch is provided with spandrel walls, being preferably extended upwardly into side walls to thereby bond the walls to the arch rib and prevent their cracking or breaking away from the latter. * * * I have found in practice that where these rods are extended continuously for a considerable distance through the tensional region at the intrados on either side of the crown, while locally effective for their intended purpose, they nevertheless tend to break the layer of concrete beneath them at and adjacent to the crown away from the remainder of the arch body, and thus permit the latter to crack at the crown and fail. I have found that this tendency may be effectually guarded against by embedding in the material of the arch one or more straps *10* which are woven back and forth between the inner and outer sides, passing beneath the tension rods 7 in the manner clearly shown in Fig. 2."

Thus it appears that the evil Luten's transverse wires woven between and beneath the tension rods were designed to remedy was the breaking through the cement on the lower side of the crown of the arch of the tension rods. He devised the use of these transverse wires beneath the crown of the arch and immediately adjacent thereto because there only was there danger that the tension rods when subjected to strains would break through the lower side of the arch, and there only, in his conception, would the transverse wires be useful to remedy the evil he perceived. He placed these transverse wires beneath the tension rods, because there only could they perform the function of his invention. There only could they bond and hold the tension rods up in the body of the cement, so that they would not break through the lower layer of the cement under the crown of the arch. The tension rods in defendants' bridge lie level in the lower part of his girders 2 or 4 inches above their lower sides. The girders are about 2½ feet in height, and the cement floor rests upon them. The hog wire which the defendants use is embedded in the floor near its upper surface and far above these tension rods. It cannot, therefore, and does not, remedy the evil at which Luten's transverse wires were leveled. It does not pass beneath the tension rods, as do his transverse wires, and it cannot and does not perform the function of those wires. It cannot and does not hold the tension rods up in the cement and in that way prevent them from breaking through the lower side of the arch or the girders. In view of the fact that the use of wire mesh of various kinds and forms to reinforce cement constructions was well known when Luten made the invention disclosed in this patent, and of the facts that the hog wire in the floor of the defendants' bridge was not placed there for the purpose and does not have the effect of remedying the evil at which Luten's transverse wires were aimed, that it does not lie beneath but lies above these tension rods, that it does not hold them up and prevent them from breaking through the lower side of the girders near the crown of an arch, or elsewhere; and therefore does not perform the function of Luten's transverse wires, its use by the defendants in their bridge does not infringe claims 6, 8, 9, 10, or 11 of his patent No. 853,203.

Claim 18 of patent No. 853,204, issued to Mr. Luten May 7, 1907, which reads, "In a bridge, an earth-covered concrete floor supported by reinforced concrete girders," was not infringed by the defendants because they did not cover the floor of the bridge which they constructed with earth. That was done after they completed it by the county for which they built it.

Finally, counsel for the patentee insist that claims 3 and 4 of patent No. 989,272, issued to Mr. Luten December 9, 1908, are infringed by the defendants' bridge. These claims are:

"3. The combination of an upright member with a transverse member and knee brace, all of hardened plastic with embedded tension members reinforcing the upright member and transverse member continuously adjacent the surfaces opposite the knee brace and extending away from said opposite surface of the transverse member intermediate its middle and the knee brace and other tension members embedded longitudinally through the knee brace.

"4. The combination of a transverse member continuous over an upright member with knee braces, all of hardened plastic, reinforced continuously along the surfaces of the upright member and along the surfaces of the transverse member opposite the knee braces, said reinforcement having extensions away from said opposite surface between the knee brace and the middles of the spans of the continuous transverse member."

The scheme of reinforcement here claimed is unique, complicated, and unintelligible without the specification and drawings of the patent. This scheme and every column, brace, and tension member described in the specification or shown in the drawings, has been followed out and carefully compared with the piers, girders, parapets, floor, tension, and other members embodied in the defendants' bridge. The result is that, while there are tension members in various parts of that bridge, the evidence in this case utterly fails to prove that the defendants' bridge embodies the scheme of reinforcement or the specific tension members described in the specification and drawings and claimed in claims 3 and 4 of this patent No. 989,272, or any tension members which, by the same or a similar scheme and means, accomplish the end sought or secured by the scheme and the members described in these claims. Hence the conclusion is that these claims are not infringed by the defendants' bridge.

All the claims urged by the complainant have now been considered, none of them was proved to have been infringed by the bridge constructed by the defendants, and the decree below is affirmed.

JOHNSON et al. v. LAMBERT.

(Circuit Court of Appeals, Second Circuit. May 9, 1916. On Hearing as to Form of Mandate, May 24, 1916.)

No. 266.

1. PATENTS ⟹328—VALIDITY AND INFRINGEMENT—GARMENT.
The Johnson patent, No. 973,200, for a union suit garment, claim 1, with proof that an article offered in evidence, but excluded, was in the prior art, *held* void for lack of invention. Claims 2 and 3 *held* not infringed.

2. PATENTS ⟹311—SUIT FOR INFRINGEMENT—EVIDENCE.
Where the answer in an infringement suit alleges generally want of invention and novelty in view of the prior art, in the absence of a motion for bill of particulars, an article shown to have been manufactured and on sale prior to the patent may properly be admitted in evidence, although not specifically pleaded.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 541, 542; Dec. Dig. ⟹311.]

3. PATENTS ⟹36—SUIT FOR INFRINGEMENT—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
The effect of commercial success as evidence of invention is lessened, when the commercial article departed from the patent and was in the hands of a concern with a large trade in other articles, which advertised extensively, and the article belonged to a class for which there was an increasing demand.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⟹36.]

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

Suit in equity by Horace G. Johnson and Henry S. Cooper against M. H. Lambert. Decree for complainants, and defendant appeals. Injunction suspended, and cause remanded, with instructions.

Appeal from a decree holding patent to Johnson, No. 973,200, dated October 18, 1910, valid, and all claims infringed, and awarding to plaintiff the usual injunctive relief, with an accounting.

F. P. Warfield, of New York City, and E. F. Samuels, of Baltimore, Md., for appellant.

L. Gifford and Albert H. Graves, both of New York City, for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. [1] "This invention," Johnson states, "relates to that class of underwear known as union suits, and has for its chief object to provide an improved construction of such garments permitting the use of a permanently closed crotch and dispensing with the use of double flaps, or a single, wide drop-fall or flap, with their numerous fastenings, heretofore used to cover the posterior opening, while at the same time presenting a posterior opening of ample dimensions for its required purpose, covering by a single flap capable of being secured by a single button or other fastening. In other words, my present invention is designed to supply a garment combining in its construction the two most essential requisites for comfort and convenience in garments of this character, namely, a permanently closed crotch, and a posterior opening of ample dimensions and convenient location that will not gap to expose the person, and closed by a single flap requiring but a single button or equivalent fastening. * * * From the above it will be seen that my invention provides a garment having a permanently closed crotch and a posterior opening extending from a point near the waistline to a point below the crotch in one leg only. By carrying this opening obliquely from a point substantially in the waist line down to a point on the inner side of the leg below the crotch, I provide a construction affording an opening of ample dimensions and not requiring twisting or lateral displacement of the intermediate portion of the garment when in service."

There are three claims; but, as claims 2 and 3 set forth a detailed specific construction, the real controversy is as to claim 1. That claim reads as follows:

"1. An undergarment having a permanently closed crotch and a posterior opening extending from a point near the waistline to a point below the crotch in one leg only, substantially as described."

If claim 1 is valid, and the contentions of plaintiffs are sound, it is plain that plaintiffs—and in that event, justly—will either dominate the practical art or exercise a major control over it. The subject, therefore, is one of considerable importance.

We agree with the court below that the patent is addressed, as the drawings show and as the specification sets forth, "to that class of underwear known as union suits" and that the word "undergarment," when used in the claims, must be construed as referring to the so-called union suit; but we consider the prior art in respect of detachable or two-piece under-garments as relevant to the question of invention. It must also be noted that the patent is not confined to garments of either sex, and therefore the prior art comprehends garments of both sexes.

The problem, if there was one, was to construct a practical, usable unitary structure to accomplish what Johnson, in his specification, called "the two most essential requisites for comfort and convenience in garments of this character." It appears from the record that union suits were known for many years; Wilson (vice president of plaintiffs' exclusive licensee, Wilson Bros., of Chicago) testifying that he was familiar with men's garments of this kind for 16 or 17 years. Wilson Bros. is a very large (Mr. Wilson thinks the largest) "general men's furnishing house" in the country. This house "started to put out" woven fabric garments about two years before it "started to make them with the so-called closed crotch," and these woven fabric garments were well advertised. What, therefore, the commercial art was looking for was a garment possessing characteristics which would make it a better seller than existing merchandise of this kind, and in the state of the art the room for advance was necessarily limited.

Plaintiffs subdivide the art into five classifications, under each of which they marshal what they regard as the applicable prior art; but we consider the art as too simple to invite such fine distinctions. With garments made under the Muller British patent 8,766 of 1896, the Cook United States patent 615,632 of 1898, the Rochette British provisional specification 1,343 of 1864, and the Tichy Austrian patent 27,283 of 1907, laid on a table before the man skilled in the art, we think there was so little opportunity for inventive ability that patentability on the record as it now stands is doubtful. We do not confine our references to those just recited. They are merely examples of the prior art, all of which we have regarded as pertinent in arriving at our conclusion. While not authority nor controlling, it is interesting to note in this connection that the Exchequer Court of Canada in Johnson v. Oxford Knitting Company, Limited (January, 1915), in construing this same patent, observed:

"It is admitted that a permanently closed crotch undergarment is old. It is shown by the art that the extension of a flap extending below the crotch to the leg is also old. This is made clear by what is called the Austrian patent to Caroline Tichy, of the 25th of January, 1907."

[2] This brings us to a consideration of Exhibit G for identification, which was excluded by the trial court. This was offered by defendant as a specimen of the so-called Holmes garments. We regard this as a closed crotch garment. To call it otherwise, in considering the prior art, is, we think, again drawing too fine a distinction. With this garment properly in evidence in connection with the other prior art, we think that no invention was needed to devise the particular construction shown in the patent, and hence we are satisfied that claim 1 would be void for lack of patentable novelty. Whether, therefore, this exhibit and the testimony relating to it were correctly excluded, becomes an important question in the case.

Defendant's answer alleged:

"The defendant further avers that said letters patent No. 973,200 is void, because it discloses a garment which is not novel and the production of which did not involve invention, in view of the state of the art relating to this type of garment and similar garments in common use in the United States at and long prior to the date of the alleged invention by Horace G. Johnson, and more than two years prior to his application for patent, and that therefore the said letters patent do not disclose any invention which is patentable, and the production of the patented device does not represent anything more than the skill to be expected of the average workman."

Plaintiffs did not demand a bill of particulars as to the facts to which this allegation related. The testimony as to the Holmes garment, infra, was not offered as evidence of anticipation, and, of course, could not be so received unless pleaded, but was offered primarily to show the prior state of the art, and incidentally to meet plaintiffs' claim that its garment was the first union garment of its kind. Defendant's counsel offered to show by a witness then on the stand that he bought from the Holmes Knitting Company, of Malden, Mass., and sold to one R. P. McLoughlin, of Utica, N. Y., a garment like Exhibit G, that similar garments were considerably traded in from 1900 to 1913, that from 1907 to 1913, as shown by the books of the witness, many such garments were ordered to fill up stock, that the garment was satisfactory to customers, and that from 1900 the business was successfully increasing in men's closed crotch union suits and spread out into three companies, with a resultant fairly wide distribution throughout the United States. The court refused to admit this testimony, saying:

"I do not regard the announced effort of the defense to prove the production of a closed crotch garment by a manufacturer in Massachusetts and its transmission to a gentleman in Utica, a dealer, for sale, and its actual sale to Mr. McLoughlin—assuming all those things to be true—as properly admissible under these pleadings; and my reason for it is that by no fair construction of the law can such a transaction as that be regarded as anything else but a prior use, and, such prior use not having been pleaded, I will not admit it under the guise of a showing of the state of the art."

We appreciate that in this case, as in other cases, the practical result may be the same, whether the prior use is admitted as an anticipation or on the state of the art; but we think the ruling was contrary to settled authority. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Dunbar v. Myers, 94 U. S. 187, at pages 198, 199, 24 L. Ed. 34; Stevens v. Rodgers Boiler & Burner Co., 186 Fed. 631, at page 637, 108 C. C. A. 495.

We realize that under the present equity rules requiring open trials, occasionally last minute evidence of this kind may result in delay, if the court, in its discretion, deems it proper to allow an adjournment under such circumstances. But, in addition to the disinclination of the equity bar to spring surprise, we think the remedy, from the standpoint of practical procedure, lies within the power of the District Court, for instance, to require bills of particulars on demand, to impose costs where an adjournment is necessitated, or to take such other appropriate steps as it may be advised in order to afford opportunity to meet unexpected prior use testimony, or to discourage such practice if attempted.

It is but fair to state that no such situation was here presented. There was no contention by plaintiffs that they were surprised; for this same evidence had been introduced in a case in another district and circuit between plaintiffs and another defendant, in which trial counsel, who had just been retained in this case, had represented the defendant in the other case.

[3] Finally, plaintiffs point to the great commercial success of their garment as evidence to resolve the doubt as to invention which they must have foreseen would exist in this case. But, though large sales of the commercial garment have been made, it is not a garment strictly embodying the structure of the patent. The commercial garment is of the woven fabric type, with short legs and no sleeves. A knit fabric, because of its elasticity, would probably be practical if manufactured as the patent points out; but, from the experiments we have made with the exhibit dummy, we are satisfied that a woven fabric garment would not be practically operative, and plaintiffs, realizing this, have made some necessary changes to create their commercial woven fabric garment.

Changes with reasonable limits, in many instances, would not affect the probative value of commercial utility; but so many considerations enter into commercial success in the arts relating to garments that a departure from the patent at once casts doubt upon the influence which the claimed new features have upon the purchasing public. This is peculiarly so in this case where an extensive advertising campaign at the instance of a powerful house, a large influence in the trade, a persistent pursuit of alleged infringers, a garment improved over the patent, and an increased demand for union suits as such, leave one in doubt as to whether commercial success has been attained because of ordinary and familiar business reasons, or by virtue of the alleged advance in the art. Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 Fed. 347.

We conclude that, if Exhibit G for identification is proved to the satisfaction of the court, claim 1 is void, and that claims 2 and 3 are, in any event, not infringed. The case is therefore remanded to the District Court to take proof as to Exhibit G for identification, with instructions to dismiss the bill if prior use of a garment of which Exhibit G for identification is a specimen is proved.

On Hearing as to Form of Mandate.

PER CURIAM. The injunction is suspended, and the cause remanded to the District Court, with instructions:

(1) To take proof as to whether the Holmes garments like, or substantially like, Defendant's Exhibit G for identification, offered as a specimen of these garments, had been in use or on sale prior to the patent in suit, and

(2) To take such testimony, if any, as it may deem advisable, to explain the construction and mode of operation of Exhibit G or similar garments, and thereupon to return the proofs to this court, with the opinion of the District Court as to (1) and as to (2), if there be any conflict in the testimony as to the manner in which the Exhibit G or similar garments, were actually constructed, and as to the mode of operation of such Exhibit G or similar garments.

L. E. WATERMAN CO. v. KLINE et al.

In re KLETZLY.

(Circuit Court of Appeals, Fourth Circuit. July 7, 1916.)

No. 1423.

1. PATENTS ⚷257—CONVEYANCES—LIMITATIONS—"INFRINGEMENT."
The owner of a patent may sell or authorize others to sell the article without limitation as to price, time, or place, or he may limit his licensees, and any sale beyond the terms of the license, if limited, is an "infringement."
[Ed. Note.—For other cases, see Patents, Dec. Dig. ⚷257.
For other definitions, see Words and Phrases, First and Second Series, Infringement.]

2. PATENTS ⚷213—CONVEYANCES—RIGHTS OF ASSIGNEES.
The assignee of a licensee to sell patented goods obtains no higher rights than the assignor had.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 315-320; Dec. Dig. ⚷213.]

3. JUDGMENT ⚷748—CONCLUSIVENESS—RES JUDICATA.
Judgment in suit by the patentee for reclamation of patented articles, finding that the articles belonged to the trustee in bankruptcy of the licensed seller, when not appealed from by the patentee, is binding against it in subsequent suit to enjoin sale of the articles by the trustee.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1065, 1297-1301; Dec. Dig. ⚷748.]

4. BANKRUPTCY ⚷345—RIGHTS OF CREDITORS—UNSECURED CLAIMS—PAYMENT IN FULL.
Although the patentee had an agreement, valid between him and the licensee for sale of the patented articles, to take back all unsold goods at list prices and credit the licensee's account therewith, the court could not, as a condition of his repurchasing the articles, order his unsecured claim paid in full to the exclusion of all other unsecured creditors of the bankrupt licensee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⚷345.]

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

Bill in equity by the L. E. Waterman Company against Edwin F. Kline, individually and as trustee in bankruptcy of Leo B. Kletzly. Decree for defendants, and complainant appeals. Affirmed.

Walter B. Raymond, of New York City (H. E. Dunlap, of Wheeling, W. Va., and Victor C. Cormier, of New York City, on the brief), for appellant.

A. L. Sawtell, of Wheeling, W. Va., for appellees.

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

JOHNSON, District Judge. On March 29, 1915, L. E. Waterman Company, appellant, filed its bill in equity in the District Court of the Northern District of West Virginia against Edwin F. Kline, individually and as trustee in bankruptcy of Leo B. Kletzly, appellee.

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

Appellant is a corporation engaged in manufacturing and selling Waterman's Ideal Fountain Pens, and is the owner of letters patent 625,722. The appellant, on January 25, 1908, entered into a license agreement with Leo B. Kletzly, of West Virginia, to furnish him at wholesale prices fountain pens to be sold by him only as licensed to the public at retail prices in the regular course of business and at full regular retail list price established by the company, and agreed to take back upon request any of the said fountain pens at the net prices at which the fountain pens were furnished, and to credit them on any account due and owing by the licensee to the company, or to pay for them in cash, in case there be no account. Kletzly agreed to sell at retail only, not to exchange them nor to sell or dispose of them except at the regular prices established by the company. Under this contract, which was not recorded, the L. E. Waterman Company furnished Kletzly pens from time to time in varying quantities. Kletzly was adjudicated a bankrupt October 22, 1912. On November 8, 1912, Edwin F. Kline was elected trustee of the bankrupt, entered upon his duties as trustee, and took possession of the bankrupt's property, including Waterman's Ideal Fountain Pens in the bankrupt's stock. Thereafter L. E. Waterman Company filed its petition in reclamation proceedings, and claimed title to and possession of the pens under the license contract with Kletzly. On the 26th April, 1913, the matter came on for hearing before the referee in bankruptcy, who held that the petition was not sufficient in law, and dismissed the same. From this order there was no appeal. The trustee in bankruptcy, having been adjudged to have title to the property, nevertheless made repeated efforts to have L. E. Waterman Company take the pens back at the net price at which they were furnished the bankrupt. But L. E. Waterman Company insisted on taking the pens back only on condition that they be credited on an open account owing the complainant by the bankrupt up to the amount of the said account, and after the account was extinguished to pay the balance in cash. On the 20th of October, 1914, the referee in bankruptcy ordered the trustee to sell said Waterman Ideal Fountain Pens in accordance with law and in accordance with the rights of the trustee. From this order there was no appeal. This action seeks to enjoin Kline from selling the fountain pens. The cause came on to be heard October 22, 1915. The court held that the trustee by a former decree of the court was in the lawful possession of the Waterman's Ideal Fountain Pens purchased by the bankrupt from the appellant. He held that under the terms of the license agreement, the appellant was entitled to take them back by paying therefor the net prices at which the same were furnished to the bankrupt. The court held that the appellant should share pro rata with other unsecured creditors of the bankrupt estate in the distribution of the assets of such estate as regards any indebtedness existing on the part of the bankrupt to the appellant, such indebtedness being properly proven in the bankruptcy proceeding, and in the event the appellant should fail to repurchase the pens and pay for the same in cash the net prices at which they were furnished the bankrupt, the trustee was entitled to dispose of the same by sale for the benefit of the bankrupt estate. Complainant was given 30 days in which to repurchase the pens under the license agreement. The appellant did not avail itself of the privilege extended by the District Court, but appealed to this court. There are nine specifications of error which are as follows:

"First. Because the plaintiff licensed the bankrupt personally to sell fountain pens made under the patent in suit, and the license granted is unassignable.

"Second. Because the license was granted to the bankrupt only because he possessed certain personal qualifications and a suitably located store required by the plaintiff as precedent to the granting of licenses, and the trustee defendant neither possesses the same qualifications nor the store.

"Third. Because the plaintiff licensed the bankrupt under a license agreement which is herein held to be valid and with the terms of which the bankrupt defendant cannot, as an alleged successor by operation of law, comply.

"Fourth. Because said license agreement provided that the licensee may sell the patented pens only in the regular course of business, and the unlicensed trustee defendant, being unable to sell said pens in the 'regular course of business,' violates said license agreement by selling or offering said pens for sale.

"Fifth. Because the restrictions which the plaintiff imposes respecting the manner in which sales of the patented pens shall be made, as the same is set forth in the license agreement attached to the bill of complaint, are enforceable against trustee defendant.

"Sixth. Because the trustee defendant is not entitled to dispose of said patented pens in a manner contrary to that specifically called for by said license agreement.

"Seventh. Because any sale of the patented pens at public auction or otherwise, or any threat or offer for sale, by the unlicensed trustee defendant, except a resale to the plaintiff under the specific terms of the license agreement, constitutes a violation of the rights secured to the plaintiff under the patent in suit.

"Eighth. Because the court has no authority to empower the trustee defendant to commit an act of infringement.

"Ninth. Because the pleadings and exhibits show that the permanent injunction prayed for in the bill should be granted."

[1-3] The appellant submitted an elaborate brief as to the monopoly rights of an owner of patents. We are in accord with all the authorities cited, but they are not applicable to this case. In our view this case is embraced in a very narrow compass. The owner of a patent may sell or authorize others to sell the patented article without limitation as to price, time, or place, or he may limit his licensees as to price, time, or locality. Any sale beyond the terms of the license is an infringement. The assignee of a licensee obtains no higher rights than the assignor had. We have stated in a few words every principle involved in the cases cited. They are elementary and self-evident. It has never been held, however, that the owner of an article manufactured under a patent is exempt from the laws of bailment or is not bound by a decree of a court of competent jurisdiction. In an action of reclamation by L. E. Waterman Company against the trustee, the court decided that the patented article belonged to the trustee. L. E. Waterman Company did not appeal. The decision in that case binds. The appellant cites numerous cases to the effect that the trustee succeeds to the article with precisely the same title the bankrupt had, but those cases were all decided under the Bankruptcy Act of 1898 and before the

amendment of June, 1910. The appellant by not regarding and complying with the law of bailments of West Virginia allowed its patented articles to pass absolutely without any limitation into the hands of Edwin F. Kline, as trustee. Having allowed the articles to pass to Kline without limitation or restriction as to his rights to use or sell them, appellant cannot now evade the bailment laws of West Virginia or escape the binding force of the adverse decree of the court not appealed from. The owner of a monopoly doing business in a rented store room where the law gives the landlord a lien for rent upon failure to pay rent would not be heard to say that because he had the right to restrict the sale of his monopolistic articles, he could thereby deprive the landlord of his lien and of his right to sell the articles in satisfaction thereof. Nor can he evade the bailment laws through one of his licensees any more than he can himself. We see no reason why the owner of patented fountain pens is not bound by the law of bailments in the same manner and to the same extent as the owner of unpatented hats, shoes, or sugar. At any rate, if appellant did not think this good law, an appeal should have been taken from the decree of the court which, in effect, so held. If it were still an open question, we do not think the appellant could escape the penalty for ignoring the law of West Virginia but the matter is res judicata. The appellant cannot have an adverse decree unappealed from vacated in this way.

[4] The District Judge gave the appellant an opportunity to repurchase its pens, the license agreement being valid between Waterman & Co. and the bankrupt, but it refused so to do except upon condition that its unsecured account against the bankrupt should be paid in full. It needs no argument to show that the court could not order an unsecured creditor paid in full to the exclusion of all other unsecured creditors.

The decree below is affirmed.

ORIENTAL TISSUE CO. v. LOUIS DE JONGE & CO.

(Circuit Court of Appeals, Second Circuit. June 19, 1916.)

No. 288.

PATENTS ⚷328—VALIDITY AND INFRINGEMENT—THIN LEAF OR FABRIC.

The Gregory patent, No. 848,301, for a thin leaf or fabric composed entirely of soluble cotton and a coloring matter incorporated therein, intended to be used for decorative purposes instead of metal leaf, *held* valid, but not infringed by defendant's article, which was composed of a large quantity of resinous matter.

Chatfield, District Judge, dissenting in part.

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

Suit by the Oriental Tissue Company against Louis De Jonge & Co. From a decree dismissing the bill, but holding complainant's patent valid, both parties appeal. Affirmed.

E. C. Seward, of New York City (Brown & Seward and Wm. McK. Barber, all of New York City, of counsel), for complainant.

Seward Davis, of New York City (D. W. Cooper and Charles E. Wilson, both of New York City, of counsel), for defendant.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

WARD, Circuit Judge. Upon appeal from an interlocutory decree in a former suit between these same parties, 218 Fed. 170, 134 C. C. A. 50, we held that a thin metallic sheet composed entirely of soluble cotton and a coloring matter was new, and that the patent for the article was valid even if there was some resin incidentally contained in the elements mentioned.

In this case the defendants call our attention much more extensively to the prior art and especially to foreign patents, in view of which they contend that the patent should now be held invalid and if this be not so, that as a much larger quantity of resinous matter is deliberately used in their new leaf, they do not infringe.

In the former case our position was that Gregory was the first person to produce thin metallic sheets as a substitute for gold leaf, silver leaf, and so forth and that he made a very great contribution to the decorative art, especially of embossing and bookbinding. The additional prior patents now called to our attention covering processes by which thin sheets or films may be made by flowing upon a glass surface mixtures of nitrocellulose or gun cotton or pyroxylin or collodion, which are similar to soluble cotton, in combination with a volatile solvent and coloring matter do not change our views. As before, we find no claim for thin metallic sheets as a substitute for gold leaf, silver leaf, and so forth. They were never produced until Gregory produced them. Therefore we remain of the opinion that the patent is valid and most meritorious.

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

It is further contended that the plaintiff's assignor in applications for a British and a German patent described his invention as thin metallic sheets made in a specified way, viz., by pouring his mixture upon the surface of water. The exigencies of the patent authorities in these foreign countries may have been such as to make him willing to accept a narrower patent there than he felt entitled to or could get here. The evidence was relevant but not conclusive.

When we come to the question of infringement some effect must be given to the limitation which the Patent Office imposed on the inventor in according him his second claim now sued on and which he accepted, viz., that the leaf should be *entirely* composed of soluble cotton and a coloring matter. With a view to sustaining the invention as far as possible, we held in the former case that this description might include such an amount of resin as is found in the soluble cotton of commerce. A line, however, must be drawn somewhere, and we think Judge Mayer was right in holding that the defendants' article as now made is not entirely composed of soluble cotton and coloring matter, and therefore does not infringe.

Decree affirmed.

CHATFIELD, District Judge. I concur in affirming the decree dismissing the bill, but it seems to me that claim 2 of the patent is shown, *upon the record in the present case*, to be invalid unless limited to substantially the same product as was the subject-matter of the other claims in the patent. When so limited, the defendant's product is not an infringement.

RITER-CONLEY MFG. CO. v. ATLANTA GASLIGHT CO. et al.

(District Court, N. D. Georgia. June 10, 1916.)

No. 56.

1. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—PROCESS OF MANUFACTURING COAL GAS.

   The Carpenter & Barnum patent, No. 1,140,113, for a process of manufacturing coal gas, as limited by the prior art and the proceedings in the Patent Office, conceding its validity, *held* not infringed by the use of the apparatus of the Congdon patent, No. 1,090,813.

2. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—APPARATUS FOR GENERATING GAS.

   The Carpenter & Barnum patent, No. 1,122,683, for apparatus for generating gas, the principal feature of which is a valve in the conduits between the retorts and the standpipe to facilitate the cleaning of the conduit, conceding that it discloses patentable novelty and invention, *held* not infringed.

3. PATENTS ⚷112(3)—INFRINGEMENT—PRESUMPTION FROM ACTION OF PATENT OFFICE.

   The granting of a patent while another application based on an invention for the same general purpose was pending, on which a patent was subsequently issued, is virtually a decision by the Patent Office that

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the two inventions are patentably different and that one does not infringe the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 164; Dec. Dig. ⚷112(3).]

4. PATENTS ⚷328—INVENTION—APPARATUS FOR GENERATING GAS.

The Carpenter & Barnum patent, No. 1,091,111, for apparatus for generating gas, the essence of which is the connecting of two vertical rows of retorts, one on either side, with the same standpipe, in view of the prior art, is void for lack of patentable invention.

In Equity. Suit by the Riter-Conley Manufacturing Company against the Atlanta Gaslight Company and Richard C. Congdon. On final hearing. Decree for defendants.

On the 5th day of October, 1914, a bill in equity was filed by the plaintiff, a New Jersey corporation, against the defendant, a citizen and resident of the state of Georgia, and of the Northern district thereof, in this court, seeking to enjoin the defendant from infringing letters patent No. 1,091,111, which was for "apparatus for generating gas," which letters patent were granted to Henry A. Carpenter and Dana Dwight Barnum on March 14, 1914, on an application which was originally filed on December 2, 1910. It is alleged that the patent was, by certain deeds of assignment duly recorded in the Patent Office of the United States, pursuant to the acts of Congress in such cases made and provided, duly assigned, transferred, and set over to the Riter-Conley Manufacturing Company, a corporation of the state of New Jersey, with all of their right, title, and interest in and to the same. The plaintiff then alleges that it and those acting for and under it have extensively constructed, equipped, operated, and caused to be operated the said improvements described and claimed in said letters patent No. 1,091,111, and since the date of the letters patent and before the filing of the bill they have marked, or caused to be marked, the apparatus containing the improvements disclosed in the patent, with the words "Patented March 24, 1914," or other words and figures indicating that the apparatus was made in accordance with the letters patent named, in accordance with the statutes in such case made and provided. It is alleged that prior to the filing of the bill the defendants were duly notified of their infringement of said patent and requested to desist therefrom, but that the said defendants, well knowing the terms and rights secured to plaintiff, have, since the date of the letters patent, at Atlanta, Ga., and before the beginning of the suit, infringed upon plaintiff's rights by making or causing to be made, and used without plaintiff's leave or license, apparatus constructed in accordance with and embodying the invention described and claimed in the patent, whereby the defendants have realized large profits which in equity belong to the plaintiff, and have caused the plaintiff great and irreparable loss and injury to its business; that defendants threaten and intend to so manufacture, sell, and use such infringing apparatus within the Northern district of Georgia and at other places within the United States. The bill prays for an injunction, and for an accounting of the gains and profits realized by the defendants.

This original bill was answered by the Atlanta Gaslight Company, denying upon information and belief that Barnum and Carpenter were the true, original, or first joint inventors of the new or useful improvements in apparatus for generating gas, as alleged in the bill, and denying that the alleged invention was not known in this country, and not patented or described in any printed publication in this or foreign countries, before their alleged invention thereof. The defendant the Atlantic Gaslight Company then says that it is not informed, except by the bill of complaint, whether the application for patent was made as alleged, and leaves the plaintiff to make proof thereof, but denies that the letters patent granted to plaintiff for the term of 17 years, or any other term, the exclusive right to make, use, and vend the alleged invention throughout the United States and territories thereof, or any rights whatsoever; that it is not informed whether Barnum and Carpenter,

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by instrument in writing, assigned to the plaintiff their rights in and to the improvements and to the letters patent of the plaintiff. It is not informed, except by the bill, whether letters patent for such alleged invention, in due form, were issued to the plaintiff, and says it is not informed, except by the bill, whether plaintiff was the sole and exclusive owner of the letters patent as claimed, or whether it has constructed and operated and has been marking its apparatus as claimed. It denies that the alleged inventions and discoveries have been of any benefit to the public, but avers that for ten years prior to the alleged invention and discovery the public already had knowledge of similar apparatus, and, so far as the same is at all practicable or useful, enjoyed the benefit of such apparatus.

The answer of the Gas Company then says that upon information and belief Barnum and Carpenter were not the original and first inventors or discoverers of the apparatus purporting to be covered by said letters patent, or of any material or substantial parts thereof, and that the same, or material or substantial parts thereof, had been described and illustrated in printed publications and patents prior to the date of the supposed invention of the said Carpenter and Barnum. It then cites such prior publications as follows:

Letters patent of the United States as follows:

Rowland, No. 211,591. 1879. Common communication with a group of retorts through a single standpipe.

Fowler, No. 808,831. 1906. Common communication with horizontal groups of retorts through a single standpipe.

Taussig, No. 694,443. 1902. Cleaning apparatus for standpipes showing common communication with vertical groups of retorts.

Wates, English, 5,513. 1880. Common communication with standpipe from groups of retorts, the standpipes being used as buck staves.

Hanson, English, 8,880. 1885. Takes the gas down instead of up, and makes common communication of vertical groups of retorts in two adjoining benches into one pipe.

Scobel, English, 421. 1858. Takes gas from a plurality of retorts by common communication through standpipes to the take-off pipe.

It denies that Carpenter and Barnum were the true, original, or first inventors of any new or useful improvement in apparatus for generating gas, as alleged in the bill. It says that the letters patent sued upon are invalid for want of patentable invention, and says that the apparatus described in plaintiff's alleged letters patent is a mere aggregation of elements and parts long known and used in the art for the period of five years or more; that there are not in plaintiff's alleged inventions and improvements any variations from previous combinations which would not occur to a mechanic of ordinary skill; that the elements, parts, and devices in plaintiff's apparatus perform precisely the same functions which are performed by these same elements, parts, and devices in previous combinations, which had been known and patented for more than five years prior to plaintiff's alleged invention and improvement.

The answer then says that the defendant has heretofore erected and operated, in connection with its gas plant in Atlanta, Ga., apparatus on the plan described and set forth in letters patent No. 1,090,813, issued to R. C. Congdon, a defendant hereto, on March 14, 1914, on an application duly filed April 29, 1913; that the principal objects of said apparatus were and are to prevent the accumulation of tar, pitch, and lamp-black inside the standpipe; to scrub the gas in the standpipe, and thus lessen the burden on the balance of the works, to increase the capacity of the exhausters, condensers, and scrubbers, to rapidly cool the gas inside the standpipe, to increase the candle power of the gas, to obviate the expense, annoyance, and work of cleaning the standpipe at frequent intervals by manual or mechanical means, and to reduce the first cost of the installation, while obtaining the advantages above cited; that the use of the apparatus in the form and combination specified in plaintiff's letters patent was and is not essential to the objects stated, and when plaintiff notified defendant of an alleged infringement by the use of one standpipe between two rows of retorts with common communication, defendant provided for changing the construction so as to use one standpipe to each vertical row of retorts. While defendant denies the validity of plaintiff's patent combination having for its object the dispensing with a multiplicity of pipes leading from the retorts to the hydraulic mains, defendant avers that the use of apparatus constructed according to the specifications of plaintiff's letters patent to accomplish the object obtained under the Congdon apparatus is not as practical as to use a separate standpipe for each vertical row of retorts. Defendant denies that the use of a single standpipe between two rows of retorts, whether in the same bench or in two benches, caused it to realize any profit in the operation of its plant. On the contrary, it caused an unnecessary expense in having to change the construction to a standpipe for each vertical row of retorts.

The answer of the Gas Company then states that it erected the apparatus with one standpipe between two rows of retorts before plaintiff's letters patent were issued. After their issue and plaintiff's complaint, the construction was changed as aforesaid, and the company denies all intention of continuing the former construction, and denies any and all threats to do so. It denies that it has injured and damaged the plaintiff in any sum whatever, in manner and form alleged, or otherwise.

The answer of the defendant Congdon is substantially the same as that of the Atlanta Gaslight Company, including the first 11 paragraphs, after which it proceeded to recount at some length and in considerable detail the conditions and circumstances leading up to and surrounding his claimed inventions, covered by letters patent Nos. 1,090,813, dated March 14, 1914, and 1,099,639, of June 9, 1914, and the erection of the plant of the Atlanta Gaslight Company, of which plaintiff complains. On motion of the plaintiff, however, this answer of the defendant Congdon was stricken from the twelfth to the twentieth paragraphs, inclusive. The twenty-first paragraph of said answer alleges that shortly after filing his application for said letters patent, to wit, in May, 1913, he communicated with the plaintiff, calling attention to the fact that his application was pending and that he expected to connect a plurality of retorts to a single standpipe, and that the ultimate object of his apparatus was to produce a pipe that would not stop up. The plaintiff replied, stating that it had installed at Worcester, Mass., a new style of standpipe which did not stop up, and that they had pending in the Patent Office for several years application covering that style of standpipe. This letter was dated May 13th, and on May 15th defendant again wrote to plaintiff, and, receiving no reply, wrote again on June 7th, and in these letters asked for information with reference to the plant at Worcester, and submitted blueprint and description of his own device, and also a rough sketch showing how eight retorts might have common communication with a standpipe. This defendant also wrote to Washington for copies of any patents which might be on file covering standpipes, but his inquiry elicited no information, for the reason that the Patent Office at Washington gives out no information of pending applications for patents; that although the application of plaintiff had been pending since December 2, 1910, with an assignment in favor of plaintiff authorizing the issue of letters patent direct to it, and although the plaintiff was, during all times referred to in said letters, fully advised of all claims of letters patent subsequently issued, plaintiff failed and refused to advise defendant of any of the details therefor, and did not procure the issuance of its letters patent until the 24th day of the following March, in the year 1914. This defendant then denies that he has injured and damaged plaintiff in any sum whatever, in the manner and form as alleged or otherwise.

An amendment to the bill of complaint was filed on January 20, 1915, by consent of the defendants, alleging that on and prior to the 24th day of July, 1913, Henry A. Carpenter and Dana D. Barnum were the original, first, and joint inventors of certain new and useful improvements in coal gas generating apparatus, on which an application for letters patent was filed by the said Carpenter and Barnum on the 24th day of July, 1913, and whereupon such proceedings were had that on the 29th day of December, 1914, letters patent of the United States No. 1,122,683, were granted to the said Carpenter and Barnum, assignors to the Riter-Conley Manufacturing Company for the said invention in conformity with the requirements of the statutes. A duly authenticated copy of said letters patent was presented and prayed to be taken as a part of the bill. Plaintiff then avers that the invention described and claimed in letters patent No. 1,122,683 is of great value to it, and further avers on information and belief that the defendants have, since the date of said patent No. 1,122,683, and before the commencement of this suit, and are still, within the Northern district of Georgia and elsewhere in the United States, without license or permission of plaintiff and in infringement of said letters patent, making, using, and vending to others to be used, coal gas generating apparatus embodying the invention claimed in said letters patent, to the plaintiff's great damage, and that the defendants have been duly notified of said letters patent and of its infringement thereof in violation of the plaintiff's rights thereunder. Plaintiff further avers on information and belief that defendants are prepared and ready to continue said infringement, and that unless restrained from doing so plaintiff will suffer great and irreparable damages, and alleges that defendants have derived and received and are still deriving and receiving from said infringing acts great gains and profits. The prayers of the original bill are then repeated.

To this amendment a joint answer was filed by the defendants, denying, on information and belief, that the said Carpenter and Barnum were the first, original, and only inventors of certain new and useful improvements in coal gas generating apparatus, as alleged therein, and say that it is not true that the alleged invention was not known or used by others in this country before their invention and not patented or described in any printed publication in this or foreign countries before their alleged invention thereof. Defendants admit the filing of the application for patent and the granting of letters patent as alleged. Defendants admit the assignment of said letters patent to the complainant in this case as alleged, and answer that for lack of information they can neither admit nor deny the value of said alleged invention, but deny that they or either of them have, before or since the date of letters patent No. 1,122,683, or before or since this suit was brought or said amendment filed, within the Northern district of Georgia, or elsewhere within the United States, made, used, vended to others to use, or otherwise infringed in any manner said letters patent No. 1,122,683, and deny that they have damaged the complainant in any manner, as the owners of said letters patent. Defendants aver that they had no notice of letters patent No. 1,122,683, or of any alleged infringement thereof, until this amendment was drafted and presented to their solicitors in this case, on or about the 1st day of January, 1915, but deny any and all infringement of the alleged invention, and deny that the continuance of their present operations will in any manner damage complainant.

Further answering, defendants allege that the apparatus, or material and substantial parts thereof, had been described and illustrated in printed publications and patented prior to the date of the supposed intention of said Carpenter and Barnum, and cite specific instances of such prior publication as follows: United States letters patent issued to T. P. Rowland, No. 211,591, dated January 21, 1879, showing a valve connection between a group of retorts and a standpipe in gas manufacturing apparatus. United States letters patent issued to Richard C. Congdon, No. 1,090,813, dated March 17, 1914, showing a valve connection between a group of retorts and a standpipe in gas manufacturing apparatus. United States letters patent issued to Richard C. Congdon, No. 1,099,639, dated June 9, 1914, showing a valve for establishing and disestablishing communication between a standpipe and a retort in gas producing apparatus. British letters patent of Wates, No. 5,513 in the year 1880, disclosing a valve connection between a retort and a standpipe. French patent No. 416,924, issued to Breuer et cie., August 18, 1910, which shows the combination covered under the claims of letters patent No. 1,122,683, in connection with the gas main instead of in combination with the retort.

Defendants further say, upon information and belief, that the letters patent No. 1,122,683, sued upon in said amendment, are invalid for want of patentable invention, that the same is a mere aggregation of elements and parts long known and used in the art for a period of five years or more, that there are not in plaintiff's alleged invention any variation from previous combinations which would not occur to a mechanic of ordinary skill, and that the elements, parts, and devices therein perform precisely the same functions that were performed by the same elements, parts, and devices in previous combinations which had been known and patented prior to the alleged invention and improvement described in letters patent No. 1,122,683. Defendants say that the structure at the plant of the defendant Atlanta Gaslight Company, which plaintiff claims is an infringement of letters patent sued upon herein, is erected in accordance with the specifications of letters patent Nos. 1,090,813, of March 17, 1914, and 1,099,639, of June 9, 1914, to Richard C. Congdon, and deny that said apparatus in any manner infringes the letters patent of plaintiff here sued upon, even though plaintiff's letters patent should be held valid. Defendants also deny that they injured and damaged the plaintiff in any sum whatsoever, in manner and form alleged or otherwise.

The answers of defendants were then amended by adding to the prior publications cited the following: Letters patent of the United States, No. 693,137, dated February 11, 1902, to C. W. Isbel, for apparatus for the manufacture of illuminating gas; and letters patent of the United States, No. 440,456, dated November 11, 1890, to Allen & Harris, for apparatus for the manufacture of gas.

A second amendment to the bill of complaint was filed, with consent of the defendant, on June 5, 1915, bringing into the suit United States letters patent No. 1,140,113, granted to said Carpenter and Barnum on the 18th day of May, 1915, application for which was originally filed July 24, 1913, and making practically the same allegations with reference thereto that were made in the first amendment with reference to letters patent No. 1,122,683.

On June 18, 1916, the defendants filed a joint and several answer to this second amendment, making practically the same answers as with reference to the first amendment, except that they say, for want of sufficient information, they can neither admit nor deny that said Carpenter and Barnum were the original, first, and joint inventors of the alleged improvement in the method of manufacturing gas, but allege that the material and substantial elements of said alleged patent had been described and illustrated in prior patents, that the letters patent are invalid for want of patentable invention, and that the manner of manufacturing gas as described in letters patent No. 1,140,113 is a mere aggregation of methods long known and used in the art of manufacturing gas, for a period of five years or more.

F. T. Chambers, of Philadelphia, Pa., and Candler, Thomson & Hirsch, of Atlanta, Ga., for plaintiff.

A. B. Stoughton, of Philadelphia, Pa., and Smith, Hammond & Smith, of Atlanta, Ga., for defendants.

NEWMAN, District Judge (after stating the facts as above). The order in which these patents were brought into this suit is shown in the above statement of the pleadings. The patent on which the suit was originally brought, No. 1,091,111, called the "standpipe patent," was granted to Carpenter and Barnum on March 24, 1914. The first amendment sets up patent granted to Carpenter and Barnum on the 29th day of December, 1914, called the "valve patent," or "lateral patent"; and the second amendment sets up a patent granted to Carpenter and Barnum on May 18, 1915, No. 1,140,113, which has been called, in this litigation, the "method patent," and sometimes the "process patent."

[1] In order to understand this last patent it has been necessary to examine with care the proceedings in the Patent Office with reference to the granting of this particular patent, and that has been made possible by the introduction in evidence of the file wrapper in the case. This patent was applied for, in different ways, four times before it was granted. From an examination of the different applications, and

the claims attached to each application, it appears that three times the claims made were rejected by the Commissioner of the Patent Office. The claims of the patent as finally granted are as follows:

"1. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas from a plurality of generating retorts directly into a vertical path formed by a standpipe and common to all of said retorts, and timing the charging with coal of each retort relatively to the charging of all the other retorts to maintain the temperature of said vertical path substantially uniform.

"2. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas simultaneously from a plurality of generating retorts directly and through relatively short lateral paths into a vertical path, said vertical path being formed by a standpipe and common to all the retorts, and timing the charging with coal of each retort relatively to the charging of all the other retorts to maintain the temperature of said vertical path substantially uniform.

"3. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in discharging gas from a plurality of generating retorts directly and in lateral direction into a vertical path formed by a standpipe and with the gas entering said path at different elevations, and timing the charging of each retort with coal relatively to the charging of every other retort to maintain the temperature of said vertical path substantially uniform.

"4. In the manufacture of coal gas, the method herein described of reducing standpipe stoppage, consisting in charging a group of retorts with coal at different times and thereby creating overlapping carbonization periods, the time of charging each retort of the group being remote from the time of charging the retorts nearest thereto and thereby minimizing variation in temperature of the retorts and of the gaseous output thereof, maintaining direct communication between each retort during its carbonization period and a vertical path with said path formed by a standpipe common to all the retorts, and timing the charging of each retort relatively to the charging of all the other retorts to maintain the temperature of said path substantially uniform.

"5. In the manufacture of coal gas, the method herein described which consists in charging in sequence a plurality of gas generating retorts with coal and retaining the charges within the retorts for corresponding periods of time and thereby maintaining overlapping carbonization periods of corresponding duration for all the retorts, discharging the gas from all the retorts directly into a vertical path with said path inclosed by a standpipe and common to all the retorts, and timing the charging of each retort relatively to charging of all the other retorts to maintain the composite gaseous stream within said vertical path substantially uniform in quality, temperature and volume.

"6. In the manufacture of coal gas, the method herein described, consisting in discharging gas simultaneously from a plurality of generating retorts directly into a vertical path formed by a standpipe, said path common to all the retorts and proportioned relatively to the latter to forestall back pressure in any retort, and timing the charging with coal of each retort relatively to the charging of all the other retorts to maintain a gaseous stream within said path of substantially uniform volume."

The claims that were rejected the last time by the Commissioner of the Patent Office, and which were succeeeded by the claims of the patent as issued, given above, were as follows:

"1. In the manufacture of gas, the method herein described which consists in heating a plurality of retorts to coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonization periods differing one from another as to time of commencement, and separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the sequential charging of the apparatus producing individual deliveries differing as to carbonization stages with each delivery of substantially uniform stages.

"2. In the manufacture of coal gas, the method herein described which consists in heating a plurality of retorts to coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonization periods differing one from another as to time of commencement, and separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the individual deliveries being in substantially uniform stages, the sequential charging producing a definite relationship between the gas delivery of different retorts.

"3. In the manufacture of coal gas, the method herein described which consists in heating a plurality of retorts to coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonization periods differing one from another as to time of commencement, separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the charging of the retorts in sequence and the delivery of the gas to the standpipe in stages differing from each other as to temperature, quality, and volume producing, through the resultant action of these differences, a diffusion of the deliveries within the standpipe with the outflow of gas from the standpipe substantially uniform in quality, temperature, and volume.

"4. In the manufacture of coal gas, the method herein described which consists in heating a plurality of retorts to coal carbonization temperature, charging the retorts with coal in such an isolation-sequence as to produce carbonization periods differing one from another as to time of commencement, separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the charging of the retorts in sequence and the delivery of the gas to the standpipe in stages differing from each other as to temperature, quality, and volume producing, through the resultant action of these differences, a diffusion of the deliveries within the standpipe with the outflow of gas from the standpipe substantially uniform in quality, temperature, and volume.

"5. In the manufacture of coal gas, the method herein described which consists in heating a plurality of retorts to coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonization periods differing one from another as to time of commencement, separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the several deliveries being above the standpipe lower end, and charging of the retorts in sequence and the delivery of the gas to the standpipe in stages differing from each other as to temperature, quality, and volume producing, through the resultant action of these differences, a diffusion of the deliveries within the standpipe with the outflow of gas from the standpipe substantially uniform in quality, temperature, and volume.

"6. In the manufacture of coal gas, the method herein described which consists in heating a plurality of retorts to a coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonization periods differing one from another as to time of commencement, separately delivering the gas from the retorts to a vertical standpipe during the respective carbonization periods, the several deliveries being above the standpipe lower end and differing as to elevation, the charging of the retorts in sequence, and the delivery of the gas to the standpipe in stages differing from each other as to temperature, quality, and volume producing, through the resultant action of these differences, a diffusion of the deliveries within the standpipe with the outflow of gas from the standpipe substantially uniform in quality, temperature, and volume.

In rejecting these claims, the Commissioner of Patents quotes the opinion of the examiner in charge of the application as follows:

"This application has been reconsidered in view of the amendment filed December 29, 1914. The claims presented by the above amendment are held not to patentably distinguish from the references of record, and are accordingly rejected. The fact that the applicant delivers his gas to a vertical standpipe is immaterial to the process. In this respect the claims are objected to in form for the reason that they confuse process and apparatus. So far as regards the operation of the process, the gas could just as well be delivered to a horizontal main as to a vertical main or standpipe. To deliver the gas to a common vertical standpipe is not new with the present applicants. This is shown old in the patents of record as far back as 1858. This idea is also common, as shown in the British patent 8,880 of 1885, also of record, and will also be seen in British patent 5,513 of 1880, of which patent the applicants are well acquainted. In connection with the process which consists in heating a plurality of retorts to coal carbonizing temperature, charging the retorts with coal in such sequence as to produce carbonizing periods differing one from another as to time of commencement, and separately delivering the gas from the retorts to a main during the respective carbonization periods, the sequential charging of the apparatus or retorts producing individual deliveries differing as to carbonization stage with each delivery of substantially uniform sequence, has been shown old in the patent to Slade, reissue, 8,422. To combine with the structure shown in this patent the well-known vertical standpipe, shown in the patents of record, would not amount to a patentable invention. Attention must be particularly called to the patent to Slade and the matter on page 1, line 7, to the end of the paragraph 3, column 1. Furthermore, to highly heat the retorts before charging the same with fuel is common in the art of making gas from coal. This is accomplished by the patent to Slade, and can be shown, by the examiner, in other patents, if the applicant so desires. It is not seen that there is anything patentable in the case. If the applicant so desires, this action may be considered final."

This opinion of the Commissioner certainly disposes of all of the claims which were then made, and apparently upon excellent grounds. In the Slade patent, referred to by the Commissioner, the method of charging, shown in the patent, is as follows:

"By the usual method of manufacturing illuminating or coal gas, the retorts are set three, five, or more in one bench, all heated by one fire, and are usually charged all, or nearly all, at one time, thus reducing the temperature to such a degree at the most important time, when the coal is throwing off the gas the fastest, that the gas is not permanent, but most of it condensed to tar and water, in the hydraulic main or condensors, owing to its being generated at too low a temperature. Now my object is to prevent loss of heat at this time in using the ordinary bench or benches or retorts; and this I effect by charging only one or two retorts at a time (preferably the former), selecting for the purpose such retort or retorts as are at a distance as far as possible from those last charged, so that the retorts that have had time to regain their heat will act as heat reservoirs and impart or give off their surplus heat to the new charge, thus preventing, in the newly charged retort or retorts, the excessive lowering of temperature, to which, under the method of charging hitherto employed, they have been subjected at the time they are doing the most work."

It would therefore appear that the Commissioner's conclusion as to the nonpatentability of this method, as shown in the claims then in question, is clearly correct. The method patent later granted to Carpenter and Barnum must therefore be confined to so much thereof as is added in the claims after the action of the Patent Office as stated.

The applicant proposed in these last set of claims two things: One was to "reduce standpipe" stoppage, and the other was to "forestall any back pressure in any retort." As to this method of introducing gas into a standpipe from overlapping charges, at differing stages of carbonization of the coal, and of thus commingling the gases given off by the coal at differing stages of carbonization, it is pretty clear that it is not infringed by Congdon or the Atlanta Gaslight Company. If anything was demonstrated in this case by the evidence, it was the fact that this commingling of the gases at differing stages would not, of itself, prevent accumulations in the standpipe. A piece of pipe from the Atlanta gas works was brought into court during the trial, in which the water, which flows down the standpipe for the purpose of preventing accumulations in the pipe, in the method used by Congdon and the Atlanta Gaslight Company, was stopped for a period of 27 hours during the normal operation of the plant. The stoppage in this standpipe and the accumulation there during this period was so clear and manifest that, when taken in connection with the evidence with reference thereto, it must have convinced any one and every one who saw it that without the use of this water the stoppage would to a large extent occur.

The standpipe brought into court was smaller, it is true, than the standpipe which was offered in evidence by the plaintiff as one of its standpipes; but, notwithstanding this, the accumulations were such as to show that, without the use of water, this stoppage in the standpipe will occur, and must of necessity be removed by other means than the mere overlapping charges and the commingling of the gases at the differing stages of carbonization. It is true that, in the evidence for the plaintiff by Dr. Lessing and Mr. Nims, and by the charts introduced by Mr. Nims, it is shown that the averaging of the temperature by this overlapping of charges does result in a reduction of the stoppage in the standpipe, and it might be conceded does very considerably reduce it.

I also understand, from the deposition of Mr. Barnum, that considerable weight seems to be attached to the fact that the plan they devised for overcoming standpipe stoppage included the provision of a large standpipe. In Mr. Barnum's deposition, in speaking of a conversation between Carpenter and himself, he says:

"We also discussed all of the other designs and methods of construction, and all the things that other operators had done in order to get rid of the stoppages. During one of these conferences we developed the idea of having a large vertical pipe connected by means of short conduits or passageways with a vertical row of retorts. It was plainly apparent that with this construction we could have larger gas way and more uniform condition in the standpipes, that the short connection between the retort and the standpipe could be easily cleaned from the opening of the retort lid, if any deposit should take place, that the large pipe would give more uniform conditions as to temperature, flow of gas, and of the condition of the deposit in the pipe, and that, if there was any deposit in the pipe it would be easily taken care of and would naturally roll down the pipe to a receptacle at the bottom."

I do not understand from the patent that the size of the standpipe has anything to do with the result to be obtained; but even if it be conceded that the enlargement of the standpipe was a part of the Carpenter and Barnum method, and even if it be further conceded that the size of the standpipe and the commingling of the gases produce, together, greater results in the prevention of stoppage than I have indicated above, still it is perfectly clear from all of the evidence, and from the opposing patents in evidence, that the Congdon method of preventing stoppage is entirely different from anything that could be used by Carpenter and Barnum under their method patent.

The contention by counsel for plaintiff, that the stoppage in the section of standpipe produced by defendant in court was due to the projection into the standpipe of the lateral passage and valve as used in defendant's construction, is, to my mind, wholly without merit. The whole facts of the case, as shown by the evidence, are, I think, contrary to this contention.

The defendant Congdon has a patent, issued to him on March 17, 1914, upon an application filed April 29, 1913, which has been called in this litigation the "scrubber" patent, covering the use of water flowing down the standpipe, which adds, of course, to the strength of his defense in respect to the use of the overlapping periods of carbonization to prevent or reduce this stoppage in the standpipe.

The prevention or forestalling of back pressure in any retort, claimed to be one of the things accomplished by plaintiff's method patent, as set out in the sixth claim of the patent, seems to me to be entirely without merit. Not very much was said, in the argument, about this claim of the patent, and very little is shown in the proof. The argument by counsel for plaintiff refers to an exhaust fan as a remedy for this "back pressure," or as an alternative the valve covered by one of the patents in suit. The exhaust fan, while referred to in the argument, cannot possibly be considered as any part of the patent method, as it is nowhere set out or referred to in the claims or specifications. As I understand the matter, however, the chief contention is that the commingling of these gases in the standpipe at different stages of carbonization of the coal reduces the temperature and renders it more uniform, and thereby prevents the temperature from becoming such as to cause back pressure through the lateral and the mouthpiece. It cannot be that the defendant has infringed this, because he does not pretend to reduce the temperature, or to render it uniform by the use of this method of overlapping charges and the consequent commingling of the gases at differing stages, but by the use of water, as heretofore stated, running down the sides of the standpipe. Unless the defendants are infringing upon the main purpose of this method patent, that is, to prevent stoppage in the standpipe, it can hardly be that they are infringing the sixth claim, in reference to preventing back pressure.

In addition to all that has been said above, it seems to me that plaintiff's method patent is but the result of a combination of old elements, well known in the art long prior to the time Carpenter and Barnum attempted to utilize them in this method patent. At least, all that is now in it would seem to me, independently of the Patent Office, except possibly the overlapping charges (and that was clearly rejected as not patentable by the Patent Office), to be the method of commingling the gases in the standpipe, and that only to prevent the standpipe stoppage.

It would be interesting to me, and would greatly strengthen what I have said in reference to this method patent of the plaintiff's, to discuss somewhat, and perhaps at some length, the testimony of Richard C. Congdon, as given before the court, Mr. P. D. Dashiell, as given in his deposition taken in Philadelphia and his testimony before the court, and other witnesses for the defendants. They seem to me, by their testimony, to make as near a demonstration as it is possible to make of the marked difference of the method used by Congdon and the Atlanta gas works from that of the plaintiff, and to show that the method of the plaintiff's patent is in no way infringed by what the defendants are doing. But I do not wish to take more time than I have, or to extend this opinion by any further discussion of the matter, even though it might add considerably to what I have said in reference to the conclusion I have reached.

There must be a decree against the plaintiff and in favor of the defendants as to this patent.

[2] Now, the other two patents are mechanical devices relating to physical features of the apparatus, or, as counsel for plaintiff says, the apparatus which is essential to the carrying out of the novel purpose of the method patent. Taking them in the inverse order, as I am doing, the next patent would be No. 1,122,683, called the lateral or valve patent. There are five claims as to this patent, but counsel for plaintiff say they rely only upon the fifth claim, because it embraces everything contained in either or all of the others, as I understand it. This fifth claim is as follows:

"The combination of a bench having a series of retorts therein arranged horizontally at different elevations, mouthpieces—one for each retort—projecting from the bench, each mouthpiece having a door-closed opening, standpipe located at the exterior of the bench, a series of laterally extending conduits, one for each mouthpiece, each conduit open at one end to its mouthpiece at a point adjacent the door-closed opening of the latter, the opposite ends of the conduits separately open to the standpipe, whereby the latter comprises an upright off-take common to the series of retorts, and a valve for each conduit located at the standpipe end thereof, whereby the entire length of the conduit is accessible from its mouthpiece for cleaning when the valve is closed."

The main feature of this, as contended for by counsel, is that the lateral passage from the mouthpiece to the standpipe has a valve which closes it in such a way as to allow the ready and satisfactory cleaning of this lateral passage. It seems that there is a deposit which accumulates as the passage of gas through this lateral passage proceeds, which requires to be cleaned out, and the main argument here has been that the ease with which it can be cleaned and the ready access to its entire length are the material features of the patent and of the invention. The difficulty about that is that it is perfectly clear that the valve between the retorts and the standpipe is certainly an old feature in the art.

The defendants set up, in answer to this first amendment to the bill, which sets up this patent No. 1,122,683; United States letters patent issued to T. P. Rowland January 1, 1879, No. 211,591, showing a valve connection between a group of retorts and a standpipe in a gas manufacturing apparatus; United States letters patent No. 1,090,813, issued to Richard C. Congdon on March 17, 1914; United States letters patent No. 1,099,639, issued to Richard C. Congdon June 9, 1914, showing a valve for the establishment and disestablishment of connection between a standpipe and a retort in a gas producing apparatus; British patent to Wates No. 5,513, issued in 1880, disclosing a valve connection between a retort and a standpipe; and French patent No. 416,924, issued to Breuer et cie., August 18, 1910, which, it is claimed, shows the combination covered by the claims of letters patent No. 1,122,683, in connection with the gas main instead of in combination with the retort.

I do not think the defendants are infringing this device of the plaintiff's, even conceding it to be novel and a patentable invention. The defendants use a valve which falls back into the standpipe, when the lateral passage is open and the valve is not in use. The valve, when closed, does shut off the lateral from the standpipe, but does it in a different way and comes into the lateral differently from that of the plaintiff.

[**3**] The Congdon valve patent was applied for March 14, 1914, and was granted June 9, 1914. The plaintiff's valve patent was applied for originally on July 24, 1913, and was divided, and the application on which the patent was granted was filed September 17, 1914, and the patent granted on December 29, 1914. It is therefore evident that plaintiff's application for its valve or lateral patent was pending in the Patent Office at the time that Congdon's application was filed and at the time his patent was granted, so that the Patent Office must have considered that the difference between the two devices was so manifest that it was justified in granting the Congdon patent notwithstanding the pendency of the Carpenter and Barnum application. On this point the Supreme Court, in Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 261, 15 Sup. Ct. 837 (39 L. Ed. 973) in the opinion by Mr. Justice Shiras, says this:

"As both applications were pending in the Patent Office at the same time, and as the respective letters were granted, it is obvious that it must have been the judgment of the officials that there was no occasion for an interference, and that there were features which distinguished one invention from the other. In Pavement Co. v. City of Elizabeth, 4 Fish. 189 [Fed. Cas. No. 312], Mr. Justice Strong said: 'The grant of the letters patent was virtually a decision of the Patent Office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent.' It would also seem to be evident that as the purpose of the invention was the same, and as the principal parts of the respective machines described were substantially similar, it was also the judgment of the office that the distinguishing features were to be found in some of the smaller, and perhaps less important, devices described and claimed. Burns v. Meyer, 100 U. S. 671 [25 L. Ed. 738]."

It is true that some of the old patents showing valves, cited and discussed above, seem to have been for use in the manufacture of water gas; but I do not think that should prevent their consideration as prior, and as showing the similarity of the old arrangements to the one patented by Carpenter and Barnum.

[4] In reference to the patent set up in the original bill, No. 1,-091,111, granted to Carpenter and Barnum on the 24th day of March, 1914, this is also one of the mechanical patents which, it is claimed, was devised to carry out the method patent of the plaintiff. The claims are brief, and are as follows:

"1. In an apparatus for generating gas, the combination with two rows of superposed parallel retorts, of a standpipe located between the two rows of retorts and between the vertical planes passing through the longitudinal axes of the retorts in each row and in common communication with the retorts of the two rows, and a takeoff pipe in communication with the standpipe.

"2. In an apparatus for generating gas, the combination with two gas benches arranged side by side, a retort in each bench, said retorts extending back from a common face of the generator, a standpipe located between the vertical planes passing through the longitudinal axis of each of the said retorts, and means connecting the standpipe with the retort of each bench."

It is granted apparently, as will be seen from the claims, for two vertical rows of retorts, one on either side of a standpipe, and both emptying into the same standpipe. It is expressed somewhat differently in the technical language of the patent claims; but that is what it is substantially for.

In answer to plaintiff's bill, which sets up this patent and claims its infringement, the defendants set up the United States patent to Rowland, No. 211,591, issued in 1879, as showing common communication with a group of retorts through a single standpipe; United States patent to Fowler, No. 808,831, issued in 1906, as showing common communication with horizontal groups of retorts through a single standpipe; United States patent to Taussig, No. 694,443, issued in 1902, cleaning apparatus for standpipes showing common connection with vertical groups of retorts; Wates, English patent, No. 5,513, issued in 1880, showing common communication with standpipe from group of retorts, the standpipes being used as buck staves; Hanson, English patent, No. 8,880, of 1885, which takes the gas down instead of up, and makes common communication of vertical groups of retorts in two adjoining benches into one pipe; Scoble, English patent, No. 421, of 1858, which takes gas from a plurality of retorts by common communication through standpipes to the take-off pipe.

There were a number of claims in this patent as originally presented to the Patent Office, and there were, apparently, a number of rejections of the claims, until finally the patent was allowed with the claims which have been stated above. This patent, to me, is of very doubtful validity. It seems to me to be thoroughly anticipated by former patents. Take the Rowland patent, United States letters patent No. 211,591, issued in 1879; the second claim of that patent is this:

"In a bench of fixing retorts, consisting of two or more series of retorts, the combination, with each series, of a common supply pipe, connecting it to a main supply pipe at one end, and a delivery pipe, connecting it to a main delivery pipe at the other end, each retort being provided with a valve at both its supply and delivery ends, and each delivery and each supply pipe connected with each series being provided with a separate valve, by means of which said series may be cut off from all other series, substantially as described."

The important thing is the emptying of a series of retorts into a common standpipe. As to this there seems to be no question about the prior art, and that this was well understood and used in the art of gas making for many years before the present patent was allowed. In the Hanson English patent take this in the specifications:

"Fig. 5 is a cross-section of two benches of retorts placed a sufficient distance apart to enable the hydraulic main descension pipes and anti-dip valve to be fixed between them; in this case the anti-dip valve *D* connects each two opposite descension pipes, and is placed between them as shown. One hydraulic main does for two benches of retorts, instead of two required under the present system."

This is quite different, it is true, from the Carpenter and Barnum patent; but it shows exactly the same idea as to the emptying of a number of retorts into a common standpipe. Now, to have two vertical rows of retorts emptying into a common standpipe, as Carpenter and Barnum do, appears to me to be a mere duplication of what was well understood before, and not anything novel or patentable. Dr. Rudolph Lessing, of England, a distinguished expert in the manufacture of gas, and in his knowledge and experience with gas apparatus, testified as a witness for the plaintiff in the present case, as follows, on cross-examination:

"Q. Turning, then, to the other patent—No. 1,091,111—in your opinion could a structure in which but one row of retorts connected to a common standpipe laterally be the thing described and claimed in that patent, or do you consider that that patent is addressed to a case where there are two rows? A. It specifically mentions two rows in the claim. Q. Yes, sir. So it would be your opinion that, where there are not two rows connected to one standpipe, there would not be the structure that those claims present? A. I think this is quite clear from the claims of this patent. Q. Won't you please state what difference there is, except perhaps in degree, whether there be a row connected to but one side of the standpipe, or there be two rows connected one on each side of the standpipe? A. Would you mind explaining more clearly? I don't quite understand the question. Q. Yes, sir; I will be glad to. What difference in result, in your opinion, would take place whether the structure has one row of retorts connected in common to a standpipe, as in this patent, or whether there be two rows connected to a standpipe, so as to discharge in common? A. The difference would be largely one of degree; that is to say, a number of retorts discharging into one standpipe would affect the degree of efficiency of the whole combination. Q. It would affect the degree rather than the character of the result, would it not? A. Except inasmuch as the construction of the whole gas bench is involved, because obviously, where one standpipe can be disposed between two benches constructural possibilities arise which are not possible in a case where only one vertical row of retorts discharge into each standpipe, where you want an extra pipe or where you would have an extra pipe necessary for each vertical row of retorts. Q. But so far as the operation of making gas goes, the difference, if any, in the result is one of degree rather than kind? A. Quite so."

My view of the matter is this: That, just in line with what has been quoted above from Dr. Lessing, there would seem to be nothing novel and nothing patentable, where it was well understood that a series of retorts could be emptied into a common standpipe, to make two vertical rows of retorts empty into a common standpipe instead of one.

This seems to me to involve a mere mechanical arrangement, and could hardly be considered the exercise of inventive genius, such as would be required to make it patentable.

It is denied here, as I understand it, that either Congdon or the Atlanta Gaslight Company is now using this arrangement of a row of retorts on each side entering into a common standpipe. Instead they have only one row of retorts on one side of the standpipe at the front or charging end of the retorts, and then a standpipe for another row on the discharging end of the retorts, which they at one time had connected with the standpipe on the charging end. In other words, as I understand their position as stated by them, they are not using this plan now of having a vertical row of retorts on each side of a common standpipe, and they do not desire to do so. But, whether this be true or not, to my mind the claims as to this patent cannot be sustained, because, if it be a thing patentable at all, it was very clearly anticipated as to one row of retorts, and I think, for the reasons I have stated, also anticipated as to two rows of retorts.

There are a number of other patents pleaded here, to which I do not care to refer more particularly—the Wates English patent, No. 5,513 of 1880, which, it is claimed, anticipates the plaintiff's standpipe patent; and the Taussig patent, No. 787,061 of 1905, which claims an apparatus for the manufacture of coal gas the combination of a stack of retorts comprising a plurality of benches each containing vertical rows or sets of non-communicating retorts having their mouthpieces in vertical alignment, showing the same character of construction claimed here.

In view, therefore, of the prior state of the art, there was nothing whatever new, certainly as to a single row of retorts emptying into a common standpipe, and the emptying of two vertical rows of retorts into a common standpipe seems to me to be a mere duplication of the former common usage of one row of vertical retorts emptying into a common standpipe. Consequently I do not regard this standpipe patent, No. 1,091,111, as a patentable invention.

Summing the whole matter up, it is this:

Complainant's patent No. 1,140,113, the "method" patent, restricted and limited as it must be by its history in the Patent Office, is not infringed by anything done by the defendants, who use a method described in Congdon's patent No. 1,090,813, known as the "scrubber" patent, using water down the sides of the standpipe, thereby causing proper temperature in the standpipe and preventing accumulation.

As to plaintiff's patent No. 1,122,683, the "valve" or "lateral" patent, the valve used by the defendants is entirely dissimilar to that of the Carpenter and Barnum patent, and consequently there is no infringement.

As to plaintiff's patent No. 1,091,111, the "standpipe" patent, the discharging of a vertical row of retorts into a common standpipe was so well known before this patent was granted, and the discharging of two vertical rows of retorts into a common standpipe being a mere duplication of what was well known and understood in the prior art, the claims of this patent cannot be sustained.

The result is that there must be a decree in favor of the defendants, and dismissing the plaintiff's bill.

MECCANO, Limited, v. WAGNER et al.

(District Court, S. D. Ohio, W. D. June 12, 1916.)

No. 23.

1. TRADE-MARKS AND TRADE-NAMES ⟹75—UNFAIR COMPETITION—DECEPTION—NECESSITY.

Where defendant dressed his goods to resemble those of complainant, and in every way attempted to palm them off as complainant's, evidence that customers were deceived and purchased defendant's goods as those of complainant is unnecessary to establish unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⟹75.]

2. TRADE-MARKS AND TRADE-NAMES ⟹70(1)—UNFAIR COMPETITION—WHAT CONSTITUTES.

Complainant and its predecessor originated a mechanical building toy for children. The toy was extensively advertised and sold in distinctive boxes, which were accompanied by manuals showing how the various parts could be combined to form many interesting and instructive appliances, such as bridges, and the like. The outfits were interchangeable, and consisted of various numbers of parts to which additions might be made. Defendant prepared a mechanical toy along exactly the same lines, selling it under a different name, but under the same dress as that of complainant's and copying its manual. *Held*, that in view of the fact that defendant sold its toy for a less price and attempted to palm off its goods for those of complainant, it was guilty of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟹70(1).]

3. TRADE-MARKS AND TRADE-NAMES ⟹68—UNFAIR COMPETITION—WHAT CONSTITUTES.

Where complainant established a business system peculiarly its own, defendant is guilty of unfair competition in attempting to appropriate such business system and substitute its goods for those of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⟹68.]

4. COPYRIGHTS ⟹5—MATTER WHICH MAY BE COPYRIGHTED.

While only those writings and discoveries which are the result of intellectual labor may be copyrighted, a manual, instructing how to use a mechanical toy prepared for children, which was more than a mere advertisement, being a guide to the combinations which children might form with the toy, and explaining many principles of mechanics, may be copyrighted.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 3, 13; Dec. Dig. ⟹5.]

5. COPYRIGHTS ⟹83—INFRINGEMENT—INTENTION.

While intention to infringe is immaterial, if infringement of the copyright otherwise appears, yet an intention to infringe may be considered in determining whether there was an actual infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76; Dec. Dig. ⟹83.]

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6. COPYRIGHTS ⟹56—INFRINGEMENT—PARAPHRASING.
The mere paraphrasing of a copyrighted work constitutes an infringement.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. ⟹56.]

7. COPYRIGHTS ⟹57—INFRINGEMENT—WHAT CONSTITUTES.
To appropriate a substantial portion of a copyrighted work which diminishes the value thereof constitutes an infringement.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 53, 60; Dec. Dig. ⟹57.]

8. COPYRIGHTS ⟹26—APPLICATION—BLANKS.
Where the duly authorized agent of the owner who made an affidavit for a copyright failed to strike from the printed form alternative statements of fact applicable to the particular capacity of the affiant, but it appeared that no fraud or injury was intended to the government, an infringement of the copyright granted cannot be defended on such ground.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 24; Dec. Dig. ⟹26.]

9. COPYRIGHTS ⟹26—VALIDITY—AFFIDAVIT.
That the agent of the foreign owner who filed an affidavit for a copyright did not actually see the printing of the copyrighted work in the United States will not invalidate the copyright, where he engaged a printer to do the work.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 24; Dec. Dig. ⟹26.]

10. COPYRIGHTS ⟹40—VALIDITY—ABANDONMENT.
Where complainant copyrighted a manual for use in connection with the sale of its mechanical toys, the fact that it copyrighted a manual issued in 1912 was not an abandonment of the 1911 manual; the latter one being a new work.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. ⟹40.]

11. COPYRIGHTS ⟹18—VALIDITY—DISPOSAL OF BOOKS PUBLISHED IN FOREIGN COUNTRY.
Complainant, an English company, sold mechanical toys, and editions of a manual, copyrighted in the United States, were printed in England and accompanied the outfits sold in the United States. Copyright Act March 4, 1909, c. 320, §§ 15, 31, 32, 35 Stat. 1078, 1082, 1083 (Comp. St. 1913, §§ 9536, 9552, 9553), respectively, provide that works not produced for sale may be copyrighted; that any book published abroad with authorization of the author or copyright proprietor may be imported, but that works imported in violation of the act shall be destroyed. *Held*, that such importation and disposal of the English editions did not invalidate the copyright.
[Ed. Note.—For other cases, see Copyrights, Dec. Dig. ⟹18.]

12. COPYRIGHTS ⟹32—ANTICIPATION—WHAT CONSTITUTES.
Complainant's copyrighted manual for use in connection with a mechanical toy is not invalid because of a previous uncopyrighted work for use in connection with such toys, where the uncopyrighted work did not contain all of the matter in the copyrighted book.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 34; Dec. Dig. ⟹32.]

13. PATENTS ⟹112(1)—VALIDITY—PRESUMPTIONS.
A patent is prima facie valid.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 162; Dec. Dig. ⟹112(1).]

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

14. PATENTS ⟹26(2)—PATENTABILITY—SUBJECT-MATTER OF PATENT.
A rectangular plate and a so-called sector for use in connection with a mechanical building toy, consisting of many strips with slotted holes, which could be used to form many ingenious devices, and thus educate the young in principles of mechanics, are, where not anticipated, the subject of a patent showing invention; the sector and plate being different from the mere strips and allowing different combinations.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⟹26(2).]

15. PATENTS ⟹35—INVENTION—EVIDENCE.
In determining whether a device is patentable or not, the fact that it has gone into general use may be considered.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⟹35.]

16. PATENTS ⟹72—ANTICIPATION—ABANDONMENT.
Where before it was attempted to be patented, a rectangular plate had formed part of a mechanical toy building outfit, the fact that the plate was thereafter flanged will not warrant the issuance of a patent; the device having been abandoned to the public.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91; Dec. Dig. ⟹72.]

17. PATENTS ⟹20—PATENTABILITY—IMPROVEMENT.
A sector or plate, intended for use in connection with a mechanical building toy, shows invention, and may be patented where it permits the formation of many new and interesting combinations which could not be formed out of simple strips and rectangular plates.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 20–22; Dec. Dig. ⟹20.]

18. PATENTS ⟹182—INVENTION—RIGHT TO.
Where defendant did not, with reasonable diligence, attempt to reduce his conception of an invention to practice, and failed to patent it, he cannot assert any rights thereafter.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 258; Dec. Dig. ⟹182.]

19. PATENTS ⟹222—INFRINGEMENT—DEFENSES.
Where complainant, as soon as advised that a patent probably did not cover a building toy outfit, directed that the marking of the outfit patented should be discontinued, defendant cannot defeat a suit for infringement of other patents on the ground that complainant was guilty of bad faith, for that is an essential element.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ⟹222.]

20. PATENTS ⟹222—INFRINGEMENT—DEFENSES.
That complainant, knowing the patent to be invalid, marked the devices "patented" is no defense to a suit against defendant for infringement of a subsequent patent on additions to the device.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ⟹222.]

In Equity. Suit by the Meccano, Limited, against Francis A. Wagner, trading as the American Mechanical Toy Company, and the Strobel & Wilken Company, who counterclaimed. Decree for complainant.

Reeve Lewis and Ralph L. Scott, both of New York City, and Healy, Ferris & McAvoy, of Cincinnati, Ohio, for complainant.

H. A. Toulmin, of Dayton, Ohio, for defendants.

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

HOLLISTER, District Judge. Action for unfair competition; infringement of copyright, and infringement of patent. Counterclaim for unfair competition.

In 1899 Frank Hornby, of Liverpool, England, conceived the idea of a mechanical toy composed of thin narrow strips of metal of different lengths perforated with holes equidistant from each other, angle bars, wheels, nuts, and bolts, so designed and constructed that by their use toy models can be built, in appearance resembling mechanical structures, and, in some instances, actually illustrating principles in mechanics applied and embodied in actual mechanical structures in common use in many arts in which the principles of mechanics are applied. Hornby had a mechanical turn of mind, and, as a boy and young man, was accustomed to the use of the simpler tools used by mechanics. He was managing clerk in the office of one Elliott, an importer of American meat and live stock. He had no means, except a small salary, and his family included two boys, for whom he constructed the metal strips and other appurtenances hereinbefore described. Various mechanical structures were built up of these, and Hornby, believing he had found a toy for which there would be a market, obtained a British patent in January, 1901. His want of means and the disinclination of the trade to further his efforts to put the device on the market did not discourage him; but, having interested his employer, he found sufficient means to further develop the toy and to bring it to the attention of the public.

The first constructions were crude and composed of comparatively few parts, but the idea was there, and by the addition from time to time of further parts, it became possible for a bright boy to build up, either on his own initiative or from illustrations in the Manual which accompanied each outfit of parts, an extraordinary number of devices resembling in form and appearance many structural devices known and used in the mechanical arts. There was nothing like it or resembling it on the market, and, after a number of years of effort to create a market by advertising and public demonstrations, a large business has been built up in the United States and elsewhere.

The toy is of great utility, of educational value, is stimulating to the imagination, appeals to a boy's creative faculties, and not only gives entertainment, but is highly instructive.

Prior to 1908, about $40,000 had been expended in the enterprise, including advertising. The toy was first called: "Mechanics Made Easy," and "Adaptable Mechanical Toy." It was in 1907 called "Meccano," by which it is known in the trade. The name was chosen after much consideration, and is a happy choice for a toy in the use of which models of mechanical devices may be built up. In 1908, the business was incorporated under the laws of Great Britain, under the name, "Meccano, Limited." It was first attempted in 1908 to interest American dealers, and in 1909 the Embossing Company of Albany, N. Y., became the exclusive agency for the United States and Canada, although prior to that time some English exporting houses had sent some of the outfits to the American market. Sales of Meccano in the

United States developed rapidly—1909, $7,000; 1910, $24,000; 1911, $49,000; 1912, $114,000—and up to the last date, approximately $100,000 had been spent in advertising, demonstrating in department stores, and divers other ways.

Each "outfit" of Meccano contains certain units, consisting of flat strips of metal, angular strips and plates of design and dimension of previous conception, so as to be adapted to the various kinds of models to be constructed. In these strips, etc., the place and dimension of the holes are also the result of thought, especially so in the early conception and development of the toy. This is also true of the ample fastenings by which units may be held together as well as appropriate wheels and other devices used in building up the models, and all of these were made according to a standard, and are, through the various kinds of outfits complainant sells, interchangeable, so that the parts of one outfit may, when appropriate, be interchanged with other parts; and in all the outfits, parts are interchangeable. The Meccano outfits are numbered from "0" to "6," inclusive, and the company sells accessories and supplemental outfits numbered "0A" to "5A," inclusive. In "0," there are different parts making up that outfit. From these parts a number of models can be made. This outfit has a certain price. In "0A," there are additional parts, which together are sold at a certain price. When "0A" is added to "0," they together make outfit "No. 1." And so on the system goes, the outfits expanding in parts and units until outfit "6," together with supplemental parts "5A," make up and comprise all of the preceding outfits and the additional parts to each outfit, the price becoming greater as the outfits contain more parts, units, etc. The plan upon which these commodities are sold was preconceived and has a definite object. If a boy starts with outfit "0," and wishes to increase, by additional parts and units, the opportunity for constructing models beyond the capacity of the units and parts in "0," he purchases the additional units and parts "0A." He then has an outfit which corresponds to outfit "1." And so if he first has, say, outfit "3," it would contain all the parts of "0," "1," and "2," which, of course, would include additional parts "0A," "1A," and "2A." The units in these additional parts and the additional parts themselves may be purchased separately. If a unit has been lost or injured, it may be obtained from dealers who carry Meccano. Such a unit can be used in its appropriate connection and relation in any Meccano outfit. The valuable quality of interchangeability attaches to the various parts. Each set is accompanied by a Manual, in which is depicted models, which may be constructed by the units contained in the outfit which it accompanies, though not intended to limit the possibilities of the units, as the thought and ingenuity of the boy owner may suggest constructions not found in the Manual.

There is no doubt, and experience shows, that the use of an outfit, with its Manual, tends to develop a desire for a more extended opportunity the possession of further units would afford. Hornby created something. What he created has been developed since by him and his associates and by the complainant, which succeeded to their rights. That which was created was the result of study, of experiment, of expense; and, when the result of these were brought to the market and to the attention of consumers, it became a creation of very great value.

It was known by a distinctive trade-name, and gave to the consuming public a toy of a new character which was in its essence a "model builder" and might well have received that name. Each of the outfits has printed on its cover or casing, "Manufactured by Meccano, Ltd., Liverpool, Eng." The box covers of Meccano outfits are black, the label—the color red predominating, the word "Meccano" in large letters being in red, and the legend, "The World's Mechanical Wonders in Every Home," being in red—when pasted on leaves a margin of black.

In each outfit, the parts or units making it up are neatly arranged in the containing box. The label also on the box represents a boy building a model of one kind or another.

[1, 2] There is no doubt that when the defendant Francis A. Wagner, trading as the American Mechanical Toy Company, introduced into the market the commodities of which Meccano, Limited, complain, the trade and a large part of the consuming public were acquainted with complainant's model builder, and the trade and those of the consuming public who had seen Meccano outfits knew it as of British make. The name "Meccano" itself attracts attention, and particularly when seen in connection with printed representations of models of well-known mechanical constructions; and the name had become identified with a toy model builder, the only one of its kind.

Prior to the date this suit was brought, Wagner and the defendant the Strobel & Wilken Company, of New York and Dayton (Wagner's selling agents), had introduced into the market a model builder, which, except for great care in examination, cannot be distinguished from the complainant's Meccano; and, in connection with the model builder so introduced by defendants, a Manual which could not in my judgment, have been made in the way they are made, in the language and figures chosen, and in the models displayed, unless the constructor had before him a Manual or Manuals issued by complainant.

The covers of defendants' outfits are black. The predominating color of the label is red, a boy engaged in the construction of a mechanical model is displayed; and on the label is inscribed "The World's Greatest Mechanical Wonder." The choice of the name, "The American Model Builder," is significant, giving the impression that it is different from the British model builder (the prior and well-known Meccano), when, in fact, it is the same. The idea conveyed by defendants' label is just the same as the idea conveyed by complainant's label. If one had seen an advertisement of a Meccano model builder, or had seen a neighbor's boy building models with Meccano mechanical units, and had gone to a toy store for the purpose of buying such an outfit and had seen there defendants' outfits and had purchased one, there is no doubt he would think he had bought what he had gone after. There is testimony showing results of similar character. Testimony, however, is not needed, for the outfits themselves, in numbers and parts corresponding with the complainant's and the arrangement of the parts in the boxes and the appearance of the boxes, are enough in themselves, without any testimony to warrant the court in concluding, as is now concluded, that the defendants' outfits, parts, boxes, and labels would deceive the purchasing public, and were so intended. A mere glance at Plaintiff's Exhibits 8, 15, and 17, of defendants' outfits of 1912, and a comparison of these with Plaintiff's Exhibits 24 to 26, inclusive, show that the one is copied from the other in all substantial details. The intention to deceive may be inferred "from the inevitable consequences of the act complained of." Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; Samson Cordage Works v. Puritan Cordage Works, (C. C. A. 6) 211 Fed. 603, 608, 128 C. C. A. 203, L. R. A. 1915E, 1107.

Defendants' outfits are also seven in number, numbered 1 to 7, inclusive, so that "No. 1" corresponds to Meccano "0," and so on. Hence, for instance, "No. 3" American Model Builder is the same as Meccano "2," and additional parts "0A" Meccano are additional parts "No. 1½" American Model Builder. As an illustration, the Meccano, 1911, lists of separate parts—some of peculiar construction—have been duplicated in all respects in the defendants' corresponding lists. The defendants have added two parts, a rack and eccentric wheel. Meccano had not, prior to that time, listed or made these—at least, had not put them upon the market. These and a few other additional parts introduced by defendants from time to time, all embodying ancient and well-known mechanical principles—"set screws," for instance—complainant uses in subsequent outfits. Upon this, the defendants found their separate counterclaim for unfair competition.

The building up of models requires not only that certain parts shall be of constant shape and size, but that the holes in the parts shall be equidistant from each other, the distance in all the parts between the holes being the same. This establishes a standard. That standard of distance Meccano established as ½ inch. The adoption of the same standard by the defendants was not accidental. If a different standard had been adopted, then American Model Builder parts and Meccano parts could not be interchangeable, since in the Model Builder the parts are substantially the same as the corresponding Meccano outfit of parts. A boy starting with a certain Meccano outfit can gratify his desire for additional parts for the construction of further models by purchasing the American Model Builder parts, resulting in obvious injury to Meccano's business. However strongly defendant asserts ignorance, accident, or mistake, little weight can be given to what he says in the face of what is disclosed by the physical appearance of the outfits, the Manuals, method of arrangement of contents of boxes, and the appearance of the, what might be called, "show case exhibits of separate parts." "Complete Manual of Instruction," issued by defendants, which accompanies each outfit, is called, in Meccano, "Manual of Instructions." Defendants' Manuals may be the result of labor and thought, but the labor and thought is not of an original character, resulting in something new taken from a mass of common information; and it is clear enough that the labor and thought expended has been for the purpose of making a Manual, appropriate to the outfit it accompanies, counterfeit the Meccano Manual accompanying the corresponding Meccano outfit; and all for the purpose of deception. Even if there were no evidence tending to show actual palming off of the defendants' for the complainant's goods, there is a silent representation made by the outfits, the arrangement of parts and number of parts, the Manuals and some of defendants' advertisement, or the advertisement of those selling their goods, that "American Model Builder" is the same as Meccano. There are in evidence many instances of deception, confusion, and mistake growing out of the similarity of these goods, even in their extraordinary detail. In addition to the evidence, the physical exhibits themselves disclose, not only the intention of defendants that his outfit is the same as the corresponding Meccano outfit, and that it is interchangeable with Meccano parts, and other evidence in the case establishing both of these charges against the defendants, but there are also in evidence two of defendants' letters which convict them of both charges. The case is so clear that it would serve no useful purpose to set forth the many proved instances of the injurious effect upon complainant's trade caused by defendants' devices and the interchangeability of defendants' parts with the complainant's parts.

One of the earmarks of unfair competition—the sale of the imitating device at a lower price—is abundantly proved in this case. Of course, when dealers can get substantially the same article at a lower price, they will deal in that in which there is "more money." Notable illustrations of this is found in the instances of the Wanamaker stores and the Curtis Publishing Company. In these, Meccano has been largely supplanted by the American Model Builder, for the reasons that they are substantially the same, and it is more profitable for the dealer to buy the imitating article. It is shown also that, for the most part, the prices to the retail trade are less for American Model Builder than for Meccano.

The subject of unfair competition is, for the moment, under consideration. Infringement of copyright and infringement of patent will be dealt with later. It seems to me that unfair competition exists both under the aspect of palming off, which is shown not only by instances in the testimony, but also in the more subtle way, as said by Judge Lacombe, "by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor." Enterprise Mfg. Co. v. Landers, 131 Fed. 240, 241, 65 C. C. A. 587, 588 (C. C. A. 2), affirming the Circuit Court in 124 Fed. 923. As I read the facts in that case in the District Court, there are two noticeable differences between it and this case when dealing with the subject of palming off one's goods for another. They are that the facts in this case show, if possible, an even more pronounced instance of appropriating all by which the complainant's product had become known to the public, and that the defendant in that case was honest enough to admit all that he had done, but took the position that he was entitled, under the law, to appropriate what belonged to the complainant. He attempted to justify himself, as the complainant does in this case, by the decision of the Circuit Court of

Appeals in this circuit in Globe-Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304. Judge Platt had no difficulty in distinguishing the facts in that case from the facts before him, and he sets forth some of the reasons. In addition it may be said that, in the Globe-Wernicke Case the units were well known. They belonged to a class of commodities for which there had long been a market. Anybody could build one in the way they were built. Nothing in the way of business system was involved in placing one unit upon another, or several units end to end, in making up a bookcase. In this case, there was not, until Meccano came upon the market, anything like it known. There was no class which would comprise it, or to which it could be assimilated. Further, the various parts in each unit were futile in themselves, and so was the unit made up of the parts. The bookcase unit, as constructed, was the final construction, except, if one wanted to, he could add one to another; but in Meccano the construction of the thing into which the parts in the unit went was in the power of the purchaser alone. He could make such constructions as pleased him, either by suggestions from the Manual, or such as came from the fertility of his own mind, all within the limits of the parts the particular unit comprised. The Globe-Wernicke Case is not helpful to the defendants.

In addition to Enterprise Mfg. Co. v. Landers, 131 Fed. 240, 65 C. C. A. 587, the principle will be found in Yale, etc., Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149 (C. C. A. 2), and Rushmore v. Manhattan, etc., Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269 (C. C. A. 2).

[3] Unfair competition exists also in that the complainant has established a business system which is peculiarly its own. This was done at the expense of time, thought, labor, and much money. If it be assumed that this court is in error with respect to the finding of palming off of defendants' goods for the complainant's, establishing thereby unfair competition, yet the defendants use complainant's business and the system it has established. In these it has acquired a property right of which its competitor cannot deprive it by introducing his goods into, and as a part of, complainant's business and business system. In this respect, the case strongly resembles Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917, affirmed by the Circuit Court of Appeals of this circuit, 215 Fed. 349, 131 C. C. A. 491.

If it be assumed that defendant could establish a business system of his own and enter into competition with the complainant's similar system, it seems to me quite clear that the defendant's system could not be so used as to appropriate the business and good will established by the complainant. It cannot be that the defendant can build up his own business by taking away complainant's business through the very method established by complainant for carrying it on. The American Model Builder is not only a fraud on the public, but also a fraud on the complainant.

I find the charge of unfair competition amply established by the facts and under the law.

[4] Defendants are charged with infringement of copyrights No.

291,375 of June 22, 1911, "Meccano Royal Manual," as shown in Plaintiff's Exhibits 42 and 42-A; and No. 294,670 of August 14, 1911, on "Meccano * * * Manual of Instruction for Whole Series of Models" (Plaintiff's Exhibits 38 and 38-A).

The defendants' infringement is charged to be in its Manual of 1912 (Plaintiff's Exhibits 9 and 10 and 112). The publication and distribution of defendants' Manual is not denied, and is also proved. Whether or not complainant's Manual may be properly the subject of copyright may be determined by the test laid down by Judge Jenkins in J. L. Mott Ironworks v. Clow, 82 Fed. 316, 318, 27 C. C. A. 250 (C. C. A. 7), in which he says, referring to certain decisions of the Supreme Court:

"The result of these decisions would seem to place this construction upon the constitutional provision under consideration: That only such writings and discoveries are included as are the result of intellectual labor; that the term 'writings' may be liberally construed to include designs for engraving and prints that are original, and are founded in the creative powers of the mind, the fruits of intellectual labor; * * * that, to be entitled to a copyright, the article must have, by and of itself, some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

When this, together with other statements in the opinion, is applied to complainant's Manual, it cannot be successfully denied that complainant's Manuals were properly copyrighted. Aside from the attractiveness of the designs themselves, it is certain that much thought and labor must have been given to their construction. They are more than an advertisement of complainant's wares. They instruct the purchaser how to use the strips of metal and wheels and nuts and angles and plates, without which even a particularly bright boy would not be able himself to think out the many models set forth. It can scarcely be doubted, too, that in constructing models based on the illustrations, many mechanical devices, of which he would otherwise have no knowledge, are brought to his mind, and many principles of mechanics imparted to him.

The Manual is in reality a key by which the really wonderful treasures contained in the various parts of complainant's outfits may be unlocked. The outfits being the same, the defendant's Manual is also a key to complainant's treasure box. Reed v. Holliday (C. C.) 19 Fed. 325, 326, is applicable to the situation.

[5] That the defendant also regards the complainant's Manual as a proper subject of copyright, is shown by the fact that he has copyrighted his own. Defendant would have the court consider the defendant's Manuals alone as if they were apart from the alleged acts of unfair competition alleged and proved. It is true, it is a different subject, and must be dealt with as such; nevertheless, the acts of unfair competition throw light upon the way defendant's Manuals were made up. Intention is held to be immaterial if infringement otherwise appears. Reed v. Holliday (C. C.) 19 Fed. 325, 327. But I take it that when intention also appears, it is a valuable fact when construing language, figures, and illustrations found in defendant's Manuals.

[6] The thought and labor bestowed by defendant was not, as said

before, in making a new work on the same subject, but was expended largely in paraphrasing the language of some of complainant's statements and descriptions in its Manuals so as to describe the same thing in somewhat different language. Paraphrasing constitutes infringement of a copyright as well as actual copying copyrighted matter. West Publishing Co. v. Thompson Co., 176 Fed. 833, 838, 100 C. C. A. 303.

[7] It is true that a part of the copyrighted Manual is found in Meccano's Manual of 1910, which was not copyrighted, and a prior Manual of 1910, copyrighted (Complainant's Exhibits 40 and 41). But material and substantial matter found in the copyrighted Manuals charged to be infringed will be found in the Manuals complained of, either paraphrased or in the same words. The appropriation of a substantial portion of another's copyrighted work constitutes infringement. Springer Lith. Co. v. Falk, 59 Fed. 707, 712, 8 C. C. A. 224 (C. C. A. 2). It is also true the defendant has not appropriated the entire copyrighted work; but he has materially diminished the value of complainant's work, and appropriated its labors to an injurious extent. This constitutes infringement. Greene v. Bishop, Fed. Cas. No. 5,-763. See, also, Folsom v. Marsh, Fed. Cas. No. 4,901. The true test of piracy, or not, is laid down by Mr. Justice Story in Emerson v. Davies, Fed. Cas. 625, No. 4,436:

"It has been truly said, that the subject of both of these works is of such a nature that there must be close resemblances between them. But the real question on this point, is, not whether such resemblances exist, but whether these resemblances are purely accidental and undesigned, and unborrowed, because arising from common sources accessible to both the authors, and the use of materials open equally to both; whether, in fact, the defendant Davies used the plaintiff's work as his model, and imitated and copied that, and did not draw from such common sources or common materials."

When defendants' Manuals are subjected to the tests laid down in these cases, there is no room for doubt that the Manuals complained of are piracies of complainant's copyrighted Manuals which the defendants are charged in this case with having infringed.

[8] The defendants claim that the copyrights sued on are void and without merit. The objection that certain printed statements in the affidavit of Hills were untrue, and that Hills did not actually see the printing of the copyrighted Manuals in the United States, seems to me frivolous. The first resulted from the failure to strike out from a printed form certain alternative printed statements of facts applicable to the particular capacity in which the affiant appears. Hills neglected to strike out the inapplicable statements, but the affidavit shows, in the application for registration of the large Meccano, 1911, Manual, that he was the duly authorized agent of the claimant of the copyright; and it is quite clear there was no fraud or injury, or intended fraud or injury, worked on the government, or upon any one, by the failure to strike out those printed statements not applicable to the capacity in which he made the affidavit.

[9] As to the second claim, it is true Hills did not see the type set up or the copyrighted Manuals bound. But what he did was in the ordinary course of business. He employed the printer to do the

printing, and furnished him the copy from which to do it. There might have been stronger evidence of these facts; but, so far as appears, the work was done by printers in Albany whose names appeared in evidence. Defendants could have called them. What appears is at least prima facie evidence of the fact that the statute was complied with.

There are many indications that the person or persons who made up the defendants' Manuals complained of must have had before him or them complainant's Manual and illustrations and descriptions; the therein set forth models; statements and prices of separate parts; and the arrangement of these, when the Manuals complained of were made. This conclusion is irresistible from what is found in the respective Manuals, especially when one considers the manner in which the defendants copied complainant's outfits and ideas, and the purposes for which this was done. As an illustration: When figure 48 of the American Model Builder of 1912 (Plaintiff's Exhibit 10) is compared with figure 64, Meccano Manual of 1911 (Plaintiff's Exhibit 38), the conclusion cannot be escaped that one was copied from the other. The fact is defendant copied its Manual both from complainant's copyrighted and uncopyrighted Manuals. And there are ample particulars in the Manuals complained of, sufficiently copied from the Manuals charged to be infringed, to hold the defendant guilty of infringement of complainant's copyright.

[10] Such embarrassment as complainant might otherwise have from the date (1910) on the manual claimed to be like Exhibit 42 is relieved by the showing that the models therein disclosed were not prepared for the market until 1911. The date, 1910, was a mistake, afterwards corrected in the Patent Office, the work being in fact published June 20, 1911.

The claim that the copyright of 1911 was abandoned by the copyright of 1912 cannot be sustained. Complainant may well claim that the copyright of 1912 was for a new book that could have been dated 1911, or 1912. West Publishing Co. v. Thompson Co., 176 Fed. 833, 836, 100 C. C. A. 303 (C. C. A. 2).

[11] So far as the issues in this case are concerned, it is immaterial that editions of Meccano copyrighted Manuals were printed in England and accompanied the Meccano outfits sold in the United States. Bentley v. Tibbals, 223 Fed. 247, 138 C. C. A. 489; Bowker, Copyright, Its History and Its Law, pp. 279, 282, 283; sections 15, 31, and 32, Copyright Act of 1909. The defendant was not injured and cannot complain.

[12] Nor does defendant take anything by his claim that the copyrights are anticipated by Meccano uncopyrighted Manual of 1910, and by complainant's copyrighted "The Hornby System of Mechanical Demonstration." (Why, upon the former, plaintiff's Exhibit 40, is pasted a slip covering the word "copyrighted" does not appear; but apparently the defendant makes no point of this.) Besides many other differences, the former contains no models at all showing the important plates and sector exhibited in complainant's copyright charged to be infringed; and the latter (plaintiff's Exhibit 41), while containing

models in which a plate appears, yet the plate has not the perforated flange and the sector does not appear at all.

[13-16] Complainant's claim of infringement of the patent may be disposed of briefly and, for the most part, affirmatively.

The claims deal with flanged metal plates, as therein described and disclosed in the drawings, both the rectangular plate and the plate called "sector." They are of sheet metal with flanges, in both cases perforated, the holes being of the standard distance apart, and may be either circular, or oblong, for purposes of adjustment in the construction of models in which some slight freedom of motion is more desirable, if not necessary. If the patent is valid, there can be no doubt of defendant's infringement.

In addition to the prima facie validity, growing out of the fact that the patent was issued, its utility is further attested, not only by the fact of the defendant's use of it and that he claims to be the inventor himself, but an examination of the Manuals shows the many uses to which both the rectangular plate and the sector may be put, so far as disclosed. They are a valuable and distinct addition to the parts with which, in combination, many structures may be built which, without them—particularly so in the case of the sector—could not have been constructed.

Many uses which the rectangular plate may serve could be similarly effected by building up a construction or frame by appropriate metal strips. But it is apparent that a construction by the strips would lack the rigidity of the plate; and its great simplicity, when compared with the built-up structure appropriate for similar uses, is clear. Furthermore, as one piece, it lends itself to structures which otherwise the young model builder might not, and probably would not, appreciate, in the absence of illustration in a Manual, or otherwise. It tends to encourage construction, as the ingenuity of the boy may discover further uses which would be beyond his capacity if he had before him only the strips. The rectangular plate is not, therefore, one piece built up of the several theretofore known parts, and not patentable, as in Howard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, and Standard, etc., Co. v. Caster, etc., Co., 113 Fed. 162, 51 C. C. A. 109 (C. C. A. 6). It embodies rather the principle of Dececo Co. v. Gilchrist Co., 125 Fed. 293, 60 C. C. A. 207 (C. C. A. 1). The plates, both rectangular and sector, accomplish a new result, as compared with the strips, and its patentability in these respects is fairly clear. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Krementz v. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Watson v. Stevens, 51 Fed. 757, 2 C. C. A. 500 (C. C. A. 1); Canda v. Michigan Co., 124 Fed. 486, 61 C. C. A. 194 (C. C. A. 6).

If the patentability of the rectangular and sector plates is regarded as doubtful, the fact that they have gone into extensive use should be considered. Standard, etc., Co. v. Caster Socket Co., 113 Fed. 162, 166, 51 C. C. A. 109 (C. C. A. 6), and cases cited therein.

I think, however, that, so far as the language of the claims is applicable to the rectangular plate, the patent in that respect has been anticipated by the disclosures in complainant's own copyrighted book, "The Hornby System of Mechanical Demonstration" (Plaintiff's Exhibit 41). The plate there appears as an important part, as no doubt it is, and is just like the rectangular plate of the patent, with the exception of the perforations in the flanges. I would not think that so slight a change would remove the rectangular plate from the charge of anticipation.

[17] I find, too, that the block with perforations regularly and uniformly arranged to correspond to the several parts in Quackenbush's patent of September 25, 1877, fairly anticipates complainant's rectangular perforated plates. This conclusion, if correct, requires the holding that the complainant takes nothing from its claim of the patent, so far as they are applicable to rectangular plates.

The claims, so far as they relate to the sector, are not open to this objection, nor do I find it anticipated in the prior art. Figure 4 in Annin's patent of January 21, 1884, forming the bottom of the wheelbarrow disclosed, is a part, it is, true, of a built-up toy; but the scope of the Annin patent is so narrow and its purposes so limited that I am unable to say that figure 4 would suggest the sector of complainant's patent. In any event, the sector with its variety of designed and possible uses is so great an improvement of Annin's device as to rise to the dignity of invention. This improvement, its utility and its different forms adapting it to uses of which Annin's device is not capable, together with its prima facie quality, warrant the finding of patentable invention.

[18] If this conclusion with respect to the rectangular plates is wrong, I find from the evidence that, even if the testimony of Wagner, his wife and brother-in-law is true, since Hornby's invention was as early as February 4, 1911, and actual Meccano models were in the United States in June, 1911, and Meccano outfits made up in form for the trade were in the hands of the Meccano United States agency on July 29, 1911, it does not avail Wagner, because he did not exercise reasonable diligence in the actual reduction of his conception to practice. Automatic, etc., Co. v. Pneumatic, etc., Co., 166 Fed. 288, 294, et seq., 92 C. C. A. 206. Nor did the application of defendant Wagner of March 27, 1912, for a patent amount to a reduction to practice, because his application did not claim a patent on the plates, although in his specifications he says:

"The body 1 of the car is built up in the usual manner from the plates and strips of metal bolted together."

And figure 1 in the drawing shows a perforated plate. It does not, however, show the flanged plate, perforated or otherwise. Of course, in any event he must be confined to his claims, and it is reasonably clear that the plate referred to in the specifications and shown in the drawings was not the flanged plate of complainant's patent or the flanged plate of complainant's copyright of 1910. If the story of defendant's conception of the flanged rectangular plate is true, it is strange, since he used a plate at all in the drawings in his application of March, 1912, he did not disclose a flanged plate.

Hornby's claim 8 refers exclusively to the sector. Claims 1 to 7, inclusive, cover both the sector and the flanged plate. Neither defendant's application nor his drawings included the sector. Whatever may be disclosed by the contents of the file wrapper of the Hornby patent in suit, there is nothing in the evidence in the case to sustain the defendant's contention of the disclosures in the file wrapper. No attention is here given to the patents cited by the defendant subsequent to the date of complainant's patent for the reason that they are not regarded as of consequence.

I find claims 1 to 7, inclusive, so far as they embrace the sector, to be valid. Claim 8, covering only the sector, is valid. Claims 9 and 10, covering new and useful combinations, are held to be valid. Defendants infringe all of these.

In view of these conclusions, defendants' counterclaim has no merit.

[19] Defendants assert that complainant comes not into court with clean hands, because for some years it marked its toys: "Patented in the United States January 16, 1906," when that patent was only for a special fastening clip. It did so mark them, but it does not appear that the purpose was to deceive the public. This is an essential element in the offense. Walker v. Hawxhurst, Fed. Cas. No. 17,071; Lawrence v. Holmes (D. C.) 45 Fed. 357, 360, 361; London v. Dunbar Corporation, 179 Fed. 506, 103 C. C. A. 130 (C. C. A. 1). When Hornby was advised—

> "that it was doubtful if his early United States patent longer covered the Meccano outfits as then marketed, he immediately gave instructions to the assembling department at Liverpool where all the marking was done, to discontinue it."

[20] But in any event, the wrong was not in connection with the controversy with the defendant, and defendant takes nothing by it. Shaver v. Heller & Merz Co., 108 Fed. 821, 834, 48 C. C. A. 48, 65 L. R. A. 878 (C. C. A. 8); Camors-McConnell Co. v. McConnell (C. C.) 140 Fed. 412, 417; Bentley v. Tibbals, 223 Fed. 247, 252, 138 C. C. A. 489 (C. C. A. 2).

Defendants' counterclaim will be dismissed. An order to that end may be taken; also sustaining the copyright and charges of unfair competition, and the patent, so far as it covers the sector and the combination in claims 9 and 10.

The court requests counsel, when the decree is presented for entry, to again call the court's attention to the matter of the taxation of the costs under rule 58 incurred in obtaining the testimony of Brennan and Read.

OTIS ELEVATOR CO. v. KAESTNER & HECHT CO. (two cases).

SPRAGUE ELECTRIC CO. et al. v. SAME.

(District Court, N. D. Illinois, E. D. June 9, 1916.)

Nos. 30294, 30295, and 30306.

1. PATENTS ⚷328—VALIDITY—CONTROL OF ELEVATOR OPERATION.

The Sundh patent, No. 861,197, for control of elevator operation, is void for anticipation.

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

2. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—ELEVATOR CONTROL.
The Herdman patent, No. 548,830, for control of elevator operation, is valid, and entitled to a fairly broad construction and range of equivalents. Claims 18, 19, 20, and 21 also *held* infringed.

3. PATENTS ⚷328—VALIDITY AND INFRINGEMENT—ELEVATOR CONTROL.
The Sprague patent, No. 815,756, for control of elevator operation, was not anticipated, and is not void for double patenting, because of the Sprague patent, No. 660,065, application for which was pending at the same time. Claims 9 and 10 also *held* infringed, and claim 1 not infringed.

4. PATENTS ⚷120—VALIDITY—IMPROVEMENT—PATENT.
A patent for a device which is an improvement on that of a prior patent to the same inventor, to adapt it to a different use, is not invalid because it includes the prior invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 172; Dec. Dig. ⚷120.]

In Equity. Suits by the Otis Elevator Company and by the Sprague Electric Company and the Otis Elevator Company against the Kaestner & Hecht Company. Decree for defendant in one suit, and for complainants in the other two.

Brown, Nissen & Sprinkle, of Chicago, Ill., for plaintiffs.

Miller & Chindahl and Lincoln B. Smith, all of Chicago, Ill., and Richard Eyre, of New York City, for defendant.

SANBORN, District Judge. Infringement suits on patents for control of elevator operation. The first suit was brought in January, 1911, on patent to Frank E. Herdman, No. 548,830, issued October 29, 1895; the second was brought in January, 1911, on the patent to August Sundh, No. 861,197, issued July 23, 1907; and the last brought in February, 1911, on the patent issued to Frank J. Sprague, March 20, 1906, No. 815,756.

[1] *Suit No. 30,295, on Sundh Patent.* I adopt the description of counsel for defendant in their brief in the Sundh suit, as preliminary to a consideration of these three cases:

"It will better conduce to an understanding of the purpose and means of the Sundh patent and of the prior art references if certain characteristics of motors are first understood. An electric motor is composed of two main parts, its armature and its field magnet. The field magnet is a fixed structure magnetized by coils thereon, and these coils are known as the field winding. In elevator practice this field winding is in a shunt or branch circuit, and the motor is known as a shunt wound motor. The armature of the motor is the revolvable member and carries a number of turns of wire, which lie in the magnetic field produced by the field magnet. It is a law of electromagnetism that whenever a wire is moved through a magnetic field in the proper direction an electric current tends to be generated in that wire, and will be generated if that wire is connected in a closed circuit. The converse is equally true, namely, that when a wire lies in a magnetic field, and a current is sent through the wire from an outside source, the wire tends to move through the magnetic field. Therefore we have such a structure having a fixed field magnet and a revolvable armature, with wires properly located thereon and connected to an outside circuit. We have a structure that will act as a motor if current is supplied to the wires of the armature from an outside source, and will act as a generator if the armature is rotated by an outside force and the wires upon it are closed through an outside circuit. In other words, the same structure is a dynamo generator or a motor, according to whether the armature is driven by an outside force or whether current is supplied to the armature from an outside source.

"In either case, as the armature is revolving it generates a voltage, or electromotive force, or pressure, and it is therefore to that extent a generator, even when it is acting as a motor. When it is acting as a generator, this voltage or electromotive force or pressure determines the output of current from the armature. When the structure is acting as a motor—that is, when it is being driven by the current supplied to it from an outside source—the pressure or voltage or electromotive force that is generated by the rotation of the armature is opposed or counter to the electromotive force applied to the armature from the outside source. In this case the current flowing through the armature is determined by the difference between the electromotive force applied from the outside force and the counter-electromotive force generated by the motor.

"The electromotive force generated by a dynamo and the counter-electromotive force generated by a motor vary with two factors, the rate of movement of the armature and the strength of the field of the field magnet. When a motor is at rest, therefore, it has no counter-electromotive force, and if the full electromotive force of the outside force were applied to it, it would take a very large current compared to that which it would take if it had developed speed and therefore the counter-electromotive force to oppose the applied electromotive force. It is for this reason that in starting a motor from rest it is customary to include a considerable external resistance in series with the armature, so as to cut down the current flowing through it, which resistance is removed gradually as the speed of the motor increases and its counter-electromotive force develops.

"To reverse the motor it is necessary either to reverse the current in the field winding or to reverse the electromotive force applied to the armature. Such a reversal of one or other of these currents causes the armature to rotate in the opposite direction. Suppose, now, that the motor is revolving at a high speed in one direction and its counter-electromotive force is high, and is preventing any but a normal current from passing through the armature. If we should accidentally reverse the connections to the motor, we would find that what was before a counter-electromotive force, protecting the motor, becomes an electromotive force assisting that of the outside force, and therefore tending to send an enormous current through the armature. The electromotive force is no longer counter to that of the applied electromotive force, because the electromotive force generated by the rotation of the armature is in the same direction as before, whereas the applied electromotive force is in an opposite direction. It has, therefore, long been recognized that in automatic control systems, such as that employed in elevator practice, a means should be provided for preventing reversal of the connections of the motor to the outside source, except at a time when the motor is at rest or of a low enough speed so that it will not develop so high an electromotive force as to cause a dangerous flow of current through the motor.

"Since the reversal of the motor requires the disconnection of one of its elements and its subsequent connection in a reverse direction, and since the electromotive force across the armature terminals at the moment of disconnection is a measure of the speed of the motor, Sundh (and the prior patentees) made use of this principle by providing a protective magnet so connected that it would be energized when the electromotive force generated by the armature is high at the time that it is disconnected from the circuit and employed this protective magnet to prevent the operation of the mechanism to reverse the motor."

In the operation of the patent in suit the operator may energize the operating circuit for either up or down by turning his lever right or left. The current will then pass from its source of supply through one or the other of two reversing coils, and pull up its switch to establish an electrical connection for the armature through its rheostat, and thence through the contacts controlled by a protective magnet, to the ground. This magnet is not energized, except when both reversing switches are open. The same movement of the operating arm sends a current through the contacts established by the operating current in the reversing coil, through the armature, its rheostat, and back to the ground. Suppose the car is now going up and the operator wishes to go down. He turns his lever to the right and into engagement with a contact for downward motion. If now the reverse current should be allowed to be turned into the armature, which is still going at high speed, it would have an electromotive force assisting that applied to it, and there would be an abnormal rush of current through the motor. This brings us to the device that Sundh adds to remove this defect. Moving the arm off the contact for up motion deenergizes one of the reversing coils, which thereupon drops its core, closing a contact of a circuit through the protective coil, which, when sufficiently energized, lifts its core, and breaks the operating circuit. So, although the operating lever has been swung into engagement with the other reversing coil, no current can reach it, because the operating circuit is broken.

The protecting coil must be sufficiently energized to lift its core and keep the operating circuit open. This is accomplished as follows: The protective magnet is, whenever both reversing switches are open, connected across the motor so as to be energized proportionally to the electromotive force generated by the motor, and this force of the slowing motor keeps up a sufficient current through the protecting coil to prevent the operating reversed current from reaching the motor until it has so slowed down that its electromotive force is not sufficient to keep the coil energized enough to hold up its core. When the core falls, the operating circuit for downward motion is closed, and the motor revolves in the other direction.

This is all there is to the Sundh apparatus. The idea is simply that there shall be a protective magnet, which is energized by a circuit connected across the motor, and which, by reason of its energization, shall prevent the operation of the reversing mechanism to reverse the motor. It is an incident of Sundh's employment of separate reversing switches, which also serve as closures of the circuit from the source to the motor, that he can only close the circuit of his protective magnet when both reversing switches are at the open position. This he accomplishes by employing back contacts co-operating with the reversing switches.

Defendant's construction is practically the same as that of the patent in suit, so the only question is that of its validity.

The Prior Art. Four prior patents are relied on as anticipations. They are Whittingham, No. 821,009, Lindstrom, No. 544,768, Voight & Haeffner (German), No. 15,593, and Sautter, Harle & Co. (French), No. 320,365.

The Whittingham patent was applied for December 9, 1902, but it was issued after Sundh filed his application. It is, therefore, not a prior patent, but the application on file is conclusive, in the absence of contrary proof, that the invention was "known to others in this country" prior to the invention of Sundh. If Whittingham, therefore, anticipates Sundh, the patent in suit is invalid.

Whittingham had the same end in view as Sundh. He says the "object is to provide an apparatus of this character wherein, when the motor is reversed, it is absolutely protected against the introduction of current until after it has first been stopped and is in condition to safely receive current to drive it in the opposite direction." This object is attained by both in a somewhat different way. In each case, when the operator throws his switch to stop the motor, or there is a break out on the line, the protecting magnet is energized according to the electromotive force of the motor, and the magnet pulls up its coil and prevents the introduction of current to the reversing coils. When the motor slows down the protective coil is de-energized, drops its core, restores the circuit through the reversing coil, and permits the motor to be again safely started.

The different way just referred to consists in three things: First, in keeping the protecting coil energized all the time the motor is performing its ordinary work, instead of being de-energized as in Sundh; second, in breaking the operating circuit when the operator swings the arm to neutral position at a point in the main supply line instead of at the point in the operating circuit controlled by the protective coil; and, third, that the protecting coil operates when one of the reverse switches is in operating position, instead of both being open, as in Sundh. These differences result from keeping the protecting switch constantly energized, and cutting off its direct line supply when the main line opens, whereupon its energy is kept up by the electromotive force supplied by the falling motor deprived of its current, but still running slower and slower, just as in Sundh. Thus in Whittingham the protecting coil, being constantly energized, is always "standing guard" over the armature. Whittingham describes the operation in substance as follows, omitting his numerals, and changing his phraseology:

"When the controller (operating switch) is moved to the opposite position its first effect is to break the circuit through the magnet governing the main line switch, and thus release blade 3, whereupon the main circuit through the field and the armature is broken. As the field is connected in shunt to the armature, whether the reversing switch is in one position or the other, then when the main circuit is so opened the armature, continuing to rotate, will supply current to the field circuit, which includes the protective coil. This coil being thus energized will continue to hold its core bar away from its contacts, and so long as this continues the appropriate reversing coil cannot be short-circuited, and the reversing switch must remain in its original position. This condition of the circuits continues so long as there is any current of appreciable strength in the armature and field circuit. When the current dies out of the field winding, due to the armature coming to rest, the protecting coil will be de-energized, and its core will drop, causing the core blade to connect its two contacts, whereupon the proper reversing coil is short-circuited, and the other reversing coil receives double current, and becomes operative, and restores the circuit to the line magnet, closing the main line and driving the motor as before."

This description reads on Sundh in substance. Any experienced electrical engineer, knowing of the previous plan of Whittingham and those of the three other patents referred to, could easily design either the Sundh device or that of the defendant.

At the hearing two Whittingham constructions were tested, and both proved operative, whether the operating current was broken by the operating switch or out on the line of supply. The practical operation and result was the same as in the patent in suit. The Sundh patent should be held invalid, because the invention was that of Whittingham; also because anticipated by the three other patents referred to.

Decree for defendant, with costs.

[2] *The Herdman Patent, Suit No. 30,294.* A high speed elevator must be slowed down as it approaches its stopping point, either by the operator or automatically. It will not do to shut off all the power, and trust to momentum alone. There must be some driving power left, both to make a proper stop and to stop short of the terminal and then start again, if necessary. Both parties accomplish this in different ways, and the only question of much importance is whether they are equivalent ways.

Both parties use an automatic slow-down, entirely beyond the operator's control. Full speed is obtained by putting resistance into the electric circuit supplying the shunt field, similar to obstructing a water pipe. As the field thus gets less current strength, the armature has less resistance to overcome and goes faster. Being directly geared to the elevator winding drum, the latter gets up to full speed. When it is desirable to slow up, the resistance is cut out, the field is strengthened, armature resistance increased, and speed lessened. This is what is done by both parties; plaintiff directly and defendant indirectly, but both without allowing the operator's volition to have any influence.

In both machines full speed is obtained by carrying the field current through a rheostat. As the car nears the end of its run up or down the winding drum is made to close a switch. This at once cuts out the rheostat, permits full current to flow through the shunt field, giving increased armature resistance, and slowing the speed, but still leaving the car driver in full control at the slower rate. Plaintiff's switch short-circuits the resistance, while defendant's takes it out through a relay motor or solenoid. The modes of operation in the two machines are different.

Described in another way, the object of plaintiff's device is thus stated by Herdman:

"In a previous patent granted to me, No. 506,911, dated October 17, 1893, there is shown, described, and claimed automatic devices moved by the winding drum and adapted at predetermined points to affect the operating mechanism and bring it to its central position. With this arrangement, if the operator should stop the car after the automatic devices have commenced to operate and before he has reached the final stop, it is difficult for the operator to throw current on the machine to continue the travel in that direction, so that, if he wishes to continue to the end of the travel, the operator would have to reverse and return to a position before the automatic devices begin to act, when he could throw on the current to run to the end of the travel. The space for the action of the automatic devices being, according to the speed of the machine, from six to ten feet, this distance is so great that at times the operator is called upon to stop the car within that space. While I do not intend to discard these automatic devices, the construction hereinbefore described is intended to be used with these automatic devices; they being adjusted to act within a short distance of the end of the travel of the car—say within two or three feet—and the devices described being placed to act at some distance before these automatic devices, to bring the motor to a slow speed independent of the operating mechanism, thereby within this limit, enabling the operator, in case the car should be stopped, to again throw on the current and proceed in the same direction until the automatic devices acted."

The automatic slow-down made by strengthening the field, as above described, accomplishes the result sought. The invention is an exceedingly useful one, having been used in large buildings in New York on elevators having a speed of 600 feet per minute. Little attempt is made to show anticipation, which was not urged at the hearing. Defendant's brief states that the case turns on the question of infringement. It is evident that the claims are entitled to a fairly broad range of equivalents. All claims are in issue, except 14, 15, 16, and 17. There are three groups of claims, one group relating to the slow-down generally. Another group applies to the slow-down, controlled both automatically and by the mechanism used by the operator, and controlled by him. The third group applies to the slow-down, automatically controlled, entirely independent of the mechanism used by the operator, or whose function is controlled by the movement of the starter.

In order to test the question of infringement, it is essential to describe the exact mode of operation of defendant's mechanism, whose result has been stated to be the same as plaintiff's. To complete the high speed defendant so arranges its wiring as to energize a solenoid or speed relay motor with a dashpot. The pulling up of the latter by the current through the solenoid releases two switches in succession and causes the current from the plus supply to go through four rheostats or resistances and thence to the shunt field. This weakens that field, and the armature, then having a diminished resistance, goes faster, up to its speed limit. In order to slow down automatically the winding drum is provided with connecting gear wheels, so that when the proper number of revolutions of the drum has occurred the current is cut off from the speed relay solenoid, the weight of the dashpot cylinder is released, and the latter falls, breaking the current through the rheostats, and allowing full current to pass through the shunt field. This increases the field resistance, and slows the armature, accomplishing the "automatic slow-down."

The slowing operations in each design may be thus compared: In both the work is automatic, beyond the operator's control. Both slow the armature by removing shunt field resistance, and thus increasing field strength. The result is the same in both, and that result depends on identical factors, the field and the armature, and so far as these are concerned the operations are the same in each, though caused in different ways. Plaintiff short-circuits the field rheostat by directly taking away its current, permitting the main current to go into the shunt field. Defendant, on the other hand, breaks a circuit through the field rheostat by releasing a dashpot plunger from a solenoid previously charged with current, permitting the main current to go to the field around the rheostat instead of going through it. In other words, defendant does by a relay what plaintiff does without one.

To use an illustration of plaintiff's counsel, it is like gathering apples by picking them while standing on a stepladder, or climbing the tree, and by knocking off with a fish pole. Both systems employ pilot motors. In one a current is taken to the field without the use of this motor, while in the other it is momentarily employed. But in both the full field supply goes around these motors. The fact that Herdman's resistance is in a single section, and is cut out instantaneously, while defendant's is in four sections, cut out one after the other practically at once, is immaterial, because the two operations are equivalent, with no substantial loss of time in either. The substance and essence of the invention are used by defendant, under the rule of Morley Machine Co. v. Lancaster, 129 U. S. 263, 282, 9 Sup. Ct. 299, 32 L. Ed. 715.

While defendant's wiring plan is exceedingly complicated, requiring careful study even by an experienced electrical engineer, yet it may be sufficiently understood by the aid of the elaborate expert testimony on each side, and the foregoing conclusions are free from doubt.

Descending more to particulars, Herdman removes the field resistance by automatic action working entirely independent of the resistance device, or any of its operations. Just before the automatic action occurs, the field circuit is established through the resistance, so as to get full speed by decrease of field current. Then a new circuit is instantly put into the field, entirely outside of both the resistance and the resistance device. As Herdman says, this "enables the speed to be reduced without changing or affecting the operating mechanism." This is done by moving a switch *8* by gearing from the winding drum.

Another feature (not yet explained) consists of another switch *7* in this same independent circuit, which is not automatic, but actuated by the operating mechanism. The purpose of this switch is to make the automatic slowing down effective only for one direction of travel of the elevator, so that if the motor has slowed down or stopped, and the operator desires to move his elevator in the opposite direction, he may do so as rapidly as he can manipulate his operating mechanism. This switch is controlled by the operating mechanism, being connected to the operating bar *G*. This second switch, therefore, makes the slow-down switch effective at the upper limit of the elevator only for upward movement of the elevator, and at the lower limit of the elevator only for the downward movement of the elevator. This switch is not a part of the operating mechanism, and can be removed without in any way disturbing any of its ordinary functions. Its function is entirely dependent on the previous automatic movement of switch *8*.

Having seen that the mechanisms of both parties accomplish the slow-down by strengthening the shunt field, through cutting out the resistances in the field circuit, and thus slowing the armature and the car, it remains to inquire whether the claims read upon defendant's method of accomplishing this slowing down. Claim 1 follows:

1. The combination with an electric motor and a source of current supply—

(1) Of an electric circuit from the source of current supply to the field of the motor.

(2) A resistance device in said circuit.

(3) A circuit to the field independent of the resistance device.

(4) A switch device controlled by the motor in said last-mentioned circuit.

The third element is found in the first 15 claims in the same words, and in substance in claims 16 and 17. Defendant's counsel argues that this third element is not employed by it; but I think it may fairly be said that the independent circuit which carries the full field strength and speeds up the motor is so far independent of the resistance device as to come within the first 15 claims. This circuit does not touch the rheostat, nor the solenoid which throws out the rheostat, though it goes through one of the switches of the resistance device, so it is not entirely independent of the resistance device, but sufficiently so for the purposes of the case under the rule of liberal construction which should apply.

The fourth element of claim 1 is in claims 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 23, 24, and 25. All these claims call for a switch device or devices in the independent field circuit. These switches are the slow-down and set switches shown in patent Figure 4, and similar switches are used by defendant, shown on Matthews' sheet 2 as *21* and *23*. But these latter switches are not in the independent circuit at all. Their movement establishes that circuit, but the circuit itself does not touch them.

Claims 16 and 17 are not in suit. This leaves for consideration only claims 18, 19, 20, and 21.

Claim 18. The combination with an electric motor and a source of current supply—

(1) Of a device controlled by the motor,

(2) And, adapted after a predetermined number of revolutions of the motor,

(3) To change the relation to each other of the strength of the current passing to the armature and field independent of the operating mechanism.

Claim 19:

(1) Same.

(2) Same.

(3) To increase the strength of current passing to the field of the motor independent of the operating mechanism.

Claims 20 and 21 are substantially like 18.

These four claims do not read with exact literalness on defendant's structure, because the latter uses the operating mechanism to change the relation of armature and field, and to increase field strength and thus slow the armature. It is true, however, that the current passing to the field, when once established, is entirely independent of the operating mechanism. It does not touch any part of the operating circuit. The substance or essence of the Herdman invention was to establish a slow-down having an electrical circuit automatically established by the revolution of the winding drum, and, when so established, to be entirely outside of the operating mechanism. This condition is true in defendant's mechanism. When the slow-down circuit has been established (it is true by the use of part of the operating mechanism), that circuit is, like Herdman's, entirely outside such operating mechanism.

It is, of course, obvious that defendant's field rheostat is part of the operating mechanism during the full speed period, and until the speed relay is de-energized and the rheostat removed. But when this has been done the slow-down is "independent of the operating mechanism" as a whole, though touching a corner of it, just as Herdman's independent circuit touches one corner of his operating mechanism; that is, the hub of arm R^3.

I think, therefore, that all the claims of the Herdman patent except 18–21 are so limited as not to be infringed, but that these four are sufficiently broad to cover defendant's device. In this case there should be a decree for plaintiff, declaring infringement of claims 18, 19, 20, and 21, and for an accounting of profits and damages; each party to pay its own costs.

[3] *Case No. 30,306, on Sprague Patent No. 815,756, March 20, 1906.* This invention is upon a system of electrical control of elevator apparatus, including control of speed and of current direction, and protection to the motor in case of a sudden turning off and on of the current supply by accident on the line or otherwise.

The first claim covers two results, one the running of the armature at one speed by removing resistance in the armature circuit, and at a higher speed by inserting field resistance. This is under the operator's control through contacts made by the operating lever. Claims 8, 9, and 10 cover means for preventing the turning on of current to the motor, once it is turned off, until other means have operated to restore the starting resistance so that the motor will be duly protected. Claims 1, 8, 9, and 10 are alone in issue.

As to the first claim there was nothing broadly new in removing armature resistance to speed up, and putting in field resistance to go faster., This was what occurred in the Herdman device, just considered, and the idea was in itself old. It is claimed by defendant that Sprague's particular system of control was anticipated by See & Tyler, No. 531,070, and by Lindstrom, No. 538,377.

When the operating switch is moved upon the starting contact, current is turned on, but the motor revolves but slowly, because all the resistance is in series with the armature; that is, the driving current has to go through a number of rheostats before reaching the armature, and part of the driving current, after going through the resistances, is also taken off by a side track or shunt, so as further to retard the armature speed. At the same time the field is kept at its maximum strength. The result is that the motor starts slowly, and does not reach full speed until the operator shifts his lever to a contact which sets the controller motor into action, resulting in cutting out that part of the armature resistance which is in series, inserting that part which is in the armature side track or shunt, and inserting resistance into the field. The two speeds, intermediate and high, are subject to the terms of the first claim, unless something more must properly be read into that claim. The first speed is obtained by leaving in the armature resistance and dividing the current and by keeping up the field, and second speed by reversing these conditions. So far as these results are alone concerned, there is nothing requiring much exercise of the inventive faculty, whatever may be said of the Sprague invention as a whole. Reading the first claim will show that on its face it covers only means for actuating controller mechanism to increase armature current and decrease field strength.

The claim calls for "means" for doing two things, increasing armature strength and decreasing field strength. All the means necessary to accomplish these results are described and illustrated. They consist of the operating switch, a small shunt motor called the controller motor, a screw-threaded motor shaft provided with two sliding nuts, and a shunt opener switch marked *42*. The co-operation of these four elements is essential to obtaining full speed. The right-hand one of the sliding nuts cuts out armature series resistance and by the same movement introduces armature shunt resistance, so as to keep all the current on the series wire. This supplies the full armature current. The left-hand sliding nut closes a solenoid circuit to cut out a field resistance shunt, which weakens the field and speeds up the motor by decreasing the counter-electromotive force. Thus we have full speed conditions, all that is called for by claim 1. The controller motor and its left-hand sliding nut do a number of other things at the same time the speed is increased; but they relate to other conditions, counted on in claims 8, 9, and 10, and have nothing directly to do with obtaining full speed. Thus the traveling nuts must be brought back by reversing the controller current before a second high speed can be obtained; but claim 1 says nothing about reversal means, merely counting on means for getting such speed.

Claims 8, 9, and 10 of Sprague Patent. Claim 1, just considered, relates to the provision of an operator's switch and a motor controller mechanism, including certain resistances; the essential idea of the claim being that at one position of the operator's switch the controller mechanism shall act to remove the resistance in the armature circuit of the motor to permit the full current to flow through the armature, and at another position of the operator's switch the controller mechanism shall act to insert a resistance in the motor field circuit to weaken the field of the motor. Thus different motor speeds may be maintained according to the position of the operator's switch. Claims 8, 9, and 10 involve a safety arrangement, covering means for preventing the turning on of current to the motor, once it is turned off, until other means have operated to restore the controller mechanism to its initial position, at which time the armature resistance is all in circuit. The particular instrumentality to effect this specific purpose is a so-called cut-out switch in the governing circuit, which switch opens when the controller mechanism is moved, and a bridging or maintaining circuit around such switch which is opened automatically when the governing circuit is opened.

It has already been seen that one of the sliding nuts on the shaft of the small pilot motor in its initial movement removes the series resistance in the armature circuit, and inserts the armature shunt resistance; also that the other nut has closed the shunt opener switch to insert the field resistance, thus bringing the main motor to its highest speed. This has resulted from either one or two swings of the operating switch, the first turning on current to the armature while its resistance is in series, and the other turning on current to the pilot motor, so as to remove this resistance and also weaken the field, or turning on both currents. At the same time the pilot motor has accomplished other things relating particularly to the protection of the armature spoken of. It has closed the pilot reversing switch, preparatory to bringing back the two sliding nuts to initial position and reinserting the starting resistance. It has also interrupted its own current and stopped, by opening switch *34*, and has also opened the important cut-out switch *13*. These have all been done preparatory to reversing the pilot motor and bringing the apparatus back to initial position, meanwhile protecting the line so that no armature current can be turned on until the starting resistances have been reinserted.

The function of the cut-out switch *13* may be thus indicated: When the operating switch is first moved, current is admitted to a circuit through a stop relay solenoid which governs a protective shunt, the pilot motor, and the armature brake coil. When the current is on, and the elevator running at full speed, the operator may open his switch, or the line circuit may be accidentally opened. This results in the stop relay coil being de-energized and dropping its contacts. If now current is suddenly restored, and were permitted to reach the armature without going through the starting resistance, the machinery might be theoretically destroyed, though actually protected by a fuse. The relay coil having dropped its contacts, as indicated, control is taken away from the operating switch, and cannot be restored until the controller mechanism is brought back to initial position, and the circuit at the cut-out switch restored, upon which operating current may again flow just as in the first operation. The gist of the whole matter is that the controller mechanism protects the armature from sudden accesses of electric current when the starting resistance is not in place, and continues to so protect it until it is safe to admit the driving force. Claim 10 covers the whole ground by counting on these elements:

"10. The combination of a motor, controller mechanism therefor, an operator's switch for operating the controller mechanism, a cut-out switch arranged to be opened when the controller mechanism is moved from initial position, a bridging contact for closing the circuit around the cut-out switch, the said contract being arranged to be opened automatically when the circuit is opened, thus taking control from the operator's switch, and means for restoring the controller to initial position and closing the cut-out switch independently of the operator's switch, thus restoring control to the operator's switch, substantially as described."

Infringement of Claim 1. The first claim is a broad one on its face, but it is obvious that the prior art abundantly limits it to the particular means shown in the description and Figure 1. There were numerous methods for gradually removing starting resistance in the armature circuit and for cutting in field resistance, to obtain intermediate and high speed. Two alleged anticipations relied on by defendant are See and Tyler, 531,070, and Lindstrom, 538,377. Both show particular means for accomplishing the speed control in question, by cutting out armature resistance and cutting in field resistance. They do not appear to me to anticipate Sprague, who shows a more efficient plan in some respects, but they do limit the broad claim for "means" reaching similar results.

It is no doubt true that Lindstrom and See & Tyler do not show mechanism as fully operative as defendant or Sprague. The overhaul, or tendency of the motor to act as a generator when running up lightly loaded, or running down heavily loaded, is not taken care of. In See & Tyler the solenoid circuit for cutting in field resistance is directly across the armature, so as to be affected by its counter-electromotive force. But both patents show means for doing just what Sprague's claim 1 does, and neither one is inoperative, though not as efficient as the later devices. Sprague is thus confined to his improved mechanism, which defendant does not use.

Defendant's system is different from Sprague in detail. For the controller motor defendant uses a solenoid to close valves for the purpose of cutting out the series resistance. Sprague puts in an armature shunt resistance, which is not used by defendant. To insert the field resistance Sprague uses the controller motor, the shunt opener switch, and a solenoid, while defendant uses a solenoid (described in the preceding opinion as the speed relay motor) with one of its switches.

The result is the same, but the means and operation are quite different. In view of the prior art there is no infringement of claim 1.

Infringement of Claims 8, 9, and 10. Infringement of claims 9 and 10 would clearly appear, except for one doubtful element, which is:

"Means for restoring the controller to initial position and closing the cutout switch."

The Sprague structure, as already shown, reverses the controller current and thus brings back the sliding nuts, either to initial position, or as far as the operator desires, thus cutting in the armature resistance to any desired extent, and obtaining different speeds as a result. This result (partial or complete) seems to be covered by the quoted element, since restoring the controller to initial positions involves stopping it in one or more intermediate positions because of the necessary connection of the controller circuit with the operator's switch contacts. Defendant's system of return to initial position is simply a dashpot, which restores the controller by gravity without stopping it in any intermediate place. The dashpot, it is true, reads literally on the quoted language, "restoring the controller to initial position," and the defendant does that identical thing, accomplishing by gravity what Sprague does by reversing an electric current. Sprague may incidentally do another thing, by throwing off the reverser current, obtaining a modified speed, and then moving on to the initial point. Stated in another way, one of the results accomplished by Sprague is obtained by defendant, but with a different operation and by different means. Whether this amounts to infringement depends on the breadth of construction and range of equivalents which should properly be given to these claims 9 and 10.

This question of range of equivalents depends on three prior patents, two taken out by Sprague, Nos. 660,065 and 696,880, and the other by Wright & Kinsey, No. 509,505. The first of the Sprague patents is the well-known electric railway multiple unit system, which made practicable the operation of electric trains of two or more cars, and the running of them forwards or backwards with equal facility. The other Sprague patent was for an improvement upon the first. The applications for these two Sprague patents, and for that in suit, were all copending, so there is no question of anticipation under the rule of Century Electric Co. v. Westinghouse El. & Mfg. Co., 191 Fed. 350, 112 C. C. A. 8. It is, however, claimed by defendant that the subject-matter of claims 8, 9, and 10 is found in the Sprague railway patent, and that those claims are void by the law of double patenting, as held in Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, and Western El. Co. v. Galesburg Union Tel. Co., 148 Fed. 857, and in this court, 144 Fed. 684, 75 C. C. A. 500.

As to the Wright & Kinsey patent, one of its objects is stated to be the adaptation of safety appliances in such a manner that there is little danger of burning out the motor. The differences between Sprague and Wright & Kinsey are fairly stated by defendant's counsel as follows:

"The cut-out switch of Wright & Kinsey is, like the cut-out switch of Sprague, located in the governing circuit, being directly in series with the coil *F* of the controller mechanism. Both Sprague and Wright & Kinsey desire that the motor circuit shall not be closed in case the protective resistance is not all in the armature circuit and dangerous current is flowing. Sprague provides his cut-out switch and bridging contact, which act every time the controller is operated, whether or not this condition is present. Wright & Kinsey provide a coil which permits the cut-out switch to open only when an abnormal current is beginning to flow. This is the only time that the cut-out switch combination is of any utility, and Wright & Kinsey operate it at this time only. This seems on the whole a most sensible procedure to adopt. When the Wright & Kinsey cut-out switch does actually open it is because the dangerous condition to be guarded against has occurred. Therefore, instead of establishing the mere shunting around the cut-out switch, they establish a circuit through contacts and a lever to energize a coil of the controller mechanism and coils of the reversing mechanism to immediately open the motor circuit and bring the controller back to initial position. This is exactly what is done in the Sprague case when the bridging contact is opened by the failure of current or the opening of the operator's switch. As in Sprague the cut-out switch cannot be closed after it has once opened until the controller is restored to initial position, this restoration being effected by the downward movement of the rod *S* of the controller mechanism."

In other words, the Wright & Kinsey cut-out operates only in cases of overload, and not at all during normal conditions. Claims 8, 9, and 10 are not limited to overload apparatus, but apply both to normal and abnormal conditions. The mode of operation is quite distinct. There is also a question as to the practical effect of the Wright & Kinsey switch in protecting the motor from overload. I adopt the argument of plaintiffs' counsel, pages 127–136, as to the Wright & Kinsey invention, with their conclusion that it does not anticipate Sprague.

In view of these conclusions on double patenting and the prior art, I think that claims 9 and 10 were not anticipated, and are entitled to a liberal construction, and that defendant's dashpot is a means for restoring the controller to initial position, within those claims, although Sprague accomplishes also other results not possible by defendant's construction. If it were not for the question of double patenting infringement would be clear.

In regard to claim 8, the element of means for restoring the controller to initial position, and closing the cut-out switch, is omitted. If this be read in, claims 8 and 9 would be identical. Without this element, claim 8 would be invalid for inoperativeness. The claim may therefore be ignored.

Double Patenting. The question is whether the claims of the patent in suit relate to a separate invention distinctly different from that of the railway patent. The claims in neither of these patents are limited to railway practice or elevator practice. In the railway specification the patentee says that some features of the system are applicable to elevators. By his figures he illustrates only railway operation in the first patent and elevator operation in the second.

There is no question that Sprague shows a similar system of speed control in both patents. There is the same cut-out switch, the same bridging contact, governed by the same solenoid, and the same result in the protection of the motor. Claim 209 of the first patent may be compared with claim 7 of the last. While claim 7 is not in suit, it may properly be referred to in order to show the identity of the two inventions.

Comparison of claim 209, first patent, and claim 7 of the second (not relied on in this action):

Claim 209.	Claim 7.
(1) A motor.	(1) A motor.
(2) A motor circuit.	(2) A motor circuit.
(3) A current varying controller for the motor.	(3) A controller for the motor.
(4) An operator's switch and circuit for operating the controller.	(4) An operator's switch in circuit for operating the controller.
(5) Means for opening the motor circuit independently of the controller.	(5) Means for opening the motor circuit independently of the controller.
(6) Means for restoring the controller independently of the operator's switch.	(6) Means for restoring the controller to initial position independently of the operator's switch.
(7) A cut-out switch connected with the controller, And closed in certain positions thereof, Which, when closed, restores control to the operator's switch.	(7) A cut-out switch connected with the controller, And closed in certain positions thereof, Which, when closed, restores control of the controller to the operator's switch.

While claim 7 is not in suit, claims 8, 9, and 10 are, and the elements of those claims are found in a number of the claims of the railway patent in broader form.

There is no doubt that the same invention is covered in both patents, and claimed in both, for entirely different purposes. Both inventions are highly meritorious, and the last should not be avoided, if it can be sustained on any reasonable theory. It is held in the Miller Case that where the invention in the two patents is the same, and the second one contains claims broader than the first, it is nevertheless invalid, but where it covers matter essentially distinct and separate from the first, and its claims, it may be sustained if it distinctly appears that the later invention is a separate one, "distinctly different and independent from that covered by the first patent." In that suit a spring with two functions was in question, and the first patent covered the spring, and, of course, all its functions, known and unknown. The second patent was for one of these functions. The first covered both a lifting and depressing operation; the second, only the lifting effect. It was also decided in the same case that a single invention may include both a machine and its product, and that an inventor may make an improvement on his own invention, and obtain a separate patent thereon. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

This question of double patenting is discussed at length in the testimony and briefs. There are numerous differences of detail between the arrangements of the two mechanisms. Two motors are used in the railway system, which are series motors, while only shunt wound motors can be used in elevator systems. For this reason the exact controlling devices of the elevator patent could not be used in the other. Another problem distinct in the two systems is the "coast relay" in the railway system, and the "overhaul" in the other. When the car is going down hill, current can be cut off the motor by a series of coast relay switches. In the elevator design, when the car is going up light or down heavily loaded, the motor becomes a generator and tends to induce a dangerous speed. This is called the "overhaul," and is provided for in a different way from that of the coast relay. In brief, the main motors in the railway system may be stopped by the coast relays, and started again by the operator, without restoring the controller to its initial position, as must be done in the elevator system.

There is also a difference between the controller of the elevator patent, and the current varying controller of the railway patent. The latter performs an additional function in shifting the two motors from series to parallel. Both are current varying controllers, however, and operate in just the same way, except for such additional function of the railway device. It is true that there is a distinction between the current varying controller of the railway patent and the controller mechanism of the elevator patent, in that the first does all that the second does, and other things also. It is here assumed that the railway system would not work satisfactorily with one motor, or with a shunt wound motor, and that the elevator system would not work with a series motor. The differences in the two systems are largely due to these facts. There are other differences in operation, because the results are different; the controller mechanism being applied to different machinery.

A test suggested in the Miller Case is whether the structure of the second patent would infringe a claim of the first. In this case it is quite clear that the elevator mechanism would not infringe the railway patent if the patents were in different ownership, because its operation and result are distinct. It seems, also, that defendant does not infringe the railway patent, for the same reason.

[4] If the elevator patent may properly be considered as an improvement upon the other, it should be sustained, although including the same invention. Miller v. Eagle Mfg. Co., supra; Cantrell v. Wallick, supra; Thomson-Houston El. Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107. The second patent makes use of a shunt wound motor, a distinct improvement as applied to an elevator system. The same is true of the armature shunt resistance. Another problem had to be met, and such changes in the railway mechanism as were necessary to solve it were made. The field resistance which is cut in for high speed in the elevator wiring is, of course, absent in the railway patent, because of the use of series motors. It seems clear that these changes, made necessary in a practical elevator system, are improvements on the railway system, and that Sprague was entitled to both patents.

Claims 9 and 10 are held valid and infringed. Claim 1 is valid, but not infringed. Decree for plaintiffs accordingly, each party to pay their own costs.

VACUUM CLEANER CO. v. INNOVATION ELECTRIC CO., Inc.

(District Court, S. D. New York. June 23, 1916.)

1. PATENTS 🔑328—VALIDITY AND INFRINGEMENT—VACUUM CLEANER.
The Kenney patent, No. 847,947, for a vacuum cleaner, was not anticipated, is valid, and covers a highly meritorious invention. Claim 4 also *held* infringed.

2. PATENTS 🔑165—CONSTRUCTION OF CLAIMS—DEFINITENESS.
The use of relative terms in a patent claim, such as "sufficient vacuum" or "narrow," does not necessarily destroy the claim for indefiniteness; nor are such terms to be deprived of reasonable elasticity, provided the court is satisfied that the disclosure is clear and practicable, and that the invention on its merits is entitled to an interpretation which will preserve to the inventor the just results of his contribution.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. 🔑165.]

3. PATENTS 🔑289—ACCOUNTING FOR INFRINGEMENT—DELAY IN BRINGING SUIT.
Where complainant, the owner of a patent, with full knowledge that defendant was making, openly advertising, and selling a device respecting which, on complainant's request and claim of infringement, it supplied full information, waited five years, and until the termination of other litigation over the patent, before commencing suit for infringement,

🔑For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes it is not entitled to an accounting for profits or damages during such time.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⟹289.]

In Equity. Suit by the Vacuum Cleaner Company against the Innovation Electric Company, Incorporated, to restrain infringement of claim 4 of letters patent No. 847,947, for a vacuum cleaner, granted to David T. Kenney March 19, 1907. Decree for complainant.

Charles Neave, William G. McKnight, and Frank C. Cole, all of New York City, for plaintiff.

Francis W. Parker, of Chicago, Ill., and A. L. Kent, of New York City, for defendant.

MAYER, District Judge. [1] It is apparent that this is regarded as a test case of considerable importance, in view of the extensive commercial growth of the vacuum cleaning art. As many devices are now on the market, it is not possible to foresee whether the decision here arrived at will be far-reaching in its effect, or merely confined to the subject-matter of this particular controversy; but, appreciating the possible influence which the ultimate result of this case may have on the commercial art, and in view of the exhaustive and able manner in which the case was presented by counsel, I have again studied the history of the art and followed in minute detail defendant's elaborate analysis of the file wrappers.

The true approach to the consideration of an alleged invention starts with the mental attitude which the claimed achievement is entitled to attract. There is, at times, confusion in the use of familiar terms of description or definition, such as "basic," "pioneer," "primary," and "improvement," and I prefer the method which seeks to ascertain at the outset what in fact has been the contribution of the patentee to the knowledge of the arts and the public welfare, rather than to be concerned too rigidly with the exact placement of the patent under some generic or specific definition.

The case at bar has confirmed the conclusion announced in Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 227 Fed. 998, that Kenney founded the modern art of vacuum cleaning, and that his invention has not only added much in the way of greater comfort and improved hygienic conditions from the household to the skyscraper, but has opened up opportunities for extensive manufacture, with the consequent employment of labor from the mechanic to the salesman.

Such an invention is of great merit, and, in determining its scope, the courts must endeavor to look at the patent in suit and at the prior art with the eyes of yesterday, and to realize what could or could not be accomplished to-day, if the prior art alone had been followed and the disclosures of the patent had never been made.

The fundamentally important proposition which Kenney taught the art, and practically exemplified, was the vacuum idea as contrasted with the air current theory. He may not have known the ramifications of the scientific side, but what he did know was that, if certain instrumentalities are employed in a certain way, the dirt will be sucked up from beneath the surface to be cleaned.

Throughout the proceedings in the Patent Office, Kenney stood his ground and step by step overcame the objections and references made by the Office in the course of the prosecution of his patents. The presumption which goes with the grant is fortified in this case by the careful and diligent examination to which Kenney's applications were subjected. Claim 4 originated in Kenney's application (No. 147,968) filed March 16, 1903, and that application eventuated in the patent in suit. The claim was at first rejected, and after further proceedings Kenney appealed to the Board of Examiners in Chief. That board reversed the examiner, and held claim 1 (claim 4 of the patent in suit) allowable, pointing out that the British patent to Howard and Taite was for an inoperative structure. The Patent Office then required that this claim, then contained in Kenney's application 147,968, should be transferred to Kenney's pending application for the patent in suit, and on December 29, 1906, Kenney, in obedience to this requirement, transferred claim 1 of No. 147,968 to his application for the patent in suit.

Referring to the specification in which the claim originated, the following appears:

"In the form of hand implement illustrated in detail in Figs. 2, 3, 4, and 5, a stock *1*, which is in the shape of a nose or nozzle and incloses a suction chamber, has formed on it a contact surface *2*, which is pierced by a narrow and restricted slot *3*. The slot is in unobstructed communication with the chamber, and is bounded and defined by lips which surround the slot; these lips, forming the edges at the outer end or mouth of the slot, also form the contact surface of the cleaner, and the outward mouth of the slot lies in the plane of this contact surface, so that, when the cleaner is applied to a floor or other surface to be cleaned, the lips and restricted outward mouth of the slot will be brought into contact therewith."

This extract from the specification shows clearly that Kenney intended that the lips were to make a sealing contact with the surface to be cleaned. But a reading of the claim, which is phrased in clear and simple language, would have been sufficient, without the further aid to interpretation abundantly found in the file wrapper; for claim 4 reads as follows:

"A cleaner comprising a suction chamber provided with a narrow inlet slot, the slot being bounded and defined by lips which lie in the contact surface of the cleaner, with the outward mouth of the slot lying in the plane of this contact surface, substantially as described."

The criticisms now made of the claim are sufficiently disposed of by what was said in Vacuum Cleaner Co. v. American Rotary Valve Co., supra, and in the opinon on the motion for preliminary injunction in this suit, except possibly in respect of the "suction chamber" and the limitation to a structure having "projecting lips," which defendant urgently insists upon.

The application in which the claim originated clearly defines what is meant by suction chamber as follows:

"The suction chamber in the stock is merely a communicating passageway for the air between the slot and the tubular portion of this passageway. It is of sufficient capacity to freely allow the air to pass and is without sharp corners or enlarged portions where the velocity of the air can become reduced and the dust deposited."

The contention that claim 4 must be limited to a structure having projecting lips is disposed of by the fact that the tool illustrated and described in the application in which the claim originated is free from projecting lips, and the wording of the claim itself does not give any solace to the contention now made. In effect, the position of the defendant is that the patent is limited to a high vacuum system; that the cleaning tool must have a large suction chamber, provided with an exceedingly narrow slot, the edges of which have protruding lips. Thus construed, the argument is that defendant does not infringe, because its devices are provided with vacuum producers utilized in connection with a cleaning tool which has a wide open mouth, with no suction chamber and no protruding lips. The argument on broader grounds rests upon the proposition that defendant's devices operate upon the air current principle, so that the dirt is removed solely by the action of air currents, which, in passing by the dirt, lift it and carry it away, as distinguished from the vacuum principle of the patent in suit, which, as the expert Reeve puts it, acts on a sort of tornado principle, whereby the dirt is violently disturbed and sucked, so as ultimately to reach the depositary receptacle.

To illustrate the theories entertained by Lucke, defendant's expert, and Reeve, plaintiff's expert, numerous demonstrations were given by Lucke at Columbia University and by Reeve at a shop known as Boucher's. It is not practicable, within the reasonable limits of an opinion, to describe these demonstrations at length. Much was interestingly said by both experts as to the meaning and theory of their respective demonstrations, and it probably will be some time before conscientious experts can agree as to the scientific theory of the operation of these devices.

In the use of defendant's structure there undoubtedly is some air current action; but that is merely incidental, and the structure operates upon the so-called vacuum principle consistently urged by Reeve throughout a series of litigations. The same must be said of defendant's devices, for there was one demonstration which, in my opinion, conclusively resolved any doubt which might have been entertained as to the principle upon which defendant's devices operated. Although defendant's business circulars addressed the public upon the representation that their machines are desirable because they remove deep-seated dirt, the theory of defendant's case was that their machines remove, in the main, only surface dirt; that theory being advanced to support, by experimental demonstrations, Lucke's theory of air currents. At Boucher's, however, Reeve trampled into a carpet a considerable amount of dirt, and, to the observer, the carpet seemed clean. When, however, defendant's devices were applied, it was surprising to see how much dirt was in the clean-looking fabric, and how efficiently defendant's devices took up this dirt, and in a manner which can be explained only upon the theory that defendant's devices operated on the same principle as the Kenney patent.

[2] Of course, where a patent by its very nature speaks of dimensions in relative terms, a skilled man, by rearrangement, or an increase here and a decrease there, may devise a structure which on mere inspection would seem not to infringe; but where, as here, the invention is highly meritorious, and the principle employed in the alleged infringing device is the same as that disclosed in the patent, the court should not be astute in searching for exculpatory changes.

As was pointed out in Vacuum Cleaner Co. v. American Rotary Valve Co., supra, and in the opinion on the motion for preliminary injunction, words like "sufficient vacuum" and "narrow" do not necessarily destroy a claim for lack of definiteness, nor are they to be deprived of reasonable elasticity, provided always that the court is satisfied that the disclosure of the patent is clear and practicable, and that the invention on its merits is entitled to an interpretation which will preserve to the inventor the just results of his contribution. Woerheide v. H. W. Johns-Manville Co. (D. C.) 215 Fed. 604; Id., 220 Fed. 674, 136 C. C. A. 316; Eibel Process Co. v. Remington Martin Co., 234 Fed. 624, Circuit Court of Appeals for the Second Circuit.

It was sought to cast some doubt upon the testimony and experiments of Reeve. But, while not failing to appreciate the sincerity and ability of the fascinating Lucke, I think Reeve must be recognized as the foremost expert in this art. This position he has attained through many years of painstaking and laborious study and experiment, and if there are occasionally inconsistencies in the testimony given by him on different occasions, they are due to his frankness, and to the fact that he does not insist that every experiment he ever made, or every conclusion he ever stated, must necessarily be right, even though later investigation has shown him previous errors. Consistency is not always a jewel, and the expert, who realizes that later and wider investigations point out earlier error, and frankly so states, invites the confidence of the court much more readily than he who persists in endeavoring to reconcile inconsistent statements.

Finally, the contention is made that defendant's devices are constructed in accordance with the disclosure of the Cummings patent of 1891 (No. 460,935). The testimony of the son of Cummings confirms the conclusion arrived at in the American Rotary Valve Co. Case that the Cummings tool was impracticable. Cummings was something of an inventor, and, although a man of limited means, certain inventions of his in other directions were successful. He actually experimented with the device of his patent in a woodworking establishment, for the purpose of sucking the sawdust and chips away from the woodworking machine. His son, who was an intelligent and truthful man, testified that, when the cumbersome Cummings device was used on a strip of carpet, it was found that it stuck to the carpet and was not practicable. Thereupon expedients were tried to overcome this difficulty, and one method was to put castors under the box, and then to put lips across the edge of the box, and finally to put the box on a truck, thus lifting the hood off the surface to be cleaned. In other words, when there was a sealing contact the Cummings device did not work, and when there was not a sealing contact the device naturally would work only to draw up surface dirt and litter.

Cummings' son did the best he could to interest people in his father's invention, but failed. It must not be forgotten that Kenney was also a man of very moderate means, and the reason for his success was the inherent merit of his invention, and the reason for the failure of Cummings was, not the latter's poverty, but the lack of merit of his device; and, after all, the best answer is that no one would think to-day of using the Cummings device.

Without further discussion, I am fully satisfied that claim 4 is valid, and, notwithstanding that defendant's machines have a wider slot or mouth than Kenney's preferred form, and a lower vacuum, it seems to me that they infringe claim 4.

[3] On the question of an accounting, an interesting situation has arisen. I still remain satisfied that defendant was not a willful infringer. I think that Rosenfield conscientiously tried to avoid the Kenney patent. He evidently saw the commercial possibilities of a small portable machine, which the housewife could operate, and for all practical purposes succeeded in producing a useful commercial article. He waited until the Cummings patent expired, and first put his machine on the market in the early part of 1910. Undoubtedly more was claimed for the Cummings machine by plaintiff's predecessor than that machine was entitled to, and the fact that Rosenfield thus waited is some evidence of his desire to avoid infringement of an existing patent.

On November 1, 1910, a letter was sent by plaintiff company to the Rosenfield Manufacturing Company (the original name of defendant company), notifying the latter of its infringement of the patent in suit, and threatening a lawsuit. On November 12, 1910, Mr. Kent, the attorney for the Rosenfield Company, replied, stating, in effect, that he had advised his client that the "suction cleaner manufactured and sold by it does not infringe any of the claims of this patent," and asking for the numbers and dates of "any other patents owned by the Vacuum Cleaner Company which you think my client is infringing."

On November 14, 1910, plaintiff's counsel asked for detailed information, blueprint, and description of defendant's "suction cleaner," saying:

"On receipt of these I can advise you more fully regarding the patents infringed."

On November 17, 1910, Mr. Kent responded, giving the information required, but no answer was received. Again on May 26, 1911, Mr. Kent wrote to plaintiff's counsel, calling attention to the letters of November 12, 1910, and November 17, 1910, and stating:

"I should be obliged if you would advise me now as you suggest in your letter of November 14th regarding what patents, if any, owned by the Vacuum Cleaner Company, you consider to be infringed by the Magic electric suction cleaner made by Rosenfield Manufacturing Company."

On July 7, 1911, Mr. Kent wrote again, without getting an answer. In April, 1914, Rosenfield, president of defendant company, called upon Jones, managing director of the plaintiff. Jones had been sending threatening letters to a customer of Rosenfield, and Rosenfield went to see him about this matter. Jones rather excused his conduct, and Rosenfield said:

"I would like you to tell me now whether you think this infringes or not, because I know it don't."

And Jones said:

"I will tell you what I will do, Mr. Rosenfield. I will give this to our attorneys, and have them write you about it."

On April 18, 1914, defendant received a letter from the plaintiff stating:

"I find it will be some days before I can write you anything definite, as our lawyers are so busy in court that I cannot get this matter up with them before the first of the week."

Nothing further was heard from Jones or the plaintiff until October 11, 1915, when plaintiff wrote defendant:

"The fundamental David T. Kenney patent, No. 847,947, has been sustained by the United States court, and we hand you herewith copy of the decision. The decree will follow later. We hereby direct your attention to the fact that your machine infringes the sustained claims of this patent, and we must ask you to cease manufacturing and offering it for sale. At the proper time, we shall expect an accounting for such infringing machines as you have already sold."

Throughout this period defendant was showing its machines at public exhibitions, was working in the open, and, in brief, was notoriously carrying on its business. It is plain that for some reason plaintiff concluded not to sue defendant until after the decision on September 30, 1915, in the American Rotary Valve Co. Case.

I am inclined to think that plaintiff thought the wise course was to refrain from suit, or threatening suit, until the American Rotary Valve Case was decided; but, whatever may have been the motive, the fact remains that plaintiff stood by from the fall of 1910 until October, 1915, and deliberately acquiesced in the sale of defendant's machines.

Plaintiff seeks to escape from this conclusion by pointing out the use of the word "other" in Mr. Kent's letter of November 12, 1910. But in transactions of this character the relations of the parties are not to be determined by an isolated expression. Such expressions often escape notice when the parties have their minds upon the substance of a situation rather than upon a close analysis of correspondence. During this period of years it was easy for plaintiff either to have begun suit, or to have threatened suit, or, in any event, to have answered defendant's inquiries, rather than take a course which naturally led defendant to believe that plaintiff did not intend to proceed against it.

I am well aware of the fact that plaintiff has been compelled to institute several litigations, and that a plaintiff cannot be expected to pursue all infringers at the same time. As has been repeatedly said, each case of laches rests upon its own facts, and in this case I think it would be inequitable to make defendant account for the period between November, 1910, and October, 1915. While, on the one hand, the infringer takes his chances, yet, on the other, where the questions involved are legitimately debatable, and a defendant furnishes full information, and has built up a business and an organization, the owner of the patent, who has knowledge of an infringement, should not be permitted to stand idly by and speculate on the accounting, pending the result of litigations which plaintiff selects, and wisely so, because of the desirability of putting the best foot forward first.

The case, it seems to me, must be placed somewhere between Richardson v. Osborne (C. C.) 82 Fed. 95, affirmed 93 Fed. 828, 36 C. C. A. 610, and Motion Picture Patents Co. v. Laemmle (D. C.) 214 Fed. 787, and thus comes practically to the same result as in Mosler v. Lurie, 209 Fed. 364, 126 C. C. A. 290.

The patent is valid, and claim 4 is infringed, and plaintiff may submit the usual decree, excluding from the accounting the period from November, 1910, to October, 1915.

Settle decree on notice.

Addendum.

As the Circuit Court of Appeals has adjourned for the summer, I shall, in all the circumstances, suspend the injunction on the following conditions: (1) That an appeal be promptly taken; and (2) that a reasonable bond be furnished by defendant.

As apparently defendant cannot obtain a license, and should not be embarrassed until the Appellate Court renders its decision, I am disposed to make the bond quite moderate. The order suspending the injunction may have the usual provision for leave to apply to vacate or modify same on short notice, so as to assure an early hearing of the appeal.

CUSHMAN & DENISON MFG. CO. v. L. F. GRAMMES & SONS.

(District Court, E. D. Pennsylvania. June 2, 1916.)

1. COURTS ⚷352—ACCOUNTING BEFORE MASTER—PROCEDURE.

Equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii), dealing with accounting before a master, which requires the party accounting to bring in an account in the form of debtor and creditor, but gives the other party, if dissatisfied, the right to examine the accounting party, deals with results and not with evidence. It gives no sanction for a demand upon the accounting party to set forth in his account evidence or the sources of possible evidence from which a different account might be stated, although the adverse party may go into such inquiry if he chooses, in which case the inquiry is governed by the ordinary rules of evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. ⚷352.]

2. TRADE-MARKS AND TRADE-NAMES ⚷94—SUIT FOR INFRINGEMENT—ACCOUNTING.

On an accounting by a defendant before a master for infringement of trade-mark or unfair competition, complainant has not the right to inspect

the books of defendant, not in evidence, for the purpose of learning therefrom the names and addresses of defendant's customers to whom sales of infringing articles were made.

[Ed. Note.—For other cases, see **Trade-Marks and Trade-Names**, Cent. Dig. § 107; Dec. Dig. ⚿94.]

In Equity. Suit by the Cushman & Denison Manufacturing Company against L. F. Grammes & Sons. On certificate of master in interlocutory report. Ruling of master affirmed.

See, also, 225 Fed. 883; 234 Fed. 952.

Oswald M. Milligan, of Philadelphia, Pa., and George W. Tucker, Jr., of New York City, for plaintiff.

George K. Helbert and Fenton & Blount, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. It is apparent that rather fine lines are being drawn in the conduct of this case. Perhaps this is unavoidable because of the character of the real questions involved. Broadly stated, the controversy grows out of these respective positions assumed by the parties. The plaintiff, with a decree in its favor for an accounting, denies the correctness of the account stated by defendants. Behind the demand made by plaintiff, there is the implied averment that defendants have returned a less volume of sales than actually made. If defendants disclose the names and addresses of the customers to whom sales were made, the discrepancy between sales admitted and sales made would appear and defendants can be charged with what they have actually received. Hence the demand for an inspection of defendants' books. Defendants, on the other hand, flatly charge plaintiff with seeking to get the names and addresses of defendants' customers from no other motive than commercial rivalry. It is apparent that each is asserting a right. The plaintiff has the right to all admissible evidence of sales made by defendants of the articles, the sale of which belonged to plaintiff. Defendants have the right to protect their own business from encroachment and from rival espionage. Which of the parties is lawfully in possession of the part of the field where these rights overlap is obviously to be determined by the trial judge in the exercise of a necessary discretion committed to him. The exercise of this discretion is governed by the finding of a fact which only the trial judge can find. If a question were asked the answer to which would disclose trade information of value only to a competitor, the situation would evoke the proper ruling. If, on the other hand, evidence necessary to a finding of the proper sum to be awarded was sought to be elicited, an incidental and unavoidable disclosure of business dealings, otherwise uncalled for, would not justify its exclusion. The master has shown himself to have a proper appreciation of this line of demarcation, and we do not feel called upon by anything disclosed by this record to interfere with the exercise of his discretion. Indeed all that is necessary to be said has already been said in (D. C.) 225 Fed. 883. With no thought in mind of prejudging the rights of either party, but merely to emphasize the distinction attempted to be before indicated, certain points may be recapitulated.

[1] 1. Rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii) relates wholly to an accounting. Its purpose is to facilitate this by requiring the party called upon to account to state one. It deals only with results and not with the evidence from which fact conclusions on which to base a statement of account might be drawn. In form it is required to be a "debtor and creditor" account. If it is satisfactory to the other party, the accounting is done. Such other party, however, is not bound to accept it. If it is not satisfactory, the accounting facts may be developed in the way pointed out by the rule.

2. Rule 63 clearly supplies no sanction for a demand upon the accounting party to set forth in his account evidence or the source of possible evidence from which a different account might be stated.

3. The opposing party may, however, go into such an inquiry if he chooses. If he does, the inquiry is governed by the ordinary rules of evidence which pertain to all judicial inquiries and must follow along these well-known lines. A sufficient guide to what may be done when this field of inquiry is entered upon is supplied by the clear-cut rulings of Judge Thompson in the case of Rollman v. Universal Hardware Works (D. C.) 218 Fed. 651.

4. The distinction between what may be brought into evidence at the trial and what disclosures may be required in advance of trial may also enter into the question. For illustration, a party might have the right to compel the production of books or papers and at the trial put them in evidence when he would not have the right to compel the production of the same books or papers to be submitted to his inspection in advance of trial, although for use at the trial.

[2] The master applied these general principles in his rulings. The defendants submitted an account. With this, the plaintiff was dissatisfied. It called, as under rule 63 it was its right to do, one of the defendants as under cross-examination. The fact was developed that the account had been prepared by an expert accountant and an employé of the defendants who had knowledge of the transactions which entered into the accounting. It also developed that the defendants had books of account in which the transactions were entered. These books, however, were not kept by the witness, but by a Mr. Eyre, who was present at the hearing with the books. The books were then called for and produced. Counsel for plaintiff demanded possession of the books for inspection purposes. The master ruled that the names and addresses of defendants' customers need not be disclosed to plaintiff. To present the precise point involved, we reframe the question certified in this form:

"Has the plaintiff the right to inspect the books of defendants not in evidence for the purpose of learning therefrom the names and addresses of defendants' customers to whom 'Gem' paper clips in black boxes with white labels were sold in unfair competition with plaintiff's 'Gem' paper clips?"

As before observed, lines of extreme fineness are drawn by the manner in which this inquiry is sought to be conducted. The question of what evidence of the volume of sales made by the defendants or to whom made, may be introduced, is not before us. It is the much narrower question of whether plaintiff may compel the defendants to submit for inspection and examination defendants' books and papers not in evidence in order that plaintiff may be able to glean from them information helpful to plaintiff in the trial of the case, and which may also be very harmful to defendants in their trade relations with their own customers and with the plaintiff as a hostile rival and competitor. If the question be analyzed it will be found not to differ in principle from what it would be if applied to the testimony of a witness. The accounting transactions might be wholly in the keeping of the memory of a witness. The accounting facts could then be made to appear only through oral testimony. This same Mr. Eyre, for instance, might have all the information which these books contain. The information would then have the like value to the plaintiff which it now has. Could the defendants be required to supply this information in advance of its getting in evidence? On further analysis it will be seen that the ruling of the master in no way conflicts with any right of the plaintiff to introduce or compel the production of any relevant evidence. In the supposititious case instanced he could call any witness, either in chief or as under cross-examination, as might be proper, and ask and have a ruling upon any question which he might see fit to ask. This it will be observed is an entirely different thing from what is the touchstone of the present inquiry, his right to information not in evidence merely because it may be helpful to him in the trial of the cause and which may or may not be used by him for evidential purposes and which, at least as a theoretic possibility, may be used for other than evidentiary purposes in harm of his opponent.

The answer to the question certified, as interpreted, is in the negative, and it is held that the ruling of the master was a proper one.

CUSHMAN & DENISON MFG. CO. v. GRAMMES et al.

(District Court, E. D. Pennsylvania. June 2, 1916.)

No. 1081.

EQUITY ⚷416—OPENING CONSENT DECREE.

A decree entered by stipulation of parties should not be disturbed except on a clear showing of a meritorious defense the denial of which would work plain injustice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 945; Dec. Dig. ⚷416.]

In Equity. Suit by the Cushman & Denison Manufacturing Company against Harry A. Grammes and others, doing business as L. F. Grammes & Sons. On exceptions to interlocutory report of master. Exceptions overruled, and report confirmed.

See, also, 225 Fed. 883, 234 Fed. 949.

Oswald M. Milligan, of Philadelphia, Pa., and George W. Tucker, Jr., of New York City, for plaintiff.

George K. Helbert and Fenton & Blount, both of Philadelphia, Pa., for defendant.

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

DICKINSON, District Judge. The parties to this controversy seem to be in accord only in the thought that this litigation should be brought to an end. A perusal of the record impresses one with the same thought. The opinion of Judge McPherson, accompanying the order of July 3, 1914, gives the then state of the record. By that order the status of the case, presenting a decree against the defendants as prayed for and a reference to a master to state an account, was left undisturbed, except in the respect that the master was directed to take and report any evidence and testimony submitted in support or denial of defendants' petition to modify the decree which had been made. If the petition were denied, there was in the case two findings: One, that the defendants had been guilty of unfair trade competition; the other, that they had infringed plaintiff's trade-mark. If the petition were granted, there would be only a finding of unfair trade. The master submitted a report upon another phase of the case but which, to some extent, involved this. By the order made, following the opinion in (D. C.) 225 Fed. 883, the master was directed in his discretion to pass upon all the matters before him in a final report, or to pass upon this phase in an interlocutory report, unless the parties should, by stipulation, eliminate this feature from the case. This the parties have not done, and the master has made his report confined to the matters referred to him by Judge McPherson.

This brings us to the question of whether the decree as made should be modified. Certain facts which are already matters of record may be here recapitulated: (1) The decree asked to be modified was based upon the admissions of the defendants and the stipulation that it be entered. This was January 22, 1914. (2) On March 10, 1914, the defendants asked leave to move to vacate the decree. This leave was refused. (3) On March 19, 1914, a petition was presented, asking that the decree made be opened, etc. This was denied. (4) On June 22, 1914, the pending petition was presented, asking that the decree be modified. This was referred by the order of July 3, 1914, to the master upon which he now reports. On August 16, 1915, the master was directed to comply with the order of July 3, 1914, as above stated. By this report it appears that a hearing was had upon the order at which the defendants offered evidence in support of the petition. The plaintiff, deeming all which had been offered insufficient to induce the court to modify the decree already made, raised the question of its sufficiency by a motion to strike out. This motion in the opinion of the master was well based, but, in compliance with the order of July 3, 1914, he reports the facts found, together with his opinion that the petition to modify the original decree should be dismissed. The defendants except to the report, advancing three propositions: (1) The order of July 3, 1914, was made without authority and was a nullity and the report thereon a like nullity. (2) The petition itself, coupled with the answer thereto, established all the facts beyond the necessity of any inquiry thereinto and rendered such inquiry superfluous. (3) A perusal of the evidence submitted by the defendants will satisfy the court that the decree as made should be modified.

The order of July 3, 1914, by Judge McPherson, having been made, it would be futile, if not indeed out of place, to discuss the authority to make it. Whether the equity powers of the court can be delegated, or whether the report before us is to be deemed that of a master under rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv) or of an examiner, or whether the testimony and evidence returned is to be viewed as a deposition taken in support of the averments of the petition, we are brought to the practical question of whether the decree as made in the case should be modified. The present form of the petition is based upon the distinction between the previous petitions and this, in that a motion to vacate or to open cannot be made the basis of an appeal, but a motion to dissolve an injunction (which this is claimed to be) is open to appellate process. However this may be, the analogue which counsel for defendants adopts of a motion for a new trial, based upon an averment of the existence of after-discovered evidence, is a fair one, so far as it goes. Even in such cases there are few in which the worsted litigant does not think he could bring about a different result if granted a new trial. A fairer analogue, however, is an application to open a judgment which has been entered on a verdict. It is apparent this decree should not be disturbed except upon a clear showing of a meritorious defense, the denial of which would work plain injustice. The strength of the appeal made lies in this: The plaintiff averred and the decree proceeds upon the found fact that plaintiff had a trade-mark right in the sale of these clips in the form sold. It appears now that this averment may be without foundation, and that plaintiff had no such right, and, when this decree was entered, knew it had none. It could therefore succeed in this branch of the litigation only by the possibility that the true facts would not appear. This attitude comes dangerously near, if it does not reach, a suppression of the truth. If the decree had been entered upon findings secured from the court through such suppression, the decree should be recalled, and the view taken by the master would clearly seem to be too narrow and technical. The tactics employed by the plaintiff throughout this inquiry would confirm the soundness of such a conclusion. They have been wholly obstructive and confined to an apparent effort to prevent the defendants from developing the facts. The real situation, however, is not quite that thus outlined. The analogue suggested by the facts is that of a confessed judgment. The phrase employed by the former counsel for defendants more accurately expresses the proper comment on what was done. The failure of plaintiff to disclose the subsequent proceedings affecting the trademark registration and the New York litigation counsel characterized as displaying a lack of frankness toward him. The motion on which the reference to the master was based could more satisfactorily be disposed of if the plaintiff had met the accusations made instead of attempting to smother defendants' efforts to present the facts on which they are based, and then taking refuge in the position that the decree made had not been conclusively shown to involve an injustice. As already more than once observed, it is high time this litigation was brought to a close. The present conditions present a situation not free from difficulties in disposing of it, and by no means free from grave doubts whether the injunction feature of the agreed decree should be permitted to stand. It, of course, does not follow that, because the plaintiff failed to succeed in his litigation against one defendant, it ought not to recover against another. It charged in the one unfair trade, and failed to prove it. It made the same charge in the other, and it was not only admitted, but the decree based upon the admission still stands unchallenged in this respect. For this infraction of its rights, plaintiff is entitled to redress. No award of damages or profits can be made because of the trade-mark feature, which is claimed to be open to dispute. The only practical value defendants' complaint has is as to the use of the word "Gem." This is in practical effect to some extent involved in the relief to which plaintiff is confessedly entitled that defendants shall no longer palm off their make of clips as the one made by plaintiff. Had the case gone to trial, plaintiff would have been entitled to a decree. Defendants may have conceded too much to the plaintiff. What they did, however, was their own voluntary act. The reluctance which Judge McPherson expressed to interfere with an agreed decree is a natural one. We confess to a like reluctance to accept the view taken by the master because of grave misgivings of whether injustice has not been done the defendants. On a review of the whole situation, however, we incline to the position that the decree as made should stand. The exceptions are dismissed, and the report of the master confirmed, the disposition of costs, however, to await final decree.

SOUTHERN PHOTO MATERIAL CO. v. EASTMAN KODAK CO. OF NEW YORK.

(District Court, N. D. Georgia. July 20, 1916.)

No. 166.

MONOPOLIES ⟹28—ACTIONS—SERVICE—SUFFICIENCY.

The Sherman Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), authorizes action in any district court in a district in which the defendant resides or is found. The Clayton Act, Oct. 15, 1914, c. 323, § 12, 38 Stat. 736, authorizes suits not only in the judicial district whereof defendant is an inhabitant, but also in any district wherein it may be found or transacts business. The defendant, a New York corporation, had its principal place of business and domicile in New York, but it also carried on business in Georgia, though it had no agent in such state on whom process could be served. *Held*, that under the statute defendant might be sued in the district court for Georgia, service being had on defendant at its domicile.

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

At Law. Action by the Southern Photo Material Company against the Eastman Kodak Company of New York. On plea to jurisdiction

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

and traverse of service. Plea and traverse overruled, and motion to quash denied.

See, also, 224 Fed. 523.

King & Spalding, of Atlanta, Ga., for plaintiff.

Smith, Hammond & Smith, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a suit brought by the plaintiff against the defendant under the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209, 210, and the Clayton Act of October 15, 1914, 38 Stat. 730. The questions now considered are the jurisdiction of the court and the sufficiency of the service.

The Southern Photo Material Company is a Georgia corporation, having its residence in the city of Atlanta, in the Northern District of Georgia. The Eastman Kodak Company is a corporation of the state of New York and a citizen and resident of that state, having its principal office in the city of Rochester.

There is a Georgia corporation in the city of Atlanta, known as the Glenn Photo Stock Company, the stock in which is owned by the Eastman Kodak Company of New Jersey, which is the same company that owns the stock of the Eastman Kodak Company of New York, the defendant here.

The first service in this case was perfected by serving W. Frank Luckiesh, manager of the Glenn Photo Stock Company. This service was traversed by the defendant, appearing for the purpose of objecting to the service.

Subsequent to this an order was made by the court authorizing service on the defendant by service at its principal office or place of business in the city of Rochester, N. Y., a copy of the petition and the amendment to the petition, and the process in the case, together with a copy of the order of the court providing for this service, to be sent to the United States Marshal for the Western District of New York to be served by him on the defendant company.

The United States Marshal for the Western District of New York has made return by his deputy of service of the petition, amendment to petition and order of court allowing the same, process and order of service, on George Eastman, treasurer of the Eastman Kodak Company of New York. After this the defendant renewed his plea to the jurisdiction and traverse as to this last service.

The Sherman Anti-Trust Act, of 1890, provided that a defendant might be sued in any Circuit Court of the United States (now District Court) "in the district in which the defendant resides or is found." In the Clayton Act, of 1914, it is provided that a defendant may be sued "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." The question discussed here is, whether suit may be brought in a district where the defendant "transacts business," although not "found" in that district within the meaning of the decisions defining that term.

In this case the evidence shows that there are 126 regular customers of the defendant company in the state of Georgia, and that it has certain demonstrators who travel in Georgia and adjoining states for the purpose of demonstrating articles manufactured by the Eastman Kodak Company of New York, of furthering its interests as its representatives and, to some extent, taking orders for goods, and the question made is whether, transacting business in this state, which it undoubtedly does to the extent indicated, but where it has no representative in the district upon whom service can be made, the court has jurisdiction. In other words, whether the service at its home office is good because it "transacts business" here and not because it is "found" here. Counsel claim that the expression "found" and that of "transacting business" are synonymous; that is, that the business transacted must be of such character and the company sued must have such representatives in the district that, under the decisions on the subject, it is "found" in the district. The claim as to the necessity for it being "found" in this district and how it must be found are based upon the cases of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and particularly Green v. Chicago, Burlington & Quincy Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and a decision made in this district, West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 170 Fed. 349. Two recent cases are cited as pertinent to the question under discussion. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, is cited for the plaintiff, and Thornburn v. Gates (D. C.) 225 Fed. 613, for the defendant.

The conclusion to which I have come is this: That under section 12 of the Clayton Act suits may be brought in any judicial district whereof the corporation is an inhabitant, and also any district wherein it may be found, and in addition in any district wherein it transacts business; the process of course must be served in the district of which it is an inhabitant or wherein it may be found. The purpose of the act was, I think, to give the courts jurisdiction in any district in the United States where a corporation transacts business, whether in the sense of the decisions it is "found" there or not, and then that service on it may be perfected at its home office in the district whereof it is an inhabitant or wherein it may be found; that is, "found" as provided in the decisions construing that term.

In this case, as I have stated, the evidence shows clearly that the defendant company is transacting business in Georgia, and in this district, and therefore the court here has jurisdiction of the case. The defendant has been served by serving it at its home office in New York, in pursuance of the court's order, and that the service is sufficient under the statute. I think the service of process on Mr. Luckiesh, the manager of the Glenn Photo Stock Company, of Atlanta, was not good and must be disregarded in determining the question of due service in the case.

The result is that the plea to the jurisdiction must be overruled as well as the traverse of service, and the motion to quash the service.

PILGRIM v. ÆTNA LIFE INS. CO.

(District Court, D. New Jersey. August 14, 1916.)

REMOVAL OF CAUSES ⚿79(6)—TIME—EXTENSION OF TIME FOR FILING ANSWER—STATUTE.

Under Judicial Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1913, § 1011]), providing that the party entitled to remove a suit from a state to a federal court shall file a petition in the state court at the time or any time before defendant is required by the laws of the state or rule of the state court to answer or plead to the declaration or complaint, an order of the Supreme Court of New Jersey, authorized by rule 217 of that court, extending the time for defendant to answer over the 20 days set by rule 76 of that court, did not extend the time within which the cause could be removed to the federal District Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 144; Dec. Dig. ⚿79(6).]

At Law. Action by Charles C. Pilgrim, receiver of the Russel-Robinson Company, against the Ætna Life Insurance Company. On motion to remand. Motion granted.

Lum, Tamblyn & Colyer, of Newark, N. J., for plaintiff.
Collins & Corbin, of Jersey City, N. J., for defendant.

RELLSTAB, District Judge. This suit was begun in the New Jersey Supreme Court. Rule 76 of that court, formerly 55 of "The Practice Act of 1912" of New Jersey (N. J. P. L. 1912, p. 377) requires that the answer of the defendant be filed within 20 days after service of the summons. Rule 217, formerly 3 of said Practice Act, authorizes the making of an order by said court, or a justice thereof, extending the time for the filing of said answer. In this case, on the application of the defendant, an order was made by one of the justices of that court, granting such an extension. Within the extended period, but after the date when, according to such rule, the defendant was required to plead, it caused said suit to be removed here. Section 29 of the Act of Congress of March 3, 1911, designated as "The Judicial Code" provides that the party entitled to remove a suit from a state to a federal court shall file a petition—

"in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit. * * *"

Said section 29 is mediately derived from section 3 of the act of Congress of March 3, 1875 (18 Stat. 471). Under the act of 1875, the suitor could remove the suit "before or at the term at which said case could be first tried and before the trial thereof."

The plaintiff moves to remand on the ground that the time had elapsed within which the suit could have been removed. So far as advised, this question has not been passed upon in this judicial circuit. The cases in the other circuits conflict upon the question whether an order made by the state court in the cause extending the time to plead likewise extends the time within which the cause may be removed.

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

In my judgment, the cases denying such latter extension, reflect the true construction of the limit placed on the right to remove by the federal statute. The legislative purpose in changing the time within which the removal was to be made seemingly was to require the suitor to make his election of the forum in which the case was to be tried before he submitted himself to the jurisdiction of the state court. At any rate, Congress used language which, if given its ordinary meaning, would accomplish such purpose. The time referred to in said section 29 is fixed and not fluctuating. It is the time designated by statute or rule which applies indiscriminately to all suits of a like character, and not a time that may vary in length fixed by an order of court as the exigencies of a particular case may appear to require. The language is not that the plaintiff petition for the removal before he is "required" to plead, but at or before the time he is "required" by the laws of the state or the rule of the state court * * * to answer or plead. Certainty, as against uncertainty, with relation to the time within which the removal is to be applied for, a prompt election by the defendant of the forum wherein the cause is to be tried, and speeding the cause for trial as against delaying it, are obtained by such interpretation—desiderations not negligible in matters of practice.

The motion to remand is granted.

THE BLAKELEY.

(District Court, W. D. Washington, N. D. May 3, 1916.)

No. 3286.

1. SEAMEN ⚷30—SUIT FOR ASSAULT BY OFFICER—PARTIES—"OR."

In the "act to promote the welfare of American Seamen in the merchant marine of the United States" (Act March 4, 1915, c. 153, § 9, 38 Stat. 1167), which makes it a misdemeanor for any officer to inflict corporal punishment on a seaman, provides that when it shall be violated by any officer other than the master it shall be the duty of the master to surrender him for punishment, and that his failure to do so, which "shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages" to the person illegally punished, the word "or" in respect to the parties liable is to be construed to mean "and," and in such suit for damages a seaman may join the master, the vessel, and the owner.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 195–211; Dec. Dig. ⚷30.

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

2. SEAMEN ⚷30—PROTECTION AGAINST CORPORAL PUNISHMENT—CONSTRUCTION OF STATUTE.

A seaman on an American merchant vessel is not deprived of the protection of such act because he is not a citizen of the United States.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 195–211; Dec. Dig. ⚷30.]

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

In Admiralty. Suit by Avgot Sjorberg against the American schooner Blakeley and J. W. Manka. On exceptions to libel. Overruled.

Saunders & Nelson, of Seattle, Wash., for libelant
Hastings & Stedman, of Seattle, Wash., for claimant.

NETERER, District Judge. [1] Libelant alleges that he was employed on the 17th day of November, 1915, by J. W. Manka, the master of the American schooner Blakeley as a seaman, and that while discharging his duties as a seaman upon said vessel while sailing on a voyage from Newcastle, Australia, to Puget Sound, and while said vessel was on the high seas on the 19th day of January, 1916, one George Denver, the second mate and an officer of said vessel, wrongfully assaulted, struck, beat, bruised, etc., libelant with his fists, whereby he was made sick, lame, sore, and disabled, and suffered great bodily pain and mental anguish, and sustained damages in the sum of $1,000. That Manka, the master, had actual knowledge of said assault at or about the time of its commission, and that he neglected to surrender the said Denver to the proper authorities when said vessel reached the port of Seattle, upon completing her voyage to Puget Sound, which failure resulted in the escape of the said Denver, and prayed that said schooner be attached, and that Manka, the master, be cited to appear and answer, and that the court pronounce judgment for damages and costs, and also condemn the said schooner, her tackle, apparel, etc. The claimant and the master have appeared separately, each filing exceptions to the libel, and, among other grounds, allege that libelant seeks improperly to join a proceeding in rem with a proceeding in personam, contrary to the admiralty rules of the Supreme Court of the United States.

This action is prosecuted under Seaman's Act March 4, 1915 (U. S. Stat. at L. vol. 38, p. 1164, § 9 at page 1167). It is contended by the claimant that, under admiralty rule 16 of the Supreme Court of the United States (29 Sup. Ct. xl):

"In all suits for an assault or beating on the high seas or elsewhere within the admiralty or maritime jurisdiction, the suit shall be in personam only."

This rule was promulgated prior to the adoption of the Seaman's Act, supra, and hence has no application. The provision of the act upon which reliance is placed (section 9 of the act, supra, page 1167) provides:

"* * * Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages. * * *"

The act was passed "to promote the welfare of American Seamen in the merchant marine of the United States. * * *" The intent of the act was to give the assaulted seaman a right of recovery for the injury. That separate recovery cannot be had against each, but one recovery against one or all, I think clearly expresses the intent of the lawmakers. I do not think that force can be given to the suggestion of claimant that the use of the disjunctive "or" instead of the conjunctive "and" distinctively discloses a different intent. The popular use of the words "or" and "and" is frequently inaccurate, and while they are not treated as interchangeable, yet where the general context implies such intention, the one may be read in the place of the other. Witherspoon v. Jernigan, 97 Tex. 98, 76 S. W. 445.

"The word 'or' is frequently construed to mean 'and,' and vice versa, in order to carry out the evident intent of the parties." Dumont v. U. S., 98 U. S. 143, 25 L. Ed. 65.

When necessary to carry out the provisions of an act the word "or" may be read as "and." North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214. In the instant case the purpose of the statute was to promote the welfare of American seamen, and against certain abuses gave them a right of recovery, and since this recovery can be obtained from the vessel, the master, or the owner, each being liable and their liability being created by the act, giving the benefit to the seamen, I think the word "or" must be held to mean "and." Rooney v. Brogan Construction Co., 107 App. Div. 258, 95 N. Y. Supp. 1. Since all are liable, there certainly could not have been any purpose or intention on the part of Congress to compel the seaman to elect as to which to pursue, and thereby exempt the others from liability. The purpose was to give him a right of recovery for the damages sustained, and this may be obtained from all of the parties.

[2] The fact that libelant is not a citizen of the United States does not change his relation to the act, as engaging in the service as one of the crew of the American ship Blakely brought him within the protection and benefits of all of the laws passed by Congress on behalf of American seamen, and subject to all of their obligations and liabilities. Ross v. McIntyre, 140 U. S. 453, 472, 11 Sup. Ct. 897, 35 L. Ed. 581.

The exceptions are overruled.

UNITED STATES v. CONWAY LUMBER CO. et al.

(District Court, D. New Hampshire. August 16, 1916.)

Nos. 178, 179, 555, C. C.

DEPOSITS IN COURT ⚷4—ACT OF CLERK—STIPULATION OF PARTIES.

Cr. Code, § 99 (Act March 4, 1909, c. 321, 35 Stat. 1106 [Comp. St. 1913, § 10267]), declares that whoever, being a clerk, shall fail to forthwith deposit any money belonging in the registry of the court or hereafter paid into court or received by the officers thereof with the treasurer or assistant treasurer, or designated depositary of the United States, in the name of and to the credit of the court, shall be guilty of an offense. Rev. St. § 996 (Comp. St. 1913, § 1645), declares that no money deposited in court shall be withdrawn save by order of the judge or judges, and it shall be the duty of the judge or judges to direct deposit in a designated depositary, while section 5153 (section 9691) declares that banking associations

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designated by the Secretary of the Treasury shall be depositaries of the public money. In a condemnation suit, where there were conflicting claims to an award, the claimants stipulated that the award might be withdrawn from the registry of the clerk and deposited in certain other national banks, in order that interest should accrue while the fund was held in abeyance. *Held*, that for the clerk to make such deposits according to stipulation and orders thereon in national banks which were not those usually designated as depositaries was no violation of the Criminal Code.

[Ed. Note.—For other cases, see Deposits in Court, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐4.]

At Law. Condemnation proceedings by the United States against the Conway Lumber Company and others. Deposit of funds by clerk of court according to stipulation approved.

Fred H. Brown, U. S. Atty., of Somersworth, N. H.

Allen Hollis, of Concord, N. H., for defendants.

ALDRICH, District Judge. The question is the same in all these cases, and it is raised in proceedings of the United States government to appropriate certain lands to public uses.

Large sums of money having been paid into court by the government as compensation for lands taken, and controversies having arisen as to what parties were entitled to the damages awarded, it was ordered that certain sums should be held in abeyance to await the disposition of questions arising from conflicting claims; and, the parties interested having expressly stipulated to the end that such sums might be withdrawn from the registry of the court and deposited in certain other national banks in order that interest should accrue while the funds were held in abeyance, the clerk, under such stipulations and orders thereon, withdrew the funds and deposited the same in certain specially designated national banks, other than the generally designated depositary of the United States.

The question which I am requested to pass upon is whether the act of the clerk was in violation of section 99 of the Criminal Code. I do not think it was. Under the bankruptcy statute, courts may designate depositaries of the United States for moneys paid into court or received by its officers in pending causes. Such designations, in the absence of special orders, would operate generally upon all moneys, all officers, and all causes.

These are not bankruptcy cases, and the bankruptcy statute has no express bearing, but there can be no doubt of a court's authority to make special orders in pending cases for special deposits, to the end that the funds shall be safeguarded in the interests of the parties concerned.

Section 996 of the Revised Statutes sustains this view.

It is true that section 5153 declares that banking associations designated by the Secretary of the Treasury shall be depositaries of the public money, but this statute has reference to public moneys in the broad and general sense, and it would seem that it should not be accepted as absolutely controlling courts in respect to moneys paid into court as indemnity or compensation for private rights. In such a situation, it must be within the general powers of courts, quite independent of statutes, to safeguard a fund deposited with clerks in pending cases as compensation to private individuals for rights taken.

Although the government has paid the money into court to answer the damages awarded in pending causes, thereby, in a sense, changing the fund from its character as public funds to that of a private fund, it still has an interest to see that the money is taken care of, and that the right party gets it, and it is for this reason that I required notice to the district attorney. I see nothing wrong about the disposition of the money. The money is in a depositary of the United States under special orders of court rather than under a general order, and, moreover, the special orders are founded upon stipulations formally entered into by the parties interested in the fundamental and substantial right.

It cannot be possible that section 99 has any application to such a situation.

This rescript may be entered in all cases where the question is raised.

PAGANO et al. v. CHAS. BESELER CO.

(District Court, S. D. New York. July 3, 1916.)

COPYRIGHTS ⚿9—PHOTOGRAPH—ORIGINALITY.

A photograph of a scene, including a public building, is copyrightable; originality in determining just when to take the photograph, so as to bring out the proper setting, for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc., being involved.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 7; Dec. Dig. ⚿9.]

At Law. Action by Antonio Pagano and other against the Chas. Beseler Company. Demurrer to complaint overruled.

Benno Lewinson, of New York City, for plaintiffs.

August C. Streitwolf, of New York City, for defendant.

MAYER, District Judge. The action is at law to recover damages pursuant to the provisions of Act March 4, 1909, c. 320, § 25, 35 Stat. 1081 (Comp. St. 1913, § 9546). Defendant has demurred, and plaintiff has moved for judgment on the pleadings. On the argument, defendant also moved for judgment on the pleadings.

The subject of the copyright is a photograph of a scene on Fifth avenue in the city of New York from Forty-First street to Forty-Second street, which includes the Public Library. In paragraph V of the complaint plaintiffs allege that the picture is—

"from his own original conception, to which he gave visible form * * * by selecting the position and place from which to take said picture, and the moment when the light, shade, cloud, and sky effects upon said New York Public Library and its surroundings combined to make a new harmonious and artistic picture."

Whether what was done makes a new, harmonious, and artistic picture is probably a conclusion of the pleader; but the allegation that

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the conception was original, and that visible form was given to that conception by selecting the position and place at the proper moment, is an allegation of fact. The demurrer, therefore, must be overruled.

But the motions may be disposed of on a broader ground. I have before me only the photograph, together with the allegations of the complaint, and the situation is as if on a trial plaintiffs had introduced the photograph in evidence and rested, and thereupon defendant had rested. It would then have become the duty of the court, as it is now, to determine whether the photograph was copyrightable.

The question is not, as defendant suggests, whether the photograph of a public building may properly be copyrighted. Any one may take a photograph of a public building and of the surrounding scene. It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc. The photograph in question is admirable. The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First street, is most pleasing, and the lights and shades are exceedingly well done.

There are other features, which need not be discussed in detail, such as the motor cars waiting for the signal to proceed. The work, it seems to me, comes well within what the authorities have held to be the subject-matter of copyright.

As defendant's lantern slide is an exact reproduction, there can be no question as to infringement.

The demurrer is overruled, and plaintiff may have judgment on the pleadings, with leave to defendant, however, to answer within 10 days after service upon him of the order filed upon this decision. During my absence on vacation the order can be submitted to Judge Learned Hand.

UNITED STATES v. CORN PRODUCTS REFINING CO. et al.

(District Court, S. D. New York. June 24, 1916.)

1. MONOPOLIES ⚷17(1)—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE.

Defendant Corn Products Refining Company, which on its organization in 1906 acquired control of all the glucose plants in the United States and of starch factories producing 64 per cent. of the total production, *held* an illegal combination in restraint of interstate trade, and to monopolize the same, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821), on evidence showing that the purpose of its organization was to prevent competition, and that the power acquired by the combination was exercised to prevent by unfair means new competitors from entering the field, and to drive out those entering or already engaged in the business, through profit-sharing contracts with customers which required them to continue to purchase from it exclusively for more than a year afterward to entitle them to the benefit of the contract in any particular purchase; by a contract with a new

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competitor, induced by threats of entering into competition in another branch of the competitor's business, by which it obtained one-half the glucose production of the new plant and sold the same at a loss through secret agents purporting to represent independent makers for the purpose of preventing others from entering the business; by the sale of mixed syrups, of which it acquired control of more than half the production, at little or no profit, and at prices which left no profit to independent mixers, who were compelled to buy their glucose in the market; and by other price manipulations and local discriminations, all of which were more or less successful in maintaining its monopoly.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⚷17(1).]

2. MONOPOLIES ⚷17(2)—ANTI-TRUST ACT—CONTRACTS IN RESTRAINT OF TRADE.

Profit-sharing contracts put in practice by a manufacturer of glucose and grape sugar, which at the time had practically a monopoly, by which 10 cents was set aside for each 100 pounds of product sold to a customer, and paid to him at the end of the following calendar year, provided he had not in the meantime purchased from any other producer, when adopted as part of a general scheme to prevent competition, are contracts in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⚷17(2).]

3. MONOPOLIES ⚷24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDY.

In considering the question of the dissolution of an illegal combination of manufacturing concerns, which has by the export of the product of one of its plants near the seaboard built up a successful foreign trade, relying on its other plants to supply the domestic market, the court cannot undertake to determine whether the public injury from the loss of such trade, which might result from the severance of such plant, because, if operated independently, its product might be sold in the domestic market, would outweigh the benefit to the public of the increased competition in the home market.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚷24(2).]

4. MONOPOLIES ⚷24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDY—DISSOLUTION.

Where an illegal combination of a majority of the plants in the country in a line of manufacture has persistently, through a number of years and in various ways, used the power given by the combination to interfere with the free course of commerce which the law demands, the remedy by injunction alone is inadequate, and to be effective should extend to a decree of dissolution.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚷24(2).]

In Equity. Suit by the United States against the Corn Products Refining Company, the National Starch Company, the St. Louis Syrup & Preserving Company, the Novelty Candy Company, Penick & Ford, Limited, Edward T. Bedford, William J. Matheson, Frederick T. Bedford, Frederick T. Fisher, C. H. Kelsey, A. B. Boardman, George S. Mahana, George M. Moffett, William H. Nichols, Jr., A. A. Smith, James Speyer, E. Beverly Walden, C. M. Warner, Thomas P. Kingsford, R. S. Burns, F. A. Lohmeyer, Benjamin Schneewind, C. W. Lohmeyer, Edward T. Bedford, 2d, A. N. Watkins, C. H. Lorenz, Louis Suss, William S. Penick, Jr., and James P. Ford. On final hearing. Decree for complainant.

This is a petition under the Sherman Act by the United States for an injunction and a dissolution of the defendant Corn Products Refining Company, because of a monopolization and a restraint of interstate and foreign commerce, and because of a conspiracy to monopolize and restrain such commerce, in the manufacture and sale of starch, glucose, grape sugar, and in the mixing of glucose with the refiners' syrup, molasses, or other syrups. The individual defendants are the officers and directors of the defendant Corn Products Refining Company and of the corporate defendants, National Starch Company, St. Louis Syrup & Preserving Company, and Novelty Candy Company. There are also joined in the petition the president and directors of a Louisiana corporation, Penick & Ford, Limited, and the corporation itself. The petition sets forth that the principal products derived from corn are: (1) Starch for food and laundry purposes; (2) glucose or corn syrup; (3) grape sugar or corn sugar. It then sets forth the history of the defendant corporations from the year 1897, alleging the combinations from which by a series of reorganizations the defendant Corn Products Refining Company arose in 1906 and the National Starch Company in 1900, and the subsequent acquisition by the Corn Products Refining Company of the stock in the St. Louis Syrup & Preserving Company and Penick & Ford, Limited. It then asserts that the Corn Products Refining Company and the National Starch Company grind 66 per cent. of the entire production of starch and glucose in the United States, and by means of the control so created, monopolize, and attempt to monopolize, interstate and foreign commerce in starch, glucose, and other corn products; that they control likewise 80 per cent. of such commerce in mixed syrups, as so defined. It then alleges ten sorts of unfair trade practices by the defendants, as follows:

(a) By means of the combinations before set forth.

(b) By means of the dismantling and sale of certain of its plants which had been acquired in excess of their real value.

(c) By means of contracts secured from officers of the corporations consolidated agreeing not to enter into manufacture within 1,500 miles of Chicago for stated periods of time.

(d) By means of profit-sharing agreements until the year 1910.

(e) By means of a guaranty in all sales of its goods against the decline in price.

(f) By means of an agreement with the American Maize Products Company by which certain of its glucose purchased by Corn Products Refining Company should be sold at low prices under the guise of sales by independent manufacturers.

(g) By means of threats against the National Candy Company that it would enter into the candy business if the said National Candy Company should enter the glucose business and by the organization of the Novelty Candy Company for that purpose.

(h) By means of fixed prices for the sale of corn products at unreasonably low figures for the purpose of harassing independent manufacturers and by the low price of its own brand of mixed syrup, "Karo," and by driving out the private brands of other individuals.

(i) By means of fixing retail prices.

(j) By means of freight rebates obtained under the cover of allowances for switching service.

The petition prays that the defendants (1) be declared to be combinations in restraint of trade and attempt to monopolize such trade; (2) that the defendants be decreed to have entered into contracts in restraint of interstate and foreign trade and to be engaged in the effort to restrain and destroy trade; (3) that the court adjudge Corn Products Refining Company a combination in restraint of trade and a monopolization thereof; (4) for such other relief as may be necessary.

The answer admits the first three articles of the petition and certain facts in the other articles. It will not be necessary for the decision of the case to particularize these admissions of the answer, as the substance of the proof is considered in the later discussion. The eighth article of the answer on behalf of the individual defendants James Speyer, A. B. Boardman, Clarence H. Kelsey, and W. H. Nichols, Jr., denies any connection with the Corn Products Refining Company except after certain dates therein mentioned.

The petition was filed in March, 1913, the answer on April 9, 1913. The government commenced taking testimony on June 10, 1914. Testimony was taken thereafter out of court until about the end of 1915, after which the case came on for a hearing on January 10, 1916, before Hon. Learned Hand, District Judge, and testimony on both sides was completed. It was thereafter argued in March, 1916. Meanwhile, and on May 14, 1915, an interlocutory decree had been taken by consent effecting a dissolution of the combination, so far as it had gone, of Corn Products Refining Company with Penick & Ford, Limited, by the sale of all securities already purchased, and forbidding the defendant from acquiring any other securities in that corporation, or in any other fashion acquiring any interest or control in it.

The following statement of facts is made for the most part in chronological order, stating separately the conditions of the starch and glucose industries until 1902, at which time they were first combined in the formation of the Corn Products Company. The starch industry before 1902 is taken up in three periods: (1) That prior to 1890, the date of the formation of the National Starch Manufacturing Company; (2) that from 1890 to 1900, the date of the formation of the National Starch Company; (3) the period from 1900 to 1902. The history of the glucose industry is considered in two periods: (1) That prior to 1897, the date of the formation of the Glucose Sugar Refining Company; (2) that from 1897 to 1902. The conditions of the joint industry are then considered in two periods, (1) that from 1902 to 1906, until the formation of Corn Products Refining Company; (2) that from 1906 until the close of the testimony. In the consideration of the period from 1906 to the present time the various practices adopted by the Corn Products Refining Company are themselves considered in chronological order along with the development of the industry itself. At the conclusion of this statement of facts the various allegations of the petition are taken up in the order stated in the petition, and formal findings of fact are made upon all of them. Finally, appears a discussion of the law deemed applicable and of the conclusions of law made by the court, together with such remedies as the facts and the law require.

Jesse C. Adkins, of Washington, D. C., and Van Sinderen Lindsley, of New York City, for the United States.

Morgan J. O'Brien, of New York City, James M. Sheean, of Galena, Ill., and Albert B. Boardman and Preston Davie, both of New York City, for defendants.

I. The Condition of the Starch Industry in 1890.

LEARNED HAND, District Judge (after stating the facts as above). [1] Starch is used for mill, laundry, and food purposes and is sold both in bulk and in packages. Its method of manufacture at the present time is not in substance different from that employed 26 years ago. The raw product is the ordinary Indian maize or corn, which is bought already separated from the husk, and is first soaked or steeped in hot water impregnated with sulphur. The water is left upon the kernel until it is quite soft, when it is run between two plates of rough, coarse teeth, which break it up and disintegrate the germ from the starch proper, after which both germ and starch are run into vats and allowed to rest. The germ, being the lighter part, floats to the top and passes over the lip of the vat into a separate container. The remainder contains the starch proper and the husk, although with the germ has gone off a certain amount of starch, which under improved methods is later reclaimed. The residual emulsion of starch and husk falls into a second grinder, like an ordinary miller's grindstone, where it is ground into a very soft pulp. The husk is separated from the starch in emulsion by revolving on the inside of silk screens. At the lower end of the screens the husk is carried off. Through the meshes of the silk flows out the true emulsion of starch in liqueous form, which is then poured upon long tables with a very slight slope, on which the starch settles to the bottom and the gluten, an element of the starch, flows off at the end of the table. After the tables have been filled with a solid cake of starch, it is dug out by shovels, pulverized or macerated in a moist condition, and delivered upon tables, whence it goes into racks, which are in turn run into long kilns. The starch is dried in the kilns by the passage of hot air constantly blown through it, until all the moisture has been evaporated. After it is quite hard and dry and brittle, it is broken up as fine as necessary. Powdered starch is what has been ground into fine powder; pearl or mill starch, what has been broken into lumps of considerably greater size. This is the end product of the process and is sold as such. In the manufacture of the package starch, which is used for the most part for edible purposes, the process is the same, except that greater care is exercised to assure the absence of all impurities. There are some variations, also, in the production of "lump starch" and its mechanically produced equivalent, "pressed starch," but these are not important. Certain by-products result from this process which it is not necessary to consider, but which in the later stages of the industry have assumed a very important part in its returns.

In the year 1890 there were 22 or 23 small plants for the manufacture of starch, situated for the most part in the corn belt of the Middle West, except several at Buffalo, one at Oswego, and one at Glen Cove, Long Island. These had a small capacity, ranging from 200 to 1,800 bushels of corn a day, except the Glen Cove Manufacturing Company, which could grind 7,500 bushels. This was the only plant at that time manufacturing both glucose and starch, and had a glucose capacity of 5,000, the rest going into starch. These companies in some instances had been over 65 years in existence; the best-known brands being those of Kingsford at Oswego and of Duryea at Glen Cove, each of which were for edible starches and were of great value. Of these plants, some 20 were combined in 1890 into the National Starch Manufacturing Company, through the active promotion of one Chester W. Chapin, of New York. The National Starch Manufacturing Company was organized with a capital stock of $10,500,000, and a first mortgage 6 per cent. bond issue of $4,500,000, making $15,000,000 in all. Like most combinations of that character, it had been preceded by a very severe competition for a number of years; many of the plants working at less than their full capacity, some being actually in the hands of receivers. Prices had been cut severely, in some cases even below the cost of production. The combination was not effected as a trust, but as a holding company, the National Starch Manufacturing Company acquiring the stock of its constituents. The owners of the companies purchased as part of the consideration generally contracted not to engage in the manufacture of starch or glucose for a period of 5 years.

This combination centered into one control between 75 per cent. and 80 per cent. of the starch business in the United States. Its plants had a capacity of between 230,000,000 and 240,000,000 pounds, and were producing in 1890 about 200,000,000 pounds of starch yearly. The competition thereafter consisted of the American Starch Company, the Graves Company (the starch plant of the American Glucose Company), Kingsford's Company, and two or three other starch plants, together with starch made by the glucose factories. Shortly after the organization in 1890 a number of the old plants were closed down, for the purpose of economizing, reducing expense, and saving cross freights. There is no certain evidence to indicate that they were closed for the purpose of limiting the total starch production, but it is probable that the total possible production exceeded the capacity of the market at a living profit. This combination was made for the purpose of getting a control of the starch industry, sufficient to fix prices and regulate the supply, and in this way of monopolizing it. By taking in so many outside producers, it was hoped that the preceding competition would disappear.

II. The Starch Industry Between 1890 and 1900.

In August, 1899, the United Starch Company was organized. It included Kingsford's Starch Company, a company at Sioux City, the Graves plant at Buffalo, and the Argo Manufacturing Company of Nebraska. Less than a year later was formed the National Starch Company, in April, 1900, under the promotion of Joy Morton, by a combination of practically all the stock of the National Starch Manufacturing Company, the United Starch Company, and the United States Glucose Company, which was a holding company for the stock of the United States Sugar Refining Company. The National Starch Company continued an independent existence until the first great combination of the starch and glucose industries of 1902, which was formed for the same reason as the others. Competition before 1900 had again become very severe, and it was hoped that the consolidation would reduce costs and improve profits. The National Starch Company on its formation controlled substantially all the starch manufacture in the United States, except that produced by the glucose manufacturers as an incident to their business. It also was formed for the purpose of monopolizing the starch industry by controlling production and prices, through combining with outside producers, and in this way restraining the competition which the previous 10 years had developed.

III. The Glucose Industry in 1897.

Glucose is made by taking the starch emulsion as it comes from the table and mixing with it a small percentage of acid in a large bulk of water, the whole being violently agitated. The acid has the property of combining the molecules of the starch and the molecules of the water into molecules of glucose. After the agitation is completed the emulsion is allowed to flow down into a converter under heat and pressure, and after a proper period an alkali, such as soda ash, is added, which combines with the added acid and produces a common salt. The next process is to strain off the salt and impurities in a bone-ash filter, after which the glucose is reduced to proper density for transportation, usually 42° Baumé scale. Grape sugar is solid glucose, except that, owing to a detail in the process of manufacture, it takes on a thick, brownish-yellow viscous appearance, while the glucose is a pellucid fluid. The grape sugar is poured off into open pans and allowed to crystallize in the air, like any other sugar, after which it is broken up into lumps. Glucose is used by syrup mixers and confectioners; grape sugar is used in the brewing and tanning trades.

In 1897 there were seven glucose manufacturers in the United States, counting as one the two factories of Charles Pope Glucose Company at Venice and Geneva, Ill. Of these the earliest incorporated was the Peoria Grape Sugar Company in 1879. During the period from 1885 until 1890 pools had been established between these companies; there being no division of territory, but each member of the pool being obliged to pay a penalty in case he sold more than his allotted percentage. In November, 1890, the pools either fell by their own weight or were voluntarily abandoned and for 6 years a period of active and severe competition ensued. The largest and most powerful of these companies was the Chicago Sugar Refining Company of Chicago, and the next the American Glucose Company. A combination in the form of a holding company was effected in 1897, which took in all of these companies but the two plants of Charles Pope at Venice and Geneva, and also so much glucose as was made in the plant of the Glen Cove Manufacturing Company, at that time consolidated with the National Starch Manufacturing Company. Pope's total capacity was 16,000 bushels a day, of which, however, about one-third went into starch and two-thirds into glucose. The capitalization of the Glucose Sugar Refining Company was $40,000,000; the daily grind was 100,000 bushels. Like the combination in the starch industry, the stock was heavily watered; but the amount of production remaining outside of the combination was only of trifling amount, so that the control over the industry was even more complete. A certain portion of the stock was retained for the purpose of acquiring the complete control of the industry by the purchase of the Charles Pope Company, if that should later become feasible. The combination was at one time interrupted through legal proceedings by George F. Harding, a stockholder of the American Glucose Company; but he was eventually bought off after the Supreme Court of Illinois had declared the proposed combination to be illegal. Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189. This combination was made for the purpose of monopolizing the production of glucose, by controlling the price and supply of the product. Like the starch combinations, it was thought that the integration of all producers would prevent future competition.

IV. The Glucose Industry Between 1897 and 1902.

After the formation of the Glucose Sugar Refining Company, the prices rose at once, and there was no competition until the year 1901, except from Charles Pope and the Glen Cove Manufacturing Company, of which the latter was almost negligible on account of its disadvantageous location. In 1901 the Illinois Sugar Refining Company, which had been originally built as a beet-sugar refinery, came into the market as a glucose manufacturer with a capacity of 13,000 or 14,000 bushels, and in the same year was formed the New York Glucose Company, at Edgewater, N. Y., which commenced operations in 1902 with a capacity of 30,000 bushels. This latter corporation was under the direction of men who had all been active in the Standard Oil Company, as was generally known throughout the industry. It proposed to make both glucose and starch, as did also the Illinois Sugar Refining Company.

In the year 1901, therefore, it became apparent that the existing monopoly of the glucose industry at that time enjoyed by the Glucose Sugar Refining Company, with the exceptions above mentioned, was to be threatened. The National Starch Company likewise was threatened, in addition to the competition already existing from the glucose plants by the new plants already mentioned. These conditions created the combination of 1902, known as the Corn Products Company.

V. The Corn Products Company from 1902 to 1906.

In February, 1902, the Corn Products Company was organized, with a total capitalization of $80,000,000 of stock. It, too, was a holding company, like its predecessors, and acquired practically all the stock of the Glucose Sugar Refining Company, the National Starch Company, the Illinois Sugar Refining Company, the Charles Pope Glucose Company, and 49 per cent. of the New York Glucose Company. It is not now denied that in its organization the corporation was grossly overcapitalized, and that it was a typical instance of the kind of financing which was common in the year 1902, in which it is no exaggeration to say that no attention was paid to the actual value of the properties included. As taken from its stocklisting statement, the total grind of the Glucose Sugar Refining Company at that time was 105,000 bushels, of the National Starch Company 43,000 bushels, of the Illinois Sugar Refining Company 15,000 bushels, and of the Pope Company 15,000 bushels. The capacity of the New York Glucose plant, which at that time had not actually begun operations, was between 20,000 and 30,000 bushels. The total capacity, therefore, of all the plants combined into the Corn Products Company, was between 200,000 and 210,000 bushels a day. So far as can be ascertained, every starch or glucose plant throughout the country was taken into the combination, which therefore exercised a complete monopoly, so far as combination could secure it, and this was, of course, its purpose. Restrictive covenants were executed by Pope and by the chief owner of the Illinois Sugar Refining Company and were refused by William F. Piel.

After the formation of the company, Conrad H. Matthiessen, its president, manipulated the prices of glucose and starch quite independently of the price of corn, alternately raising and lowering it as the immediate occasion seemed to require. At the outset prices were at once raised and for a portion of the year 1902 maintained. Shortly thereafter, however, friction developed between the Corn Products Company and the New York Glucose Company, of which E. T. Bedford was the president. In March, 1903, a year after the combination, the relations of the two corporations had become strained, and Bedford resigned as director of the Corn Products Company. Meanwhile, and in 1903–1904, as the result of the combination in question, other plants began to appear. One of these was that of J. C. Hubinger Bros., of Keokuk; the second was a new starch plant erected by Piel, in Indianapolis; a third that of Douglas & Co., at Cedar Rapids; a fourth, the Union Starch & Refining Company, at Edinburg, Ill.; a fifth, the Keever Starch Company, of Columbus; and a sixth, the Huron Milling Company, of Harbor Beach, Mich. All of these were small companies, many of them engaged in the manufacture of what are known as specialties, and none of them of much consequence so far as concerns the control of the industry. The high prices and the combination, however, attracted larger companies into the field. In 1904 Winterman, a syrup mixer, of Granite City, Ill., built a glucose plant of 12,000 bushels at that city. In the same year the Warner Sugar Refining Company, at Waukegan, Ill., reconstructed its own factory, which had formerly been discontinued, and started with a glucose capacity of 18,000 bushels, which in 1905 was increased to 25,000. This factory made all the products arising from the process of wet milling. The Goyer-Alliance Refining Company attempted the erection of a plant of 10,000 bushels in 1905 at Bell-Alliance, La., but owing to an outbreak of yellow fever this was discontinued and failed. A small Cereal Sugar Company also was organized at Waukegan and subsequently bought over by Warner.

The competition developed during the years 1904–1905 and became very bitter. The Corn Products Company, with a number of antiquated plants, was in no proper position to pay dividends upon its grossly watered capitalization, although it actually continued to do so. As a result its plants ran down in manufacturing efficiency, and its stockholders threatened suit. The more powerful competing companies were not so much affected by the combination, as they were more modern and of a higher manufacturing efficiency, especially the New York Glucose Company, which was at that time the model plant in the country. All producers, however, decided that competition was ruinous, and that the time had come for another combination in order to preserve them from its effects. From this resulted the formation of the defendant Corn Products Refining Company, which purchased practically all the stock of the Corn Products Company, of the Warner Sugar Refining Company, and of the St. Louis Syrup & Preserving Company, the outstanding 51 per cent. of the stock of the New York Glucose Company, and the majority of the stock of the small Cereal Sugar Company. The companies so purchased, exclusive of Corn Products Company, were at that time jointly doing about 50 per cent. of the entire domestic and export business of the glucose and starch industry.

VI. Formation of the Corn Products Refining Company in 1906.

In its origin, the defendant Corn Products Refining Company was a holding company, with a capitalization of $80,000,000 of stock, of which about $75,000,000 was issued. This involved the scaling down of the capitalization of the Corn Products Company, which was accomplished by compelling the stockholders to take two shares in the new company for three in the old. The stock of the New York Glucose Company, $1,275,000, was exchanged for $5,000,000 of preferred stock and $4,000,000 of common. The purchase of the St. Louis Syrup & Preserving Company and Warner Sugar Refining Company was accomplished in part by cash. The total grinding capacity so consolidated, by the statement of the Corn Products Refining Company itself, amounted to 235,500 bushels. There were left outstanding at the time of the consolidation no glucose manufactories in the United States, though a very substantial starch capacity; for example, in the year 1906 the defendant Corn Products Refining Company did 100 per cent. of the glucose manufacturing, and only about 64 per cent. of the starch.

There were six companies altogether left out of the combination, of which the largest were the Piel and the Douglas companies; but the aggregate grind of these six outside companies together was only 3,384,961 bushels, all of which went into starch. On the basis of grind the Corn Products Refining Company had about 91 per cent. of the total production; on the basis of starch, as just said, only about 64 per cent. Restrictive covenants were procured from the Warners for a period of 10 years and from the Wintermans of the St. Louis Syrup & Preserving Company. Some of the old covenants of the Corn Products Company still remained outstanding and came to the Corn Products Refining Company as part of its assets.

1. Causes of the Combination.

This combination of 1906 was caused primarily by the character of the competition theretofore existing under which such low prices had been reached. The income of the Corn Products Company during 1905 had fallen to less than $500,000, and much of its plant had been allowed through several years to fall into a dilapidated condition. This condition had no doubt largely arisen from the improper declaration of the dividends, most of which ought to have been put back into the property to keep it in condition. Indeed, there is no reason to suppose that, during the period of the existence of the Corn Products Company, its actual earnings were not an ample profit upon the actual value of the property, and although the trade war had very seriously affected the New York Glucose Company and the other companies taken in at that time, their earnings also had been substantial.

2. Condition of the Plants Taken Over in 1906.

Of all the plants taken over in 1906, only eight had been operated during the previous year. I think it must be assumed that these constituted the heart of the enterprise. Many of the Corn Products Company's plants had become antiquated and inefficient relatively to a contemporaneous construction. Edgewater and Granite City had been independent, and with Pekin were at the time all new plants, and the first two were in high efficiency. It is doubtful whether Pekin, which had been built as a beet-sugar plant, was ever well arranged. Chicago, which was a great producing plant, was certainly in its last stages, and was wisely abandoned within two years. Warner's Waukegan plant had been independent, and was also a modern plant of high efficiency, though probably a little run down. Of the starch plants proper the best were Oswego, Indianapolis, and the United States Sugar Refining Company's Waukegan plant, all of which were in tolerable condition. Besides these, the Corn Products Refining Company had inherited a number of starch plants which had been closed by the Corn Products Company, many of them plants of the old National Starch Company, which were confessedly in the most deplorable condition. Possibly in many cases these had been closed by the Corn Products Company to avoid overproduction, yet it must be admitted that in the year 1905, when the competition was severest, no effort was made to open them. My conclusion is that those closed down were not, either by their size, their situation, or their physical equipment and structure, capable of effective production. To have made them so would have been to increase a production already greater in volume than the market would bear, and would have stolen from dividends, which for ulterior reasons the Corn Products Company wished to maintain. I believe that these plants, while, as I have said, they were originally combined in an effort through monopoly to control the market, were not closed down by the Corn Products Company in order to keep the price above the fair cost of production.

VII. Control of the Glucose and Starch Trade by the Corn Products Refining Company.

Since 1906 the proportion of the industry based upon total grind controlled by the Corn Products Refining Company has fallen, in whatever method that may be calculated, and both absolutely and relatively the portion of the industry done by the independents has increased. Three new companies have come into the field—the first, A. E. Staley Manufacturing Company, of Decatur, began to grind only in the year 1912; the second, the Clinton Sugar Refining Company, began in 1907; and the third, the American Maize Products Company, in 1908. The total aggregate of grind of the nine independent companies existing on December 31, 1913, had risen from about 3,000,000 to 17,500,000 bushels, and the total grind of the Corn Products Refining Company during that year was a trifle less than in the year 1906. The proportions for 1913 are, Corn Products Refining Company 65 per cent., independents 35 per cent., and with one exception the decrease in proportion has been constant. The actual grind of Corn Products Refining Company has remained not far from constant, varying between 35,000,000 in 1910 and 26,000,000 in 1908. In 1913 it was substantially the same as in 1906. 1914 is an unsafe year upon which to base any estimate in absolute quantities, as the Great War occurred. I have, however, occasionally used the percentages.

The proportion of this grind distributed to glucose and grape sugar shows a greater change during the period in question than the grind itself. There is a steady decline in the percentage of total glucose production, domestic and foreign, attributable to the defendant Corn Products Refining Company, until in the year 1913 the total percentage is only 57 per cent. and in 1914 53 per cent. The change in the percentage of grape sugar production is not great; in 1914 it was still over

90 per cent. of the whole. Of starch, in 1906 the defendants' percentage was about 64, and actually increased to more than 70 per cent. in the years 1907, 1910, and 1911. In 1912 it fell to 67 per cent., and in 1913 to 63 per cent., so that the net change for 8 years was practically nil. However, in 1914 it fell to about 58 per cent. I think it a fair inference from the tables that the percentage of production of the Corn Products Refining Company is on the whole surely, but certainly, decreasing, due to the absolute increase in the grind of its competitors and its own inability permanently to increase very substantially its own grind. It would be obviously futile to attempt any forecast of the industry.

The defendants urge that in considering their control of the industry there should be included in total production, not only the starch or glucose production, but also those substances with which the starch and glucose come into competition in their end products. Thus they say that the pearl and powdered starch come into competition with the grits of the dry-corn millers in the brewing trade, and that the dextrines and gums come into competition with those made from other substances than corn. They say that in the mill trade the corn starch comes into competition with sago, tapioca, potato, and wheat starches; that the syrups made from 85 per cent. to 90 per cent. glucose come in competition with those made with much less; that candy contains all sorts of percentages of glucose. So, they argue, the whole of these industries must be considered, in order to get any fair estimate of the amount of the control exercised by the Corn Products Refining Company.

This argument may best be met by an illustration for which I will take as an instance one much pressed by the defendants; i. e., that of the competition of the pearl starch, under the name, "refined grits," with the dry millers' similar article, "brewers' grits." What the brewer, the buyer, wants is maltose, and he will buy it indifferently from the wet or dry miller as he gets more maltose for his money. The production of maltose is, however, by a different process in the one case from the other, and the proportion of maltose is as 90 to 73 in favor of "refined grits." So long as the cost of production per unit of maltose favors the "refined grits," a producer who controls its means of production has a monopoly limited only by the amount of that differential. It is quite true that, if for any reason the monopolist of the cheaper material raises the price to that of the dearer, he will at once meet with the competition of the sources of supply so thrown open by his advance. Thereafter he cannot be properly called a monopolist, unless the supply thus opened is so insubstantial as not to affect the market. In short, his monopoly, where the two commodities compared are indistinguishable in use, is limited by the actual differential in the cost of production between them. Such a monopoly is therefore only a limited one, but within the limits it may be a true one.

There is no very definite evidence of the relative cost of production of "refined grits" and "brewers' grits," but in Bedford's testimony he speaks of the dry millers' cheaper production and cheaper construction, and how at times it drove them to sell below cost. If the dry process was cheaper per unit of maltose than the wet process, obviously the dry process only would hold the market, unless the dry millers added to their profit all the differential in cost of production. If they did that, the wet millers would come into competition with them. If not, the wet millers' competition must be only sporadic, or to force a demand in the hope of establishing a market and in the end lowering cost.

The relevancy of all this is only as follows: If the wet process is cheaper than the dry, then, although a monopoly of the wet will be limited by the dry, it is improper to consider the production of the dry millers, when ascertaining the proportion of production controlled by a supposed monopolist of wet milling. If, on the other hand, the dry process is cheaper than the wet, and if, which would be hardly possible, a sustained competition between them existed, then one could not disregard the dry production for all purposes. In that case one ought to eliminate from the supposed monopolist's production that part of the grind which went to "refined grits," but that would be the only correction necessary. The rest of the grind would not come into competition with the brewers' grits or with the dry millers' upon the same conditions; i. e., indistinguishability in use and less cost of production.

The evidence contains nothing which would permit the application of any such refinement of reasoning. I have elaborated upon it, not because I think it has any practical bearing upon this case, but for the sake of analyzing the contention of the defendants that all the products which they vaguely say come into competition with them must be considered. This is certainly far from true; it is only true under those very limited conditions above set forth. In the case of the sago, potato, corn, and wheat starches it is not true at all, because those have both a distinguishable use value and a higher cost of production. The most that can be said of them is that they do afford a substantial limit upon the wet millers' price, because they would come in if it got high enough. Like any other monopoly, even a legal one, there is a limit of price at which substitutes will displace the cheaper commodity.

When we come to the syrups and the candies, the distinction is even more plain. Syrup with 90 per cent. or 85 per cent. glucose is a different article from that with 40 per cent. So is candy. If either is honestly sold, the purchaser will know the difference. He does not buy, like the brewer, to get a percentage of maltose; he buys the whole mixture as he likes it. If the public at large prefers low-glucose syrups, which in most parts of the country are dearer, the high-glucose syrup mixer's profit will be limited by that difference in selling price which will offset the preference in taste. That will always be a limit depending upon the palate of the public, but within that limit the question of monopoly must be considered, without regard to the production of lower percentage syrups. On the other hand, where the cane syrups are cheaper, as is said to be the case in the South, there the wet miller, to sell at all, must find or create a preference for glucose syrup over cane syrup. His margin of profit, and with it the only room for monopoly, will be within such compass as the consumer's preference will tolerate a difference in price.

The tables prepared by the government must therefore be accepted implicitly with the foregoing limitations. As such they are reliable to ascertain the proportion of the defendants' production to the whole, and I have used them as such. It is proper to make one table for both foreign and domestic commerce, since it rests in the will of the producer to sell in either market. Indeed, this interchangeability of the markets is the implied basis of one of the strongest arguments made by the defendants to oppose dissolution, as will later appear. It is also proper to include the specialties, so called, such as grape sugar, dextrines, thin-boiling and package starches and syrups. These are end products out of a raw material controlled by the wet millers, taken as an industry. What they choose to put into specialties, what they choose to sell as bulk, rests with them, and them only.

It is possible, of course, to have subindustries—syrup mixing is one of these—in which the end process is not wholly in the hands of the wet millers. This subindustry may, however, be treated as separate, and the proportion of it in the defendants' hands compared with the total bulk. That should not be confused with the question of the control of the raw material itself.

It may, perhaps, be questioned whether control of an industry would not be better gauged by the relative producing efficiency of the combination and the independents. If that were done, however, there would have to be figured in some coefficient of efficiency for each, which would be impracticable. The proportion of actual production really shows the resultant of those two factors as well as anything can which is not fanciful. I have, it is true, considered the total producing capacity of Corn Products Refining Company later, but that is for the limited purpose of showing its power to drive down prices. I do not regard that capacity as an index of its permanent occupation of the field; rather I regard it as an index of the capacity for that kind of trade warfare in which Corn Products Refining Company was so much engaged.

VIII. Efforts of the Corn Products Refining Company to Maintain Their Original Monopoly of the Industry.

As already appears, the combination of 1906 was avowedly for the purpose of terminating a competition theretofore existing. The industry had already experienced at least three such situations before, in 1890, 1897, and 1902, and in each case a combination had been effected for the same purpose—to prevent what the parties called a destructive and unfair competition. The fact in each case seems to have been that the industry had developed a supply greater than the market would absorb at any prices which permitted a living profit, and whether or no they may have deliberately contemplated a termination of that overproduction it was a necessary and inevitable result that this should take place, because it was the only means by which the conditions could be avoided which all sought to avoid. After the combination had been completed, those plants were closed which were the feeblest economically—the Chicago and the two Waukegan plants—and the remaining were either refitted altogether or brought to a higher efficiency; but, as I shall show later, I do not think that the purpose in either case was to limit production.

The combination of 1906 would certainly have continued effective to monopolize the trade, had it not been for the growth of the independents already mentioned in the heading just preceding. Yet the Corn Products Refining Company was the first in the field, and for a period of a year or more it had that field alone. The contention of the government, which I think is amply proven by a variety of considerations which I will afterwards discuss, is that the officers of the Corn Products Refining Company made every effort to maintain the monopoly with which they started; and the contention of the defendants, which it seems to me is equally well proved, is that, regardless of what their efforts may have been, in fact the conditions of the industry were such that they could not do so, but have been slipping back proportionately from the very outset.

In the following subheadings, the devices adopted by the defendants to continue the control are taken up seriatim, but at the outset it will be clearer to comment upon a certain part of the evidence which is unusual. Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparently had a custom of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony. In the face of these memoranda, which for some strange reason were preserved, there can be no question in my mind of the continuous and deliberate purpose of the Corn Products Refining Company, by every device which their ingenuity could discover, to maintain as completely as possible their original domination of the industry. That they recognized the impossibility of an absolute exclusion of other glucose and starch manufacturers is true enough, for they were minutely advised as to all conditions of the industry. But, while recognizing this inability, they in no wise conceded among themselves that their conduct could not have, and should not have, a depressing influence upon the growth of any competition. In considering the various devices adopted for that purpose, I shall paraphrase the memoranda in detail; but at the outset it is important to remember that permeating the whole of their conduct, certainly down to the year 1912, there runs the intent which I have mentioned, an intent the execution of which it is the precise purpose of the anti-trust act to foil.

1. The Profit-Sharing Plan.

[2] On November 12, 1906, after the combination had been some 8 months in existence, the defendants announced their so-called "profit-sharing plan." This applied only to glucose and grape sugar, in which, as already appears, the defendants' monopoly was at that time most nearly absolute. They agreed to set aside out of the profits from the sale of glucose and grape sugar 10 cents on each 100 pounds (with some exceptions) purchased by a consumer from July 1 to December 31, 1906. This amount was, however, not to be paid to the consumer until the end of the year 1907, and then was to be payable only in case the customer had purchased glucose and grape sugar of no other producer than itself. This policy was continued through 1906, 1907, 1908, and 1909, and was abandoned at the end of the year 1909; the profits for that year, however, not becoming due until the end of the year 1910. The profit varied, beginning at 10 cents, and afterwards varying between 15 and 5 cents; the last figure, however, being announced only. That such a contract was not inherently illegal is undoubtedly the fact, for it was so expressly decided by the Supreme Court in the case of Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. But there is no warrant in the opinion for supposing that it was a permissible method of trade when a part of a general scheme of monopolization. That is the question which this case presents.

The National Candy Company was about to start its glucose plant at Clinton, and, in fact, got it under way in April, 1907. It was the first glucose company outside of the combination which showed its head. The Western Glucose Company was organized in 1906 at Roby, Ind., likewise for the purpose of competition in glucose. In fact, it, too, did not get under way until 1908, owing to the panic of 1907; but the enterprise was known to Bedford during the year 1906. The Union Starch & Refining Company, a small corporation organized before 1906, began to put in a glucose plant early in 1906 and started running in December of that year. There was, therefore, known competition springing up in the glucose business, and it was quite obvious that, if large sales could be made during the year 1906 or the early part of 1907, before the new plants began to sell, the accrued profits might be a substantial way of hampering these at the outset. That this was in fact the purpose of the defendants admits of no conceivable doubt. Smith, a director, writes to Bedford on April 10, 1907, that "the profit-sharing plan is the best scheme ever devised in the way of limiting the output of competitors and making it difficult for them to sell." He adds that if they were to have a war it should be to the finish. Walden, on April 27, 1908, writes to his brokers, Johnson and others, that if they lost a customer the competitor must pay for him what the defendants would have had to pay (in profits) to retain him. The purpose of the parties is particularly indicated in the correspondence early in July of 1909, when they were actively discussing the value of the device, and the wisdom of continuing it after that year. Bedford, on July 9, 1909, wrote to his son that the profit-sharing was a wall the competitors felt that they could not get over; that without it they would have made very much more money and would have been much larger manufacturers than they were at that time; that some of them had said the Corn Products Refining Company had built a Chinese wall against competitors and kept them in chains. On the same day he wrote again to his son that the scheme created expenses and difficulties to the seller of glucose that the starch manufacturer did not have.

Bedford's own testimony on the trial was that the purpose of the plan was only to prevent small manufacturers in dull seasons from selling the defendants' own regular customers and offering his surplus to other customers at a trifle under the regular price. In view of the expressions in the memoranda, this understanding of the plan must be rejected.

The plan undoubtedly had a deterrent effect upon the trade and was thought by many competitors to be unfair. Peckham, the president of the Clinton Company, swore that, had he known it, he would not have gone into the business. Hughes, the vice president of the Union Starch & Refining Company, found the trade tied up and hard to get business from. The American Maize Products Company, the successor to the Western Glucose Company, which began to do business about May, 1908, was much hampered by it. Edinburg swears that in July, 1909, the plan made it difficult for competitors to get business. Numerous customers were likewise called, who swore that the plan kept them from buying from independents.

2. The Transaction with the American Maize Products Company and Stein, Hirsh & Co.

As already stated, the Western Glucose Company had begun to erect a plant in July, 1906, but for financial reasons was compelled to stop until it was taken over in February, 1908, by the Royal Baking Powder Company, and its name changed to the American Maize Products Company. The contention of the government is that by the threat of entering into the baking powder business the Corn Products Refining Company first contracted under a false name, "J. B. Esh," to buy one-half the grind of the new company, of which one-half it sold the part that came as glucose at ruinous prices to break down competition, through Stein, Hirsh & Co.; and, second, that as soon as the new company got well under way the combination compelled a reduction of its grind to one-half its full amount. The defendants deny any threat or agreement to limit the grind, but admit that they bought half of the glucose output of the American Maize Products Company, which they needed in order to supply their trade for the time being. Bedford's account is that just then the Chicago plant had been dismantled, as was the fact, and that it was necessary to supply a sufficient amount of glucose and starch to take the place of its production. The pure food laws had just gone into effect, which made it illegal to add a preservative to the glucose, and

Bedford says that he soon found the glucose of the American Maize Products Company was inferior in quality. As he must dispose of it in some way, and could not have two prices for glucose, he was obliged to sell through Stein, Hirsh & Co. secretly.

The evidence shows that originally Bedford attempted to buy the Western Glucose Company, but that was before 1908. The purchase of that company by the Royal Baking Powder Company took place under conditions of great secrecy in the spring of 1908. On March 17, 1908, Bedford's son wrote the traffic manager of the Corn Products Refining Company that they had decided to put up a baking powder plant at Oswego. Bedford says that they had discussed the making of baking powder as early as 1906, and had had some labels printed; but the coincidence in time of their actual decision to enter this trade, in the light of the other evidence, is significant.

The sales by American Maize Products Company to the Corn Products Refining Company began on May 26, 1908, and ended on December 30, 1909. The total capacity of the company was about 325,000 bushels a month, which was reached in March, 1909, about 10 months after the "J. B. Esh" account appears. At that time, although the company had orders for all that it could grind, the grind was at once cut to substantially one-half its volume, at the direction of Vernon Gray, the assistant treasurer of the American Maize Products Company, to Saenger, who at that time was the manager. The cut continued through the summer of 1909. "J. B. Esh," the fictitious name in which the account was carried, was concededly a cover for the Corn Products Refining Company, whose identity was kept even from the high employés of the company, and in August, 1908, the account was credited with $600 for machinery, at the personal direction of Boselly, the president. The credit implies the sale of $600 of machinery by the Corn Products Refining Company to the Royal Baking Powder Company, and in my judgment offers strong corroboration of the assertion that the baking powder venture had been in fact a threat. That this machinery was for manufacturing baking powder is matter of inference, which I do not hesitate to make.

The starch bought by J. B. Esh was delivered to the Corn Products Refining Company, but the glucose was all sold secretly through a firm of brokers, Stein, Hirsh & Co. These brokers refused to give to customers the source of the glucose, except to say that they had large factories, situated vaguely in the corn belt. F. T. Bedford directed them with care not to sell to Corn Products Refining Company customers, and their sales were much below the market price, sometimes as much as 30 cents. The defendants repeatedly denied their connection with the sales which had excited the suspicions of the trade. Thus Walden wrote to Gibbs on May 15, 1908, not only denying the sales, but suggesting that the competitors of Corn Products Refining Company were themselves selling under cover. F. T. Bedford wrote Smith on May 25, 1908, advising him that he might say the sales came from "independent manufacturers." Bedford asserted that the glucose was of inferior quality; but, except for his testimony, which I cannot accept, I can find no such evidence. No complaint appears to have been made to the brokers themselves.

The attempted explanation of these unquestioned facts is discredited for many reasons. First, the arrangement with Stein, Hirsh & Co. was made before May 26, 1908, the date of the first delivery to "J. B. Esh." The letters of May 15, 1908, from Walden to Gibbs, of Creel to Smith of May 18, 1909, and of F. T. Bedford to Smith of May 25, 1908, all speak of Stein, Hirsh & Co. At that time Bedford, by his own statement, was buying in good faith and expected glucose of prime quality; it was only after the deliveries were made that it became necessary for him to employ Stein, Hirsh & Co. The position absolutely contradicts the documentary facts. Second, upon finding the glucose bad, Bedford had it in his power, so far as appears, to direct his demand upon starch, because of the flexibility of the American Maize Products Company plant, which out of a total grind of 12,000 bushels could make 10,000 in starch. Yet he bought only about 40 per cent. of the actual starch output of the plant, and 60 per cent. of the glucose. Not only did he, therefore, make no effort to avail himself of the flexibility of the plant, but he did not even do his best with the proportion, as it existed. Yet he swears that he was always anxious to get all the starch that he could. Third, it is quite evident from the later letters what the device had been. In his letter of July 8, 1909, F. T. Bedford, in writing Reichmann about the proposed appointment of another selling agent, said that he would remember the trouble they had had with this (method) and the suspicion and feeling it had engendered. In his letter of even date to his father he is even more explicit. After showing that a lower sale price by competitors did not necessarily mean a lower net price, he adds that it had cost them money and created a good deal of feeling to put in a third party to sell glucose for them, in the effort to make the competitors pay as much to customers as the company did. Bedford conceded that the reference was to Stein, Hirsh & Co., and with that concession there is left no room for ambiguity.

The reasonable conclusion from the whole testimony is this: That the agreement between the American Maize Products Company and the Corn Products Refining Company was for the purpose of limiting the competition of the former—first, by obtaining half its starch and glucose output and selling the glucose secretly in competition only with the independents to injure their business; and, second, by procuring an actual limitation of the grind when the business became too large. The whole device was that known as the "bogus independent"; i. e., a false independent organized for the purpose of fraudulently breaking the market of the actual independents, by selling under conditions with which they cannot compete. It was a means of secret price discrimination.

3. Defendants' Entry into the Candy Business.

(A) Manierre-Yoe.

As already stated, the Clinton Sugar Refining Company, a subsidiary of the National Candy Company, began grinding corn in April, 1907. The original capacity of the plant was 5,000 bushels, of which the National Candy Company itself consumed about one-third. In 1906 Bedford had an interview with Kersting, the general manager of the Clinton Company, and told him that he was violating his old contract with Warner, which forbade his entering the business. Walden met Peckham, the president, in that year, and suggested that his plan for reconstruction might yet be stopped before completion.

These preliminaries did not stop the erection of the plant, and in the autumn of 1907 the Corn Products Refining Company bought out an old syrup company called the Manierre-Yoe Syrup Company, which had been in existence since 1898. Manierre, the president of the company, who certainly was bought out under pressure, at the request of the Corn Products Refining Company remained as president and agreed not to mention the fact that the business had been sold to them. In 1908 the Manierre-Yoe Syrup Company began for the first time to manufacture certain grades of candy, such as gum-drops, made largely of glucose. The identity of the purchaser becoming suspected, there was in February of 1909 an interview at which were present Bedford, Hoops, and Peckham, the president of the National Candy Company. At this interview nothing definite was settled, but each party assumed a somewhat threatening posture toward the other, and later another meeting took place between Bedford, Walden, and Peckham. At that time Bedford said that Peckham had promised not to increase his plant, to which Peckham answered that, while he had said this, yet, if the Corn Products Refining Company went into the candy business, he would increase his own glucose plant. Bedford answered falsely that he was not in the candy business, though he had long since bought and was using the Manierre-Yoe Company as a "fighting proposition." Before this meeting Bedford had asked Hoops, who arranged the interview, to induce Peckham not to increase his own grind, and Peckham had told Hoops his terms as he repeated them to Bedford.

Meanwhile the Corn Products Refining Company was using its ownership of the Manierre-Yoe Syrup Company secretly to compete at cost or less; the proof is to be found in the correspondence. On May 26, 1908, Bedford wrote Smith that the gum-drops which were being put out by the Manierre-Yoe Company should be sold at cost, since they were a "fighting proposition"—a direction which F. T. Bedford and Smith proceeded to put into execution. On May 4, 1909, Morton wrote to Bedford that they should go into the candy business to regulate prices sufficiently to deter ambitious candy manufacturers from engaging in the glucose business; that this would be the best protection to the Corn Products Refining Company; that they could meet this competition better on candy than on confectioner's glucose; and that, unless the Clinton factory was disposed to go out of business and close up, he would be in favor of going into the candy traffic and staying there. This letter was certainly written to be shown to Hoops, and was in fact sent by Hoops to the National Candy Company. The only reasonable explanation is that it was of a piece with the interviews which were going on during the spring of 1909. It can have no other interpretation than a threat, with the purpose of compelling the Clinton Company either to close up its business or to limit its supply. Yet on July 13, 1909, Bedford wrote Hoops, on receiving a price list of the Manierre-Yoe Company, that it was the first time he had ever seen or heard of it. His letter reads as though the company was one of which he heard by information only, and is a deceitful attempt to make Hoops suppose that he had nothing to do with its competition. Following this letter, Hoops says that Bedford denied that he had any ownership of the Manierre-Yoe Company, when directly challenged. It was impossible for Hoops to put any other interpretation upon the letter without implying that Bedford was deliberately intending to mislead him.

(B) The Novelty Candy Company.

Bedford called together the candy makers twice in conference, once in July, 1909, and later at Chicago. At each of these meetings Bedford told them that the defendants were losing a part of their trade in glucose, owing to the competition of the Clinton Company, and that he wished them to buy more of him. Otherwise, he said he should be forced himself to go into the candy business.

These conferences apparently did not have the desired result of securing to the Corn Products Refining Company so much of the candy business as they thought should be theirs, and the Novelty Candy Company was purchased in January, 1910, with three old candy plants at Jersey City, Pittsburgh, and Memphis, to which was joined the Manierre-Yoe Company, purchased nearly three years earlier. All of these factories Bedford described at the trial as junk and excused his purchase of them because of the defendants' ignorance of the candy business. It is quite certain that for the years 1910 and 1911 they ran jointly at a loss, and in the year 1912 the loss of the whole Novelty Candy Company amounted to over $100,000, counting the liquidation of the Pittsburgh plant, which caused a loss of $48,000. The Manierre-Yoe Company was generally operated at a profit, and has so continued to the present time. At times the Jersey City plant has shown a profit; but the total candy business had always been at a bookkeeping loss, at least till 1914.

That this loss was due to the low price at which the product was sold many candy makers believed, though, taken alone, their testimony would not be convincing. Some of the manufacturers complained that they were driven out of business; some said they had nothing to complain of. The conclusion of competitors that a competition they have been unable to bear is necessarily below cost is by no means compelling evidence, at least when it is as little unanimous as this, yet the composite of all the proof here leaves little doubt. The method of the defendants' entry into the field, their purchase of useless plants, which they operated at a loss, their avowed cost prices when first operating the Manierre-Yoe Company, and Bedford's confessed policy of selling such products at cost (his letter to F. T. Bedford of March 28, 1910), their double-dealing, their efforts to exclude or restrict the Clinton Company, the covert threats to candy makers, not only at the conferences, but more openly in the Joy Morton letter above quoted, and the last passage of Bedford's letter to Hoops of July 13, 1909—all these together make it so inherently probable that they did put into effect ruinous prices as to justify such a conclusion. Their excuse that they were deceived in the purchase of the Novelty Candy Company overtaxes my credulity. They were experienced men of affairs, in constant touch with the candy trade, well able to go outside for sound advice, if they did not have it within their own numbers. Quite another purpose fits much more easily into the frame, and that purpose I find that they entertained.

IX. Unreasonable Prices and Manipulation of Prices.

The profit-sharing plan ceased at the end of 1909, although its results necessarily endured for another year, as the consumer could not get its retained profit unless he dealt exclusively with the Corn Products Refining Company during 1910. The position of the government is that by a preconcerted effort the defendants in the years 1910–1911 attempted to drive down the price of the main products, starch and glucose, to such a point that the independents could not live, meanwhile making up the profits necessary for their own dividends by the sale of their package starches, grape sugar, and their other specialties. The defendants assert that the decline in price, which all concede took place in the years 1910–1911, was the result of a fall in the price of corn, and that the prices kept pace with corn, without any deliberate or concerted action on their part, or indeed without any power by them to control prices, had they desired to do so.

1. The So-called Low-Price Campaign of 1910 and 1911.

(A) Outline of the Plan.

That the defendants contemplated just such a maneuver and supposed themselves capable of carrying it out, their private correspondence abundantly proves. The effort appears first in Walden's letter to Bedford, of July 1, 1909, in which he says that they have capacity to supply all of the glucose trade, and are, in fact, only supplying 60 per cent. What he proposes is to make that portion which they do not control feel the force of their competition, which cannot be done under the profit-sharing plan. This depends chiefly upon the company's ability to produce its products at a minimum, which must be done by an increase of output and an abandonment of the profit-sharing plan. His proposal was that the profit-sharing plan be declared off, and, to quote his lively language, "then open the sluice valves and force our competitors' hands during the most effective season of the year—the fall and winter months. Quick action of this kind would most assuredly deter any of those who now contemplate building glucose factories." Bedford's marginal notes upon this letter are instructive. They are as follows: "Make them sell at a loss." "Yes. By making a loss."

Bedford answered this letter on July 12, saying that the principal object of making a larger profit-sharing is to effect a low price for next year:

> "In this letter you say they have 40 per cent. Good—that is the place to make a low price. In this memo you also state that their sales for this year were so low that the price of corn would make them of little or no profit—good. Then, we do not need to make our reduction until next year."

On July 7 Bedford wrote to Walden as an alternative of a contract arrangement with the confectioners that they must consider making their price low, commencing on the 1st of January. His plan was to keep the price fairly good for January until the competitors had conceded 10 cents for profit-sharing, then they were to make competition, and the more the competitors sold at a loss the better the ultimate result for them. On the same day Walden answered Bedford that, if the primary object was to sell during the next year at unprofitable prices, he would begin in the autumn, as more injury could be done than in the first six months after January 1; he would put a ruinous price in force on September 1, which would force the competitors to make a concession on contracts already entered into, "thereby robbing them of the opportunity to obtain profitable deliveries on low-priced corn conditions the balance of the year."

On July 8, F. T. Bedford wrote to his father suggesting 5 cents profit-sharing and a 10-cent profit on 100 pounds, which would make the business done by the competitors unprofitable. Whether the 10 cents profit would pay 5 cents on the preferred stock would depend, says he, entirely upon the profit made on the other products. It was equivalent to not over 4 cents a bushel, and out of the 14,000,000 bushels ground in the glucose would give a return of only $560,000. It would be necessary, therefore, on the 11,000,000 bushels which remained to make a profit considerably more than the profit on glucose. He was certain, however, that 10 cents profit, with 5 cents profit-sharing, would make the business very unprofitable to competitors. As to his father's suggestion that they take it out of this year's earnings, because they would make more this year than next, it was itself a good argument for terminating the profit-sharing now, so as to bring about the low-price condition partially in this year and partially in the next. Bedford answered on July 9, in the letter already quoted, showing how much of an impediment the profit-sharing had been to glucose makers and how good in comparison had been the starch makers' profits which Joy Morton had seen. This memorandum he inclosed to Walden on the same day with a letter, saying that they agreed that any scheme which obliged the customers to sell at much lower prices than their own, as the profit-sharing did, had been a great servant to the company. He was doubtful about changing it at that time, but next year was to be some one's "Waterloo." In another memorandum to Walden, of July 12, 1909, perhaps also in reply to Walden's of July 1, he suggests the possibility of making out of the profits for 1909 a reduction of 10 cents a hundred and so inducing the competitors to commit themselves to their customers, and thereafter to reduce the prices so that their proportion of the business should be very unprofitable:

"If they fail to keep their agreements with the trade, it, of course, would come back to us, and we might get 100 per cent."

In that event the competitors would go to the mixers, and the Corn Products Refining Company would have to make the syrup prices relative to what they sold glucose at. He asks for possible prices at which to sell syrups so that the glucose price to the mixers would still be low.

Walden answered on the 15th of July, suggesting that after their many talks his conclusion was that the best results would be to set the level of their prices in December and January at such a point as to lure on the competitors toward foolish contracts, by reasonably high prices inducing them to make contracts to such an extent even as to encroach upon their own part of the trade warning the trade to secure from the competitors agreements to guarantee against Corn Products Refining Company prices. "Then," he says, "having got them to secure as much as possible, let the Corn Products Refining Company set in to make it unprofitable to the competitors." Before entering on such a campaign, and to avoid the possibility of their competitors being driven from the confectionery trade to other lines, he would suggest that contracts be entered into with the mixing, tanning, and other trades to secure those. After the time arrived when competitors had contracted practically all they could arrange to handle, then they could open their "sluice valve."

This correspondence was all six months in advance, and prices actually remained high into November. On November 4, 1909, Walden wrote Bedford that the most important thing was the danger of their competitors making contracts for the ensuing year at to-day's high level. Bedford had obviously suggested to him a cut in price of some 50 points in a day against that possibility—a possibility which had been actual in the previous year. He warns Bedford against such a sudden drop in prices. A decline of 10 points a day would be more reasonable; a reduction of 25 or 50 points would shock the trade. He believed that they could prevent any of the competitors from making any profitable contracts for next year, but the prime condition was to prevent them from taking advantage of the present high profits; that to him was a most important item to consider. The price, in fact, began to drop at once. On November 15 it was $1.95; it had dropped 10 cents in the next week, though by January 14 it had risen again. It continued dropping for a whole year until on January 10, 1911, it had reached $1.25, 70 cents less than at the time the letter was written.

In 1910 certain of the correspondence shows that the parties understood they were carrying out the policy outlined in the foregoing. Walden wrote to his brokers on February 19, 1910, that "the policy of Corn Products Refining Company adopted about a month ago was to sell goods for the coming year at a very close margin," by which policy he believed that with their own low cost of manufacture he could force the competitors to "cry quits." It was their intention to adhere strictly to the policy and to produce the result which they were assured would be successful. The buyer who remained in the open market and took advantage of daily conditions would undoubtedly reap the best benefit. The most dangerous kind of contract for a competitor to make was to guarantee against their own prices, for if they made enough, and the Corn Products Refining Company saw fit to drive the price down lower, it would be 5 cents worse for them than for that company. By this 5 cents he referred to the fact that the competitors, in order to sell to their customers, must still pay the accrued profits for the year 1909, which were not due until the end of 1910.

Bedford, in the letter to his son of March 28, 1910, declares his policy. It was to subordinate all profits and to use all their energies to increasing the grind. No thought of profits even in specialties at first should come in, which in any possible way might interfere with the greatest volume of business. Candy without profit, syrup without profit, jam and jelly without profit—all to increase or maintain the volume of business. Profits, if need were, should go to 8, if necessary to 5, cents a bushel, and if that did not serve to retain their position the prices should go practically to cost, making up by getting good prices in good seasons.

There could hardly be a more unequivocal statement of policy than this, or one which better fitted the plan as the government asserts it.

(B) Execution of the Plan.

How far the defendants have succeeded in executing the plan suggested in the correspondence cannot be absolutely proved, but I am disposed to think the evidence convincing that they actually did succeed, just as they had proposed. The matter is somewhat complicated by several factors: First, that the price of corn began to go down in June of 1909 until April of the next year. From then until the 1st of September it rose, but fell again until on February 1 it had reached only 25 cents a bushel. (The price of corn is throughout figured after deducting the sale price of the by-products, and the prices are therefore, of course, conventional. Both parties accept this method for convenience.) From then until November 1, 1911, it rose, and continued with variations at between 50 and 55 cents until the end of 1912, when it fell again to less than 30 cents. It is perfectly true, as the defendants assert, that the price of both glucose and pearl starch varied generally with that of corn. The chart put in evidence by the defendants shows that after the middle of the year 1908, when competition had become effective, the prices had a general correspondencce; but a closer examination shows, I think, that there was a very large drop in net profits, just as the defendants proposed. We may begin with gross profits, by which I mean the difference between the price of corn (the value of by-products being deducted) and the price of glucose and starch; this difference is called the "spread." For glucose the average gross profits for the year 1908 had been 38 cents, and for 1909, 33; in 1910 it dropped to 27 cents, and in 1911 to 25 cents; it rose in 1912 to 31 cents, again in 1913 to 32 cents; 1914 is not a fair test, owing to the war.

Similarly in the case of starch the gross profits fell from 29 cents in 1908 and 23 cents in 1909 to 18 cents in 1910 and 15 cents in 1911. In 1912 it rose to 20, and to 21 cents in 1913. The lowest figures in each case were, therefore, reached in 1910 and 1911, the period during which the campaign was to be carried on as planned in the letters already mentioned. It should be remembered that this gross profit by no means shows the full proportional fall in prices for competitive purposes, because out of it must come cost of production, and this, so far as appears in the testimony, was constant. If, for illustration, we suppose a profit of 10 cents a bushel on glucose and 8 on starch in the year 1909, we should have a manufacturing cost of 23 cents and 15 cents, respectively. We should find the net profits on glucose to be 10, 4, and 2 cents for the years 1909, 1910, and 1911, indicating a cut in earnings of 60 per cent. and 80 per cent. In starch the figures would be 8, 3, and nothing, an even more radical cut. If we supposed even that net profits were 50 per cent. of gross in 1909, the figures would still be 16½, 10½, and 8½ for glucose, and 10, 6, and 5 for starch. The last figures certainly presuppose too much net profit in 1909, yet they show a decrease of 50 per cent. in net earnings. The earlier figures are probably not too low for net profits, at least on glucose. All this assumes a fixed cost of production, and no suggestion is made of any improvement in technique during the period. We may be sure that such evidence would be forthcoming, if it existed, because the proof lay easily within the defendants' power to produce. Nor can we suppose that the first unit of Argo which opened on March 28, 1910, affected the cost, since it is uniformly stated that a plant of 10,000 or 15,000 has full economic efficiency.

The subsequent rise of prices in 1912 and 1913 may have been due to the change in the differential between grape sugar and glucose, or to the investigation preceding this suit. I think the causes of this rise too uncertain and speculative to justify any finding.

(C) Sales Below Cost.

The government in further proof of the execution of the low-price campaign asserts that the defendant was actually selling glucose at less than cost during portions of the year 1911. That they were for some time selling "Karo" syrup at less than cost above glucose is abundantly shown, and will be considered when I come to the syrup-mixing business. The contention regarding glucose rests on some tables sent by F. T. Bedford to his father in May, 1912, designed to show the cost of "Karo." These tables are figured upon the price which the glucose that went into "Karo" would have brought upon the market, and were the subject of a long and complicated controversy at the trial. The tables show the price at which glucose was billed to the syrup-mixing house, which was in all cases somewhat less than the price at which it sold in tanks; the difference being designed apparently to represent the selling cost. In order to get the profits on the glucose included in the "Karo" sales, the cost of manufacturing the glucose which was shown on the tables was subtracted from the price at which it was billed to the syrup house, and the resulting difference was stated in cents profit per pound. In certain instances this profit appears as a loss. For example, in April and May of 1911 the sales touched their lowest point, showing either a loss or only 1 cent profit per 100 pounds, and it is upon these instances that the government relies to prove its position. Similar tables were made for "White Flake" syrup and for the standard syrups of the defendants, which show either losses or negligible profits for the same months.

Moffett attempted to explain away the effect of this proof as follows: He said that the tables in the column containing the selling prices showed, not the price of glucose at the time of delivery, but at the time when the order came to the syrup house. These orders were for deliveries at 20 or 30 days, and as corn was always bought against the orders, so as to insure the profit, the price of glucose at that time was at once charged against the order. Yet the manufacturing cost was figured in the month in which the glucose was made.

Moffett was mistaken in his recollection of the plan upon which these tables were prepared. First, his May vouchers corroborate the government's position rather than his own, for they show the price of May deliveries as $1.20½, and the tables show them at $1.20. Second, if he is right, the prices of these May deliveries should figure opposite the June syrup deliveries, if the syrup deliveries were at 20 or 30 days, and were at once charged with the price of glucose when the order was made. The June deliveries were therefore being ordered in May. Now the June deliveries were charged with glucose, not at $1.20½, but $1.35, which is much further from the May entry than $1.20½. The vouchers strongly corroborate the government's interpretation.

Yet, if he were right, the proof would still be that glucose was sold at a loss, or substantially at cost, because, in order to find the profit and loss on glucose under Moffett's contention, it would be substantially correct to compare the cost of glucose in one month with the price at which it is entered in the succeeding month, in the price column, since the price in the succeeding month indicates the average of delivery prices 20 or 30 days earlier, as has already been said. When the market began to rise, in some instances, under this interpretation, the defendants sold glucose at a loss. Take, for example, the cost of glucose for blue "Karo" in August, 1910, which was $1.38. The price of glucose for blue "Karo" in the succeeding month, September, 1910, was $1.35. If $1.35 indicates the average selling prices 20 and 30 days earlier than September, then in August the defendants were selling it at a loss of 3 cents. Again, take the price of glucose for blue and red "Karo" in September, 1910, which was $1.28 and $1.32, respectively. The selling price in October was $1.20 and $1.28, respectively, showing a loss in each case, if the price column represents current prices 20 and 30 days earlier than October. In the month of January, 1911, glucose for "White Flake" cost $1.02; the price in February was $1, showing a loss in sale of 2 cents per 100 pounds. The cost of glucose for standard syrups in August, 1910, was $1.38, exactly the price charged against the syrup house in September, 1910. Again, the cost of that glucose in September, 1910, was $1.28, exactly the price charged the syrup house in October, 1910.

(D) Profits from Specialties.

The government also seeks to show the low prices of the year 1910 by deducting the known profits from specialties for the year from the profits for the whole year. The remaining sum they divide by the number of bushels ground, and so get the net profit per bushel. Much of this calculation seems to me to be too speculative for safe inference, but I think there are some kindred facts which corroborate the conclusion that the profits for the year were very low. We know the profits upon the sale of standard syrups and "White Flake," because they are contained in F. T. Bedford's tables of May, 1912. We also know the number of pounds of grape sugar made, and that the differential between grape sugar was 14 cents, with no added expense. Indeed, if we were to accept Edinburg's testimony, we should have to make the differential 24 cents, as he considers the price of the barrel 10 cents cheaper; but that element I omit. The profits on the syrups were $522,626.01, and the total differential over glucose on the grape sugar, $226,917.48, making a total of $749,543.49. The total profits for the year 1910 were $2,102,611.45, leaving a residual profit of $1,353,067.96 to be accounted for by the total grind, less the amount which went in to make syrups. The total grind was 36,-203,652 bushels, and that going into the mixed syrups other than "Karo" 4,556,916 bushels, leaving 31,646,739 for the glucose, grape sugar, and starch. If we divide this into the residual profits, we get a profit of about 4⅕ cents a bushel. It should be remembered, however, that a substantial amount of this grind was sold as Kingsford's starch and thin boiling starch, and I think it quite safe to estimate that the profit per grind on the staples for that year was not 4 cents a bushel. This was much lower than the usual profit in the trade. In Bedford's letter to his son of March 28, 1910, already twice quoted, he speaks of 5 cents as a low profit, even during a trade war, and in F. T. Bedford's letter to his father of July 8, 1909, he says that the proposed profit of 10 cents on glucose would be equivalent to only 4 cents a bushel, a return so small as must be made up for in specialties. The calculation seems to me added proof of the low-price campaign based upon unquestionable evidence. I believe that the profits were lower, perhaps even as low as 2.07 cents; but I only find that it was no higher than 4 cents a bushel, and that this was lower than a fair profit.

It should be observed that, under the calculation as I have figured it, it is proper to include in the number of bushels to be divided into the residual net profits the bushels used for grape sugar, since the differential subtracted for grape sugar was the profit over the profit on glucose, and that all grape sugar made the profit on glucose as well as its own differential.

(E) The Judgment of the Trade.

That the trade supposed the prices to have been cut appears from the evidence of the witnesses, who said that prices were uncomfortably low and that they were hard pressed. Peckham, president of the Clinton Company, says that at times prices got below cost, that extremely low prices went into effect after the rebate plan was abandoned, that they continued until 1912, that in 1910 he did business without any profit, and in 1911 with a very small one. Hughes, of the Union Starch Company, says that little or no money was made in those years. Edinburg, of the American Maize Company, says that in January, April, May, and July of 1910 his books showed a loss, though not for the whole of the year. Hubinger found the Corn Products Refining Company prices very low; his plant was not profitable in the years in question; in some months there was a loss, and in some months a profit; a small profit at the end of the year; 1911 was better. Piel says that the prices were abnormally low, and that it was pretty hard for a man to stay in the business during those years. Douglas says that the prices were lowest in 1911; an audit of his books shows a net profit for the year ending October 31, 1911, of less than $5,000. Several of the witnesses experienced a demand from their customers for a guaranty against Corn Products Refining Company prices, foreshadowed in the correspondence between the officers of the company.

From all these considerations I find that the so-called "low-price campaign" actually went into effect. It does not appear how far the defendants succeeded in their maneuver of inducing their competitors to load up with long contracts, though they did succeed in discouraging them greatly with business, and perhaps this may have led directly to the complaints out of which this proceeding took place. In 1912 the pressure which they exercised upon the trade abated; but, as has already been shown, the defendants came under investigation in the autumn of 1911. How far there is any causal connection between those two events, as I have already said, rests too much upon inference to justify a finding. Yet the connection appears to me to be not wholly without significance.

2. Manipulation of Prices.

Enough has already been shown in the expressions of the defendants to prove that at least they believed they had entire control over the price at which the product should be sold. Walden's letter of November 4, 1909, is a naïve confession of this power. He and Bedford in that correspondence are discussing whether it would not be better to disguise their power by a reduction which would not be so unheard of as 50 points in one day, which Bedford apparently proposed, making, as he said, "one bite to the cherry." Whatever was in fact their power, the change in prices beginning in November, 1909, suggests strongly that Walden's policy won. Nor is this the only instance, for in the correspondence of July, 1909, in which they are discussing abandoning the profit-sharing, the presupposition upon which the whole discussion takes place is that they may make prices as they wish. It hardly serves any purpose to go over this matter once more in detail; it is so constantly implied in all the correspondence that the letters must be read to obtain their full force. Some letters in 1908 show the same thing. On November 20, 1908, Smith wired F. T. Bedford, speaking of lowering or maintaining prices upon the assumption that it rested with them to do so. F. T. Bedford replied on the same day by a wire which implied the same thing. On December 10, 1908, Walden wired Bedford, one passage of which is as follows:

"I would recommend, first, that we make contracts with the confectionery trade to April at present prices; about a week or so from now force the hands of our competitors on their yearly contract by making a low price basis for them to work on."

The plan seems to have been put into effect. On December 1, 1908, the "spread" between glucose and corn was 50 cents a bushel; on

February 1, 1909, 35 cents. The figures for starch are 43 and 24 cents. In each case the profit-sharing is deducted from the price. I have used Mahana's diagrammatic table, and not Defendants' Exhibit No. 78, which was not actually offered in evidence. No change in technique accounts for this change in the "spread," and Fisher's figures of the loss in corn seem to me irrelevant. Taken in connection with the proposals in the correspondence, there seems to me no reasonable explanation, except that the prices were manipulated for the purposes declared.

In the early years of the combination a mere glance at the Mahana table shows that the corn did not control the prices, but that these were maintained where the defendants chose to place them, though this absolute control certainly ceased after competition began to be active.

Many of the witnesses called testified that they followed the prices fixed by the defendants, and this is undoubtedly true. The defendants set the prices of the staples of the industry, published them, and the rest of the trade generally followed. A distinction must, however, here be taken between actual control by the leader, and voluntary following by the independents. A producer may still be the largest in the market, and yet be unable to force others to follow his lead. That would depend upon his capacity to fill the larger demand which would arise from his lower prices. If, for example, he was producing nearly up to his capacity, he would be unable with a drop in price to increase more than to that limit, and, indeed, it would be hard to imagine any purpose in lowering his price, for it would result in the economic solecism of two prices in the same market. If, however, the elasticity of the largest producer's capacity of production were so great that he could accommodate it to the increased demand as the price fell, then he has an absolute power to compel all other producers to follow him down when he lowers his prices.

The defendants had the necessary capacity. We may omit the years 1906 and 1907 and take Moffett's table of grind, with a maximum working year of 350 days, which he gives. The defendants' utmost capacity and the yearly grind of the industry are given in the following table:

	Total Grind.	Defendants' Full Capacity.
1908	34,774,000	31,500,000
1909	38,861,877	33,775,000
1910	47,887,377	40,775,000
1911	46,084,854	42,000,000
1912	47,542,157	45,500,000
1913	50,340,235	52,150.000
1914	45,801,973	45,150,000
1915	....	46,375,000

From this it appears that the full capacity of the defendants was equal to the whole demand at the prices fixed in 1913 and 1914, to substantially the full demand in 1912, to 85 per cent. and 90 per cent. of the demand even in the low prices of 1910 and 1911, and to the 90 per cent. in 1908 and 1909. When it is remembered that their increased capacity in Argo was foreshadowed as early as 1909, it is a safe conclusion that in lowering prices in 1910 they exercised a real economic coercion upon their competitors, and that the very numerous witnesses who said that they dominated prices were speaking more than figuratively.

The government's figures give a greater grind than those I have given, but I choose the defendants to be on the safe side. I conclude that their implicit assumption throughout their correspondence of a power to manipulate prices was correct, and that this power they exercised for the purpose of harassing competitors.

The power to raise prices is quite different. It depends upon the inducement to the independents at existing prices. After 1907 I think the capacity of the independents was sufficient to prevent raising prices beyond the vague area at which the price became sufficient to induce new capital into the industry. It was not possible indefinitely to raise the price of a commodity which, like this, enjoyed no natural monopoly, and the power to raise prices was limited by that fact.

3. Discrimination in Prices.

The government alleges that the defendant has discriminated in its prices among customers; but the evidence is very slight, except for the Stein, Hirsh & Co. matter. The methods of selling "Karo" to the eventual consumer admit of favoritism, and it is a reasonable supposition, I think, that some favoritism was practiced. Bedford, in his letter to Walden of August 15, 1911, spoke of the manipulation of weak spots by Mr. Durham's trade method when referring to the "Karo" trade, and his letter to his son of September 12, in the same year, spoke of continuing "deals" in weak places as long as was thought necessary in order to get the volume of the business they were seeking. I can find no evidence of the misuse of the so-called "zone system," a system which in itself is entirely capable of equitable application. Theoretically the consumer on the near side of the zone is discriminated against in favor of him on the far side; but, if the zones are fairly organized and not too large, and the radial difference from the routing point of places within the same zone is not too great, there seems no objection to the system, and it certainly makes for convenience and economy in practice. In general, I find the evidence too scanty to justify any finding that the defendants have attempted a genuine price discrimination, though they unquestionably had it in their power to do so.

4. Price Manipulation of Grape Sugar.

The defendants continued substantially the sole makers of grape sugar until the end of 1908. During the year 1909 the Union Company made about 4,000,000 pounds and in 1910 the American Maize Company began, and together they made about 8,000,000 pounds, or

5 per cent. of the total supply. In 1911 this had increased to over 10,000,000 pounds, about 6 per cent. Throughout the year 1911 the differential between grape sugar and glucose was 14 cents a hundred in favor of sugar. The expense of manufacture was substantially the same, except for the price of the barrel, which was, perhaps, some 10 cents cheaper for the sugar. The difference of 24 cents, according to Edinburg, of the American Maize Company, proved an attractive inducement to him, and it is obvious that the competition had begun to count by the end of 1911. The production of the American Maize Products Company for January, 1912, was about 1,500,000 pounds, but during that month the differential was cut by the Corn Products Refining Company from 14 cents to 9 cents. There followed an immediate diminution of the production of the American Maize Products Company to 450,000 pounds in February. The differential continued at 9 cents until July of that year, by which time the production of the American Maize Products Company had risen again to a point exceeding that of January. The differential was then cut to less than that of glucose for a few weeks, and then fixed at 4 cents until the middle of October. The production of the American Maize Products Company broke in half, whereupon the differential was restored to 9 cents until December of that year, when a slight differential appeared in favor of sugar. This continued substantially through the first half of the year 1914, when the production of the American Maize Products Company was at an average of about 600,000 pounds a month. Edinburg says that the variation of his grape sugar production depended entirely upon the differential between glucose and sugar; that when he found that differential large he increased his production, and as it fell he reduced his production. I have used the table of Benham & Noyes, which contains the freight differential.

Moffett's explanation of the change in the differential is that they had always thought it cost more to make grape sugar than glucose, and that in 1912 they discovered their mistake. The coincidence between the growth of the competition and the slow change downward of the differential is better reconciled with the more obvious explanation. Moreover, it is very hard for me to believe that persons as skilled in the detailed expenses of production as the defendants should for so many years have been misled as to an operating cost which must have been fairly obvious in itself. Whether they kept, as Edinburg did, any record of their operating cost, does not appear; but it seems to me too much to ask us to accept the explanation suggested. I find that they manipulated the price of grape sugar to meet competition, and that they had knowledge of the amount of that competition.

X. Efforts to Fix Prices and to Restrict Production.

1. Starch Agreement of 1906.

In 1906 the Corn Products Refining Company produced only about 63 per cent. of the total starch made, and a meeting took place at New Haven between Walden and Reichman, representatives of the Corn

Products Refining Company, and Piel and Douglas and Tooker, independents. What took place at this meeting is in dispute under the testimony. Hubinger says that the Corn Products Refining Company was to set the price and the others were to follow. Douglas says that they did not agree to maintain a price, but that it was an informal talk, in which they endeavored to maintain each other's prices, which were to be based on Chicago rates. Tooker, the vice president of the Douglas Company, says that there was no agreement to maintain prices, though they discussed the matter generally, and Reichman corroborates him. It was agreed, however, that Reichman, under an assumed name, should write to Hubinger's brother under an assumed name, stating the rates from Chicago, upon which the prices were to be based. Those witnesses who say that no agreement was made insist that this letter was only for the purpose of informing Hubinger of the freight rates. The letter is in evidence, dated November 8, 1906. Some of the matters in it certainly suggest a price agreement. For example, it is stated that on starch guaranteed to comply with the national Food and Drug Act the price is to be 15 cents above the price of ordinary pearl starch, a subject having nothing to do with freight rates.

This document seems to bear out the construction placed upon the interview by Douglas and Hubinger, and I believe and find that there was an informal understanding by which the persons at the interview were to maintain the price of starch. There is no evidence as to how long this continued, but I hardly think that it lasted very long.

In connection with this may be noted the correspondence regarding splitting commissions by starch brokers, a practice which Walden endeavored to prevent. This effort was undoubtedly to maintain the defendants' own prices uniform, and was therefore of an entirely different character. That the Corn Products Refining Company should desire not to have varying prices on their own products in the same market was in no sense illegal. Indeed, the opposite practice lends itself readily to that price discrimination which is an easy device for monopoly.

There were several meetings in 1909, both in New York and Chicago, between Bedford and the starch makers. The upshot of these meetings is in considerable dispute. Douglas says that in one of them Bedford directly proposed the joint reduction of grind, but the others refused. Tooker denies that Bedford made any such proposal, and, on the contrary, says that he refused a price agreement when it was suggested to him. Reichman bears out Bedford, but he is not a weighty witness. Some time in 1909 Hubinger and Bedford had another private conversation about curing the demoralization of the business, in which Hubinger says that Bedford told him the only way he knew was to restrict the grind. Hubinger suggested a clearing house. Bedford acknowledges that the conversation took place, but denies that at that or any other time he ever suggested restriction of the grind to any one. Taken on the testimony alone, there is hardly sufficient evidence to justify a finding that he did; but his letter to Walden on July 9, 1909, makes the weight of probability in favor of the fact as testified by Hubinger and Douglas, and certainly altogether discredits Bedford's denial. This was one of the letters discussing the termination of the profit-sharing, of which a number have already been noticed. In giving his reasons for not announcing the profit-sharing at that time, he said that there were several things under consideration, of which he enumerated five. The first was an agreement as to total grind; the third, possibility of going into the candy business. Bedford was necessarily wholly unable to give any explanation for this letter, except the childish one that it might have been a typographical error, or that it might refer to a limitation of his own grind.

On the same day, in his second letter to Walden, which has already been noticed, he was discussing what should be said to the candy makers in relation to the company's righteous resentment at the aggressive attitude of the National Candy Company. He says that their suggestion that the candy makers shall buy of them is very moderate, and does not bring about any aggressive competition with the National Company, because they, the candy makers, were to agree with the National Candy Company to maintain good prices, and that the only reason why the defendants could consider the proposal was that Hoops and Heide guaranteed promises of the National Candy Company to at least a limitation of their glucose business, which was a matter, however, of which, perhaps, they could not talk, because it might be illegal. Bedford admitted that Hoops and Heide said that they could get a limitation from the Clinton Company, but insists that he did not entertain the proposal.

There cannot be the least doubt that in 1909 one of the devices which was in the defendants' minds was a limitation of the grind, and this contemporaneous documentary revelation of their purposes to my mind makes it probable that the discussion was of the tenor which Douglas and Hubinger remember. I do not believe that there was any such agreement, because my conclusion is that during that year the defendants decided upon lowering the price by their own low-price campaign.

2. *The Suppression of Proposed Companies.*

(A) Federal Syrup Refining Company.

The government asserts that Bedford procured the suppression of a proposed glucose company in the autumn of 1912. This rests chiefly upon the testimony of Bertram Orde, a witness hostile to the defendants. He had organized a syndicate for the erection of a new company, and had procured an option on the Douglas plant at Cedar Rapids. Among others, they invited Smith, a director of the Corn Products Refining Company, to join them, and he was thus informed of their steps. At one time they had secured subscriptions of about $1,250,000. Smith told Orde that Bedford was worried over the prospect of the plant, and was doing all he could to prevent its building, and to influence the syndicate against it. The syndicate, in fact, dropped the matter in the middle of December, 1912. Bedford denied taking any such steps; but Smith was not called, a circumstance of weight. The government's position is that Bedford induced Meyer, who was to be a substantial subscriber, to change his attitude, and the defendants' other conduct lends much plausibility to the theory. In support of this the government produced a letter written by Bedford to Smith on October 28, 1912, in which he says he is pleased to note that Meyer is with them at heart and trusts that his conversion may extend to his managers. It should, because "Karo" was going to be the seller on the whole more profitable and easier of sales than any other syrup. This letter refers, I think, to Smith's letter to Bedford of October 25, 1912, in which he said that Hubinger's constant activity had prevented at least two of Meyer's managers from falling in line for "Karo" at "yesterday's meeting"; they wanted to await the next move of Hubinger. I do not believe that this refers to the Federal Syrup Refining Company, and I think the evidence doubtful as to the interference by the defendants with Orde's plans, and decline to make any finding upon that score.

(B) The Staley Manufacturing Company.

Staley was a packer, who began business in 1898, but bought all his starch of the manufacturers. In November of 1906, having found difficulty in procuring as much starch as he wanted at satisfactory prices, he incorporated his business and considered building a plant, and in March, 1907, Walden wrote him a letter, offering him certain bulk prices on starch, in consideration of which he was to agree for the term of the contract not to engage in preparing or grinding corn in the manufacture of starch, nor to take any action toward equipping his factory with machinery for that purpose. This proposal Staley did not expressly refuse or accept in his letter of March 18, 1907, and in Walden's answer on March 20 he suggested that his own proposal on starch implied a contract for three years, and not for one year, as he understands Staley to suggest. Staley did not begin until June 1, 1909, when he bought the old Cutsinger Starch Company, which had been discontinued by the National Starch Company. Even then he did not begin to grind until March, 1912, and had to shut down again in June; he began again in September, when he ran until July, 1914, with some interruptions. At that time he closed, but has since that time opened. Walden had advised him that he was undertaking heavy responsibilities, and that he could buy the starch cheaper than to make it, and he seems to have been on the whole somewhat unsuccessful. He believed that the defendants made the prices in the market, but I cannot find any evidence that they adopted toward him any unfair practices after he got started. Walden's letter was, of course, an attempt to keep him out of the business, and, taken in connection with the general intent shown through the whole of defendants' conduct, was an illegal effort; but I do not find that in its execution there was any unfair practice.

XI. Freight Rates.

(1) East-Bound Glucose Rate.

On September 20, 1905, the barrel rate of glucose from Chicago to New York was 25 cents domestic, and 20 cents export, which it had long been; at the same time, the tank rate was 17½ cents domestic, and 15 cents export. The barrel corn rate from Chicago to New York at the same time was 17½ cents, and Edgewater had a transit privilege to New York of ½ cent; the usual lighterage charges being 3 cents. By "transit privilege" is meant the right to carry the corn to New York from Edgewater at ½ cent per pound after it is made into glucose. The lake and rail rate on corn from Chicago to New York was not fixed at this period, especially as rebates were common; but it probably was not far from 10 cents. The greater part of the corn, which came to New York, came by way of water to Buffalo. Gantt, the traffic manager of the Corn Products Refining Company, testified that probably about 70 per cent. of the whole came in that way. On this corn the rate had therefore been in the neighborhood of 11 cents, as against a tank rate for glucose of 17½ cents, a differential of 6½ cents, and a barrel rate of 25 cents, a differential of 14 cents. These were heavy advantages in favor of Edgewater in its New York business.

In 1907 the Union and the Clinton Companies began their manufacture of glucose, being the first competitors, and on May 1, 1907, the railroads advanced their glucose rates to 30 cents domestic and 25 cents export on both barrel and tank, thus increasing the differential on the domestic barrel rate from 14 cents to 19 cents, and on tanks from 6½ to 19 cents. The independents objected to this, and succeeded in getting the railroads to reduce the rates on September 1, 1907, on both tank and barrel, to 25 cents domestic and 22½ cents export. This still left a marked advance in tanks, but restored the barrel rates to about what they had been. On April 15, 1908, Ingalls, the freight traffic manager of the New York Central Lines, and Morgan, the assistant general freight agent of the Nickel Plate Road, wrote to Kersting, of the Clinton Company, that on June 1, 1908, they would make a further compliance with their demands by reducing the rate on both barrels and tanks to 21½ cents domestic and 20 cents export. These reductions never took place, but on April 23 of that year these officers notified Kersting that another hearing would be had. This hearing took place after several adjournments, and the roads declined to make any further changes. Thereupon the independents took the matter to the Interstate Commerce Commission, which held the rates unreasonable (State of Iowa v. A. C. L. R. A., 24 I. C. C. 134) and finally fixed the rate for both tanks and barrels at 20 cents domestic and 18 cents export in August, 1912.

By the recent 5 per cent. general increase allowed by the Interstate Commerce Commission, the domestic rate was raised to 21 cents, and remained until March 1, 1915, when it was advanced again to 25 cents for domestic and 20 cents for export. These increases were justified by the decision of the Commission on November 9, 1915—"Glucose from Chicago," 36 I. C. C. 379. In this decision, however, the Commission took away the transit in favor of Edgewater, which amounted to 2½ cents. Therefore, if the 5 per cent. increase be disregarded, the actual result of the increases made after 1912 amounts to 1½ cents domestic and an actual lowering of the export rate, if the transit formerly applied to it. The basis of the Commission's decision was that, although Edgewater had a genuine advantage through its differential in New York, that advantage did not exist for Boston, Philadelphia, Pittsburgh, Reading, Harrisburg, Rochester, Albany, Buffalo, and Baltimore, because the combination corn rate to Edgewater and the proposed glucose rates to the cities named was in excess of the glucose rate paid by the independents.

These being the undisputed facts, the government asserts that the changes in rates in 1907 and 1908 were due to the improper intervention and interference of the defendants. The support of this rests altogether in the correspondence. The first rise, as stated, occurred on May 1, 1907, and was known to Ashcraft, the assistant traffic manager, and Tremain, the traffic manager, in March and April of that year. Tremain's letters are not in evidence, but several letters from Ashcraft to him appear, and they show that he was quite aware, as was, of course, inevitable, of the advantage which the increase would give to him in securing a differential in favor of Edgewater. It was a fair inference from the letters of March 31 and April 1, 1907, that the rate had been secured by solicitation to the railroads themselves, and that the motive was in order to check the growing competitors in their Eastern business. There is no evidence, however, that this was procured by any corruption of the railroad or its officials. One purpose was to raise the rate on glucose and lower it on syrup, so as to reduce the profit to the syrup mixers. It is to be noted in this connection that the year 1907 was the first in which the defendants entered the syrup-mixing business. The letter of April 3, 1907, corroborates this interpretation, and, like the others, is full of intimations of suppression of and secrecy about the real facts.

The rates established were certainly higher than were justified, and were reduced in September, as already shown. That Ashcraft was aware of the indefensibility of his support of a higher rate than that existing appears in his letter to F. T. Bedford on September 21, 1907. The independents were not satisfied with the rate as lowered, and continued their agitation; the matter was then referred to the Central Freight Association. The railroads were concerned lest the matter be carried to Washington, as Ashcraft wrote F. T. Bedford on February 20, 1908.

The crux of the matter lies in what was done between March and July of 1908; i. e., what was done "in the nature of lobbying," as Ashcraft wrote to F. T. Bedford on March 16, 1908, and what pressure was exercised upon the railroads to maintain the rates and to suffer the matter to go to the Interstate Commerce Commission. That there was private access to the presidents of the roads, and that there was pressure of some sort, seems to be unquestioned. The correspondence throughout shows that the defendants were in constant private communication with the railways, and were even supplying them with arguments to use in answering the independents themselves. The traffic managers having decided to reduce the rates, their subsequent change of mind was almost certainly produced by the intermediation of the defendants. On April 21, 1908, after the original decision had been made, Ashcraft wrote to F. T. Bedford that from the efforts made it was apparent what they were to expect if the matter was not taken up with the presidents as he had urged; that, confidentially, he was supported in this advice by the high traffic officials. This, of course, means that he had been in private communication with the high traffic officials of the railroads, and that they had advised him that they were powerless against the importunities of the independents, unless the defendants could take it up with the presidents. From this letter it also appears Bedford had himself talked with some of the officials, in spite of his present denial. The communication between the defendants and the railroad officials also appears from F. T. Bedford's wire to Ashcraft on April 22. On April 23 he wired Ashcraft, suggesting that the Pennsylvania could be induced to take no action if the American Maize Products Company at Roby withdrew their requests, and that Reichman should see Scully with that in mind. Ashcraft answered on the same day that he would see to it, and agreed that the case would be much weakened if Scully should withdraw.

In fact, Scully, who was fighting the existing rate, had a talk with F. T. Bedford, who told him that he wished him to withdraw his objection and let the rates continue. Scully continued, however, to oppose, until he got word from Boselly to withdraw his objection a day or two after. Gardiner, also of the same company, was stopped in his activities and actually withdrawn from a public meeting with the railroad officials. Gray, Boselly's intermediary, was indefinite in his recollection of the matter, but it certainly took place as stated. The importance of Scully's withdrawal is further shown by the wire of F. T. Bedford to Ashcraft on April 23, 1908, in which he said that Hodgson, of the Pennsylvania, had told him that if Scully withdrew he would have no further interest in it.

My conclusion from this evidence is that the defendants attempted, both in public meetings and by private communication and importunity, to secure the original rise in rates of May, 1907, and to prevent the reduction proposed on April 15, 1908; that in so doing they procured Boselly to withdraw his objection and attempted to get Scully to give a false reason. I believe that this was a part of their arrangement with Boselly in the spring of 1908, by which they should purchase half his grind. I find no evidence, with the exception of the suggestion concerning the Nickel Plate Road, that there were any bribes to the road or to the officials, or any threats used; but I do find that the effort was to continue the differential with the purpose of preventing any competition with Edgewater. I find that at the time the differential gave an undue advantage to Edgewater in supplying New York and its environs, but not elsewhere. I also find that the private solicitation of the railway presidents and supplying the roads with facts which were not known to the independents was an unfair method of competition. It need hardly be added that the methods by which the opposition of the American Maize Products Company was withdrawn was also unfair.

2. Transits.

I find no competent evidence to show that the change of the transits at Clinton were due to the mediation of the defendants, except a passage in a letter from Ashcraft to F. T. Bedford on January 2, 1908, in which he says that Clinton would be probably deprived of its glucose transits to St. Louis; yet this alone seems hardly sufficient to justify a finding that Ashcraft procured the change. The general policy of the company, stated in Ashcraft's letter of July 2, 1908, to F. T. Bedford, was, however, consonant with that possibility. He there said that he was trying to get the roads to believe that it was best for all concerned to take up and consult with him any question of the readjustment and change of rates in his commodity; that they were fast getting to realize that the defendants knew how to be fair in these things, and not to oppose advances on the idea that an advance is against the shipper; that his own idea was that adjustments were frequently more important to them than the rate itself. O'Halloran, moreover, said that Grossclose had told him that Ashcraft wanted the transits withdrawn; but this is hearsay. Disregarding that evidence, there remains a strong antecedent probability that the transits were removed through the instigation of Ashcraft. Yet there is no direct evidence, and in its absence I think the inference not certain enough for a finding. The same considerations apply to the change of transits at Cedar Rapids and Decatur, with greater force.

3. Barrel and Tank Rate from Clinton to St. Louis.

By very old adjustment, Clinton was entitled to the same rate on glucose to St. Louis as Chicago. In 1908 the barrel rate was 10 cents and the tank rate 7 cents, while the Clinton rate was 10 cents on both. O'Halloran, of the Clinton Company, wished the railroads to give him a 7-cent rate on tanks, which was done; but shortly thereafter the rate on tanks in both places was raised to 10 cents. I think it reasonable to suppose that this change was procured by Ashcraft, because of the correspondence between him and F. T. Bedford. On January 7 he wrote F. T. Bedford that Clinton was making application for the same rate on tanks and barrels which Chicago enjoyed; that with their plant at Granite City getting into St. Louis on bridge toll, and their plant at Pekin at 6 cents, together with the disability of Chicago, which was then being dismantled, they had no special reason for a tank rate of 7 cents from Chicago. Scully might also go after some of that business. He concludes:

"If Clinton's application for Chicago's rates should be voted down to-day, I believe the same rate could be forced in through proper agitation."

Bedford agreed to the same rate on barrels and tanks in his answer of January 9, and apparently went to Chicago, not observing, however, Ashcraft's injunction to bring his letter of the 7th with him, which he thought ought not to have remained on their files. I find from this correspondence that the subsequent rise from 7 to 10 cents was done at the instigation, or, as Ashcraft put it, the "agitation," of the defendants—that is, that they exercised at least persuasion over the road to make the rates the same for tanks and barrels. I find that there was no reason for the rise in the rate, and that the defendants' efforts were to prevent competition by Clinton.

XII. The Syrup Trade.

The general charge in respect of the monopolization of the syrup trade is that the defendants, seeking to control the manufacture of glucose, included those end products which were made from them. Glucose, which for some 8 years has been generally known as corn syrup, enters into the composition of many syrups. The cheapest, and probably the widest used, table syrups of any are those which contain between 85 and 90 per cent. of glucose, flavored with 15 or 10 per cent. of refiners' sugar. Before the organization of Corn Products Refining Company, the Corn Products Company had put upon the market a syrup under the trade-name "Karo," already referred to, of this class. They had spent a good deal of money advertising it, but it had not obtained more than a place along with other brands. When the Corn Products Refining Company was organized, they continued to make "Karo," along with a general business in mixing other brands of their own, and also private brands of such jobbers as might wish. The labels for these brands they printed in large numbers and pasted upon the cans. Mixers also bought large quantities of glucose direct and sold it under their own brand. The position of the government is that the defendants kept the price of glucose and mixed syrup which they sold on substantially an equality, allowing no differential which would justify the industry of mixing at all; that in this way they gradually drove the mixers out of business, and then declined to make any more syrups themselves under the private brand. The result of all this was that the whole trade, or substantially the whole trade, remained in their hands under their name "Karo," or under one or two of their standard brands, which they retained.

The defendants at first seem to have enjoyed a substantial monopoly in the mixing trade among glucose manufacturers. During the first two years they alone mixed any corn syrup. In 1908 the American Maize Products Company, their only competitor, mixed about 5 per cent. of the total syrup mixed by glucose manufacturers; in the next year the Union Company appeared. The American Maize Company discontinued in 1909, and thereafter only the Union Company and the Hubinger Company have mixed. During the years 1912, 1913, and 1914 they have mixed about 12 per cent. of the total supply made by the glucose manufacturers.

The defendants urge two objections to this presentation: The first is that it leaves out of account the private mixers; and, second, the competition of corn syrup with the other various syrups—a question which has already been touched on. I am satisfied that the corn syrup proper, by which I mean a syrup containing 80 per cent. or more of glucose, is regarded by the consumer as a substantially different article, both by taste and by custom, from those which contain 40 per cent. or less. The molasses, sorghum, and cane syrup contain a smaller percentage of glucose, and, although there may be no deceit involved, they are in fact harmlessly adulterated. Of course, I do not suggest that such syrups are illegal or improper as sold.

The corn syrup proper is, and necessarily must be, confessedly a flavored glucose, and the distinction between the demands seems to me substantial. Of course, these two commodities will, at certain prices, compete with each other; but upon that score I need add nothing to what has been said previously. I think it proper to consider, therefore, the percentage of the supply of corn syrup which the defendants control and their conduct to obtain it.

1. The Purpose of the Defendants to Control the Syrup Industry.

It was the purpose of the defendants generally to extend the Corn Products Refining Company's control as far as possible into all end products, and among other such to get as large a percentage of the syrup industry as was possible. This appears in several letters, most of them from Bedford, sometimes by way of fatherly advice to his son, drawn from his own prior experience in the Standard Oil Company, which he said had adopted precisely the same policy. Their attitude toward the syrup mixer himself was at one time ambiguous. Thus Smith wrote to Bedford on April 10, 1907, a letter which illustrates the defendants' attitude of mind. He was there urging that the syrup mixers should be protected, and for that reason for himself he preferred to maintain a greater differential between glucose and syrup, so as to tie the mixer to the company. If they themselves could make syrup cheaper than the mixer, they should tie him to them with a contract, unless they were determined on a "war of extermination." If they were to have such a war, there ought to be no outstanding contracts to cause embarrassment. As things were, they had already aroused a feeling of resentment among the mixers, and for that reason they might as well try to exterminate them at the same time by adding pure maple syrup and the higher grades of jelly, as well as New Orleans molasses. Yet Smith had his doubts of their success in exterminating either the mixers or any of the new competitors, all of whom were well fortified. He considers in detail the position of these new added companies, and is convinced that they could stand a long fight and keep up a long war. Yet, if there were to be a war, let it be to the finish, not the kind of sporadic war that Matthiessen used to engage in.

This ingenuous discussion was answered by F. T. Bedford, apparently at the direction of his father, on April 12, 1907. The writer inclined against an effort to tie the mixing trade to the company, and doubted the strength of the mixers' position or of the glucose manufacturers'. The inference is that he was for a war to exterminate the mixers.

This alternative seems to have been accepted, for it is quite clear from Ashcraft's letter to Tremain, March 21, 1907, that the plan was to raise the rate on glucose in part for the purpose of getting it on a parity with syrup, so as to eliminate any profit over glucose and make mixing impossible. Mention of this letter has already been made in the east-bound glucose matter. Wintermann, who had been in the St. Louis Syrup & Preserving Company, which went into the combination of 1906, organized a new company directly thereafter under the same name, and in 1907 Bedford bought the common stock of this company and entered into a contract with it to sell it glucose;

in 1910 he bought the balance of it and closed out the syrup-mixing business. It was at about this time that he wrote his son, on March 28, 1910, of the possible importance of this company as a good ally.

To return to 1908: It appears that by the end of that year the defendants supposed that they were selling to 90 per cent. of the trade, and that they contemplated getting part of the other 10 per cent., though they did not expect to get it all. This is in Smith's letter to Bedford of November 20, 1908. Bedford attempted to explain this letter by saying that Smith was referring only to glucose manufacturers who made syrup. But this cannot be so. In 1910 the Union Company alone was making syrup, and making less than 4 per cent. at that. Later on in the letter Smith says, "Our largest competitors in mixing line are working on low-price contracts for glucose," which is entirely inconsistent with the idea that the earlier part of the letter refers only to the Union Company. Whether they actually had at that time 90 per cent. of the trade may be open to question, but I am discussing only their purpose at this time. On March 29, 1910, Bedford in a letter to Walden recommends doing business, if necessary, without profit on the end products, so as to increase the sales of glucose, instancing the practice of the Standard Oil Company 25 years before, by which eventually petroleum drove out the other oils; that the proper course was to surround their business with the consumption products, syrups, candy, and preserves. They must take the mastery in these three specialties, so as to increase the consumption of their primary products. On the next day, in an added memorandum, he spoke of the logical right of the company to command the syrup business, and how the general outcry when they started in had died away; they need only take a firm stand to prove that they might dominate the jam and candy business, as they did the syrup business. That was the psychological moment for a campaign. On March 28, 1910, Bedford wrote his son in the same vein. He thought that all profits should be subordinated to increase the grind; there should be no consideration for profits in the specialties at the outset, which might prevent the greatest possible volume of business. He was in favor of doing the candy, maple syrup, and jam business without profit, even down to the extent of 5 cents a bushel, and, if that would not do, practically at cost.

Later in the year, when the low-price campaign was well on, several letters passed, showing the defendants' purpose. Walden wrote to Bedford on July 5 of that year that the syrup mixer might make specialties like maple and flavored syrups, but that the defendants did the bulk of the business in corn syrup.

About a year later they were discussing withdrawing all brands but "Karo." On July 25, 1911, Walden writes Bedford that, if they are doing 90 per cent. of the syrup business as it is, 30 per cent. under the "Karo" brand, it would mean, if they withdrew their standard syrups and sold nothing but "Karo," that the cost of advertising "Karo" would go down. There would be more or less of an outcry, he thought, from the jobbers generally; but the outcry would soon fade away if the trade realized they were uniting with them in moving these goods direct to the customer. If "Karo" could be made to do 90 per cent. of the syrup of the country, it would become the name of a class of goods, and not a specialty.

That the defendants in fact sold "Karo" at no profit abundantly appears. This was the whole purport of the letters of F. T. Bedford to his father in May, 1912, together with the tables which have already been discussed under the heading "Sales at a Loss." Both in the year 1910 and 1911 this was done, even at a period when the profits on glucose itself were very trifling. On October 29, 1912, Bedford, probably relying on these tables, wrote to Smith that he had already told him there was no profit in "Karo," but that, with or without profit, they must have their share of the business. On April 4, 1912, he had written to Smith that it was 100 per cent. "Karo," and that as soon as possible. On June 24, 1912, in a letter of advice to his son, he instanced the course of the Standard Oil Company in Australia and South Africa, who got all their business in one brand. On June 30, 1912, F. T. Bedford wrote his father that he did not always advance syrup when they advance glucose, but that the syrup prices always went down with the glucose. Thus, in the month of April of 1912 standard syrups did not make within 1 cent a pound of the profit on glucose, and in the month of May 11 cents less.

By the 1st of August, 1912, they thought, apparently, that they had excluded all the syrup mixers, for Bedford wrote to his son that they recognized that now the competition was that of the glucose manufacturers. They recognized this policy to be unfair, as appears in the letter of September 30, 1912, from Bedford to Smith, in which he said that they could not have it known and might not talk of it, but that he had been advised by his lawyer that no law compelled them to make the same price to different customers as long as it was done without a contract with others. They might say, if need were, that they did not want parties to handle their syrup to the injury of their business.

In February of 1912, without much warning, Bedford called the jobbers together and announced that he would not sell any more syrup in private brands. His excuse for that at the trial was that the annoyance and expense involved in conducting that part of the business made it much more undesirable than not. But in the face of the correspondence already quoted, I cannot accept this as a true explanation. It is perfectly clear that they intended to have their own brands dominate the syrup market as much as possible, that in 1912 they had supposed that they had succeeded, and that they also anticipated a slow substitution of the single brand "Karo" for their own standard brands. It was a necessary part of this device that they should succeed in eliminating the private brands themselves. This would have left them in that dominant control of the syrup-mixing business, which is what they wanted; it would have left only the glucose manufacturers as their competitors. Whether Bedford's reference in the letter of September 30, 1912, to a discrimination in price was followed up by such discrimination, as I have already said, it is somewhat difficult to tell. The indications from this, and also from the method of selling the "Karo," which was by allowances, called "deals," and by other means lending themselves to discrimination, strongly suggest to me that, in fact, there was discrimination. The reference of Bedford in his letters as to the manipulation of "weak" places is another corroborative circumstance. I think it extremely probable that throughout this "Karo" campaign there was actual price discrimination exercised wherever it appeared profitable; but in the absence of more specific proof I can make a finding no further than that the defendants showed an entire willingness to do this, and used methods which permitted it.

Such was the plan which they proposed to themselves in getting control of the syrup business, a plan which itself was part of their general policy to secure control of all the end products of the raw materials which they manufactured. It remains to consider how far they were successful.

2. The Execution of the Plan.

We have it on the admission of the defendants that they were trying to lessen the differential between glucose and syrup as early as 1907, and that by 1910 they were selling "Karo" at a loss over glucose. The effect of this was reflected in the distress of their competitors. The Union Company commenced in 1909, and made very little money. They would have made no profit, had they charged the market price of glucose, which seems to indicate that what we know to have been the practice of the defendants in 1910 extended at least to the previous year. The methods of merchandising the syrup also caused them some embarrassment. The zone prices they thought different from the usual way of figuring on Chicago plus freight, and the "deals" established an uncertain element, as well as the window-display allowances. Yet in spite of these handicaps their trade as syrup makers has greatly increased, having nearly trebled from 1909 to 1913.

The American Maize Products Company tried it for one year and then abandoned it, but the Hubinger Company established a substantial business during the years 1912, 1913, and 1914. So much for the mixing done by the glucose makers themselves.

Numbers of witnesses were called, for the most part mixers, who testified that the market was dominated by the Corn Products Refining Company. The use of this word I have already discussed, but under the circumstances of this case, considering the large proportion of the supply in the hands of the defendants, it seems to me to have a relevant significance. Several of them testified that the price of glucose and mixed syrup was either the same or so that they could not compete; in some instances they gave up altogether the sale of the higher percentage glucose syrups. Yet the testimony is by no means uniform. A number of mixers have continued in the business, and seem to find no difficulty in getting their syrup or glucose from other persons, either Scully, or the Union, or the American Maize Company. A tabulation has been prepared by the government of the percentage of syrups sold by wholesale grocers who testified in the case, amounting to 65 in all. The percentage of syrup bought from the defendants is 71 and from the independents 29. This probably represents as fairly as is accessible the proportion of the high percentage syrups supplied to these customers by the Corn Products Refining Company. Some mixers still remain in this part of the business, but the greater number have gradually discontinued, and in many cases they attribute their withdrawal to the appearance and progress of "Karo."

My conclusion is that in this grade of corn syrup the production of the defendants amounts to substantially more than half, and that their capacity for expansion is sufficient to give them the power to lower the price to such figure as they wish. I find that, except for the maintenance of substantial equality of price between glucose and syrup and the withdrawal of private labels, there were no unfair practices in detail in the marketing of "Karo," with some reservation regarding the uses which may have been made of "deals" and window-display allowances.

A word should be said as to the defendants' tables, which are made up for the year 1912 (Defendants' Exhibit 59–L). I do not accept the percentage of 13 as a fair estimate, because this attempts to lump all the syrups together into one, which, for the reasons already given, does not seem to me to be a reasonable test. The defendants claim that they supplied only 45 per cent. of the total trade, based upon a mixture of 85 per cent. glucose and 15 per cent. flavoring; but this is based upon the assumption that all the glucose sold by the competitors went into syrups, and it is very doubtful whether this be true. F. T. Bedford, in his letter to Smith of April 10, 1907, said that the defendants knew that a great part of the glucose did not go into corn syrup, saying that the mixer put fully half his requirements into goods not competitive with their own. This indicates that the percentage of 45 contained in Mahana's table is erroneous. The government, accepting F. T. Bedford's word, figures that the defendants made and sold 64 per cent. of the glucose syrup in 1912. I deem it impossible to obtain any exact information upon this score, but I think it conservative to estimate that more than half the trade is in the hands of the defendants. The rest of the glucose probably goes into those which contain a smaller percentage.

I find, therefore, that the plan to exclude the mixer from their subindustry has not succeeded to the extent that the defendants planned, and that as such a subindustry competition continues to exist and probably will continue.

XIII. Dismantling of Plants.

One of the articles in the petition alleges the dismantling of the plants by the defendants. I have already considered the dismantling of the plants of the old Corn Products Company. Of those with which the defendants started in 1906, the Chicago and two Waukegan plants have been dismantled, and Davenport, Granite City, and Pekin have been reconstructed, some at large expense. The greatest factory of all, Argo, was not in existence until 1909, and did not begin to manufacture until the spring of 1910. The factory at Pekin was thoroughly reconstructed at an expense of over $1,000,000 and began operations in 1913. At present the factories of the company consist of Argo, Pekin, Edgewater, and Granite City, the latter a syrup-mixing factory. There is also a reserve not ordinarily operated at Davenport, and there is a relatively small starch-producing factory at Kingsford.

In the case of most of the changes, the result has been a higher producing efficiency and a greater concentration of capacity. Moffett's table of grind, already alluded to, indicates on the whole a steady increase in capacity, at least, after the first two years. The Chicago plant, the government admits, was in no position to be continued, and not only economy, but mere prudence, required its abandonment. I do not believe that the abandonment of the so-called Upper House at Waukegan was with an effort to curtail the grind. This was the old Warner Company plant, and while it was in fair condition in 1906, and was operated through 1913, I believe those witnesses who say that it could not have been rehabilitated to compete on a modern basis at that time without the expenditure of a greater sum of money than was justified economically. The other Waukegan plant, that of the United States Sugar Refining Company, called the Lower House, was only operated one year after the defendants were organized, and the same may be said of it. I find nothing to criticize, therefore, in the abandonment of these plants. The testimony of the letters indicates pretty well that after the first two years the policy of the company had never been toward a restriction of its own grind.

Bedford was actuated throughout with a passion for an increase in size. He seems to have inherited this from his experience with the Standard Oil Company, and to have supposed that only through constantly forcing his production could he obtain that domination which he wished. I believe that he thoroughly understood that any efforts to curtail production and raise prices would be the best means of inducing new capital into the field, and this was the one thing above all others which he wished to avoid. He no doubt knew that, in an industry which enjoyed no legal or natural monopoly, control, in any event, could exist only within narrow limits, and profits could be obtained over a narrow margin. The government, which rightly relies upon the naïve interchange of ideas between the defendants to show their purposes, must be content to accept what makes for them with what makes against, and no one can read this correspondence without observing that there is no desire at any time to limit the grind of the defendants. This seems to me the surest proof that any change of factory equipment was throughout with an eye to manufacturing advantage. Nor can I regard the apparent decrease of capacity dating from 1902 as more than a paper index of actual power. A large number of factories located as chance competition might have dictated might well have an apparent capacity which could not be made real. How far they would have been expanded and modernized, had there been no combinations, it is hard to say. The law of increasing returns operates in the industry up to a grind of 10,000, perhaps up to 15,000, bushels by the unanimous testimony, and many of the old plants had less. Location, especially relative location, must have counted for a great deal, especially when the question was of investing enough more money in a plant, even a large one, to bring its efficiency to modern standards.

I find that the abandonment of the plants since 1906 was without any purpose of limiting production or raising prices.

XIV. FINDINGS UPON THE ARTICLES ALLEGED IN THE PETITION.

It remains to take up the allegations of the petition as they are set forth in separate articles and to make specific findings in relation to them.

I, II, III. The first three articles of the petition are conceded.

IV. The fourth article is not disputed, except so far as the purposes of the defendants are alleged. I find that the reorganizations of 1897, 1902, and 1906 were for the purpose of monopolizing and restraining trade in the manufacture of glucose and starch.

V. I find that the defendants have attempted and are attempting to monopolize the trade in mixed syrups, consisting of from 85 per cent. to 90 per cent. glucose and the balance flavoring matter.

VI. I find that the defendants have attempted, and are attempting, to monopolize the trade in glucose and starch and derivatives therefrom.

VIIa. I find that the consolidations set forth in the petition were made for the purpose of restraining competition in domestic and foreign commerce in starch and glucose and their derivatives.

VIIb. I find that the dismantling of the plants by the defendants was not for the purpose of monopolizing or restraining trade.

VIIc. I find that in two instances before mentioned the defendants exacted contracts not to engage in the trade from the owners who sold their plants, and that this was done with the purpose of monopolizing the industry as aforesaid.

VIId. I find that the defendants from November, 1906, until January 1, 1910, engaged in a profit-sharing plan as alleged, and that this was part of an attempt to monopolize and restrain commerce as aforesaid.

VIIe. I find that the defendants guaranteed their prices against decline in many instances, but I make no finding as to the purpose with which this was done.

VIIf. I find that the defendants attempted by threats to prevent the erection of the American Maize Products Company, and that they subsequently succeeded in restricting the grind of that company by agreement; that in addition they secretly and deceitfully sold at unprofitable prices a part of the product of that company, representing that it came from outside producers, when in fact it was owned by them. I find that both these devices were with the purpose of monopolizing and restraining commerce as aforesaid.

VIIg. I find that the defendants attempted to restrict the grind of the Clinton Sugar Refining Company, and instituted a competition in candy at less than cost, for the purpose of impeding the business of that company, and of securing to itself the custom of candy manufacturers, and that this was done with the same monopolistic intent as above stated.

VIIh. I find that during the years 1910 and 1911 the defendants, having control of the prices at which glucose and starch could be manufactured, lowered prices to a sum less than a fair profit, for the purpose of securing the trade to themselves, and harassing, annoying, and, if possible, driving out their competitors, and that this was done with the same monopolistic intent. I also find that they have since

1909 endeavored to secure to themselves by low prices as much as possible of the trade in mixed syrup of the kind described in article fifth of the petition, and that this was done with monopolistic intent.

VIIi. I decline to find that the defendants fixed any resale prices.

VIIj. I find that the defendants have not used their switching roads since 1906 as a covert means of obtaining rebates.

XV. The Law.

Before the cases of U. S. v. Standard Oil Co., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, it had no doubt been an open question whether the Sherman Act did not forbid all combinations which resulted in terminating a competition theretofore existing, regardless of the effect of that termination upon the industry at large. Those cases must be understood to decide that the effect upon the industry is a factor in determining the illegality of the combination, and perhaps it is yet an open question whether or not the test is to be found only in the combination of enough producing capacity to control supply and fix prices, at least until new capital be induced into the field, or whether it must also be shown that the combination has injured the public in the exercise of that power. The opinions of the Supreme Court certainly seem to indicate that it is the power and not its exercise which is the test. U. S. v. Standard Oil Co., supra; U. S. v. American Tobacco Co., supra; U. S. v. Union Pac. R. R. Co., 226 U. S. 61, 88, 33 Sup. Ct. 53, 57 L. Ed. 124; Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107; Eastern States Retail Lumber Dealers' Association, 234 U. S. 600, 613, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525. This was certainly the opinion before U. S. v. Standard Oil Co., supra; U. S. v. Joint Traffic Association, 171 U. S. 505, 575, 19 Sup. Ct. 25, 43 L. Ed. 259.

Yet it is quite true that the court has also at times spoken in terms which leave it open to argument whether or not it was the public injury done by the combination which makes it illegal. Such is the often-quoted passage in Mr. Justice Holmes' opinion in Nash v. U. S., 229 U. S. 373, 376, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232), that only such "combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition." There are also passages in the opinion in U. S. v. Standard Oil Co., supra, which lend themselves to such an interpretation. It must be conceded that the lower courts are not in entire agreement upon the question (U. S. v. International Harvester Co. [D. C.] 214 Fed. 987), and that the Supreme Court at this time has ordered a reargument of that very case. Yet even the expressions relied upon in these opinions are open to a construction entirely consonant with the rule which makes power only and not the manner of its exercise the test of legality. We have only to assume that all "undue" restraints prejudice the public interest, even though the apparent results are economically benignant to reconcile both forms of expression. Such language might, it is true, cover only distinct economic injuries. A national policy would be intelligible which looked only at the price and service to the consumer, disregarding the misfortunes of the producer altogether. Yet even then the consumer's interest in the long run is quite different from an immediate fall in prices, even if the quality of the service is maintained. The very defendants allege that a trade war is bad in the end for consumers, and no doubt they are right. If, therefore, "public prejudice" be the test, it by no means follows that it is to be judged alone by price and quality. A given organization of industry may be thought to react to the public prejudice, regardless of its directly observable results.

If the decisions of the Supreme Court are to be so understood, it is the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price, that is illegal. It is not necessary in any view that the combination should exclude, or be able to exclude, all others; it is not necessary that its control should extend beyond such a period as is required to bring in new supply. U. S. v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325. If these were necessary conditions, there could, indeed, be no restraint of trade without patent or control of some natural source. Under such an interpretation of the act, Corn Products Refining Company is certainly a combination in restraint of trade, and its excuse is irrelevant, if it were true, that it has had a beneficent effect upon the industry. If the statute condemns an industrial integration of producing units sufficient to fix prices, so long as the total producing capacity remains unchanged, that policy must be respected and enforced, whether it is a good one or a bad.

If, however, it shall be eventually decided that it is the exercise of the power, as so defined, and not the power alone, which is illegal, the case at bar is in the end no different. Under that theory the injuries to the public are shown by the means which the combination has employed in its efforts either to gain or to maintain its position. The means forbidden have been evolved, often empirically, because of a slow recognition that they make for the disorganization of industry and of the depression of a competing producing capacity which, if let alone could compete upon even terms. While the statute under this theory relies upon competition as a proper stimulus to the maintenance of industrial advance and as the chief protection to the consumer, it takes a long view, not a short. It recognizes that with the customer in the end must lie the decision between producers, and that those who fail to secure the market by the quality and cost of their service must pass out of the field; but it does not identify permanent capacity with the inability to endure a transitory or local appeal to customers. Its presupposition is that there may well be competitors capable in the end of giving a service which will serve the public as well as their neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary, and is put forward with no purpose of universal application. Possibly it would be hazardous to attempt an absolutely general statement, but it would yet be true to say that nearly all the devices condemned by the courts contain this sporadic element, either of time or place; that is to say, that they cover only a competition which was not intended to be permanent, and which the combination knew was only for the temporary purpose of extirpating a competitor who had at least some chance in the long run of establishing a service which would be as acceptable as any within the power of the combination itself.

It is on this account that the intent of the combination so often appears in the cases as the determinating factor in illegality. It is not because unfair competition is a crime, but only because a monopolistic intent is the clearest evidence that the competition attempted is shown to be temporary and local, and that there is on this account a reasonable expectation that it will be succeeded by competition which the newcomer might well be able to meet, had his development been all the while left unimpeded. If that temporary or local competition were not coupled with such an intent, if there were honest grounds for supposing that it would or could remain to the permanent advantage of the consumer, the public would have no ground to complain, so long as the organization of industry remains on a competitive basis. The intent is the touchstone, not because we are concerned with moral delinquency, but with a test of the probable persistence of the combination's course of conduct. As Mr. Justice Holmes, in Swift v. U. S., 196 U. S. 375, 396, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), says:

"When that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

Similarly Mr. Chief Justice White, in U. S. v. Standard Oil Co., 221 U. S. 1, 76, 31 Sup. Ct. 502, 521 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), says:

"We think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."

These expressions mean that where the intent is established to occupy the whole of an industry, and the intent is accompanied by some appropriate conduct, the competition has already ceased in the sense that the national will has directed. Persons actuated with a desire to monopolize the whole of an industry will try—indeed, are already trying—to keep out others, regardless of whether those others can compete efficiently or not. Their conduct constitutes a social evil, because the public is entitled to the free play of such industrial power and capacity as such outsiders may be able to develop.

The Corn Products Refining Company's industrial history has not only been characterized throughout by attempts to create such sporadic competition, but we have the richest possible evidence that they never meant to maintain it as a policy, but only to drive out weaker competitors, so as to maintain the field. The only device which is open to any question in this respect is the low-priced campaign. It might, indeed, be difficult to establish the temporary character of this, were it not, first, for the purposes disclosed in its preparation, and, second, for the fact that it went too far by the defendant's own statements to admit of continuance. They never meant to keep prices so low, and could not have endured, if they had done so, except by making up through excessive prices on specialties. All their conduct illustrates the kind of competition which tries to prevent the development of newcomers who might permanently secure their own position. I will try to state their position, as I understand it, as sympathetically and as strongly as possible. Their only defense really in the end comes down to the assertion that their efforts to restrict competition failed:

"The statute condemns a monopoly in the sense of a power to exclude others from entering the industry. It has been proved that, whatever our purposes, the field was never closed to competitors. We have continued with only a small absolute increase in grind, if, indeed, we can truly be said to have increased at all, while our competitors, both those who were in the industry when we combined and those who have since appeared, have grown with extraordinary rapidity. We have no natural or legal monopoly upon which we rely; we hold no trade secrets; we have no ability that any one else may not procure. We have never tried to limit our own production; on the contrary, we have flooded every avenue of consumption and opened every new available market, often at great initial expense. We have benefited the consumer by insuring him a sound product at a low price. Nor was our original combination without justification. The industry was engaged in that kind of competition from which the consumer in the end must suffer, since it leads to the destruction of the capital involved. No one could make enough money to keep up his producing capacity, yet all feared to fall behind in sales lest they should be obliterated altogether. Some kind of concerted action alone could save the industry from ruin, and it makes but little difference, as the courts themselves have often said, what form it takes. The critical fact was that some kind of joint action was necessary, and that involved an understanding which, no doubt, must in the end result in some slackening in the ruinous race of overproduction. So much we acknowledge; but we insist that it was a benefit to the industry, and that it finally relieved it from restraint, instead of imposing restraints upon it."

The answer to this is partly on the facts and partly on the law. If the test be that of power alone, it needs no other answer than the opinions already cited at the beginning of this point. If the test be the exercise of the power, the question is of fact. They say that they combined to prevent a ruinous competition, and this is true; but the immediate result of the combination was such a rise in price as attracted new capital into an industry whose producing capacity, on paper, was already more than the market would take. This is good evidence that the price was higher, or the quality worse, than need be. It was no public benefit to fix that price at a point where, with ample capacity, new capital came in; or, if it be said that the old plants were too inefficient to compete, it was no public benefit to combine old plants, now called junk by the defendants themselves, so as to preserve them from their own mutual destruction.

As to their conduct toward subsequent competitors, in their failure they forget their repeated efforts to eliminate all newcomers or to suppress the production of those already in. No one can, in fact, tell how far they have succeeded in discouraging the first, or in depressing the expansion of the second. Under a competition free from such practices, inherent weaknesses of their own might have been discovered; they might themselves have been eliminated. Elimination of some was perhaps necessary; much waste is certainly the price of a competitive organization of industry. The national will has not declared against elimination of competitors when they fail from their inherent industrial weakness. On the contrary, it has declared with great emphasis against any methods by which such weaknesses might be concealed; in so doing it has assumed a positive purpose toward industry, has established a norm to which competition must conform. This purpose the Corn Products Refining Company has persistently and ingeniously endeavored to thwart from the outset. Its constant effort has been to prevent competitors from that test which would in the long run discover whether they could manufacture as well and as cheaply as itself. It has tried throughout, by its power temporarily to affect commercial conditions, so to obscure the actual industrial facts as to make impossible any test of relative strength. That it has failed does not change the past or make its continued existence in any sense less compromising to the future. There is every assurance that it will continue unfair trade methods, unless it be forcibly prevented. I therefore find that it is an illegal combination.

XVI. The Remedies.

By far the most important question in the case is whether the remedies which the government shall have shall be limited to an injunction, or whether they should include a dissolution of the Corn Products Refining Company into four or five constituent parts. That there should be an injunction admits of no question. Some of the unfair practices have undoubtedly been stopped; some ceased long before the petition was filed, and there is indeed no reason to suppose that they will again be resumed; but defendants are in no position to complain against a decree of court specifically forbidding them from any resumption of practices which were merely the incidental manifestations from time to time of a purpose which actuated them throughout their whole progress. The injunction will cover in detail the specific matters already considered, such as profit-sharing, a low-price campaign, bogus independents, price agreements, attempts in any way to prevent the entry of others into the industry, or to secure agreements to restrict competition from those already in, and such other details as shall be appropriate.

The question of dissolution turns upon different considerations. As has already been said, if power alone be forbidden by the statute, it can make no difference whether its results are beneficent or sinister, whether a dissolution will affect the industry to its prejudice or to its advantage, whether it will promote or depress foreign trade. So much is indeed implied in the opinions in those cases already cited in point XV. Such questions concern the wisdom of the act, and with it I have nothing to do if once its purpose be authoritatively declared.

If, on the other hand, the exercise of the power is what the statute touches, then the question arises What is practically necessary to prevent the repetition of those unfair means? The defendants' solicitude against dissolution seems to me to be significant in this connection. It is conceded that each of their units is as large as the law of increasing returns demands, and there is no apparent reason why they should fear dissolution if they mean to adopt that kind of competition which the law contemplates. In order to test the injury which they anticipate, and their good faith in opposing dissolution, it is fair, therefore, to consider their objections in detail.

[3] The chief ground is that dissolution would have an immediate and disastrous effect upon the foreign trade. The argument is as follows: At the present time Edgewater sends two-thirds of its product to Europe, and in so doing has spent large sums of money in opening up many currents of foreign trade. If the combination were divided into competing units, Edgewater at times could find a more profitable individual market by competition along the Eastern seaboard, working out so far to the West as freight differentials allowed. At periods, for example, when Argentine corn can be imported into the port of New York, the local advantage of Edgewater becomes high. If it were a separate plant, whose policy was dictated alone by the interests of its stockholders, in those periods it would compete effectively with the Western plants and would diminish its foreign trade. At present, at such periods it continues its export business, relying upon the Western plants to supply that portion of the demand which it would itself supply if it were acting alone. It is true that there would remain sporadic periods when it would export, times of "dumping," but the development of a sustained foreign export trade would be impossible, once Edgewater were divorced from the combination as a whole. As it is, that plant is pressed to maintain its position against foreign manufacturers having themselves access to Argentine corn. If it could find a ready local market of its own, it would inevitably seize that.

The argument comes to this: That in times of cheap Argentine corn Edgewater does not use its advantage to sell to the Atlantic seaboard (Bedford, indeed, says that, it could at times show a profit in Chicago), but uses that advantage for foreign trade. The question really is whether the local consumer should be deprived of that advantage for the sake of maintaining foreign trade, and that depends upon what the relative valuation of the two advantages should be. I cannot think that a court is competent to determine such a preference; it depends rather upon questions of national policy, the indirect benefits of foreign trade, which can be dealt with only where each interest is effectively represented. Certainly I have no means of saying that the commercial advantage of cheap Argentine corn ought to be enjoyed by the manufacturers here, or the foreign consumer, as against the eastern American consumer. It is indeed easy to see that this would be a compelling motive urging competitors of the Corn Products Refining Company to join in opposing any dissolution, but their interest in this respect is not necessarily coincident with that of the general public and their opinion is inevitably interested.

It is quite true that dissolution might result in an overproduction within the United States, and so in the end in the elimination of some of the producing units; but this again is the same problem in another form. It means that because of the present unitary control of Edgewater and the other Corn Products Refining Company plants, in periods when there is a differential favoring Edgewater, that differential is used for the benefit of export trade, rather than to throw out that part of the Western supply which because of its higher cost could not be marketed in the East. I am not aware of any obvious and compelling policy which makes it advisable to favor a more expensive manufacture in the West, with its necessary higher prices to the consumer, for the sake of foreign trade. The decision of such questions certainly should not rest with the producers themselves, nor, as I have said, is it a proper matter for courts. The foreign trade of the competitors of the Corn Products Refining Company has so far been of a trifling character. In 1912 it represented less than 8,000,000 pounds of glucose out of a total of 278,000,000, and of starch less than 700,000 out of a total 2,000,000. The question really seems to concern, therefore, only the export trade of Edgewater itself. I shall therefore lay from consideration this feature of the evidence.

[4] The next objection is that a dissolution will involve the expenditure of large sums of money to readapt the several plants to stand upon a self-subsisting basis. Argo is the largest of all, but is especially adapted to manufacture the specialties, so called—dextrines, gums, grape sugar, and syrup. It must either discontinue some of its manufacture of specialties or put in more bulk-producing capacity. The reason for this is said to be that in selling it must be possible to supplement the specialties with bulk supply in order to hold customers. No plant could undertake to sell specialties alone, though it manufactured itself all the glucose and starch which went into them. Pekin is at present a starch plant altogether, though it has a glucose refinery of 12,000 bushels out of a total capacity of 30,000; it would have to develop a more diversified business if it were to sell alone. Granite City is a syrup-mixing plant, making its own glucose; it might succeed in its own territory, but the matter is problematical. Davenport is only a reserve plant, not usually operated, and somewhat antiquated as well. It would not make an economical unit.

I do not doubt that a dissolution in the case would operate to the disadvantage of the total production, and that it would require readjustment of the plan of manufacture of each plant; but there is nothing in this evidence which indicates any serious demoralization of the industry at large. Argo could certainly maintain its grind, even if part of the glucose and starch were sold as bulk products. The result would be to leave unemployed so much of its capacity for making end products as now rely upon the bulk capacity of Pekin and Granite City. In so far it would injure the usefulness of that much of the capital already invested. Pekin may have been used as a bulk starch house, but with so large a glucose capacity it cannot be said to be a specialized plant. Indeed, there are, as it is, plants which do nothing but a starch business, e. g., Douglas, Huron, Staley, Piel, and Keever, which have never done anything else, just as there are plants which have made nothing but glucose, as the Clinton Company. The only competitors which have made both starch and glucose between 1906 and 1914 are Hubinger, Union Company, and the American Maize Products Company. Similarly, the Granite City plant need not make starch; possibly it might have to sell part of its glucose unmixed, but that, as in the case of Argo, would only make less useful so much of its finishing plant as could not be employed. Davenport seems to me to have a questionable value as it is; it is not generally operated at all, and is run as a reserve. A question might arise as to the propriety of allowing its union with Pekin or Granite City, if need were.

None of these considerations seem to me sufficient to prevail over the wisdom of disintegrating a combination which has shown such an inveterate and incorrigible insistence upon interfering with the course of commerce which the law demands. That the general organization of the Corn Products Refining Company would be disrupted would, of course, follow; it is, indeed, the very purpose of the relief itself. The suit is, it is true, not punitive in its character; but the stockholders are in such cases responsible for the conduct of the business by the officers in charge. Such loss as is involved in removing from their hands the power which they have so persistently used contrary to law is an inevitable, though unfortunate, incident in the enforcement of the statute.

In all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued, all make against such a limitation. It may be safely assumed that evidence such as was by chance available here of the actual purposes of those in charge will never again exist. Without it, perhaps, it is doubtful whether the case could have been proved. Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity. No case, it seems to me, could more require such a remedy, unless injunctions are to serve for the only remedy. It is clear enough that, had dissolution been decreed in 1906, no court would have allowed any units so large as the present Corn Products Refining Company. The precise form of redistribution will have to come up later, but a combination of 60 per cent. of the whole industry would not have been considered.

The form of the decree as concerns dissolution will in general follow that in the case of U. S. v. International Harvester Company, except that the time within which to file a plan will be 120 days, instead of 90, and that the plan will be filed with the Federal Trade Commission as master in chancery, under section seven of the Federal Trade Commission Act. That commission will in due course present a plan for dissolution, which will come on for confirmation to the District Court as the report of any master in chancery.

XVII.

I see no reason to exempt from the injunction the defendants Speyer, Boardman, Kelsey, and Nichols. They were all directors for three years before petition filed, and must be supposed to be privy to the general plans of the company. If they wish, they may be excluded from such parts of the decree as cover any trade practices which terminated before January 1, 1910.

The final decree may be settled upon five days' notice to the defendants.

UNITED STATES v. AMERICAN CAN CO. et al.

(District Court, D. Maryland. July 7, 1916.)

MONOPOLIES ⚷26(1)—SUIT FOR DISSOLUTION—DECREE.

Although a corporation has been adjudged in its inception to have been an unlawful combination in restraint of interstate trade and to have committed unlawful acts, whether a dissolution will be decreed rests in the discretion of the court; and where the unlawful acts have ceased, and in the judgment of the court the public interest will be best served thereby, the corporation will be permitted to remain intact and to continue its business, the court retaining the bill as a restraint upon its future operations.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⚷26(1).]

In Equity. Suit by the United States against the American Can Company and others. Decree considered.

G. Carroll Todd, Asst. Atty. Gen., and Henry E. Colton, Sp. Asst. Atty. Gen., for the United States.

John Barton Payne, of Chicago, Ill., George R. Willis, of Baltimore, Md., and Thomas M. Day, of New York City, for defendants.

ROSE, District Judge. Shall the defendant be dissolved? is the only question in which any of the parties are interested. On the record the government may be technically entitled to other relief, but it would be of no practical value, if given, and no request for it has been made. For similar reasons, none of the defendants still before the court have thought it worth while to insist upon their separate defenses. Upon the question at issue the opinion heretofore handed down said:

"Under the circumstances, would it not be better simply to retain the bill, without at present decreeing a dissolution, but reserving the right to do so whenever, if ever, it shall be made to appear to the court that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance and control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient? * * * I shall take the course indicated, unless one or the other of the parties insist on my entering such a final decree as will enable them to seek at once a review by a higher tribunal. If either of them does, I am not prepared now to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise." 230 Fed. 859.

The defendant was willing to accept the court's suggestion, provided the government would do likewise; but the law officers of the latter felt that, in view of the importance of the issues involved, the case should be carried to the court of last resort. The government has, accordingly, moved for a decree of dissolution. The defendant has countered with a motion for an unqualified dismissal, or, in the alternative, for a dismissal without prejudice. For the reasons stated in the original opinion, defendant's motions will be denied.

In passing upon the government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. As a matter of course, in weighing the probabilities for good or evil, the chancellor must put aside any individual opinion he may have as to whether the community gains or loses by unlimited competition. The Anti-Trust Acts voice the will of Congress that the competitive régime shall be maintained. In contemplation of the law, any restraint of competition unlawfully brought about does harm. It is the duty of the courts to give effect to the legislative will, but it is equally their duty so to shape their decrees as to bring about the result desired by Congress with the least possible waste of anybody's time or of anybody's money.

The government asserts that, because of defendant's size and power, the checks and balances imposed by free and unrestrained competition do not limit its operation to anything like the extent they would if it were smaller or weaker, and that, if it be broken up into five or six separate and independent concerns, such checks and balances will come into play. In the long run such would doubtless be the outcome. The form of dissolution decreed might be such that the hoped-for end would be attained in a shorter time than apparently will be required in the oil and in the tobacco trades. Yet it is by no means certain, nor even perhaps probable, that between the various units into which the defendant might be divided sharp competition would at once spring up. The officers and managers of the new concerns would at first be men, most, if not all, of whom had been trained in the service of the defendant, and who in that service had acquired more or less uniform habits of mind and ways of looking at the problems of the business. It is likely that for a period greater or less in duration they would be discinclined to depart from the paths in which they had been used to tread. The mass of details with which such a dissolution would require them to deal would for some time absorb most of their energies of mind and body. A dissolution, if really thorough-going and radical, would necessarily cause a good deal of loss, and for a while entail unusual expenditures of many kinds. For the time being the power of any of the concerns to compete in ways advantageous to the consuming public would be largely curtailed.

Such considerations are important in themselves, but they might be held immaterial to the question in hand, if any one of a number of other conditions existed, viz.: If the defendant was using its power, prestige, or resources to deal unfairly or oppressively with its competitors or with the public, or if the maximum prices which it could hope to obtain for its wares were not limited within a rather narrow range by the actual competition to which it is exposed, and still more by the potential competition which a few months of higher prices, under the conditions prevailing in the industry, would make real and dangerous, or if there was no probability that within a reasonable time, and without the aid of judicial action, the competitive régime would again establish itself. But such is not the case. At no period after the first year or two following defendant's organization has the unfair or oppressive treatment of its competitors been a part of its policy. It is true that it concealed or denied its ownership of a couple of its subsidiaries. Nothing can be said even in excuse, much less in justification, of what it did in that way. Nevertheless those actions appear to have been exceptional, rather than part of any general scheme.

Its bargain with the Tin Plate Company may have operated unfairly to its competitors, and for a time probably did. The growth of independent manufacturers of tin plate, and various changes in the conditions of the industry, have in recent years made that advantage of little moment. The record seems to show that a number of years before the filing of the petition in this case the defendant made up its mind that it would not give its competitors or the public cause for complaint against it, and that it has since lived up to that resolution.

The defendant does fix the prices at which an overwhelming majority of the packers' cans are sold. It is the most potent factor in determining the price at which all of them are disposed of, but its power to do either depends upon its making a fairly accurate estimate of the market conditions. Any considerable increase in prices would promptly bring a host of new competitors into the field. It is neither certain nor probable that it will be able to maintain its relative position in the trade. The business and resources of some of its competitors have been steadily growing, both absolutely and relatively. A continuation of the present conditions may well result in the development of some of them until competition will again control the market. It is by no means unlikely that this result may be attained even earlier than the public could begin to enjoy the benefits which the government hopes a dissolution would ultimately confer.

If, as has been suggested, jurisdiction over the case is retained, the assurance that the defendant will not resort to unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. In this case it appears probable that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the play of economic forces. If so, no dissolution should now be decreed.

It is, of course, possible that these forecasts of the future may not be realized. In that event, the retention of jurisdiction will enable the government promptly and cheaply to compel a dissolution whenever anything which defendant may hereafter do, or whenever anything which may hereafter happen makes such action necessary or expedient.

It is however, said that what the court has suggested it may not do, whatever else may be within its power. It is not denied that the course mapped out is well within the jurisdiction of the chancellor. The right to make decrees which are indistinguishable in principle from the one proposed has been recognized and exercised, but it would be of little moment if it had not been. The creative faculty of equity still continues to be energetic and productive. Bispham's Equity (9th Ed.) § 583.

Conceding all this to be true, it is nevertheless asserted that no such decree could be properly made by a District Court of the United States. The argument is short. Such a decree is not final. No appeal will lie from any decree which is not. The court of first instance may not take away the right of review. There can be no question of the absolute soundness of the third of these propositions, and the second, correctly understood, is equally unquestionable; but the rule that an aggrieved party, before he may appeal, must await the entering of a final decree, was never intended to put limitations upon the power of a court of equity to give the relief most appropriate to the case before it. What it would be lawful for a court of chancery to do if there was no such rule as to appeals remains lawful, although such rule exists. The fact is that in this case the decree to be made would be final. The case has been brought regularly to hearing. Upon the record so made, the government says it is entitled to a decree of dissolution. The court upon that record denies the relief for which the government asks, which is a final determination of the issue, so far as it depends upon the record as it stands.

No one would question that a dismissal of the petition, albeit without prejudice, would be a final decree, from which an appeal would lie. Why should a mere retention of the petition make any difference? Dissolution is equally denied on the case as made. It is true that if, from something which has occurred since the filing of the petition, and which is subsequently brought to the attention of the court, a decree for dissolution becomes proper, it may then be made, precisely as the same result would follow if the petition had been dismissed without prejudice. The only difference is that in the latter case everybody would be put to far greater cost and trouble to reach the same end.

A decree will therefore be entered adjudging that while the defendant was organized to monopolize interstate trade in cans, and to attain that object such trade was unlawfully restrained by it and by those who formed it and directed its earlier activities, and that some of those individuals still participate in its management and control, still, upon all the facts and circumstances of the case, as those facts and circumstances are set forth and found in the opinion heretofore filed, the request or demand of the government for a decree of dissolution is denied, without prejudice to a renewal of such demand or the seeking of other appropriate relief, if it shall hereafter be made to appear to the court from other facts occurring subsequent to the filing of the petition in this cause that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance or control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient.

MEMORANDUM DECISIONS

E. PETRONIO & CO. v. CENTRAL TRUST CO. OF ILLINOIS. (Circuit Court of Appeals, Seventh Circuit. April 27, 1916.) No. 2361. Appeal from the District Court of the United States for the Northern District of the Eastern Division of Illinois. Suit by E. Petronio & Co. against the Central Trust Company of Illinois, trustee in bankruptcy of Eliza Petronio Zarosi and Luigi Zarosi, as individuals and as copartners under the firm name of E. Petronio & Co. From a decree for defendant, complainant appeals. Affirmed. See, also, 220 Fed. 269, 136 C. C. A. 285. Henry S. Blum, of Chicago, Ill., for appellant. Alvin H. Culver, of Chicago, Ill., for appellee. Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. On the authority of Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, the decree is affirmed.

ODOM et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. February 29, 1916.) No. 1437. In Error to the District Court of the United States for the Western District of South Carolina, at Greenville. Case docketed on certificate of clerk, and writ of error dismissed, under section 6 of rule 23 (193 Fed. xiv). Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., for the United States.

PITT et al. v. RODGERS. (Circuit Court of Appeals, Ninth Circuit. July 24, 1916.) No. 2832. Appeal from the District Court of the United States for the District of Nevada. Morrison, Dunne & Brobeck and Edward Hohfeld, all of San Francisco, Cal., for appellee. Upon application of counsel for appellee, and on consideration of certificate of clerk of the United States District Court, District of Nevada, ordered, appeal dismissed for noncompliance by the appellants with provisions of subdivision 1 of rule 16 of the Rules of Practice (150 Fed. cxxvii).

In re RICHARDS BROS. (Circuit Court of Appeals, Sixth Circuit. December 18, 1914.) No. 2516. Petition to Revise an Order of the District Court of the United States for the Eastern District of Michigan, in Bankruptcy; Arthur J. Tuttle, Judge. Proceedings in the matter of the bankruptcy of Richards Bros. On petition to revise an order of the District Court (206 Fed. 932) allowing trade exemptions to the bankrupts. Order affirmed. Oscar W. Baker, of Bay City, Mich., for petitioner. Coumans & Gaffney, of Bay City, Mich., for respondent. Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

PER CURIAM. The trustee in bankruptcy complains of the action of the court below in allowing to the bankrupts the trade exemptions provided by the Michigan statute (3 C. L. Mich. 1897, § 10322, subd. 8), against the contention that the name Richards Bros., under which the bankrupts did business, is an assumed or fictitious name, in violation of the statute (P. A. Mich. 1907, No. 101), which forbids the carrying on of business under an assumed or fictitious name, unless a certificate showing the real names of the parties is filed in a designated public office. This contention is effectually foreclosed by a decision of the Supreme Court of Michigan, made since these proceedings to revise were taken. Cross v. Leonard, 181 Mich. 24, 147 N. W. 540. The order complained of is affirmed, with costs.

END OF CASES IN VOL. 234