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IN THE
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DISTRICT COURTS OF THE
UNITED STATES

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This is a Key-Numbered Volume

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

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

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OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Grand Rapids, Mich.
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Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge .....Chicago, Ill.

[1] Died November 2, 1916.
[2] Died November 12, 1916.
[3] Died December 20, 1916.
[4] Resigned December 12, 1916.
[5] Appointed December 21, 1916, to succeed Thomas S. Maxey.

Hon. EVAN A. EVANS, Circuit Judge .....Baraboo, Wis.
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Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
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Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
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Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
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Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
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Hon. OSCAR A. TRIPPET, District Judge, S. D. California.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
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Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

[6] Appointed December 21, 1916.

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

CINCINNATI, N. O. & T. P. RY. CO. v. THOMPSON.

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

No. 2697.

1. MASTER AND SERVANT ⊂=288(1)—QUESTIONS FOR COURT—WEIGHT OF EVIDENCE.

The court cannot as a matter of law declare that a servant assumed a risk, where there is any substantial evidence that he did not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068, 1069, 1087, 1088; Dec. Dig. ⊂=288(1).]

2. MASTER AND SERVANT ⊂=217(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

For a servant to assume the risk, it must appear that he had knowledge of the defective condition out of which the risk arose and appreciated the danger arising therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. ⊂=217(1).]

3. MASTER AND SERVANT ⊂=217(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a brakeman alighting from a moving train stepped on a large piece of slag, turned his foot, and fell under the train, he assumed the risk of injury, though he did not know of the presence of the particular piece of slag, if he knew that there were similar pieces of slag in the yards.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 577; Dec. Dig. ⊂=217(4).]

4. MASTER AND SERVANT ⊂=217(5)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

An employé assumes risks attributable to his employer's negligence, where they are plainly observable though he did not know of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 578; Dec. Dig. ⊂=217(5).]

5. MASTER AND SERVANT ⊂=217(5)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Though a brakeman, who was injured when he stepped on a large piece of slag in alighting from a moving train, did not know of the presence of pieces of slag of that size, he assumed the risk, where the presence of such slag was plainly observable, for in such case knowledge is imputed to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 578; Dec. Dig. ⊂=217(5).]

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6. MASTER AND SERVANT ⊂=217(5)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A brakeman alighting from a moving train does not assume the risk of injury from the presence of pieces of slag on the roadbed because ordinarily prudent persons would have observed the presence of the slag before alighting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 578; Dec. Dig. ⊂=217(5).]

7. MASTER AND SERVANT ⊂=217(1), 234(1)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

The defenses of contributory negligence and of assumption of risk are entirely distinct, and one may exist without another; knowledge of the risk actual or imputed being essential to the existence of assumption of risk, while not to contributory negligence which merely deals with the negligence of the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574, 706; Dec. Dig. ⊂=217(1), 234(1).]

8. MASTER AND SERVANT ⊂=217(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

That a brakeman, injured when he stepped on a large piece of slag in alighting from a moving train, knew that there were smaller pieces of slag on the roadbed, does not as a matter of law establish that he assumed the risk of injury from the presence of such larger pieces, for the danger from them must be deemed substantially greater than the danger from the smaller ones.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 577; Dec. Dig. ⊂=217(4).]

9. MASTER AND SERVANT ⊂=217(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

As the doctrine of assumption of risk necessitates a knowledge of the conditions of the risk which can be gained from pure observation, the brakeman cannot be held to have assumed the risk of injury from the presence of large pieces of slag, on the theory that their presence might have been inferred from the presence of smaller ones, particularly where the railroad company had provided for the removal of large pieces of slag.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 577; Dec. Dig. ⊂=217(4).]

10. MASTER AND SERVANT ⊂=288(8)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Whether a brakeman, injured when he stepped on a large piece of slag in alighting from a moving train, assumed the risk of injury therefrom, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1074; Dec. Dig. ⊂=288(8).]

11. MASTER AND SERVANT ⊂=217(5), 234(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

That a brakeman, injured in stepping on a piece of slag as he alighted from a moving train, might have seen the slag before he alighted, does not put in operation the doctrine of assumption of risk, but affects the issue of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 578, 709; Dec. Dig. ⊂=217(5), 234(3).]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by S. E. Thompson against the Cincinnati, New Orleans &

Texas Pacific Railway Company, removed from the state court. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Carr, of Harriman, Tenn., for plaintiff in error.
W. T. Kennerly, of Knoxville, Tenn., for defendant in error.

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

COCHRAN, District Judge. This was an action on the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), removed to the lower court from the state court where it was brought. No question as to the right of removal has been made there or here. It resulted in a judgment for plaintiff for $3,000.

The plaintiff was head brakeman on a freight train on defendant's railroad, which, on August 24, 1911, was running from Oakdale, Tenn., to Danville, Ky., and was an experienced employé. In its course the train stopped at Oneida, Tenn., to fill out with other cars. The railroad, at that point, runs north and south, and has two main tracks. North-bound trains take the east, and south-bound the west, track. The freight depot is north of the passenger depot, and a public road crosses the railroad at right angles between them. The former is on the east side, and the latter on the west. The train was north bound and on the east track. It reached Oneida about noon. Plaintiff was riding on the engine. As the train was slowing down, he alighted on the left or west side between the two tracks. It was then running about 6 or 8 miles an hour. The place at which he so alighted was 20 or 30 yards north of the road crossing and almost opposite or even with the freight depot. The caboose was about this place when the train came to a stop. His purpose in so alighting, according to his testimony, was to inspect the under parts of the cars as they passed him. The rules of the company made it a part of his duties to make such an inspection whenever he had a chance. There was evidence tending to show that he could do this, remount, and go back to the head of the train to handle signals whilst the conductor left the caboose and went to the freight depot for waybills and returned. In alighting he jumped or stepped on a loose piece of furnace slag the size of a man's two fists or a cocoanut. It or a similar piece was introduced in evidence as Exhibit No. 1. It "kinder rolled" under him and pitched him head foremost. He fell on all fours, and his right foot, going under the cars, was crushed so that it had to be amputated.

The negligence complained of was permitting this piece of slag to be there. There were three trials. The first resulted in a verdict for the plaintiff for $3,000. This was set aside on the ground that it was against the weight of the evidence. The particular in which it was held to be so was as to plaintiff's purpose in alighting. It was held that the weight of the evidence was that his purpose was to go to a refreshment stand west of the passenger depot and get a bottle of beer, and hence that, when injured, he was not in the line of his duty.

The second was a mistrial. The jury could not agree. And the third resulted in a verdict for $5,000. The plaintiff remitted $2,000 of this to keep the court from setting it aside. This it would otherwise have done on the ground that the plaintiff had been guilty, as a matter of law, of contributory negligence, and the jury had not made sufficient allowance therefor.

The errors assigned and argued are the refusal of the court to give a peremptory instruction to find for the defendant, at the close of all the evidence, and its refusal to give a certain other instruction asked for by it.

The ground upon which it is claimed that defendant was entitled to a peremptory instruction is that, under the evidence, plaintiff had, as a matter of law, assumed the risk of defendant's negligence in relation to the piece of slag which was the cause of his injury. Judge Sanford in stating, in his charge to the jury, what was essential to make out the defense of assumption of risk, said:

"It is not essential * * * that the plaintiff knew of this particular piece of slag; it is sufficient if he knew that there was loose slag there on the ground in sizes and in such condition as to render the use of that ground there for the purpose of alighting from the train a dangerous use. If he knew there was loose slag there, and if he knew that would render the alighting from a train by a brakeman a dangerous thing to do, and if slag of this kind, dangerous slag—if it was dangerous—had been there so long, and he had such means and opportunity of seeing it that a reasonably prudent person would have understood the danger and appreciated the danger resulting from that situation, and he then continued to work for the railroad as a brakeman and used this yard in that way, then it has made out its defense, and there can be no recovery in this case."

If this statement was correct, it would seem, as a matter of law, plaintiff had assumed such risk and defendant was entitled to the peremptory instruction; for plaintiff, in his testimony, admitted that he knew that there were loose pieces of slag where he alighted of sufficient size for it to be dangerous for him to step on one of them. He testified:

"In my service there, going about over the yards, from time to time, prior to the accident, I saw that loose slag was lying there between the tracks. It was perfectly plain for me or anybody else to see, and, in getting off of these trains at Oneida, I, as a rule and practice, at all times, avoided stepping on those loose pieces of slag lying there. No one would step on them on purpose. * * * I didn't know there were any pieces there as large as the one I stepped on. There were small pieces there. I knew it would be dangerous to step on any kind of a piece of slag, even if it was only one-half as large as Exhibit No. 1. I knew it would be dangerous and liable to throw me. They would not be as liable to throw me as this piece, but it would be dangerous just the same. * * * It would be dangerous to step on a piece of slag of any size."

As to the size of the pieces of slag which he knew were there, his testimony was that they were a "good deal smaller" than the exhibit and "anywheres from the size of a hen egg, some smaller and some larger," and, again, that they were of the "size of a hen egg, or something like that, down to most any size, something like a grain of corn or a bird shot."

He further testified that, because of such knowledge on his part, he did not alight immediately from the engine, but stood on the step, within a foot of the ground, looking at the space between the tracks, and that, as he rode along, he saw loose slag and picked out a smooth place to step on, and after he had done so, he "looked up at the fireman for some purpose and passed by this smooth place and then stepped off of the engine without again looking at the ground to see where" he "was going to alight."

His conduct in alighting without looking again was characterized by Judge Sanford as "great contributory negligence," and because of it the remission of the $2,000 was required; and he testified that the piece of slag on which he stepped was plainly observable at least 20 feet before it was reached.

Furthermore, Judge Sanford in his charge to the jury expressed the opinion that as a matter of fact plaintiff had assumed the risk, and this seemingly even though the law required that, in order to this, plaintiff must have known the exact condition of the yard. He said:

"Speaking a moment about the facts in this case, it is very hard for me to see that this man was not getting down to get that beer. It is hard for me to understand why he should have gotten down at this particular place unless he was getting down to get beer; and it looks to me, as a question of fact, as though the condition of that yard was known to him, and he assumed the risk in this case, under the weight of the proof in this case. That is the way it looks to me, but that is not a matter for me to determine."

And in overruling the motion for new trial he thus expressed himself:

"In my opinion the weight of the evidence shows such a state of facts as makes the risk of injury to the plaintiff from the slag between the tracks of substantially the size and character as the piece on which he struck, one which the plaintiff assumed."

When he acted on the motion, his conception of the law had changed from that expressed in his charge to the jury as above quoted. His then conception he thus expressed:

"I do not think that the knowledge of danger of a certain kind and degree can be said, as matter of law, to involve the assumption of a similar kind materially greater in degree."

It was with this view of the law that he thus held that the weight of the evidence favored the position that plaintiff had assumed the risk.

He was led to overrule the motion so far as the question as to plaintiff's being in the line of his duty when he was injured by the consideration that this was the second time a jury had found in his favor as to this; and, so far as the question of assumption of risk, largely by the consideration that the last was the first of the three trials at which defendant had urged this defense. At the other two it had contested plaintiff's claim that it had been negligent in relation to the slag. He stated, in his opinion overruling the motion, that on those trials there had been "great conflict in the evidence on the question as to the presence of loose slag in between the railway tracks in defendant's yard," and that "in neither of these trials was the defense of assump-

tion of risk relied on. In the present trial, however, the defendant, in effect, abandoned its effort to show reasonable diligence in furnishing a reasonably safe place and rested its main defense upon the proposition that the condition of the yard in regard to loose slag between the two tracks was so well known to plaintiff and so apparent that the risk thereof was assumed by him."

The defendant, no doubt, was led to pursue this course by the consideration that, though, by so doing, plaintiff would be enabled to shun Scylla, i. e., a failure to make out a case of negligence against defendant, he would fall into Charybdis, i. e., make such an obvious case thereof that it would be entitled to a peremptory instruction on the ground of assumed risk. Thus it was that it determined, like B'rer Rabbit, to "lay low" and let plaintiff have his own way as to the material conditions of the portion of the yard at Oneida where he alighted, then and theretofore, helping out by cross-examination of plaintiff's witnesses as to this particular. It, perhaps, was in pursuance of this policy that it refrained from introducing witnesses whose depositions it had taken, possibly introduced on the former trials, one of whom, at least, was familiar with those conditions. And it must be said that apparently plaintiff did not come far short of thus putting himself out of court and, if the case had been submitted on his evidence, possibly he would have succeeded in so doing.

[1-5] We face then the question which this case presents for our determination, i. e., whether, as a matter of law, plaintiff had assumed the risk of the defendant's negligence, of which he complains. The meaning of this question is, not whether the weight of the evidence was to the effect that he had so done, but whether there was any substantial evidence to the effect that he had not. For, only in case there was no such evidence can it be said that as a matter of law he had; and in disposing of it we are conscious that we have to be on our guard in a certain particular.

In the case of Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, Mr. Justice Moody noted the fact that modern thought is against the defense of assumption of risk, and stated that there was "a notorious unwillingness" on the part of juries "to apply the rule." The particular in which we feel that we should be on our guard is to see to it that there is no unwillingness on our part to enforce this rule, and that we are not to be led thereby into any insincere argumentation to deny defendant the benefit of it.

There are several propositions in this connection as to which there ought to be no controversy. Some of them favor plaintiff, and some defendant. It will help if we first dispose of them so that the single question on which the case hangs may be seen in all its nakedness. Those that favor defendant are these: It is trite that two things are essential to make out the defense, to wit, knowledge of the defective condition out of which the risk arose, and appreciation of the risk arising therefrom. These two, indeed, may be reduced to one, i. e., knowledge of such condition and of such risk. In the case of Chicago & E. R. Co. v. Ponn, 191 Fed. 682, 112 C. C. A. 228, Judge Hollister said that the word appreciated "does not mean more than actual knowl-

edge. It does not mean less." Here, there can be no question that plaintiff appreciated, i. e., knew, the risk. The quotation heretofore made from his testimony contains an express admission that he did. The only possible question is whether he knew the conditions out of which the risk arose.

Again, it is not essential that plaintiff knew that the particular piece of slag, stepping on which caused his injury, was there. It is sufficient if he knew that such slag, i. e., slag of that character or slag substantially as large and as dangerous as that piece, were lying loose in and about the place where he alighted.

And again, his denial of such knowledge is not merely not conclusive of the question. It may be of no value whatever in determining it. Notwithstanding such denial, it may be that it should be taken that he did in fact have such knowledge.

In the case of Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102, Mr. Justice Pitney said that the employé was "not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it." Language to the same effect may be found in numerous decisions of the Supreme Court. Washington & G. R. R. Co. v. McDade, 135 U. S. 554, 573, 10 Sup. Ct. 1044, 34 L. Ed. 235; Choctaw O. & G. R. R. Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Butler v. Frazee, 211 U. S. 459, 467, 29 Sup. Ct. 136, 53 L. Ed. 281; Schlemmer v. Buffalo R. & P. Co., 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596; Texas & Pacific R. R. Co. v. Harvey, 228 U. S. 319, 321, 322, 33 Sup. Ct. 518, 57 L. Ed. 852; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521; Seaboard Air Line R. R. Co. v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

The presumption here referred to, I take it, is conclusive. It cannot be overthrown or affected to any extent by a mere denial on the part of the employé. In Butler v. Frazee, supra, a peremptory instruction was upheld in face of a denial by the plaintiff, whose hand had been injured, whilst feeding a mangle in a steam laundry. The denial there, however, was of appreciation and not of knowledge of the condition out of which the risk arose; but, if such a denial was of no avail, a denial of such knowledge could not have been of any more value. Mr. Justice Moody said:

"The contention, however, is that, as the plaintiff testified in substance that she did not know and appreciate the danger which she was encountering, that testimony, with the other facts in the case, raised an issue for the jury, and that it could not be said, as a matter of law, that the risk had been assumed. This contention is sustained by a well-considered case. Stager v. Troy Laundry Co., 38 Or. 480 [63 Pac. 645, 53 L. R. A. 459]."

To this contention he responded:

"But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence, and adequate experience, and all

these elements of the problem appear without contradiction fom the plaintiff's own evidence, the question becomes one of law for the decision of the court."

The recent case of Jacobs v. Southern R. Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970, which in some of its features is more like the one in hand than any other in the Supreme Court, also involved a denial of appreciation, i. e., knowledge of the risk. There the question of the assumption of risk was left to the jury, which found in defendant's favor. Seemingly, it was urged that because of this denial that question should not have been left to the jury. Scant consideration, however, was given to the denial. Mr. Justice McKenna said:

"He (i. e., the fireman who was injured whilst attempting to mount his engine when in motion from a cinder pile) admitted a knowledge of the 'material conditions,' and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding 'not over a gallon,' could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them."

That this presumption is so strong indicates how "rigorous and vigorous" must be the circumstances which give rise to it. They may be thus put: The defective condition and the risk must have been so obvious and the employé's relation thereto must have been so close and intimate that he could not help but have known of them. This makes a denial by him of knowledge thereof in effect a denial of a physical fact. The case of Butler v. Frazee, supra, is an apt illustration of the circumstances under which the presumption arises. The defect in the mangle complained of consisted in the excessive height of the finger guard rail above the feed board. This was obvious to any one looking at it. The plaintiff's relation to the defective condition and the risk was as close and intimate as it could be. As she fed the mangle, it was right in front of her, and she had worked at it for some months before she was injured. This, of course, was a strong case for the presumption to arise. It was so strong that plaintiff did not deny that she knew of the defective condition. Conceivably cases may exist not so strong as this and yet strong enough to give rise to the presumption. But in one and all, in order thereto, the defective condition and the risk must have been so obvious and the employé's relation thereto must have been so close and intimate that he could not help but have known of them.

It must be taken, therefore, that plaintiff's denial of knowledge of the presence of slag such as that upon which he stepped was not only not conclusive as to his state of knowledge, but it may not have been sufficient to make the question in regard thereto one for the jury to determine. The circumstances may be so coercive that it must be conclusively presumed that he had knowledge thereof.

[6, 7] The propositions referred to favoring plaintiff are two. Knowledge on his part of the conditions out of which the risk which he incurred arose cannot be presumed from the fact that an ordinarily prudent person in like business, under like circumstances, would have

ascertained that condition either just before he jumped or theretofore. This fact made out a case of contributory negligence, not one of assumption of risk. That the two defenses are distinct is nowhere better settled than by the decisions of the Supreme Court of the United States. The matter is dealt with in the following cases: Choctaw, O. & G. R. Co. v. McDade, supra, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Schlemmer v. Buffalo R. P. Co., supra, 220 U. S. 596, 31 Sup. Ct. 561, 55 L. Ed. 596; Seaboard A. L. R. R. Co. v. Horton, supra, 223 U. S. 503, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Yazoo & M. V. R. R. Co. v. Wright, 235 U. S. 379, 35 Sup. Ct. 130, 59 L. Ed. 277.

In the Schlemmer Case, Mr. Justice Day said that the distinction between the two defenses was "practical and clear," and, in the Horton Case, Mr. Justice Pitney said that it was "simple." This court, speaking through Judge Hollister, in the Ponn Case, 191 Fed. 687, 112 C. C. A. 228, said that they were "entirely distinct." The distinction was again noted by it in Sterling Paper Co. v. Hamel, 207 Fed. 300, 304, 125 C. C. A. 44, and Yazoo R. Co. v. Wright, 207 Fed. 281, 285, 125 C. C. A. 25. In the case of McMyler Mfg. Co. v. Mehnke, 209 Fed. 5, 126 C. C. A. 147, through Judge Denison, it said:

"When each, alike, constituted a complete defense, the distinction was largely academic, and it was natural that the terms should be used with some confusion; but, now that statutes have made differences in the defensive value of the two things, the distinction has become vital and has been the subject of much judicial inquiry."

He dealt therein with what he termed the "seeming conflict" between the statement of Mr. Justice Holmes in the first Schlemmer Case, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, that assumption of risk "obviously shades into negligence as commonly understood," and that "the difference between the two is one of degree rather than of kind," and that of Mr. Justice Day in the second one that "there is, nevertheless, a practical and clear distinction between the two."

Knowledge of the risk is the watchword of the defense of assumption of risk; want of due care in view thereof is that of contributory negligence; and these are distinct conceptions. Conceivably, at least, it is possible for an employé to have knowledge of a certain risk, when he enters the employment, and at the same time to exhibit a want of due care in entering it in view thereof. But it would seem that the decisions in the Schlemmer and Mehnke Cases are against treating such conduct as making out the defense of contributing negligence under a statute abolishing the defense of assumption of risk and not that of contributory negligence. It is only in case the employé, thereafter, in view of his knowledge of the risk, exhibits a want of due care in his behavior in relation thereto, that he has been guilty of such contributory negligence as to defeat the right of action. In such a case, assumption of risk and contributory negligence, but for a statute abolishing the one or limiting the effect of the other, coexist, each as a complete defense to the action. They need not, however, coexist. In the absence of statute, conceivably at least, there may be assumption of risk without contributory negligence. This is so, in case, at

the time the employé enters the employment, he knows of the risk, and with such knowledge a prudent person would encounter the risk of entering the employment. So there may be contributory negligence without assumption of risk. This is the case where the employé in the course of his employment, with no previous knowledge of the risk, is suddenly confronted therewith and has no freedom of choice between quitting and continuing in the service, but fails to exercise due care in view of the risk with which he is thus confronted. So if a prudent person, under the circumstances of the particular case, would have discovered the existence of the risk and acted accordingly, a case of contributory negligence would be made out, but not assumption of risk. This is so because knowledge of the risk is essential to the defense and this does not exist. All that exists is that the employé ought to have known.

In the case of Texas & Pacific R. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, a switchman was injured whilst attempting to uncouple two cars delivered to defendant by another railroad company to be locally handled and then returned, by reason of the coupling apparatus being defective. The court held that defendant owed plaintiff the duty of exercising due care to furnish him reasonably safe appliances in the way of coupling apparatus as to foreign cars delivered to it to be locally handled the same as in case they were delivered to be handled over its road. The defendant requested an instruction to the effect that, if plaintiff knew or by the exercise of ordinary care could have known that it was the custom of the defendant company not to inspect such cars, he assumed the risk of being injured by reason of the defects in such cars. The court struck out the words "or by the exercise of ordinary care could have known" and gave the instruction thus altered. The action in so striking was approved. In the case of Choctaw, O. & G. R. Co. v. McDade, supra, the jury were instructed that if the deceased employé either knew of the danger of collision with the water spout, or, by the observance of ordinary care upon his part, ought to have known of it, no recovery could be had. Mr. Justice Day, as to this portion of the charge, said:

"The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé."

[8, 9] The other proposition favoring plaintiff is that it does not follow from the fact that the plaintiff knew that pieces of slag of the size of a hen's egg and smaller were between the tracks in the yard at Oneida north of the road crossing and that it was dangerous for him to step on one of them in alighting from the train as he did, so that if he had been injured by stepping on such a piece he could not have recovered because he had assumed such risk, that he had assumed the risk of stepping on a loose piece of the character of that on which he did step. It seems to have been the thought of that portion of the charge to the jury as to what was essential to make out the defense

of assumption of risk heretofore quoted that it did so follow. Possibly there is no room to claim that a piece the size of a man's two fists or of a cocoanut is not substantialy larger and more dangerous to step on under such circumstances than one only as large as a hen's egg. At least, it cannot, as a matter of law, be said that such is not the case. This being so, we must take it that it is substantially larger and more dangerous. And such being the case, it is not to be said that an employé who assumes a particular risk assumes a substantially greater one because it is exactly of the same kind, and that, even though such particular risk is an "extraordinary" one, in that it arises from the employer's negligence, as is the case with the substantially greater one. Conceivably he might be willing to incur the one and not the other. Such fact cannot be made the basis of charging plaintiff with having assumed such risk on the ground that it was inferable from the presence of the smaller pieces that there might be larger ones or even that it was probable or likely there would be. The knowledge of conditions from which a risk arises which the doctrine calls for, as we understand it, is immediate knowledge obtained from pure observation. It does not cover conclusions or inferences from such knowledge. Probably it would be safer to say that it does not cover inferences or conclusions therefrom as to possible, or probable or likely conditions. In the Ponn Case, 191 Fed. 688, 112 C. C. A. 228, Judge Hollister said:

"The only kind of knowledge which, on the ground of assumption of risk, will bar a recovery is actual knowledge."

And in the Wright and Hamel Cases, 207 Fed. 285, 125 C. C. A. 25, and 207 Fed. 304, 125 C. C. A. 44, Judge Warrington characterized the assumption called for by the defense of assumption of risk as a "conscious assumption"; and in order to be conscious assumption there must be actual knowledge. In the case of Chesapeake & Ohio Ry. Co. v. Deatley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016, the plaintiff, a head brakeman, had been injured whilst attempting to mount, at the engine, a freight train in motion. By direction of the engineer he had dismounted at a coal dock, at which the train had stopped, and gone forward to a signal tower a short distance ahead, for information. The attempt to mount was from the platform of the tower as the engine passed him. His employment required him to mount a moving train on proper occasions, and he had frequently mounted his train, whilst in motion, on such an occasion as this one. The mounting could be made with reasonable safety if the train was running at a moderate rate of speed. There was some risk in so mounting, but it was one of the ordinary risks of the employment, in that it did not arise from negligence of the defendant or its engineer. And this risk the plaintiff had assumed. The train in question was running at the rate of 12 miles an hour, and the claim was that this was an unusually dangerous rate of speed at which to mount the train, and that therefore the engineer was negligent in running it at that rate, which made the risk of mounting the train whilst it was so running an extraordinary risk. The principal question in the case was, accepting this to be true: Did the plaintiff assume the risk of such

negligence on the part of the engineer? Possibly the case did not involve the doctrine of assumption of risk at all, in that plaintiff, when suddenly confronted with the increased risk, had no such freedom of choice, as to whether he would continue in or leave defendant's service, as is essential to call for the application of the doctrine, and therefore involved only the question of contributory negligence. But the case was disposed of on the basis that it did, and it was held that plaintiff did not, as a matter of law, assume such risk. It was so held because, the plaintiff not having admitted that he knew and appreciated the increased risk, it could not, as a matter of law, be said that he did; and this though there was no denial on his part that he did. The extraordinary risk which plaintiff thus encountered was exactly the same kind as the ordinary one which he had assumed. It was merely greater in degree. It was a risk which the engineer might easily create, and it was to be inferred that it was possible or even probable or likely that plaintiff would have to encounter it. This, however, was without effect. Mr. Justice Pitney stated defendant's position thus:

"It is insisted that the true test is, not whether the employé did, in fact, know the speed of the train and appreciated the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger."

To this he responded:

"This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employé may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

But it may be urged that the smaller risk, to wit, that of running at such a moderate rate of speed that the train could be mounted with reasonable safety and, which was assumed, was an ordinary risk, in that it involved no negligence and the plaintiff had the right to presume that he would be subjected to no greater risk by running the train at a greater rate, whereas here the smaller risk, to wit, the presence, at the alighting place, of pieces of slag the size of a hen's egg and smaller, was in itself an extraordinary risk, in that it involved negligence. They were dangerous to step on. Brakemen were known to alight at that place in the line of their duties. The pieces could have been removed and reasonably should. Thus knowing that defendant was negligent to this extent, plaintiff not only had no right to presume that it had not been also negligent in permitting larger and more dangerous pieces to be there, but reasonably should have inferred that it might have or probably or likely had been and if he was not willing to incur the risk should have quit the employment. In the case of Texas & Pacific R. R. Co. v. Archibald, supra, though the only question directly involved was whether the words as to ordinary care were properly stricken out of the instruction requested by the

defendant, it was held that the jury should not have been instructed that, if plaintiff knew of the custom not to inspect and repair foreign cars handled locally, he had assumed the risk of injury by the defective coupling apparatus which he encountered, as it was in the instruction in its altered form. It was negligence on defendant's part not so to do, and it was inferable therefrom that the coupling apparatus of cars so received by it possibly might, even probably or likely would be, defective, and yet plaintiff was not held to have assumed the risk of the presence of such defective apparatus because he knew of such negligence.

A conclusive reason why the employé should not be chargeable with knowledge of defective conditions the possibility, probability, or likelihood of the existence of which is inferable from known conditions, is that the only basis for charging him with such knowledge is that an ordinarily prudent employé under like circumstances would draw such inference and act accordingly; and, as we have seen, the question of care on the employé's part has nothing whatever to do with the defense of assumption of risk. It has solely to do with that of contributory negligence.

[10] We come then to the narrow question on which the right of the defendant to the peremptory instruction hangs. It is whether there was substantial evidence that plaintiff did not know that slag, of the same character as that on which he stepped, i. e., substantially as large and as dangerous, lay between the two tracks in the yard at Oneida north of the road crossing. Here we are confronted at the outset with plaintiff's denial of such knowledge. This of itself was substantial evidence—evidence sufficient to carry the question to the jury—in the absence of a presumption of knowledge, i. e., of the existence of such slag at that place having been so obvious, and plaintiff's relation thereto having been so close and intimate that he could not help but know thereof. We shift then from this denial to consider whether the facts of this case were such as to give rise to such presumption.

The basis of the presumption contains two elements: The obviousness of such slag of that character as was there, and the closeness and intimacy of plaintiff's relation thereto. It is clear that it was obvious that such slag of that character as was there was there. It lay on the ground out in the open. There was no obstruction preventing any one, looking at it and close enough, from seeing it. To such a one it was plainly observable in the daytime. The more there was of it and the longer it had been there, the less close and intimate need plaintiff's relation have been to it in order for him to have known of it. Hence the importance of the question as to the quantity thereof and its duration there. Plaintiff introduced four witnesses besides himself whose testimony had bearing on these two matters; the defendant two, the testimony of one of whom was in line with that of plaintiff's four. The testimony of each of these five witnesses need not be set forth here. The effect thereof will be combined into a single statement.

The defendant ballasted its railroad from Oakdale, Tenn., to Somerset, Ky., which included the yard at Oneida with furnace slag

in the fall of 1907—four years before the accident—and it had not placed any new slag thereon since. South of the road crossing in front of the passenger depot the tracks and the space between them had been covered with small screenings. In the yard north of the road crossing between the two tracks there was a great deal of loose slag. In the distance of 90 feet from the road crossing it would take a man a day to pick up and remove it. The pieces in size ranged from the size of the exhibit down to that of a man's fist or a hen's egg and smaller. There is no statement as to the number of pieces the size of Exhibit No. 1 that were there, but the testimony tended to show that they were numerous, were everywhere, and had been there since this portion of the road was so ballasted.

Then, as to the closeness and intimacy of plaintiff's relation thereto, he testified that he passed Oneida several times a week, as much at nighttime as in the day, or practically every day or night ever since the road had been ballasted; that in alighting from the train as he did at the time of the accident he did as he "usually" did; and he had inspected trains at that point in a similar way "at many other times." His testimony as to this was somewhat corroborated by witnesses testifying in his behalf. Of course, the closeness and intimacy of his relation to such slag was affected by the consideration that in so alighting it was in the performance of the duty of inspecting the train as it passed him and absorption in that duty would draw his attention more or less from the slag; but according to his admission, it had not done so sufficiently to prevent his taking notice that there was slag there as large as a hen's egg and smaller.

If then, this had been all the evidence bearing on these two elements of the basis of the presumption in question, it would be hard to resist the conclusion that the presence of pieces of loose slag substantially as large and as dangerous as Exhibit No. 1 at that place was so obvious and his relation thereto was so close and intimate that he could not have helped but know thereof, and that therefore he must be presumed to have known of it, against which presumption his denial was of no avail. Such, however, was not all the evidence bearing on these matters. In upholding its meritorious defense that plaintiff alighted not in the line of his duty but to get a bottle of beer, defendant introduced strong testimony to the effect that plaintiff was not in the habit of alighting there for the purpose of inspection. The tendency of this testimony was, not merely that he had not alighted for such purpose on the occasion in question, but also that his testimony as to the extent to which he had theretofore alighted was an exaggeration. In view thereof, the conclusion could have been drawn that plaintiff, theretofore, had alighted only occasionally, and that therefore his relation to such pieces of slag was not so close and intimate as appeared from his own testimony. If, then, plaintiff had only so alighted occasionally, and when he did alight he was absorbed in the performance of his duties, is it to be said, even though such pieces of slag were as numerous and had been there as long as the testimony referred to tended to establish, that plaintiff could not help but have detected their presence? We seriously doubt it. But

this still is not all the evidence bearing on the question in hand. The defendant did not adhere to its tactics of "laying low" and let the plaintiff have his way as to the condition of the slag, helping out by cross-examination of his witnesses to magnify such condition. The other witness introduced by it on that subject, referred to above, gave testimony tending to show that the condition was not as bad as it would otherwise appear to have been. He testified that he passed through the yard at Oneida every day, that it "seemed to be in good condition," that it was "well cared for, seemed to be kept up and clean all the time," that he did not "remember seeing prior to the accident a piece of slag as big as your two hands lying between the tracks at or near where Thompson was injured," and that he had observed "George McDaniels (whose deposition had been taken by defendant and was not read), who was track walker at that time, * * * frequently with a wheelbarrow clean up stuff in the yard * * * that he didn't want left in the yard." The rules of the company read in evidence by plaintiff to prove negligence required that the yard should be kept clean of such slag. In addition, plaintiff's denial that he had theretofore seen such slag in the yard was some evidence as to the extent of such slag therein and how long it had been there.

In view then of this conflict in the evidence as to both elements of the basis of the presumption, it cannot be said that a case of presumptive knowledge was made out against which plaintiff's denial of knowledge was of no avail. The fact that the conflict is made out by defendant availing itself of plaintiff's evidence and plaintiff of defendant's makes no difference.

We conclude, therefore, that the court did not err in overruling defendant's motion for a peremptory instruction at the close of all the evidence.

[11] The other error assigned was the refusal to give a certain instruction requested by defendant. It is in these words:

"If the jury should find that plaintiff, while riding along there preparing to alight, could have seen the piece of slag complained of before he jumped off the engine, then they should find that it was of such nature as to be open and obvious and that he assumed the risk."

In view of the preceding discussion, it is hardly necessary to say much in support of the position that defendant was not entitled to this instruction. It is sufficient to say that it places the defense on a wrong basis. The sole basis thereof is knowledge of the risk at the time of entering into the employment or obtained subsequently under such circumstances that there is freedom of choice as to remaining in the employment before incurring it. What the employé could have known does not enter into it. That has to do with the defense of contributory negligence, and the two defenses should never be confused.

We are constrained, therefore, to affirm the judgment below.

DENISON, Circuit Judge. I concur. The criteria which should govern a jury in determining whether there has been assumption of

risk, as distinguished from contributory negligence, are clearly stated in the opinion; but what we said in McMyler Mfg. Co. v. Mehnke, 209 Fed. 5, 126 C. C. A. 147, seems to call for some comment. We there assumed that there were cases in which the two things coexisted or overlapped, and in which it would be difficult definitely to characterize the plaintiff's act. This difficulty does exist, but is—at least usually—one of fact and not of law. The shading of one into the other, and the difference which is of degree rather than of kind, to which Mr. Justice Holmes refers in the first Schlemmer Case, 205 U. S., at page 12, 27 Sup. Ct. 407, 51 L. Ed. 681, pertain to those varying inferences which may be drawn from the same evidential facts. It may well be said that the notice of danger which a prudent plaintiff should have taken, and the knowledge of that danger which the actual plaintiff must have had, are things which shade into each other and are different in degree, but not in kind. Indeed, the jury will have practical difficulty in distinguishing between that danger which was merely so apparent that every reasonably prudent man would observe it, and that danger which was so obvious that the plaintiff could not help but know it; yet the knowledge which plaintiff should have had and the actual knowledge to be imputed to him are distinct—at least in theory—and the authoritative cases cited in the opinion must be accepted as establishing this distinction.

In the McMyler Case, it was suggested that an assumption of risk which did not involve negligence might, by increase of risk, develop into negligence, and a similar relation is suggested in Seaboard v. Horton, 239 U. S. 595, 601, 36 Sup. Ct. 180, 60 L. Ed. 458. It would seem that in the more typical case negligence would develop, by knowledge, into assumption. In that event, would the negligence disappear, or would it persist and continue to invoke its due results? This query does not breed so much trouble in the present case, where a finding that actual knowledge had supervened upon the mere duty to know could well raise the statutory bar, as it would under a statute like that involved in the McMyler Case, where, although the greater would include the less, the less would bar the action and the greater would not—so far as the words of the statute go.

From another aspect of the present case confusion (probably as affecting the fact inference to be drawn) may appear. If plaintiff knew of the existence of the stone, or others like it, yet he also knew that there were places where he could safely step. He picked out such a place and intended to step upon it, but then carelessly neglected to do so; he negligently stepped into a place which he knew was unsafe. If the other elements of assumption existed, might there not be difficulty in stating or applying—or both—the proper formula of distinction?

However this may be, and if indeed there may be cases seemingly within the twilight zone, where no satisfactory and intelligible rule of distinction can be stated, I am content to think that when Congress by this statute greatly broadened plaintiff's right to recover, preserving only one bar out of the three existing, the defendant must

bring its case clearly within the bar so preserved; and that plaintiff's conduct should not be treated as assumption of risk, and so be allowed to defeat the action, unless it can be clearly and distinctly so classified. As said in the McMyler Case, the statute cannot intend to preserve by one name that which it destroys under another.

GREAT NORTHERN RY. CO. v. ENNIS et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2598.

1. RAILROADS ⊂⊃348(1)—CROSSING ACCIDENTS—EVIDENCE.
In an action against a railroad company for the death of a traveler whose team was frightened by the carcass of a dead horse on the right of way, evidence *held* to warrant a finding that the horse on the right of way was killed by a train.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. ⊂⊃348(1).]

2. RAILROADS ⊂⊃305(3)—CROSSING ACCIDENTS—LIABILITY OF COMPANY.
Where a railroad company allowed the carcass of a horse killed by one of its trains to remain on its right of way near a railroad crossing, emitting offensive odors, the company is, under Rev. Codes Mont. §§ 6162, 6163, declaring anything injurious to health or offensive to the senses to be a nuisance, and that a public nuisance to be one which affects members of the community, liable for damages occasioned by the nuisance, including the frightening of passing teams.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 971; Dec. Dig. ⊂⊃305(3).]

3. RAILROADS ⊂⊃350(15)—CROSSING ACCIDENTS—ACTION—JURY QUESTION.
In an action for the death of a traveler killed when her team took fright at the putrefying body of a horse on railroad right of way and ran off, the question whether the traveler or her agents were guilty of negligence in taking that particular road, where there was another road which could have been used and the presence of the dead horse was known, *held* for the jury.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1168; Dec. Dig. ⊂⊃350(15).]

4. RAILROADS ⊂⊃324(1)—CROSSING ACCIDENTS—LAST CLEAR CHANCE DOCTRINE.
Where a traveler's team took fright at the putrefying body of a dead horse lying near a railroad crossing and ran away, the last clear chance doctrine has no application on the theory that the traveler should have taken another road knowing of the presence of the dead horse.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020, 1022, 1023; Dec. Dig. ⊂⊃324(1).]

5. NEGLIGENCE ⊂⊃132(3)—EVIDENCE—HABIT—ADMISSIBILITY.
Where it was claimed that the driver of a traveler, killed when her team ran off on seeing a dead horse on a railroad right of way near the crossing, was intoxicated and negligent, evidence that the driver was habitually a drinking man is not admissible; proof of his habit not being proof of his condition at the time of the accident.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 259, 260; Dec. Dig. ⊂⊃132(3).]

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6. EVIDENCE ⊜577—FORMER TESTIMONY—ADMISSIBILITY.

Under Rev. Codes Mont. § 7887, declaring that the testimony of a witness deceased, or out of the jurisdiction, given in a former action between the same parties, relating to the same matter, is admissible, evidence of plaintiff's witness given at a former trial between the same parties is admissible where at the time of the second trial he was without the state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406; Dec. Dig. ⊜577.]

7. APPEAL AND ERROR ⊜1047(3)—REVIEW—HARMLESS ERROR.

Where evidence of inconsistent statements made by a witness out of court was mere hearsay, any error in the refusal of the court to permit defendant, the transcript of the witness' testimony at a former trial being read on account of his absence from the state, to withdraw a statement that questions as to the witness' inconsistent statements were not for impeachment, 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 District of Montana; George M. Bourquin, Judge.

Action by Herbert L. Ennis and another against the Great Northern Railway Company, a corporation. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

This action was brought to recover damages on account of the death of the wife of the defendant in error Herbert L. Ennis and mother of the other defendant in error, who were plaintiffs in the court below; her death resulting from being thrown from a buggy at the time drawn by a runaway team of horses in charge of one Bigelow, an employé of the husband of Mrs. Ennis.

The case was twice tried and the complaint twice amended. That upon which the last trial was had alleged, among other things, that the plaintiff in error (one of the defendants to the action in the court below) owned and operated at the time in question a line of railway across the state of Montana and across Valley county of that state and owned in connection with its railway a right of way which at the place where the accident occurred embraced a strip of ground about 75 feet wide on each side of the railway track, of which section of the railway one John Hamilton (also made a defendant in the court below) was section foreman, whose duty it was, among other things, to abate any nuisance, public or private, that might exist on that portion of the said right of way; that some years before the accident the county commissioners of Valley county, on proceedings taken for the purpose, undertook to lay out for use by the traveling public a certain roadway across the right of way of the defendant company at a certain point on the section under the supervision of Hamilton, which roadway was about 60 feet in width and crossed the railway track under permission of the defendant railway company, and was open to travel by the public, and extended to the town of Bainville in Valley county, where a post office is maintained, and to points beyond, since which time the said roadway has been at all times used by the traveling public as if it were a public highway, and has been so treated by the commissioners of the county in the expenditure of money in its opening, maintenance, and repair; that the defendant company placed and maintained across its tracks a plank crossing on said roadway for use by the traveling public, and placed, and has since maintained where the roadway crosses its right of way, a warning signal that a public crossing existed there, and installed and has since maintained fences and cattle guards bordering the said roadway where the same crosses its right of way, and has since the year 1906 treated the said roadway where it crosses its right of way as if it were a regularly laid out public highway, and has thus

invited the use of the roadway by the traveling public; that during the month of December, 1908, the defendant company placed "on its said right of way and in close proximity to the said traveled roadway, and in such position so that it could readily be seen by animals traveling on said roadway as it crossed said right of way, the carcass of a horse"; that the defendant company permitted the carcass to remain where it was so placed until April 18, 1909, undergoing decomposition and exhaling noxious odors, so that, on the day last mentioned, and for some time prior thereto, it had become and was a public nuisance and an object likely to frighten teams driven along the said roadway, all of which the defendants knew, or in the exercise of reasonable diligence should have known; that on the day last mentioned Mrs. Ennis was being driven by one Bigelow with a gentle team along the roadway, when the team became frightened by the carcass and the odor therefrom and ran away, although the driver was exercising due care, resulting in her being thrown from the buggy and receiving injuries which caused her death.

In its answer to the second amended complaint the defendant railway company admitted its ownership and operation of the railway and right of way as alleged, and that its codefendant Hamilton was at the time of the accident in question, and for more than a month prior thereto had been, section foreman of that part of the road where the accident happened, and admitted the crossing of its right of way by the roadway as alleged, and the existence of the alleged fences and cattle guards, and admitted the laying of the carcass of the horse as alleged, the driving of Mrs. Ennis by Bigelow in a buggy drawn by a pair of horses in the attempt to cross the railway track, and that the team became frightened and ran away, resulting in the injuries to Mrs. Ennis and her death from them, but denied that the horses became frightened by the carcass or that the runaway was in any manner or to any extent caused by it. And for a separate answer the defendant railway company set up that, if it "was in any respect negligent in any of the matters stated in the second amended complaint herein, then and in that event plaintiffs' damage, if any, was due to, and caused by, their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employés, and each of them to exercise such reasonable care and caution, for the safety of said Nettie Ennis, as would, could, and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint; and to the fact that the said Nettie Ennis and the said John Bigelow so negligently drove the said team of horses that the same ran away and escaped from their control. Further answering, this answering defendant says that, if the matters of fact stated in said second amended complaint are true, then and in that event, in the exercise of such reasonable care and caution as the average reasonably prudent person, under all the circumstances then and there existing, would, could, and should, and ordinarily would, have exercised, the plaintiffs, the said Nettie Ennis, their and her agents, servants, and employés and the said John Bigelow would have known—and, in fact, actually did know—the facts stated in said second amended complaint, if the same were or are true and they, and each of them, had the last clear chance to avoid the alleged negligence of this answering defendant and the damages, if any, resulting therefrom, and to avoid the said runaway and by the exercise of such reasonable care and caution aforesaid, as the average reasonably prudent person, under all the circumstances, would, could, and should, and ordinarily would, have exercised, they, and each of them, could, should, and would, and ordinarily would have discovered and avoided the alleged negligence, if any, of this answering defendant, and the alleged dangers alleged in the complaint."

The replication of the plaintiffs put in issue the allegations of the second separate answer.

Veazey & Veazey, of Great Falls, Mont., for plaintiff in error.

Walsh, Nolan & Scallon, of Helena, Mont., and R. O. Lunke, of Sidney, Mont., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). We pass without comment the many manifestations of feeling disclosed by the transcript in this case, both on the part of counsel and the court, in the hope that we shall not see here another such record.

The issues between the parties were few and simple: Was there negligence on the part of the defendant company? If so, was it the cause of the death of Mrs. Ennis, and was there such contributory negligence on her part as precluded a recovery for damages by the plaintiffs?

[1, 2] The testimony of Hamilton was that at the time of the accident he was not section foreman, but was at that time engaged in prospecting for gravel.

"I started to prospect for gravel the same day the horse got killed," said the witness. "I saw the horse there that same day. It was discovered in the morning about 7 or 8 o'clock. The horse was then dead. I had been over that place the day before about half past 4 or 4 o'clock. There was nothing there then. I made an examination of the horse the next morning at half past 8 o'clock. The horse was cut on the hip. The skin was broken. The horse was about 16 or 17 feet on the outside of the rail. The horse lay between the space between the wind fence and the cattle guard. I don't know exactly how far up. I would say it was about 10 feet from the cattle guards. Trains passed through there in the nighttime. During the night preceding the morning when I first saw this carcass on this roadway, there were two passenger trains during the night and several freight trains—I don't know how many. I did not see any freight trains there myself during the night; I didn't hear any, that I remember now. I didn't pay any attention to trains going through there. Under the schedule that worked there, there were trains scheduled to go through there in the nighttime. * * * It was not my duty to make any report as to animals killed by trains. I was not section foreman at that time. I had charge of something else. I was prospecting for gravel at that time. Another foreman was in charge of the section at that time. As section foreman, it was my duty to report about cattle killed by the trains. I did not make any report about this horse being killed myself. * * * The section foreman put ties on the animal to burn it that same morning. I was on a saddle horse, and he came around in a hand car, and he discovered the horse, at the same time he went around. The carcass was on the south side of the track, and on the road side of the fence."

The witness George Anderson testified as follows:

"I am assistant roadmaster for the Great Northern, and held that position in the spring of 1909. As such officer, I had jurisdiction over the section foremen along my line of route. My duty is to look after the road in general, including the right of way fence and including cleaning up the right of way and keeping up the road fence. As to removing any obstructions that might be on the right of way, such as dead animals, and things of that kind, I bury them. I had jurisdiction over that, too. I had no jurisdiction at all in relation to ascertaining how animals that were on the right of way got there. My jurisdiction would simply extend to disposing of the carcass after it got there. I saw the carcass which is said to be the cause of the runaway in question. I saw it there different times between December, 1908, and the spring of 1909. My recollection would be that it came there in December. As assistant roadmaster, I gave directions as to any disposition to be made of it. On account of the ground being frozen, and it being a hard matter to bury it, I instructed the foreman to burn it. I do not know how it came there. No claims come to me for animals killed by the railroad. They burned it twice that I know of, and probably three times."

The circumstances disclosed by the evidence were sufficient to justify the jury in concluding that the horse was killed by a passing train.

Thompson on Negligence, § 2194. And if the defendant company permitted the carcass to remain upon its right of way and emit offensive odors close to a roadway traveled by the public, there can be no doubt of its liability for damages occasioned by such nuisance. Revised Codes of Montana, §§ 6162, 6163; Wood on Nuisances (3d Ed.) § 115; Ellis v. Kansas City, etc., Ry. Co., 63 Mo. 131, 21 Am. Rep. 436; City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005.

[3-4] The husband of the deceased testified, among other things, that he had owned the team of horses in question from four to six weeks, and had known them for about six months; that Bigelow, who he said was a good horseman, was in his employ at the time; that he himself drove the team a good deal; that the horses were well broken, and that his wife also drove them, which he would not have permitted her to do if he had not considered them gentle; that about the last of December or the first of January, and three or four days after the carcass was first there, he saw Hamilton pile ties on the carcass of the horse and set them on fire; that the carcass was frozen, and as a consequence about all that was accomplished was the burning of the hair; that subsequently he saw the carcass frequently in going to Bainville, always seeing it except when it was covered with snow more or less.

"Sometimes," said the witness, "it would be seen plainly, and sometimes it would be buried in snow, so that it would be pretty hard to see it. I think the last time I went across there prior to the accident was Thursday evening, if I remember right. The accident happened on Sunday, the 18th of April. During the time that the carcass was there I drove there frequently back and forth, crossed there. I had been driving those horses back and forth for about four or five weeks."

The witness further testified that after the weather began to get warm he noticed odor from the carcass, which grew stronger as the month advanced; that that season it was pretty cool until the first of April, after which the smell became perceptibly stronger.

"By the Thursday before the accident," said the witness, "the dogs and coyotes had worked on that carcass during the winter in frozen weather, and had eaten up the upper portion of it. The under side of it laid on the ground. That was pretty near all intact. The bones held up there, and the skin was on the head and back and shoulders. That was pretty near perfect. The upper ribs, as it looked to me, had been eaten off. The meat had been eaten off of that portion. The ribs were still attached to the backbone, and you could see space plainly between them. There was no connection between the ribs. The outer portion of the body had been eaten away, and the lower portion as it lay on the ground, the major portion of it, was there yet. At the time of the accident the carcass was not far from the traveled road. It was somewhere in the neighborhood of 12 or 14 feet from the driveway on the right-hand side as you go towards my house from Bainville, or on the left-hand side as you go from my house towards Bainville. I have had considerable experience in handling horses all my life. Yes, sir; I have handled horses on the range. Yes, sir; I have encountered carcasses on the range when I was handling horses. As to whether or not a carcass like that would have a tendency to frighten horses, it always does."

There was other testimony given tending to show that the carcass of a horse, especially when in a condition to emit strong odors, not

only has a tendency to frighten a team of horses, but may make them run away. On the part of the defendant, there was testimony given tending to show that the carcass in question would in no manner tend to frighten horses.

Undoubtedly, both Ennis and his wife, as well as Bigelow, knew of the existence of the carcass, for the evidence without conflict shows that it had lain where it was for months, and the latter two had passed it on the way to Bainville the day of the accident. It is conceded that mere knowledge of an obstruction in or along a highway is not always enough to establish contributory negligence as a matter of law in one who attempts to pass it, but that whether such a person is negligent in attempting to pass such a known obstruction, or in not avoiding it, is ordinarily a question for the jury. But it is contended that in this case because the plaintiff Ennis and his wife and Bigelow all knew of the existence of the carcass, and because whatever dangers flowed from it were peculiarly known to those familiar with horses, as were the parties mentioned, and because the plaintiff knew, as the evidence showed that he did, that the railroad company had attempted to burn the carcass, and because he made no complaint to the company in respect to it, and because the carcass "could easily have been removed by him with a shovel or team," and because the evidence showed that there was another road leading to Bainville variously stated at from 2½ to 5 or 6 miles longer, it is insisted that the issue of contributory negligence was established as a matter of law and that the trial court should have so held.

We think the case of District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237, cited by the plaintiff in error in support of the contention, wholly unlike the present one. There the steam roller which frightened the horse of the plaintiff in the action in passing it on Park street, in the city of Washington, was lawfully on that street where it had been used in resurfacing the street with macadam. The court said, among other things:

"That the plaintiff had notice of the presence of the roller on Park street in ample time to have avoided it is undisputed. When he turned from Fourteenth street into Park street, it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the district to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—that the district was under no obligation to restrain the plaintiff from attempting to pass, either by closing Park street or by other means. The district was not bound to presume that it would be necessarily hazardous to attempt to drive past the roller, stationary and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. The district, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would inevitably do so. It was bound to give sufficient notice to drivers of the presence of the roller in time to enable them to avoid passing it, if desired. The district, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being law-

fully on the street, the district was not bound to guard against the consequences of a voluntary attempt to drive by this roller. Certainly, if a driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the district ought not to be charged with notice that the attempt would be dangerous either to life or to limb."

In the present case, the railroad company had no legal right to leave the carcass of the horse within its right of way, the direct tendency of which, according to testimony on the part of the plaintiffs, might cause injury to people passing along the roadway. It need hardly be said that Ennis was under no obligation to bury or remove it.

The evidence showed without conflict that for many years the roadway had been traveled by the public without objection, if not by invitation of the railroad company, many times by the plaintiff Ennis, his deceased wife, and Bigelow, and on different occasions with the horses in question, which, according to testimony on the part of the plaintiffs, was a gentle and tractable team, while, on behalf of the defendant, there was testimony tending to show that it was a nervous and high-strung one.

Bigelow, the driver, testified that, just before the horses became frightened by the carcass and the odors therefrom, they had been frightened by a piece of paper and then attempted to run away, but from that fright he had succeeded in quieting them and gotten them to going steadily when very shortly afterwards they approached the carcass and again became frightened and the accident happened. Whether it was the paper or the carcass which caused the runaway and the death of Mrs. Ennis the trial court left to the jury to determine under very plain instructions which are not complained of, and so were the instructions in respect to the alleged negligence of the defendant company clear and correct.

There was, however, testimony given by a witness for the defendant company named Hubener tending to show that, while in Bainville on the day of the accident, Bigelow had taken one or two drinks, and there was also testimony tending to show that there was the smell of liquor on his breath. On that point the trial court instructed the jury as follows:

"The issue in reference to the contributory negligence alleged against the driver Bigelow and, in reference to that, all the court has heard in the way of evidence, is that Bigelow had been drinking that day, a drink or two, seems to be all the direct evidence. Possibly you would say one drink is all that is actually proven; but it is for you to say because the witness Hubener was the defendant's witness, and, if he is in doubt, you have the right to take the most favorable view of the evidence for the plaintiffs. There is other evidence that witnesses smelled liquor on Bigelow's breath, saw a bottle in his pocket. They do not describe the bottle, but, perhaps, under all the circumstances, it would be a fair inference that it was a bottle of liquor of some kind. Outside of this, the evidence shows there were other horses which passed there, and had not been seriously frightened, and you would have a right to infer that it would not frighten horses that were driven with ordinary care. There is not much evidence from which you might infer negligence on the part of Bigelow; at the same time the court will leave it to you to say, under proper direction, as to the charge against Bigelow. The charge, of course, would be thrown over to these plaintiffs as to whether Bigelow was negligent himself. 'Contributory' negligence means that a

party who is laying a claim against another person for his negligence was himself lacking in ordinary care due for his own safety, under the circumstances, and that, because of that, contributed to his injuries. In other words, if he had not been negligent, the injury would not have happened; that even though the defendant company was negligent in leaving the horse there, and even though it frightened the team, yet if Bigelow had driven with ordinary care, and thus prevented the accident, and could have prevented the accident that happened, why then his negligence contributed to the injury; and, since he was the servant of Mr. Ennis and Mrs. Ennis, they would not be entitled to recover in this case. Now, that is for you to determine. Now, this condition the defendant must prove, and prove to your satisfaction by a preponderance of the evidence. * * * In my opinion, the evidence of contributory negligence would be very slight. But you are not bound by that opinion. You have a right to infer it from the fact that Bigelow had some drinks; but I imagine most men take a drink or two occasionally, and the question is whether that incapacitated him so that he, when driving across the crossing, where the carcass was, was not acting as a reasonably prudent man should. Unless you find by a preponderance of the evidence that he did not so drive, why, you put the question of contributory negligence out of sight."

No exception was taken to this instruction.

The defendant company did, however, except to the action of the court in holding that the deceased and her driver were not obliged to take the other road mentioned instead of the one along which the carcass of the horse lay, and that the doctrine of the last clear chance rule contended for by the defendant company was inapplicable to the case.

In concurring in that view, we think it sufficient to say that there was obviously no chance, clear or otherwise, to take the other road when the trouble that caused the accident began. All that it was then possible for the driver to do was to hold and drive the horses as best he could in the place where they were and under the conditions then and there existing. Neither the driver nor Mrs. Ennis, any more than any other of the public, was obliged by the last clear chance rule to abstain from traveling the roadway in question while the carcass of the dead horse remained where it was, the effect of which, according to testimony on behalf of the plaintiffs, might cause injury to passers-by, and, according to testimony on behalf of the defendant, would have no such effect. The duty imposed by the rule referred to is "to avert the threatened injury after the perilous situation is actually discovered." Dahmer v. Northern Pacific Ry. Co., 48 Mont. 161, 136 Pac. 1059, 142 Pac. 209. The record here shows without dispute that this roadway was regularly traveled by the public, including the plaintiff Ennis, his deceased wife, and Bigelow, while the carcass lay where it was, and that it had been passed without trouble by Bigelow and the deceased on the day of the accident on their way to Bainville; the runaway occurring on the return trip.

[5] It is also insisted that the court below erred in refusing to permit the defendant company to prove that Bigelow was by habit a drinking man—from which, as the court below said, to raise a presumption that he had drunk to excess at the time in question, from which to presume that he drove negligently, from which to presume that his negligent driving contributed to the injury complained of.

We are of the opinion that the ruling of the trial court was right. Evidence in respect to the driver's drinking on the day of the accident was permitted to go to the jury on the question of the alleged contributory negligence, for such weight as they should deem it entitled to. The principle which we think should control the contention here made, that the defendants should have been allowed to show that on other occasions Bigelow was in the habit of drinking to excess, was announced by the Supreme Court in the case of Thompson v. Bowie, 4 Wall. 463, 18 L. Ed. 423. That case was an action brought to recover on certain promissory notes. Bowie, the maker, sought to avoid payment on the ground that the notes were founded on a gaming consideration and therefore void. There was no direct evidence offered at the trial to impeach the consideration of the notes, and circumstantial evidence only was relied upon. The trial court permitted a brother of the defendant to testify that whenever his brother was under the influence of liquor he had a propensity to gamble, and as the maker was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, payable to the keeper of the gambling house, the inference was that they were given for money won at play. The court, in disposing of the question, said:

"All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas J. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev. § 54. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

[6] The only other point made for the appellant that we need to specifically mention arose out of the offer and admission of the testimony of Bigelow on the first trial of the case and the attempt on behalf of the defendant company to show that the witness had made other inconsistent statements.

The record shows that on the trial under consideration the plaintiffs offered in evidence the transcript of the testimony of Bigelow given on the first trial, under this stipulation:

"It was stipulated between the parties that the driver, Bigelow, was not now in the state of Montana, and was probably in the state of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial."

The defendant, however, contended that before such testimony could be admitted it was essential for the plaintiffs to show, not only that

the witness was out of the state of Montana, but that his absence was permanent, or indefinite.

We think the contention answered by the statute of Montana, which declares:

"In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * (8) The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter." Section 7887, Rev. Codes Mont.

Apart from the statute, however, we are of the opinion that the testimony was admissible. In Chicago, St. P., M. & O. Ry. Co. v. Myers, 80 Fed. 361, 365, 25 C. C. A. 486, 490, the Court of Appeals of the Eighth Circuit said:

"The defendant company assigns for error that the trial court wrongfully excluded a stenographic report of the testimony of a witness by the name of Moses R. Dickey, which had been given on a former trial of the case, after the defendant company had shown that the said Dickey was a resident of the state of Ohio, and that the defendant had been unable to procure his attendance at the second trial. The rule appears to be established in Minnesota—where this case was tried—that such testimony is admissible. Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; King v. McCarthy, 54 Minn. 190, 55 N. W. 960. And the same rule, it seems, prevails in some other jurisdictions. Railway Co. v. Elkins, 39 Neb. 480, 58 N. W. 164, and cases there cited. We can see no substantial objection to the admission of such testimony when, on the first trial, the witness was fully examined and cross-examined, provided, always, that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct, by the person by whom it was reported, and provided further that the witness is beyond the reach of the process of the court, and his personal attendance cannot be secured."

In 5 Encyc. of Evidence, p. 904, the rule is thus stated:

"The absence of a former witness from the state is sufficient ground for admitting proof of his former testimony"—citing many cases.

And in Wigmore on Evidence, § 1404, it is said that where the witness is out of the jurisdiction, and it is therefore impossible to compel his attendance, his testimony given at a former trial is generally accepted.

[7] In the course of the testimony of Bigelow so introduced, he gave a detailed statement of his familiarity with the roadway, the team of horses in question, of the trip to Bainville, and of the accident on the return trip, and of the piece of paper that has been mentioned, saying, among other things, on cross-examination:

"That piece of paper blew across the road between the house and the Hanson gate, about ten rods from the house. It just blew across the road, and went on down another part of the country. * * * These horses took fright at this piece of paper like any ordinary horses, just kind of shied out to one side a little bit. I pulled them right up, and they settled down and seemed to be as calm and cool as could be. It was not over two or three minutes that I took to calm them down and get them cool. It was about a minute until I had them down to a walk. I just pulled them down and got them on a walk. * * * As to whether I have testified to the effect that it was the blowing of the paper across our path that frightened them, well, it was fluttering there and then blew across. As regards which frightened them, the fluttering or the blowing across, it was the blowing across. The

fluttering frightened them first, and then the blowing across. A small piece of paper fluttering on the bush started them first."

The record proceeds:

"Thereupon there was offered and received in evidence a written statement, signed by the witness, and referred to in this testimony, reading as follows: 'A small piece of paper on a bush fluttered considerably close to this crossing, which frightened the team. This was about at the bottom of the hill referred to. I had just got the team quieted down when we reached the fill or approach to the track, and at that moment the wind blew the odor from the dead carcass right toward them, which frightened the team, so that they became unmanageable and ran away.'

"As to whether, as I approached this crossing, I did not expect the horses to be frightened to such an extent that they would get beyond control, I had a tight hold on them in case; I thought I had control over them enough to hold them. No, as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control. No, sir; I had not been drinking any that day. As to whether I am a drinking man, yes, sir, I take a drink. I was not drinking intoxicating liquors prior to that time to excess.

"The remainder of said transcript of the testimony of the witness Bigelow, as given at the last trial, read as follows: 'Q. Do you remember at any time, or did you at any time state to any one at any place, that it was this piece of paper which caused this runaway, and not this carcass? By General Nolan: I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement. By the Court: Sustained. By Mr. Veazey: We are not laying the foundation for impeachment, but are inquiring for evidence. By General Nolan: Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except in so far as this statement would be contradictory to anything he has said on the stand here. By the Court: I will allow him to answer the question. Q. Did you ever at any time or at any place make any statements to any one to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass? A. No, sir.'

"Before the first question above set forth, beginning with the words, 'do you remember at any time, or did you at any time,' etc., was read, counsel for the defendant advised the court that defendant desired to withdraw said question, and to waive it, and advised the court that, if the witness were present, an impeaching question would be propounded, since impeaching testimony was not available, and defendant demanded that the witness be produced, in order that an impeaching question might be propounded; but the court declined to allow said question to be withdrawn. To which ruling of the court defendant, by its counsel, then and there duly excepted. Which said exception was thereupon noted and allowed. And the court likewise overruled the demand of the defendant that said witness be produced. To which ruling of the court the defendant, by its counsel, then and there duly excepted. Which said exception was thereupon duly noted and allowed.

"Likewise when that part of said transcript, containing the objection to said question and the court's ruling sustaining the said objection, and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence, was read, counsel for defendant advised the court that defendant desired to withdraw said disclaimer that it was not laying the foundation for impeachment, and counsel stated that, at the time of the former trial, the defendant did not have any impeaching testimony, and was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement or impeaching testimony, but that since then impeaching testimony had been procured, and defendant desired, therefore, to withdraw said disclaimer and to impeach the witness. By the Court: The court will not permit it. Now, we will hear what the witness has to say and bring that up later. To which ruling of the court the defendant, by its counsel, then and

there duly excepted; which said exception was thereupon duly noted and allowed. Thereupon, the testimony of said witness, as above set forth in said transcript, was read to the jury."

Sections 8022 and 8025 of the Revised Codes of Montana provide as follows:

"Sec. 8022. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 8025."

"Sec. 8025. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

In speaking of those statutory requirements, the Supreme Court of Montana, in the case of State v. Burrell, 27 Mont. 285, 70 Pac. 982, said:

"Owing to the frequency with which able counsel raise the point, and contend for it in this court, that when, on cross-examination, a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of time, place, and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If, in answer to a question so put, he deny that he has made any inconsistent statements, or say that he does not remember, that ends the matter; and he cannot be impeached by production of evidence that he has done so, for the reason that a proper foundation * * * has not been laid. Section 3380, Code of Civil Procedure. Before such evidence may be introduced to contradict him, common justice and ordinary fairness demand that he have his memory aided by such relation of such circumstances, and that he be allowed to tell and explain exactly what he did say, if he said anything apparently or at all inconsistent at other times. If counsel intend to go further, and to bring in evidence of such inconsistent statements, if the witness deny them or say he does not remember, then, and only then, is it necessary to lay such a foundation."

If it be conceded that the court below erred in refusing to permit the defendant to withdraw the waiver made in the course of the proceedings above set out, it is manifest from the further record of the case that no harm resulted therefrom to the defendant; for it appears that the only inconsistent statements claimed to have been made by Bigelow were said to have been made to the witness Gardner, who testified that he talked with Bigelow in regard to the accident.

"I do not remember," said the witness, "what the substance of that conversation was. I know we were talking about this case, but I do not know what the substance of the conversation was. I do not remember what he said at that time in regard to how the accident happened. I remember talking with Dr. Brockman in regard to the accident. Q. Do you remember telling him what Bigelow told you in regard to the accident?"

The objection to that question was sustained, the defendant reserving an exception to the ruling. Later Dr. Brockman was called, and the record discloses these proceedings in regard to that witness:

"I know William Gardner. I talked with him in regard to the Ennis accident. By Col. Nolan: You want to ask this witness if Gardner didn't tell him something. By Mr. Veazey: Yes. Thereupon defendant offered in writing to prove by the witness now on the stand (Dr. Brockman) that shortly after the accident he had a conversation with the witness Gardner, in which Gardner discussed the accident and the cause thereof, and told the witness that Bigelow had told him (Gardner) that it was a piece of paper that scared the horses and caused them to run away, and not the carcass. By Col. Nolan: I object to that as incompetent and hearsay. By the Court: Objection sustained."

In our opinion the ruling was clearly right.

The judgment is affirmed.

EMERSON et al. v. CASTOR et al.

In re CATARACT RUBBER CO.

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

No. 2829.

1. BANKRUPTCY ⊂=455—PROCEEDINGS—APPEALS.

A rubber company incorporated in New York, having its principal place of business in Rhode Island, maintained a plant in Ohio. At the suit of appellee, one of its employés, a receiver was appointed and ordered to take possession of the company's assets in Ohio. Two days later proceedings in involuntary bankruptcy were commenced in the District Court for Rhode Island, and the company was adjudged a bankrupt. Appellant, who was appointed receiver, was by the District Court for Ohio appointed ancillary receiver of the bankrupt to collect assets located in that state and to carry into force and effect the orders of the original court of jurisdiction. Thereafter the receiver appointed in the Ohio state court filed a final report, showing a considerable balance in his hands, and on the same day the Ohio state court approved the report and entered an order, reciting that the federal District Court for Ohio had made an order for it and its receiver to pay over to appellant, the receiver, the balance in his hands. Thereupon appellees asserted liens against, and claims for priority in, the funds under Gen. Code Ohio, § 11138, giving priority to laborers' and operatives' claims to the amount of $300. In no case was the fact of the rendition of services or their value in dispute. The claims of appellees to priorities were sustained. *Held*, that the proceeding plainly was not one to secure a judgment allowing a debt or claim, and therefore an appeal from an adverse decree was not governed by Bankruptcy Act July 1, 1898, c. 541, § 25a, cl. 3, 30 Stat. 553 (Comp. St. 1913, § 9609), allowing appeals in such cases where the amount involved is $500 or over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. ⊂=455.]

2. BANKRUPTCY ⊂=440—PROCEEDINGS—APPEALS.

The case, although informally presented in the court below, gave rise to a controversy in bankruptcy proceedings amounting to an intervention under Bankruptcy Act July 1, 1898, § 24a (Comp. St. 1913, § 9608); the proceeding was not open to revision here, under section 24b of the act, since the fund was recovered in the court below subject to liens alleged to exist against it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.]

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3. BANKRUPTCY ⊂=450½, New, vol. 14 Key-No. Series—PROCEEDINGS—APPEALS —AMOUNT IN CONTROVERSY.

The right of appeal in bankruptcy proceedings given by Bankruptcy Act July 1, 1898, § 24a, is not affected by the amount in controversy.

4. BANKRUPTCY ⊂=11—PROCEEDINGS—ANCILLARY PROCEEDINGS.

In such case, though appellant receiver was appointed trustee before the state court entered the order directing payment of the fund to him, and Bankruptcy Act July 1, 1898, § 70a (Comp. St. 1913, § 9654), declares that the trustee shall be vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, the District Court for Ohio did not, by reason of appellant's appointment as trustee, lose the right to determine in the ancillary proceedings claims of local creditors to liens and priorities, for the court had ancillary jurisdiction under section 2, cl. 20, as amended by Act June 25, 1910, c. 412, § 2, 36 Stat. 839 (Comp. St. 1913, § 9586), over persons or property within its territorial limits in aid of the receiver or trustee appointed in bankruptcy proceedings pending in other courts, and appellant could not, having invoked such jurisdiction, at his option withdraw the fund from the custody of the court under authority of which he secured it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊂=11.]

5. BANKRUPTCY ⊂=11—PROCEEDINGS—DISTRICT COURT—ANCILLARY JURISDICTION.

As District Courts in bankruptcy possess ancillary jurisdiction to make orders and issue process in aid of proceedings pending in other districts, such ancillary jurisdiction carries with it power for the ancillary tribunal to decide questions of liens and priorities to property over which it exercises jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊂=11.]

6. BANKRUPTCY ⊂=350—PRIORITIES—LABORERS—OPERATORS.

Gen. Code Ohio, § 8339, provides that in all cases when property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of 3 months prior to the time such assignee, receiver, or trustee is appointed shall first be paid in preference to all other claims, except claims for taxes and costs of administration, while section 11138 declares that every person who has performed labor as an operative in the service of the assignor within 12 months preceding the assignment shall be entitled to receive out of the trust funds, before the paying of other creditors, the full amount of wages due for such labor not exceeding $300. The latter section appeared in the chapter regulating the administration and distribution of estates of insolvent debtors, while the former was part of the chapter providing for liens of laborers and employés of any person. *Held*, that as the two sections were distinct, providing different time limits, the one fixing an amount for which the claim might be asserted, and the latter fixing none, the latter section must be construed as not applying where a receiver or trustee is appointed, and hence laborers or operatives having claims against an insolvent employer are not, receivers having been appointed before bankruptcy and its assets subsequently taken over by the receiver and trustee in bankruptcy, entitled to assert claims under section 11138, but must assert them under section 8339.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⊂=350.]

7. BANKRUPTCY ⊂=350—PRIORITIES—PERSONS ENTITLED—LABORERS.

Within Gen. Code Ohio, § 8339, giving priority to claims due for labor performed, employés of a rubber company who, on its falling into difficulties, abandoned their work of superintendence and engineering and

discharged manual labor in manufacturing rubber tires, are, despite their superior titles and higher rate of pay, entitled to priority as laborers.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

8. BANKRUPTCY ⟸350—REVIEW—HARMLESS ERROR.

A decree, awarding priority to laborers under state statute, is not open to objection on the ground that it failed distinctly to give effect to Bankruptcy Act July 1, 1898, § 64b, cl. 4 (Comp. St. 1913, § 9648), giving priority to claims of laborers for services rendered within three months of institution of proceeding, where under the circumstances the allowances must have been the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

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

In the matter of the bankruptcy of the Cataract Rubber Company. Proceeding by Robert S. Emerson, as trustee in bankruptcy and as receiver of the bankrupt, and another, for the recovery of property against which Charles A. Castor and others asserted liens and priorities. From a decree upholding the liens, the receiver and trustee appeals. Reversed and remanded, with directions for modification.

The Cataract Rubber Company was incorporated under the laws of the state of New York, and its principal place of business was in the state of Rhode Island. The company maintained and operated a plant for the manufacture of rubber tires in the city of Wooster, Wayne county, Ohio. October 24, 1914, in the common pleas court of that county, and at the suit of I. C. Emery, a receiver was appointed and ordered to take possession of the company's assets then in Wayne county. Two days later, proceedings in involuntary bankruptcy were commenced against the company in the District Court of Rhode Island, and Robert S. Emerson was on the same day appointed as receiver in bankruptcy; and on November 7th the company was adjudged bankrupt. On the 18th of that month, and upon petition of creditors who were also petitioners in the involuntary petition in bankruptcy, Robert S. Emerson was appointed by the court below as ancillary receiver of the bankrupt "in and for the Northern district of Ohio, with all of the rights and powers to carry into force and effect the orders of the original court of jurisdiction." December 7th following, Robert S. Emerson was elected trustee in bankruptcy at Providence, R. I. Three days later the receiver, appointed as stated in the Wayne common pleas court, reported to that court that he had sold the rubber company's assets, and later in the month (December 31st) filed his final report in that court, showing the net balance of cash assets in his hands to be $1,259.74. On the same day the common pleas court approved and confirmed the report, and also entered an order, reciting that the federal District Court of the Northern District of Ohio had "made an order for the [common pleas] court and the receiver in this case to pay over to said Robert Emerson, receiver and now trustee of the Cataract Rubber Company, bankrupt, the balance of the money and assets in his hands," and directing its (the common pleas') own receiver to "pay over to said Robert Emerson, receiver and now trustee of the Cataract Rubber Company, said balance in his hands. * * *" On the 20th of January following, the court below modified in two particulars its previous order appointing Emerson as ancillary receiver: (1) Investing the ancillary receiver with the "right and power to carry into force and effect the orders of this court which may be entered herein"; and (2) directing the ancillary receiver to "report and account to this court for all property" of the bankrupt coming into his (the ancillary receiver's) "possession in the

Northern district of Ohio," and to "hold the same subject to the further order of this court"—to which exception was reserved. On the same day, the court below entered an order, reciting that it was "made to appear to the court that residents of the Northern district of Ohio hold labor claims against the bankrupt herein, and that there is doubt as to whether or not said claims are a lien upon the property of said bankrupt," and appointing a special master to take testimony as to the character and amount of the claims, the times the services were rendered and the claims became payable, and to report findings with the testimony taken. March 26th, the ancillary receiver reported to the court below that the state receiver had paid, though without naming the date, "to the trustee in bankruptcy," the balance, before stated, remaining in the state receiver's hands, "which the said trustee in bankruptcy now holds, subject to the orders of the bankruptcy court."

The special master filed his report in the court below, stating there were nine creditors who were asking preferences under section 11138, Ohio Gen. Code, for services rendered in different capacities as employés of the bankrupt during stated periods prior to the bankruptcy and at the plant in Wooster; the sums so earned by each claimant; and his allowance to each in accordance with the section mentioned of the Ohio Code and the fifth clause of section 64b of the Bankruptcy Act. Emerson reserved exceptions to this report in his capacities both as ancillary receiver and trustee. The total recovery so allowed exceeded the sum paid over by the state receiver, and counsel agree that this fund is in the hands of the District Court clerk. The court below approved the report, and entered an order, directing payment to be made to the claimants pro rata, according to the allowances made to them, respectively, out of the balance remaining in the fund in question after payment of the costs and the special master's fee. Emerson, as trustee and as ancillary receiver, and the Manhasset Manufacturing Company, a petitioning creditor, appeal from this order.

A. A. Stearns, of Cleveland, Ohio, for appellants.

A. D. Metz, of Wooster, Ohio, for appellees.

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

WARRINGTON, Circuit Judge (after stating the facts as above). The ultimate question concerns the distribution of the fund pointed out in the statement. The appellants contend that the fund should be turned over to the court of primary jurisdiction, the District Court of Rhode Island, sitting in bankruptcy, for purposes of distribution among all the creditors of the bankrupt estate. The appellees, who are the nine labor claimants, insist that the court below, sitting in bankruptcy and as the ancillary tribunal, is empowered to pass upon the questions of priority and to provide for applying the fund accordingly.

[1] Before the issue thus made can be considered, it will be necessary to pass upon a preliminary matter. The appellees have presented a motion to dismiss the appeal. The grounds of the motion in substance are: (a) That "no claim allowed or judgment or decree rendered" exceeds $300, and so the appeal cannot be sustained under section 25a, cl. 3, of the Bankruptcy Act; and (b) that such a case as this is not open to appeal under any other provision of that act. The theory of the first ground is that the final action of the court below was the rendition of "a judgment allowing * * * a debt or claim" in favor of the claimants, respectively, for sums less than "five hundred dollars," and that since the claims as allowed are separate and

distinct in ownership, the appeal must fail for lack of the requisite amount in any of them. This is a misconception of the case. Neither the fact that the appellees severally rendered the services as to which priority was determined, nor the value of such services, is in any instance in dispute. The testimony taken before the special master shows that the value of the services rendered, respectively, by two of the appellees was in excess of the minimum sum, $500, named in clause 3 of section 25a; and those two amounts were each reduced to $300, because of the limitation contained in section 11138, Ohio Gen. Code, on which the appellees mainly rely. The positions taken by the appellees were that under that section of the Ohio statute each was entitled to receive out of the bankrupt fund in preference to other creditors "the full amount of wages due for" his "labor, not exceeding three hundred dollars"; in other words, they sought to have the fund distributed and applied in payment of acknowledged claims, at least in sums not exceeding in any instance the amount prescribed by the state statute. It is, moreover, to be observed that when the bankruptcy proceedings were commenced against the Cataract Company and the adjudication took place in the District Court of Rhode Island, possession of the property which is represented by the fund in question was in the receiver appointed in the common pleas court of Wayne county, Ohio; that this receivership was created at the suit of one of the present appellees for the benefit of himself and the other creditors of the Cataract Company; that it became necessary to institute a proceeding in the court below, as an ancillary tribunal, to gain possession of this property and ultimately of the fund; and consequently that neither the property nor the fund ever passed into the hands of Emerson as trustee in bankruptcy in virtue alone of the adjudication. The practical effect, then, of the action taken by the present appellees in the court below was to assert priorities, indeed liens, against the fund. Plainly, the action was not to secure a judgment allowing a debt or claim within the meaning of clause 3, § 25a; and hence the motion to dismiss must depend upon the other ground offered in its support.

[2, 3] Section 24a invests the Circuit Courts of Appeals with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." The jurisdiction so given is not in terms affected by the amount involved. In re Rouse, Hazard & Co., 91 Fed. 96, 98, 33 C. C. A. 356 (C. C. A. 7). It is to be inferred from the record that the action taken by the appellees in the court below was, in practical intent and purpose, an intervention in bankruptcy proceedings which gave rise to a controversy within the meaning of section 24a. There were nine claimants asserting priorities, or, in effect, as we have seen, liens, against a particular fund which, we repeat, was not derived through direct operation of the adjudication in bankruptcy. Such action naturally invoked the equity jurisdiction of the court; and the court below, sitting in bankruptcy, ordered the fund to be applied in partial satisfaction of these admittedly earned labor claims. No formal pleadings, it is true, were presented by either side

to show the theory of the parties, either as respects recovery or defense. It is to be presumed that the appellees initiated their action by orally calling attention to the facts concerning services they had rendered to the bankrupt; for, as we have shown in the statement, an order was entered January 20, 1915, reciting that "it being made to appear to the court that residents" of the district "hold labor claims against the bankrupt herein, and that there is doubt as to whether or not said claims are a lien upon the property of said bankrupt," whereupon the special master was appointed to take testimony, as stated. The nature of this action is further shown by the report and findings of the special master, who appears to have treated the earnings as constituting liens upon the fund; and also by the exceptions reserved below and the assignments made here by the appellants, in which it is stated, among other things, that the title to the fund had passed directly from the state receiver to Emerson, as trustee in bankruptcy and not as ancillary receiver, and, consequently, that the fund was not within the jurisdiction of the court below, but was within that of the court of primary jurisdiction. The method thus adopted of introducing and conducting the controversy was certainly informal, to say the least, and yet the method discloses an assertion and denial of liens against the fund, also a dispute as to where the title to the fund as well as its control lay. The method further discloses an alignment of parties similar to that involved in a plenary action. Surely these features ought not to be ignored at the instance of any of the parties themselves. It has been aptly said that "the Bankruptcy Act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice" (Botts v. Hammond, 99 Fed. 916, 920, 40 C. C. A. 179 [C. C. A. 4]); and, in working out these ends, the bankruptcy courts have not indulged in technicalities wherever a liberal procedure was consistent with the substantial rights of the parties in interest; and one of the clear objects of the Bankruptcy Act is to secure speedy and economical, though just, adjudication of controversies arising in bankruptcy proceedings. These considerations lead us to believe that the action taken below in respect of these labor claims fairly involved a controversy under section 24a, and so justified the appeal. Rode & Horn v. Phipps, 195 Fed. 414, 418, 115 C. C. A. 316, and citations (C. C. A. 6); Bell v. Arledge, 192 Fed. 837, 839, 113 C. C. A. 161 (C. C. A. 5); In re Breyer Printing Co., 216 Fed. 878, 881, 133 C. C. A. 82 (C. C. A. 7); Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567, 568, 134 C. C. A. 295 (C. C. A. 6); In re Martin, 201 Fed. 31, 33, tit. "Jurisdiction," to 37 (119 C. C. A. 363); s. c., sub nom. Globe Bank v. Martin, 236 U. S. 288, 295, 296, 35 Sup. Ct. 377, 59 L. Ed. 501; In re Hartzell, 209 Fed. 775, 776, 778, 126 C. C. A. 499 (C. C. A. 8); Houghton v. Burden, 228 U. S. 161, 164, 165, 33 Sup. Ct. 491, 57 L. Ed. 780. It hardly is necessary to say that in reaching this conclusion we do not here pass upon the merits of the action. The attempt has been to describe the action with a view of testing the challenge made of the remedy of appeal. We are not, however, unmindful of the remedy, as respects a proceeding in bankruptcy, given by section 24b to super-

intend and revise in matter of law, though it must be said that counsel do not even suggest that remedy as the proper one here. At first view it would seem that these labor claims presented questions of law which might well have been disposed of as a step in an ordinary "proceeding in bankruptcy," as distinguished from a "controversy arising in a bankruptcy proceeding" (In re Rouse, Hazard & Co., supra, 91 Fed. 99, 33 C. C. A. 356; In re Worcester County, 102 Fed. 808, 813, 814, 42 C. C. A. 637 [C. C. A. 1]; O'Dell v. Boyden, 150 Fed. 731, 732, 80 C. C. A. 397 [C. C. A. 6] 10 Ann. Cas. 239; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 48, 144 C. C. A. 338 [C. C. A. 6]); but in reality the instant case is distinguishable from these decisions, and for the reasons that when the present proceeding in bankruptcy was commenced and the adjudication declared, the bankrupt, the Cataract Company, was not in possession of either the property or the fund derived therefrom, and the ancillary proceeding was found necessary in order to gain possession. We but repeat when we say that the fund thus reduced to possession came into the court below with priorities, indeed, liens, alleged to exist against it in favor of resident claimants, and so gave rise to a controversy within the meaning of section 24a. In re Breyer Printing Co., supra, 216 Fed. 881, 882, 133 C. C. A. 82. The motion to dismiss will be denied.

[4] Upon the merits of the case the appellants' counsel contend that the jurisdiction derived through the ancillary proceeding did not empower the court below to determine the rights of appellees in the fund recovered. The theory of this contention is that Emerson's selection as trustee operated to vacate his positions as receiver and ancillary receiver, and that the state court receiver did not pay over the fund until after Emerson's selection as trustee was made. Counsel, in effect, concede that if the fund had been paid over before such selection, the court below could have controlled and applied the fund at the suit of the resident claimants. Thus the issue is reducible to the circumstance that possession of the fund was not secured until after the trustee was chosen. It is to be remembered that while Emerson was first appointed by the court below as ancillary receiver for the Northern district of Ohio, "with all of the rights and powers to carry into force and effect the orders of the original court of jurisdiction," yet that this portion of the order was subsequently vacated, and Emerson reappointed as ancillary receiver, but invested only "with the right and power to carry into force and effect the orders of this court which may be entered hereafter"; and it was at the same time ordered that the ancillary receiver should report and account to the court below "for all property of said bankrupt coming into his possession" in such Northern district, and that he should "hold the same subject to the order of this court." We have seen that the fund was paid over by the state receiver under an order of the state court, and that this order contained a recital that it was made in pursuance of an order of the court below. It is admitted by appellees that the fund was paid by the state receiver after Emerson had been elected trustee; and in his report as ancillary receiver to the court below, March 26, 1915, Emerson stated that the fund

was paid to the "trustee in bankruptcy." Despite this, we have seen that the order of the state court, directing its receiver to pay over the fund, distinctly provided that it should be paid to "Robert Emerson, receiver and now trustee of the Cataract Rubber Company, bankrupt"; and, although the record fails to disclose the form of the receipt given to the state receiver, it is to be presumed, and it is so stated without denial by appellees' counsel, that the receipt conformed with the order of the state court.

Section 2 of the Bankruptcy Act (subdivision 20), as amended June 25, 1910, vests in the federal District Courts—

"ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." 36 Stat. pt. 1, 839.

We cannot think that Emerson's selection as trustee operated to vacate his ancillary receivership, and to transfer the fund through him as trustee to the sole control of the court of primary jurisdiction. It is, of course, true, as counsel say, that section 70a of the Bankruptcy Act provides that the trustee shall be "vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt"; still reliance on this provision ignores the facts that the property from which the fund was derived was in possession of the state court receiver at the times of both the bankruptcy and the adjudication, and that admittedly the rights of the ancillary receiver and the trustee in bankruptcy in respect of the property could be determined only through the ancillary proceeding in question. The object of bestowing ancillary jurisdiction would naturally be to invest the tribunal, whose aid is once invoked, with power itself to control the agencies coming within its territorial jurisdiction, and likewise the property found and sought to be recovered therein on behalf of the bankrupt's estate. It would be an anomalous proceeding which would suffer an ancillary receiver or a trustee in bankruptcy at his option to withdraw property recovered through the aid of the ancillary tribunal, and regardless alike of the tribunal itself and resident suitors there appearing and claiming priorities or liens against the property. This would be to make the ancillary tribunal a mere instrument of the official instituting the action, since it would deny to the tribunal power to pass upon the rights of adverse claimants and even of a person found in possession of the property. Such a proceeding would hardly square with due process of law; it would savor rather of violence.

[5] It was held prior to the amendment of 1910 that the District Courts of the United States, sitting in bankruptcy, each possessed "ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the District Court of another district." Babbit v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Elkus, Petitioner, 216 U. S. 115, 117, 30 Sup. Ct. 377, 54 L. Ed. 407. Ancillary jurisdiction, it is true, signifies power to aid primary jurisdiction. But the power in an ancillary tribunal to take possession of property at all is founded on the interest therein of the person or estate in whose right the

proceeding is maintained; and this interest cannot, in the nature of things, be ascertained without passing upon such adverse interests as may be claimed by others in the property. When, therefore, an ancillary tribunal takes possession, whether with or without opposition, such possession draws to that tribunal power, indeed, imposes a duty, to determine all questions of priorities and liens affecting the property. This applies with especial force to the rights of resident adverse claimants. Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 873, 115 C. C. A. 527 (C. C. A. 8); In re Farrell, 201 Fed. 338, 339, 119 C. C. A. 576 (C. C. A. 6); Loeser v. Dallas, 192 Fed. 909, 911, 114 C. C. A. 349 (C. C. A. 3); In re Lipman (D. C.) 201 Fed. 169, 172; In re Rathfon Bros. (D. C.) 200 Fed. 108, 109. It results that the court below had complete control of Emerson in both of his capacities as respects this fund (Fidelity Trust Co. v. Gaskell, supra, 195 Fed. 874, 115 C. C. A. 527; Reynolds v. Stockton, 140 U. S. 254, 272, 11 Sup. Ct. 773, 35 L. Ed. 464.

[6] The final question is whether the claims of any of the appellees are recoverable under either section 11138 or section 8339 of the Ohio Gen. Code. The learned trial judge, in affirmance of the special master's ruling, based allowance of all the claims upon section 11138. The portion of that section so relied on provides:

"Each person who has performed labor as an operative in the service of the assignor, within twelve months preceding the assignment, shall be entitled to receive out of the trust funds, before the paying of other creditors, the full amount of wages due for such labor, not exceeding three hundred dollars." 5 Page and Adams Ann. O. G. C.

It was held that this provision operated to create a lien upon the fund in dispute, securing each labor claim in a sum not exceeding $300. This was upon the theory that the case is controlled by the ruling of this court in In re Laird, 109 Fed. 550, 48 C. C. A. 538, and the decision of the Supreme Court of Ohio in Machine Co. v. Supply Co., 68 Ohio St. 535, 67 N. E. 1055, 64 L. R. A. 845, 96 Am. St. Rep. 677. The foregoing statutory provision was not involved in the Laird Case. The provision there relied on in sustaining labor claims was the following portion of the present section 8339, Ohio Gen. Code, which at the time of the decision bore the number 3206a, Ohio Revised Statutes (In re Laird, 109 Fed. 554, 48 C. C. A. 542):

"In all cases when property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall first be paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust."

Several observations are to be made upon these two statutory provisions. The one of most obvious pertinence is the difference in time within which the services must have been rendered in order to come within the respective limitations there prescribed; the first being "twelve months preceding the assignment," and the other "three months prior to the time such assignee, receiver or trustee is

appointed." The services of each of the nine claimants here were rendered within this twelve months' limitation, but only four of the claimants distinctly appear to have performed any services within the three months' limitation, and such latter services were small in comparison with the whole. It is next to be observed of these statutes that the one first in part quoted belongs to the chapter regulating the administration and distribution of estates of insolvent debtors (5 Page & Adams Ann. O. G. C. pp. 431, 488), and that the other is part of the chapter which in distinct terms provides for liens, and, among others, for liens of "laborers and employés of any person," etc. (3 Page & Adams O. G. C. pp. 1081, 1103). Further, the first statute relates to "each person who has performed labor as an operative," and the second one to "laborers and employés" whose claims are "for labor performed"; and, while the claim of an "operative" may cover a period of 12 months, the amount of recovery is limited to $300, and although a claim "for labor performed" may cover a period of only 3 months, there is no restriction upon the amount of recovery.

In view of these marked differences between the two statutes, it is reasonably to be inferred that they are independent each of the other, and designed for the accomplishment of distinct objects; and such was the conclusion of this court in In re City Trust Co., 121 Fed. 706, 58 C. C. A. 126. That case presented the question whether the claims of "operatives" were, under either section 3206a (now section 8339) or section 6355 (now section 11138), or both, entitled to priority over certain prior and good-faith chattel mortgage liens. Moreover, a deed of assignment for the benefit of creditors had been made by the assignor previous to the adjudication in bankruptcy; and the court was accordingly called upon to determine whether, under either or both of these statutes, the operatives' claims were entitled to priority over the claims of the chattel mortgagees. This led to the consideration again of the Laird Case and also to its reaffirmance. The result was to deny the application of section 6355 (now section 11138) to estates held by receivers or trustees, and also to deny to laborers, who might fairly be classed as operatives, the benefit of both section 3206a and section 6355; the present Mr. Justice Day saying in the course of the opinion (121 Fed. 708, 58 C. C. A. 128):

"Section 6355 (now section 11138) is a part of the chapter regulating the administration of estates of insolvent debtors, and deals with the distribution of the fund in the hands of the assignee. It does not have to do with estates placed in the hands of receivers or trustees. * * *"

And again (121 Fed. 709, 58 C. C. A. 129):

"While we realize the general principle which gives to this kind of legislation a liberal construction, with a view to carrying out its beneficent purposes, we do not think it was the intention of the Legislature to give to laborers of this class the benefit of both sections 3206a and 6355. As we have said, the broad provisions of 3206a might include all classes of laborers; but in section 6355 the Legislature is dealing with a distinct class, fixing the right to preferential claims in cases of assignment."

The effect of this was to deny to an "operative" under present section 11138 the right to claim any benefit under old section 3206a,

in cases where an assignment has been made; and the judgment below was reversed for that reason. The present importance of that ruling will be seen in the fact that in the instant case the court below, in affirming the special master, found that the appellees were operatives within the meaning of section 11138, and also entitled to liens under that section upon the theory of the rule laid down in the Laird Case. This was to overlook the ruling in the City Trust Case that section 11138 applies only to cases of assignment, and not to cases of receivership. However, it was not decided in the City Trust Case that operatives, within the meaning of old section 6355, would not be entitled to prove their claims under old section 3206a, wherever it appears that the estate has been placed in the hands of a receiver instead of an assignee. This points to an important distinction which must be observed when considering both the City Trust Case and the Laird Case; the fact of the assignment which appeared in the former case was held to require disallowance of the claims of operatives under old section 3206a, while the presence of the receivership in the Laird Case was sufficient to justify allowance of the claims there involved under that section. True, no question arose in the latter case as to the character of the claims, that is, whether of operatives or only of ordinary laborers, though apparently they were of the latter class; but the point is clear, and it must be borne in mind, that the effect of these two decisions is to allow claims of operatives under old section 3206a, where the estates are not in the hands of an assignee, but are in the hands of a receiver, yet it is equally important to remember that allowance under old section 3206a must be subject to the limitation in point of time prescribed by that section.

It is, however, urged, and it was in effect so held below, that the decision in Machine Co. v. Supply Co., supra, 68 Ohio St. 535, 67 N. E. 1055, 64 L. R. A. 845, 96 Am. St. Rep. 677, decides that labor claimants like the present are entitled "to invoke the provision most favorable to themselves," that is, the provision of either of these Ohio laws. We do not so understand that decision. The sole question involved in the case was one of priority as between the claims of certain laborers and chattel mortgagees. The property of the mortgagor had been placed in the hands of receivers in the common pleas court of Allen county, Ohio, and after the property had been converted into money the rights of the parties were transferred to the fund so derived. The circuit court held that the amounts due on the laborers' claims should first be paid in full, and the remainder applied, in a way pointed out, to the payment of the mortgages. The judgment was reversed and the holders of the chattel mortgages were given priority. Plainly the question involved, and so the judgment, had no relation to a right, like that mentioned in the opinion, of labor claimants to select and recover under the statute "most favorable to themselves." The court was required, and only required to determine which of two classes of claimants—one class claiming for labor performed and the other for loans secured by chattel mortgages—should be subordinated to the other in the distribution of the fund; and nothing more than the determination of that issue is to be found in the syl-

labus. Under the Ohio rule the syllabus is controlling, "even though the expression of the judge" delivering the opinion "should be thought to indicate a state of mind favorable to the contention of counsel upon a question not before the court." Trust Co. v. Stich, 71 Ohio St. 459, 466, 467, 73 N. E. 520. As respects the third paragraph of the syllabus in the Machine Company Case, the term "trust fund" there referred to and defined clearly relates to the general estate of the debtor, and which, incumbrances being discharged, is applicable to the payment of labor claims, if there be any, according as such claims arise under the one or the other of the sections there mentioned, in preference to the claims of general creditors. This by no means holds that an "operative" has a choice of these statutes as respects the enforcement of his claim. The decision in that case, therefore, is not in conflict with the decision in the City Trust Case, certainly so far as anything here involved is concerned; and, in view of the latter decision, we hold that section 11138 has no application to the present case.

[7] It follows that if we treat the four appellees as "operatives," who rendered services within three months of the appointment of the receiver in the state court, they are, by reason of such receivership, entitled to allowance for those services, under section 8339 (old section 3206a). Further, if such appellees were not "operatives" within the meaning of section 11138, but were engaged as ordinary laborers, in the three months' period mentioned, still the allowance may be based on the same section; i. e., 8339. We are disposed to interpret the view entertained by the learned trial judge that appellees were operatives, within the meaning of section 11138, to have been intended rather as a conclusion of law than a finding of fact. As we understand the evidence, these four appellees were in that period engaged in a substantial way in the performance of manual labor. True, Emery was employed as "consulting engineer and rubber expert," and was later operating machinery, Castor was employed as superintendent, and Bogner as machinist; but the remaining appellee was the night watchman, Davenport. It was shown, however, and so found below:

"The plant was a very small one, employing at least in its later stages only nine men in all, and the testimony shows that Emery and Castor, necessarily having little to do in the way of superintendence, and the company being in financial difficulty, devoted themselves, in large part, to manual labor contributing to the manufacture of rubber tires."

Indeed, we think it is fairly to be inferred that so far as any services were rendered by Emery, Castor, and Bogner in the last three months, their services consisted mainly in the performance of manual labor and negligibly in the discharge of their earlier duties. It is this feature of the evidence which we think warrants the belief that the titles borne by these three appellees signify but little in the last stages of the business, and consequently that their claims, as well as the claim of the watchman, may rightfully be classified and treated as falling within the purview of section 8339 (old section 3206a). The wages of Emery and Castor were, it must be conceded, in excess of what would ordinarily be allowed to persons for such work as

they were latterly required to perform, and yet for aught that appears their employer was satisfied with the wages and they with the labor. See allowance of Winn's claim in Blessing v. Blanchard, 223 Fed. 35, 37, 138 C. C. A. 399 (C. C. A. 9) Ann. Cas. 1916B, 341. In view of these circumstances and of the obvious need of bringing this litigation to a close, we shall treat these four claims as falling within the rule of the decision in the Laird Case. It is true, as counsel show, that that decision has not received approval in some of the federal circuits, and so it is contended that the case should be reconsidered and overruled. This contention fails to observe the fact that the decision has been recently cited, and with apparent approval, in two decisions of the Supreme Court (Henderson v. Mayer, 224 U. S. 631, 637, 32 Sup. Ct. 699, 56 L. Ed. 1233; Globe Bank v. Martin, 236 U. S. 288, 301, 35 Sup. Ct. 377, 59 L. Ed. 501).

[8] The complaint made of the Laird decision is in substance that it fails to give effect to 64b (4) of the Bankruptcy Act; but the limitation there imposed upon the allowance of claims for wages is the same in point of time as that fixed by the state statute which is here treated as applicable. It so happens, moreover, that the earnings of each of the four employés within the last three months were less than the limitation in amount fixed by 64b (4); and only two days elapsed between the appointment of the receiver in the common pleas court of Wayne county, Ohio, and the commencement of the bankruptcy proceeding in the District Court of Rhode Island. This lapse of time is so slight as not materially to affect the amounts of recovery, whether the state statute or 64b is to be applied. If, then, the court were inclined to reconsider the decision in the Laird Case, such an attempt would not be justified here.

The decree must be reversed, and the cause remanded, with direction to enter a modified decree providing for payment out of the fund here in issue of such portions of the claims of the four appellees, viz. Emery, Castor, Bogner, and Davenport, as represent the services rendered by them within the three months' period prescribed by section 8339, Ohio Gen. Code, and likewise respecting the claims of Miller, tire builder, and Young, day watchman, appellees, in case they performed services within that period. The parties on neither side will recover costs of this court against the others; but the costs paid by appellants to the clerk of this court, and, since the expense of preparing and printing record and printing briefs would be largely the same if only the four appellees named had recovered, appellants' expense of preparing and printing transcript of record and briefs, as well as appellees' expense of printing brief, shall also be paid out of such fund.

BABBITT v. READ et al.

(Circuit Court of Appeals, Second Circuit. June 29, 1916.)

No. 236.

1. CORPORATIONS ⊂=247—BONDS—EXEMPTION OF STOCKHOLDERS FROM LIABILITY.
A clear provision in a corporation mortgage that the holders of the bonds shall rely for payment entirely on the corporation and its property without recourse upon stockholders because of any personal liability which might be asserted against them is not contrary to public policy and, in the absence of fraud or deception, is enforceable.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983-997; Dec. Dig. ⊂=247.]

2. CORPORATIONS ⊂=478—BONDS—REFERENCE TO MORTGAGE.
A provision in a corporation mortgage which is referred to in the bonds secured is of the same effect as though contained in the bonds themselves.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. ⊂=478; Mortgages, Cent. Dig. §§ 208-257, 259-289.]

3. BANKRUPTCY ⊂=282—RIGHT OF ACTION BY TRUSTEE—ACTION FOR DECEIT.
A trustee of a bankrupt corporation cannot maintain an action on behalf of bondholders against stockholders to recover for fraud committed by them in the sale of the bonds of the corporation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. ⊂=282.]

4. COURTS ⊂=366(1)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.
Where the highest court of a state has interpreted a state statute in a way showing that it is considered a positive enactment and not merely a re-enactment of the common law, as to rights arising thereafter, its construction is binding on the federal courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⊂=366(1).]

5. CORPORATIONS ⊂=232(3)—LIABILITY OF STOCKHOLDERS—STOCK ISSUED FOR PROPERTY—MISSOURI STATUTE.
Under Const. Mo. art. 12, § 8, which provides that "no corporation shall issue stock or bonds, except for money paid, labor done or property actually received," and Rev. St. Mo. 1909, § 2981, which contains the same provision, as construed by the Supreme Court of the state, where a corporation issues stock in payment for property the property must be the fair equivalent in value of the par value of the stock issued for it; otherwise the stockholder receiving it is liable to creditors of the corporation for the difference, whether the overvaluation of the property was intentional or not.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 884; Dec. Dig. ⊂=232(3).]

6. BANKRUPTCY ⊂=282—ASSETS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT BY TRUSTEE.
As under the decisions of the same court such liability is an asset of the corporation, it may be enforced by its trustee in bankruptcy for the benefit of the estate.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. ⊂=282.]

7. COSTS ⊂=32(3)—SUIT BY TRUSTEE IN BANKRUPTCY—PARTIAL SUCCESS.
A trustee in bankruptcy, when he sues a third person, takes the same risks as any other party and cannot impose on defendants, directly or

indirectly, liability for costs made on a supplemental bill setting up an invalid claim, although successful under his original bill.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 112; Dec. Dig. ⊂⊃32(3).]

8. WORDS AND PHRASES—"VALUE."

The "value" of a thing is what it will presently bring in exploitation or exchange under presently possible conditions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Value.]

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

Suit in equity by Byron F. Babbitt, trustee in bankruptcy of the Randolph-Macon Coal Company, against William A. Read, Seth Sprague Terry, and John S. Melcher, executors of James T. Gardiner, deceased, William T. Van Brunt, and others. Decree for complainant for part of his claim, and both parties appeal. Affirmed.

For opinion below, see 215 Fed. 395.

This case arises upon two appeals from a decree in a suit in equity brought by a trustee in bankruptcy of a Missouri corporation to collect upon stockholders' liabilities for the issuance of stock for less than par. The creditors for whose claims the trustee recovered amounted, together with allowance to counsel, costs, and the like, to more than $160,000, and a decree went for that amount against two New York stockholders, Read and Gardiner. There were excluded from the benefit of the decree, however, the bondholders under a trust mortgage containing a so-called "no recourse" clause, and, because of that clause, these bondholders appeal from that portion of the decree which excluded them, and Read and Gardiner appeal from so much as found them liable at all. Other stockholders were joined, but the bill was dismissed as to them.

The facts, while somewhat complicated, are very fully and accurately reported in the opinion of the District Court (215 Fed. 395), in view of which it is unnecessary to repeat them at length here.

Charles A. Boston, of New York City, and P. Taylor Bryan, of St. Louis, Mo., for appellant trustee.

Carter, Ledyard & Milburn, of New York City (William F. Taylor, of counsel), for appellants Metropolitan Life Ins. Co. and others.

Charles E. Rushmore, of New York City (George N. Hamlin, of New York City, on the brief), for defendants Reed and Gardiner.

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

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question arises under the plaintiff's appeal and brings up the meaning and validity of the "no recourse" clause. The plaintiff's idea that the stockholders' liability is not an obligation founded on the bonds, but only on the statute, seems to us verbal and scholastic. The statute is a necessary factor of the obligation, to be sure; but the obligation is none the less to pay the debt created by the bonds. If more words than are in article 22 of the mortgage are necessary to comprise such an obligation, we do not know where they could be found. Indeed, the only just criticism of the article is

that its verbiage, by including so much, opens ground for suspicion. Such instruments frequently suffer from that defect; but the intent, though it could have been put in a few lines, is not lost in spite of the conventional redundancy of its expression. The meaning is so clear that the only question which can arise is whether it is against public policy, whether the clause extends to the bondholders as well as to the mortgage trustee, and whether the supposed deceits affect the situation.

We can see no reason for saying that such a provision is against public policy if the bondholders were properly apprised in advance, and no authority is suggested even remotely in point. The theory of such liabilities is that the capitalization of a company conveys a belief that it starts with an equal value in property. That theory may be questionable in fact; but, assuming it to be true, it has no application when the creditor knows how the stock was issued before he lends his money. This is the law of Missouri (Woolfolk v. January, 131 Mo. 620, 33 S. W. 432; Trust Co. v. McMillan, 188 Mo. at p. 567, 87 S. W. 933, 107 Am. St. Rep. 335; Biggs v. Westen, 248 Mo. 333, 154 S. W. 708) under which the plaintiff sues. The provision is only intended to protect against deception, and there is no apparent reason to deny the right to creditors to say in advance that they will not rely upon it. Such covenants have been held valid whenever they have been tested, so far as we have found. Brown v. Eastern Slate Co., 134 Mass. 590; Fidelity Trust Co. v. Washington, etc., Corporation (D. C.) 217 Fed. 601.

The business of selling corporate bonds is not obviously affected with a public interest, as are such businesses as those of common carriers. While it is true that such bonds are sold broadcast to large numbers of people, they are generally distributed originally to bankers or brokers in large blocks, and in such cases it is the custom of the latter to familiarize themselves with the mortgage and its provisions. The final purchasers are their customers, and look to, and depend upon, these distributors, and not upon the obligors. The case is not, therefore, one where the obligor deals directly with a numerous class, not accustomed to look carefully at the details of the bargain, and where the detailed provisions of the contract are submerged by the urgency of the demand. It may well be that these distributors do not pay such attention to the details as they should, yet the matter is one in which they have an interest to protect the eventual customer, and where, if they do not, they are themselves affected by the result. An investor can hardly be put in the class of those not responsible for the clear meaning of the instruments on which he buys; at least, if it is so, we have no means of knowing it, and the matter must await some legislative determination.

[2] The plaintiff resorts, therefore, to the fact that the bonds did not incorporate the limitation, except by reference to the mortgage. Yet it has always been held that such a reference makes the provisions of the mortgage a part of the contract, as much in this case as in one where the instrument is prepared with the deliberate scrutiny of both sides. Natl. Salt Co. v. Ingraham, 122 Fed. 40, 58 C. C.

A. 356; McClelland v. Norf. S. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397; McClure v. Oxford, 94 U. S. 429, 24 L. Ed. 129. It would indeed be only a fictitious protection to insist that such provisions as this should be incorporated in the bonds. The investor who would read with so much care the whole of a bond so voluminous as it would become, were all the limitations included, would be as likely to look at the mortgage, if the bond referred to the mortgage. Buying such bonds is not like taking a bill of lading from a common carrier, an everyday incident of common affairs. Those who wish in any case to read the extended text carefully have now the power to go to the printed mortgage, and are as likely to do so as though the bond itself contained all its limitations. Certainly we may not say that such a company is under a public duty against which it may not contract by sufficiently explicit language.

Finally, the plaintiff says that at least as to the Mackay bonds the defendants are estopped by their misrepresentations from setting up the "no recourse" clause. Now, these alleged misrepresentations did not touch the existence of that clause in the mortgage; nor did they say that the stock had been issued for property worth its face, as in Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777. Such a statement would indeed have been absurd in the face of the fact that the bonds not only sold for less than par, but that the stock was given away as a bonus. They were general statements about the character of the property, its prospects, its value, and the extent of the title held by the company.

The plaintiff says that the defendants may not assert the clause because of these statements which constitute inequitable conduct. He wishes to use this misconduct by way of estoppel, and in that he fails, because estoppel never can do more than hold the utterer to the truth of his speech. If the rights of all the parties here are adjudicated upon the basis of the truth of the supposed deceits, it would not affect the stockholders' liability. They escape because they bargained to escape in advance, and no estoppel is relevant unless it comprises a statement that they had not so bargained. If they had sold the bonds on such a statement, they could not later take advantage of their exemption, but they did not. Nor did the defendants say that the stock was fully paid, though, if they had, it would not affect the covenant by which their liability as stockholders was waived. Downer v. Union Land Co., supra, is not to be so understood; the only point decided was that the covenant did not waive a liability for fraud and that an action of tort still lay. Finally, the general inequity of the defendant's conduct towards the Mackay group will not bar their assertion of a legal right in defense to the bill; they do not come into a court of equity, but are brought in. There is no rule of equity which takes from a defendant his legal defenses because his conduct has been inequitable. We therefore decline to consider the evidence of these supposed deceits or the extent to which the Mackay representatives were fully acquainted with the facts at the time they bought the bonds.

[3] However, while the stockholders are protected against any claim upon them as stockholders by the "no recourse" clause, that clause does not protect them as individuals, though they be stockholders, against the claims of persons who have been induced by them to buy bonds upon fraudulent statements. Yet it is only such defrauded purchasers, and not the trustee, who have the right to assert such a claim; the Mackay group may have its rights against some of the defendants, but they cannot assert them here. Such an effort was made in Slater Trust Co. v. Gardiner (C. C.) 183 Fed. 268, but failed. We have nothing to say as to the success or failure of such an action, if brought by the defrauded bondholders against those responsible for the utterance of the fraud. We only seek here to avoid a confusion between two separate matters: (1) The wrong done by deceit in selling the bonds; and (2) the obligation of the stockholders because of their acceptance of the stock.

This disposes of the main points in the plaintiff's appeal. The lesser points we consider at the end. The next question is of the defendants' appeal, especially as affecting Read and Gardiner. In this, the first question is of the value of the property. As to Gardiner, the proof is beyond question; he puts the outside value on the whole property at $4,000,000, which, while we do not accept it, is too little to save him against the claims allowed by the District Court. As to Read, assuming Gardiner did not speak for him, the mere situation shows the character of the undertaking. The total money expended in purchasing coal properties was $1,150,000, or about one-sixth of the capitalization. It is, of course, conceivable that the promoters got such a fabulous bargain as this; but how likely is it? Moreover, if it were such a good bargain and the coal remained, as it did, it is scarcely possible that it should lose so much of its value as never to be able to pay a dividend, though subsequently organized on about its cost basis. The sale value of coal thereabouts was not more than $20 per acre, and the necessary value to justify the capitalization was over $140. We may allow that consolidation into a single holding increased the value, but with what warrant may we say it increased the value sevenfold? Furthermore, we should be blind to the commonest facts of finance, if we allowed so transparent a disguise to pass muster. The constant effort to inflate capitalization so that the earnings shall not be too apparent could have no more characteristic an expression. That the incorporators honestly supposed that the property had a value beyond its bonded indebtedness we are quite willing to admit, but that they thought the stock at the time worth par passes belief. Their expectations did not constitute property until they could put them into the realm of such established certainty as would lead men generally to share them. The mere fact of the distribution of the stock as bonus demonstrates that they had not got so far as that.

[8] The defendants' calculations of value were properly characterized by the District Judge as the merest speculation, and even then at the expense of the most commonplace actuarial theory. The peg to hang them on is the testimony that royalties are the "basis" of cal-

culating value. Doubtless they are, but not upon the present full value of royalties payable a century hence. "Value" is what the thing will bring to-day in exploitation or exchange under some presently possible conditions. It has often been the custom in excessive capitalizations to try to justify watered stock issues by the statement that the value to the incorporators is such and such, greatly in excess of what they paid. That may or may not be true, according as the combination had enhanced the economic efficiency of the units, or as it results in the control of the market or the like. Some properties cannot be successfully sold; they are too big to have a genuine market. This perhaps was one, and perhaps its fairest measure of value lay in future exploitation; but just in so far as that exploitation involved the future it was subject to the discount of the future, even after the promoters' confidence became shared by the public. Moreover, to suppose that these coal lands were so little subject to competition that one could buy them at one-seventh of their value is wholly unwarranted. The region was known, it was being freely exploited already, it was no secret El Dorado; if the lands had any such value in combination, it is not possible that the demand for them should not have created a higher price. Judge Mayer was therefore certainly right in finding that, whatever its value, the property as a whole was not worth more than $6,600,000. That was all he need find.

[4, 5] The next question is of the defendants' liability as stockholders. The only statutory provisions in Missouri touching stockholders' liabilities, even indirectly, are that which requires stock to be issued for money, labor or property (Const. art. 12, § 8; Rev. St. 1909, § 2981), and that which allows execution directly against a stockholder upon a judgment against a corporation (R. S. 1909, § 3004). Stock issued for property is quite valid, and as between the corporation and the stockholder the agreement is conclusive. Like other courts in a similar situation, however, the Missouri courts have construed this constitutional provision not to justify all bargains which the stockholders collectively under the corporate name may choose to make with some of their number. The question came up first in the Supreme Court of Missouri in Schickle v. Watts, 94 Mo. 410, 7 S. W. 274, a case which, however, involved an Illinois corporation, and which could not therefore rule definitively upon the effect of the Missouri statutes. Next came Woolfolk v. January, 131 Mo. 620, 33 S. W. 432, in which the case was treated as though the stockholders' liability depended only upon his contract, and in which, since no bad faith was shown, he was exonerated. The basis of the liability where there was bad faith was not considered, but the dictum in Schickle v. Watts, supra, was overruled. After Woolfolk v. January, supra, came Van Cleve v. Berkey, 143 Mo. 109, 130, 44 S. W. 743, 42 L. R. A. 593, a case turning, like Schickle v. Watts, supra, on the liability of an Illinois stockholder. Nevertheless the discussion covered the Missouri law at length and held that the "American trust doctrine," as it was called, was "reinforced" by the Constitution and statutes of Missouri. Finally, Berry v. Rood, 168 Mo. 316, 67 S.

W. 644; Id., 209 Mo. 662, 108 S. W. 22; Id., 123 S. W. 888, 225 Mo. 85, was a decision squarely in point and went upon the theory that the result followed from the statutory law, though just how was not very clearly shown. The theory was repeated in Bank v. Rockefeller, 195 Mo. 15, 54, 55, 93 S. W. 761. Berry v. Rood, supra, is concededly the established law of the state to-day, whatever the source of the doctrine.

The defendants' distinction is no doubt real between collecting a partly paid subscription and assessing stock which has been paid in property. In the first case, the stockholder may be held in contract, although it may be necessary to set aside a subsequent fraudulent release to do so. In the second case, his sole promise is to convey specified property in exchange for the stock. If for any reason that contract, being voidable, is rescinded, the rescission would result in leaving no promise to do anything. Obviously, therefore, if the right against the stockholder is to sound in contract, no rescission theory will serve; any obligation over and above the conveyance of the property must be the mere creation of appropriate power. The defendants concede that if the property is consciously overvalued such an obligation arises; but they say that this obligation necessarily depends upon "general law," and that by similar reasoning, when the obligation is urged to depend upon unconscious overvaluation, it must equally depend upon an interpretation of "general law," as to which the decisions of the Missouri courts do not bind a federal court. Yet, however the Missouri courts might have founded the obligation, there can be no doubt that they in fact did found it upon the provisions of their Constitution and statutes requiring the stock to be paid for in property. From those provisions they thought it followed that the property must actually equal the face of the stock, regardless of what the stockholders honestly thought; and that, when it did not, their obligation to pay the difference arose from the fact that they had attempted an evasion of the statute. Their innocence of intent to violate the statute was not thought relevant, as it often is not. To succeed, the defendants are obliged to take the position that, while the Missouri courts were truly enough interpreting their Constitution when they held that it required payment in property of the actual value of the stock, they were relying upon "general law" when they created out of that interpretation an obligation coextensive with the violation of the statute. Such a distinction seems to us wholly factitious; it is not suggested in the opinions of the judges and presupposes a subtlety not to be expected. When in Van Cleve v. Berkey, supra, and Rood v. Berry, supra, the Supreme Court of Missouri repudiated the rule of Woolfolk v. January, supra, they clearly intended to establish a new rule dependent upon the public policy of Missouri as it was expressed in its positive enactments. This is what they said and, we must take it at its face. Of course, it cannot matter that the obligation was not expressly enacted in the statutes; we have nothing to do with the meaning which a state court chooses to impose upon any set of words, so long as we once are assured that they are engaged in finding that meaning. Any other canon would

inevitably involve a federal court in the necessity of ascertaining how far the state court is justified in finding the meaning, which they do find, from what they select as conveying that meaning. It is the very purpose of the rule to avoid such scrutiny, and to treat the positive enactments of a state as composed in part of the meaning which the state's authoritative interpreters choose to place upon them.

The authorities cited in support of the position that we are not bound by the state cases are all distinguishable. It is settled, for instance, that state decisions are not conclusive when they first are made after the rights of the parties become fixed. Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Adelbert College v. Wabash R. R. Co., 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204. This is the basis of the decision in Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, so far as it touches the state decisions, since it cites Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, which distinctly asserted the doctrine. As the whole transaction in the case at bar occurred after Berry v. Rood, supra, the defendants can take no advantage from those cases. There is another doctrine, not so well settled, that where a state court decides that a state statute merely intends to re-enact the common law, and then sets forth its own notion of what the common law is, a subsequent federal court is still free to form its own decision as to the common law, notwithstanding the statute. This is indicated anyway, if not decided, in Byrne v. Kansas City Ry. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. If once it is apparent, however, that the state court founds its decision upon the statute, even though the federal court has decided precisely the same question directly the contrary, it will none the less follow the state decisions. Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795. Taylor v. Cummings, 127 Fed. 108, 62 C. C. A. 108, expressly declined to pass upon the question whether the federal court is bound, when the state decisions purport to construe a state statute contrary to the common law of which it appears to be the enactment. Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212, did indeed disregard the decisions of the courts of Colorado, but so far as appears they were all made after the rights of the parties were fixed, and therefore fall within Burgess v. Seligman, supra. It is fair to say that this distinction is not taken in the case, and in so far as the opinion goes further than the facts, with great respect, we cannot follow it. As to Mutual Life Ins. Co. v. Lane (C. C.) 151 Fed. 276, affirmed 157 Fed. 1002, 85 C. C. A. 677, the state decision (Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350), which preceded the assignment of the insurance policy, is somewhat ambiguous, but seems to turn upon the theory that the state statute did not affect to change the common law. The second state decision (Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. [N. S.] 128, 5 Ann. Cas. 355) was rendered after the rights were fixed. These are the only cases which need discussion.

We feel no hesitation in finding, therefore, that when a state court, by a decision before the critical facts occur, has purported to find in a state statute language which is not intended merely to re-enact the common law, we are conclusively bound, whatever our own judgment as to the propriety of their interpretation. We do not suggest what the rule should be if the decision finds the statute intended only to be declaratory of the common law and then determines what is the common law. In Van Cleve v. Berkey, supra, the language may, under this rule, be thought ambiguous, since the word is "reinforced," as already mentioned, though we interpret even this as going further than a mere declaration of common law; but no one can read Berry v. Rood, supra, without being satisfied that the court supposed itself to be construing the positive enactment of a policy peculiar to, or, if not peculiar, at least deliberate with, the state of Missouri. The Circuit Court of Appeals for the Eighth Circuit, in Mudge v. Black, 224 Fed. 919, 140 C. C. A. 397, took the same view of the same decisions, though the case involved bonds instead of stock subscriptions.

[6] The next question in the defendants' appeal is the right of the trustee in bankruptcy to sue. This is a question wholly of state law as well, depending upon whether the liability created by the statute is regarded as running towards the creditor individually or towards the corporation. Thus in New York, where it is well settled that the liability is personal to the creditor, the trustee may not sue (Re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641), and the same is true of Minnesota (Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257). Yet in New Jersey (Re Remington Automobile Co., 153 Fed. 345, 82 C. C. A. 421) and in Ohio (Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559), the obligation runs to the corporation and passes to the trustee. In general, all the incidents of the obligation are to be found in the decisions of the state courts, which interpret the statute. Converse v. Hamilton, 224 U. S. 253, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. This stops any inquiry in the case at bar beyond the Missouri decisions. In Berry v. Rood, supra, 168 Mo. 335, 67 S. W. 644, stockholders' liabilities were distinctly treated as a part of the corporate assets, and a receiver was allowed to sue. In Biggs v. Westen, 248 Mo. 333, 154 S. W. 708, while the trustee in bankruptcy was not successful, it is apparent (248 Mo. 343, 344, 154 S. W. 708) that his failure did not turn upon his incapacity to sue. The court below had disallowed the claim of one creditor, but had given a decree sufficient to cover all the claims allowed. It was not suggested that the trustee was not the proper party to sue upon such claims; the implication is to the contrary. We do not doubt that this is the law of Missouri, and we are not concerned with the validity of its underlying theory. Nevertheless it is less anomalous than the defendants seem to suppose. That the corporation while solvent should not be able to sue on such liabilities might well be true, because they were subject to a condition that the corporate assets should be first exhausted. There is nothing any more anomalous in superadding to an illegal subscription for stock a liability in favor of the corporation to pay more

than you agree to pay, than there is in setting aside a release of an existing contract of subscription.

There remain some incidental matters for determination. The plaintiff's claim of a joint liability we pass, as it is stated in his brief to be of consequence only in case the bondholders be allowed to recover. The question of the liability of the other stockholders than Read and Gardiner we likewise pass, because it appears in the motion papers which were filed when the case was argued that the defendants have deposited sufficient cash to pay the whole amount of the judgment, which we are to affirm. Had the defendants Read and Gardiner appealed from that part of the judgment exonerating these other stockholders, or had the bondholders been allowed in to recover, the question would have been relevant to our decision. The defendants Read and Gardiner do not, however, ask to throw any part of the decree upon the stockholders exonerated, and the plaintiff has no interest in the incidence of the loss so long as he gets his money which is already assured to him.

[7] We see no reason to disturb the finding of the District Judge regarding the costs under the supplemental bill. A trustee in bankruptcy, when he sues a third person, takes the same risks as any other party. In the case at bar it is true that he is entitled to all the expenses of administration, but we do not think that the cost of prosecuting an invalid claim is a proper part of such expenses. It may be urged that, if the claim was reasonable, it is a hardship to put the trustee to his peril in suing upon it. We are not satisfied, if this were the test, that the probability of success was sufficient to justify the prosecution of the claim at the expense of the defendants; but, independently, it does not seem to us that in any case it is fair to call upon them to pay the expenses of an unsuccessful prosecution against them. Nor will we disturb the allowance to the defendants of costs on the supplemental bill.

There will be no costs on this appeal, but the disbursements will be divided one-half against the plaintiff and one-half against the defendants Read and Gardiner jointly. We do not understand that these defendants wish us to divide between them their half of these disbursements, nor do we see any occasion to dispose of the motion made at the outset of the argument.

The decree will be affirmed, with interest and without costs; the disbursements to be divided as above set forth.

ALASKA PACIFIC FISHERIES v. TERRITORY OF ALASKA.*

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2709.

1. LICENSES ⟸3—IMPOSITION—ALASKAN FISHERIES.

Organic Act Alaska Aug. 24, 1912, providing for a territorial Legislature, and declaring that the federal Constitution and all laws not locally inapplicable shall be effective, and shall remain in force until altered, amended, or repealed by Congress or the Legislature, provides, in section 3, that the territorial Legislature shall not have power to alter, amend, modify, or repeal existing laws on enumerated subjects including the fish and game laws applicable to Alaska and federal laws providing for taxes on business and trade, but the section further declares that it shall not operate to prevent the territorial Legislature from imposing other and additional taxes or licenses, while sections 9 and 20 of the act provide that the legislative power of the territory shall extend to all rightful subjects of legislation, and reserve to Congress the right to nullify any law passed by the territorial Legislature. Act June 26, 1906, c. 3547, 34 Stat. 478, for the protection and regulation of fisheries of Alaska, provides that every person or corporation carrying on the business of canning, curing, or preserving fish, or manufacturing fish products, shall, in lieu of all other license fees and taxes therefor, pay enumerated license taxes computed on the output. The act further provides for exemption of license fees on canned salmon in consideration of liberation of salmon fry. On passage of the Organic Act, no general property tax laws obtained in Alaska. *Held* that, in view of that fact, and the necessity of obtaining revenue for the territory, Act Alaska April 29, 1915 (Laws 1915, c. 76), amending Act May 1, 1913 (Laws 1913, c. 52), which imposed taxes on the owners of fish traps, whether fixed and floating, or dummy traps, is valid; the Legislature being authorized to impose additional license fees, and the act not violating the federal regulation of fisheries.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 2; Dec. Dig. ⟸3.]

2. LICENSES ⟸7(7)—UNIFORMITY IN TAXATION.

Though the tax on the traps which were of varying value was the same, the law does not violate Organic Act, § 9, providing that all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and assessments being according to the actual value, for the territorial Legislature had a power of classification of license taxes which it might exercise, and the tax was not strictly a revenue measure.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 13, 19; Dec. Dig. ⟸7(7).]

3. LICENSES ⟸7(3)—UNIFORMITY—CLASSIFICATION.

It is not an abuse of power if the burden of taxation is imposed equally on all persons pursuing the same business or calling, provided, in case of classification, the basis is reasonable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 9, 19; Dec. Dig. ⟸7(3).]

4. LICENSES ⟸7(1)—WHAT ARE.

Though dummy traps, which are traps that cannot be used for fishing, were classified with others, Act Alaska April 29, 1915, cannot be held invalid on the theory that the tax on dummy traps was a tax on property and not a license tax, for the first section of the act expressly declares

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

*Rehearing denied October 9, 1916.

that any person prosecuting, or attempting to prosecute, the business of fishing, shall pay for a license the sum of $100 per trap.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. ⟸7(1).]

5. TIME ⟸9(1)—COMPUTATION—DAYS—LEGISLATURE—PASSAGE OF ACTS.
Where the territorial Legislature conveyed on the 1st day of March, Act Alaska April 29, 1915, which was passed in the last hours of the session that adjourned sine die between 3 and 4 o'clock a. m., sun time, on April 30th, was not passed in violation of Organic Act, § 6, declaring that sessions of the Legislature shall not continue longer than 60 days.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11–16, 24½, 32; Dec. Dig. ⟸9(1).]

6. LICENSES ⟸7(3)—IMPOSITION—ALASKAN FISHERIES.
Act Alaska April 29, 1915, imposing as a license tax on fisheries a tax on fish traps, is not invalid as being an unjust discrimination in favor of those fisheries where the business is carried on by means of seines.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 9, 19; Dec. Dig. ⟸7(3).]

7. LICENSES ⟸7(8)—TAX ON APPLIANCES—ALASKAN FISHERIES.
Act Alaska April 29, 1915, imposing as a license tax on the business of fisheries a tax on fish traps, does not impose a tax on appliances used in the business, and so is not unenforceable on the theory that, the license taxes imposed by Act Cong. June 26, 1906, having been paid, the proprietor of a fishery could not be further taxed on his appliances.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 14, 19; Dec. Dig. ⟸7(8).]

8. LICENSES ⟸7(9)—VALIDITY—ALASKAN FISHERIES.
Act Alaska April 29, 1915, imposing a license tax on the business of fishing by taxing fish traps, is not confiscatory though in some cases it exacts a tax as high as 10 per cent.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 15, 19; Dec. Dig. ⟸7(9).]

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action by the Territory of Alaska against the Alaska Pacific Fisheries, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Hellenthal & Hellenthal, of Juneau, Alaska, for plaintiff in error.

John H. Cobb, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In an act of Congress "for the protection and regulation of the fisheries of Alaska," approved the 26th of June, 1906 (chapter 3547, 34 Stat. 478), it was provided, among other things, that every person or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within Alaska shall, "in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds. * * *" The payment and collection of such license tax was re-

quired to be in accordance with the provisions of the Act of March 3, 1899, c. 429, 30 Stat. 1253, which was an act defining and punishing crimes in Alaska.

On August 24, 1912, Congress passed the Organic Act for Alaska providing for a territorial Legislature. In this act, which conferred legislative power upon the territory, it was provided that the Constitution of the United States and all the laws not locally inapplicable should be effective; and all laws then in force were to be continued in force until altered, amended, or repealed by Congress or by the Legislature, provided that the authority granted to the Legislature to amend, modify, and repeal laws in force in Alaska should not extend to certain laws, including the game, fish, and fur-seal laws applicable to Alaska, "or to the laws of the United States providing for taxes on business and trade," etc. It was also provided:

"That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

Section 6 of the Organic Act provided that the Legislature should convene at the capital, Juneau, on the first Monday in March, 1913, and on the first Monday in March every two years thereafter, but should not continue in session longer than 60 days in any 2 years, unless, etc. By section 9 of the act, the legislative power of the territory shall extend to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," etc., "provided, * * * all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof."

By an act of the Legislature of the territory, approved April 29, 1915 (Laws 1915, c. 76), entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof, for the territory of Alaska, and for other purposes; and to amend * * * 'An act to establish a system of taxation, create revenue, and provide for collection thereof for the territory of Alaska, and for other purposes,' approved May 1, 1913," it was provided:

"Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the territory of Alaska shall apply for and obtain a license and pay for said license for the respective lines of business as follows: * * * (8) Fish Traps: Fixed or floating, one hundred dollars per annum. So-called dummy traps included."

The plaintiff in error, defendant below, was sued by the territory for moneys alleged to be due for prosecuting and attempting to prosecute the business of fishing by means of fish traps situated in the waters of Alaska. After a demurrer had been overruled, defendant answered, setting up, in effect: (1) That the act of the Alaska Legislature just cited was void under the act of Congress creating the Alaska Legislature, and under the Constitution of the United States; (2) that the act was void because the tax attempted to be laid was not uniform upon the same class of subjects, in that it taxes fish traps and gill nets, while seines are not taxed; (3) that the act referred to is void, in that it is an attempt to levy a tax without ref-

erence to the value of the thing taxed; (4) that the tax imposed by the act cited is, in fact, a specific tax on property, and as such is levied without reference to the value of the property sought to be taxed, and is therefore contrary to the provisions of the Organic Act; (5) that the act referred to was void because the term of the Legislature had expired when the law was passed; and (6) that the defendants were not engaged in the fishing business within the meaning of the law.

The case was tried upon agreed facts substantially as follows: That the defendant owned 19 fish traps within the waters of Southern Alaska, and that they were all operated during the fishing season of 1915; that none of the fish taken in any trap operated by defendant were sold prior to being canned, but all fish so caught were used by defendant in operating its canning plants; that some of the canneries in Alaska are so situated that they are obliged to supply the fish canned by resorting to the use of fish traps, while others are situated so that the fish can be supplied in no practical manner except by the use of gill nets, and others are so situated that fish cannot be supplied except by the use of seines, and that defendant cannot practically use seines and is obliged to resort to fish traps; that defendant has complied with all the provisions of chapter 3, tit. 7, of the Compiled Laws of Alaska, relating to fish and fisheries, including the provisions of sections 259 to 275a, inclusive, and has paid the license tax provided for by said sections, but that defendant has not paid the tax sued for in this action for 1915, or any part thereof; that the session of the Legislature which passed the act which forms the basis of this action, namely chapter 76 Session Laws of Alaska 1915, convened March 1, 1915, at 12 o'clock noon; that on the 29th of April, 1915, the Legislature adjourned sine die at 12 o'clock midnight according to the official timepieces of the Legislature, that is to say, the clocks hanging in the halls of the two houses were stopped or turned back by the sergeant-at-arms just prior to the hour of 12 o'clock midnight of April 29, 1915, and thereafter, between the hours of 3 and 4 o'clock a. m., sun time, of April 30, 1915, while the clocks in the halls of the Legislature still indicated a time prior to midnight, being stopped or turned back as aforesaid, the act, chapter 76 of the Session Laws of Alaska 1915, was finally passed by both houses of the Legislature and approved by the Governor and enrolled with the Secretary for the territory as it now appears in the printed volume of the Session Laws of Alaska 1915, c. 76; that some of the traps of the defendant are worth over $10,000, while some are not worth to exceed $1,000.

The District Court ordered judgment for the territory for $1,963. Judgment was entered accordingly, and writ of error to this court was sued out.

[1] It is plain, we think, that our conclusions should be arrived at by assuming that the great object of the legislative act of April 29, 1915, quoted above, was to create revenue, and that in its scheme of license taxes the Legislature had in mind provision for the expense of administration of the territory. Congress having given to Alaska a territorial form of government and having created a legislative as-

sembly and conferred upon it legislative powers, the power in the general words used was broad enough to authorize legislation upon "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." This was the scope of the power as by first expression conferred. But at once, by the same provision which conferred the general power, there were imposed many restrictions or limitations which must be read with the general transfer of authority, and which, when construed with it, in practical effect greatly limit the exercise of the power. The specific restrictions included, among other matters, legislation with respect to public lands, charters, divorces, lotteries, gambling, manufacture of liquor, subscriptions to stock of incorporated companies, and laws creating loans and bonded indebtedness. We have mentioned these enumerated limitations because their number and importance emphasize the thought that but for them the general words whereby the conferred legislative power should extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States would have comprehended power to legislate with respect to them as included within rightful subjects of legislation. We find also that, by section 3 of the Organic Act, the power was curtailed with respect to the then existing game and fish laws of the United States applicable to Alaska by express declaration that the general authority conferred was not extended to alter, amend, modify, and repeal laws in force on those subjects, or "to the laws of the United States providing for taxes on business and trade." If these restrictions stood without qualifying language, undoubtedly they would prevent legislation which would alter, amend, modify, or repeal not alone the then existing fish laws, but also the laws for taxation of business in force when the Organic Act was passed; that is, August 24, 1912. Plainly such then existing laws would have continued as the only statutes which controlled. But we cannot stop at this point, for, by the same section (3) of the act wherein we read the words which saved existing fish laws and those providing for taxes on business, Congress went on to provide explicitly that the provisions of limitation should not "operate to prevent the Legislature from imposing other and additional taxes or licenses." Now, when Congress provided against possible misunderstanding as to the operation of the statute, it in effect defined its intentions and by positive words removed limitations upon the grant of general legislative power under which other and additional taxes and licenses might thereafter be imposed, excepting, of course, such other special limitations as were incorporated within the Organic Act itself. Going, then, to the text of the act to see if we find such limitations upon the power to legislate for the future, none such appear with respect to the imposition of additional license taxes on the fishing business.

It is urged that by the legislation of Congress (act approved June 26, 1906, 34 Stat. L. 478, c. 3547) there was a reservation of exclusive control of the fish of Alaska and of the right to legislate with respect thereto. It is correct that in the act of 1906 referred to there was a provision that every person or corporation carrying on the business of canning, curing, or preserving fish products within Alaska should,

"in lieu of all other license fees and taxes therefor and thereon, pay a license tax on their said business and output as follows," and specifying taxes to be paid and collected. The effect of this declaration was to make the license fees upon the salmon canning and manufacturing business those prescribed in that act, and not those which had previously been fixed in the act of June 6, 1900 (chapter 786, 31 Stat. L. 331). This act of June 26, 1906, with detailed care made provision whereby the catch and pack of salmon made in Alaska by the owners of private salmon hatcheries in Alaska should be exempt from all license fees and taxation of every nature at the rate of 10 cases of canned salmon to every 1,000 red or king salmon fry liberated, upon certain conditions. Provisions were also made declaring it to be unlawful to maintain dams, fences, and other obstructions, except for fish culture, unless placed at certain distances from shores; imposing restrictions on the use of drift nets, seines, traps, and other appliances, except for fish culture; also, for a weekly close season. The law also authorized the Secretary of Commerce and Labor to designate spawning grounds in which fishing might be limited or prohibited. The wanton waste of fish was prohibited, the use of brands was limited, the method of catching or killing fish was regulated, and provisions made for punishment for violations of the law. But when Congress, in 1912, conferred the legislative power which we have shown exists, while it expressly withheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force, it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and it might be additional to, those already in force when the Organic Act was approved. And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906 were kept in force without possibility of alteration, amendment, or repeal by the territorial Legislature, and the specific license tax provided by the act of 1906 was kept in force, but with power transferred to the Legislature to impose, if it should see fit, other and additional license taxes.

We cannot agree that the portion of the act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved; but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly. The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to providing for the fiscal needs of the territory. No general property tax laws obtained. Revenue would have to be raised, and naturally some

scheme of license taxation of the extensive industries carried on in the territory presented itself for adoption. The business of fishing, therefore, became a main subject for consideration by Congress in the question of future taxation. The Congressional Records disclose that after discussion it was decided not to abridge too far the transfer of power in the Legislature to adopt its own scheme of levying taxes and licenses upon the fishing business; Congress reserving to itself, by section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the territorial Legislature. Congressional Record, Sixty-Second Congress, vol. 48, pt. 6, p. 5288; Lapina v. Williams, 232 U. S. 90, 34 Sup. Ct. 196, 58 L. Ed. 515; Woodward v. De Graffenried, 238 U. S. 285, 35 Sup. Ct. 764, 59 L. Ed. 1310; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844.

[2, 3] Does it follow that, because the license tax imposed by the territorial Legislature is a measure creating revenue, it conflicts with that portion of section 9 of the Organic Act providing that:

"All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof."

We take it to be indisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is, in a general sense, a rightful subject of legislation. But in this matter inquiry into the general question is unnecessary, for, as already pointed out, we have express transfer of authority to the territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed without the restrictive limitations which must control in levying taxes upon property in its usual sense. Many well-considered cases might be cited holding that taxes which are levied on occupations, business, or, it may be, franchises, are not brought within the principle of equality and uniformity in the sense that the Legislature must make the taxation of all occupations or pursuits equal. Cooley on Taxation (3d Ed.) c. 6. And it is well established that it is not an abuse of power if the burden of taxation is imposed equally upon all persons pursuing the same business or calling, provided, if there should be any division into classes, the basis of classification is reasonable and not merely arbitrary. Brushaber v. Union Pacific R. Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; Peacock & Co. et al. v. Pratt, 121 Fed. 772, 58 C. C. A. 48.

In Binns v. United States, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, we find a helpful discussion of the taxing power of Congress with respect to Alaska. A statute passed by Congress required one "prosecuting" a "line of business" within Alaska to obtain a license from the District Court in Alaska and pay for the license for the "line of business" a certain prescribed fee. The statute also provided that, if one attempted to do business without having first paid the license, he should be deemed guilty of a misdemeanor. Binns was prosecuted and convicted of violation of this statute. Upon review, the argument in behalf of Binns was that the statute referred to conflicted with sec-

tion 8 of article 1 of the Constitution of the United States, which reads:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The Supreme Court, through Justice Brewer, accepted the purpose of the Alaska law fixing license fees to be the collection of revenue, and conceded that license fees are excises within the constitutional sense of the term; but, even so, the court held that they were to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska, and that Congress had plenary power, except as controlled by the Constitution, to legislate for the territory of Alaska. The court said:

"It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a Legislature elected by the citizens of the territory. * * * For Alaska, Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes. * * * In the exercise of this power, Congress, like any state Legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

We think these views are applicable and controlling in the present case, because, when Congress gave to the Legislature of the territory the power to legislate upon all rightful subjects not inconsistent with the laws of the United States, it thereby exercised the right to transfer the power which it itself had, and the Legislature could use it, subject, of course, to such constitutional limitations as always surrounded the congressional power and to such further limitations as Congress might see fit to throw about the power transferred.

[4] It is argued that the Legislature of Alaska did not have reference to the business of fishing with fish traps, as "dummy traps" are classed with the others, and, as dummy traps cannot be used in fishing, it is said the Legislature intended to place a specific property tax on fish traps regardless of whether the traps were used in catching fish or not. Pursuing this line of thought, plaintiff in error argues that the character of the tax from a tax on a fish trap as property to a tax on the business of fishing by means of fish traps merely limits the persons liable to pay a tax on fish traps to those engaged in fishing by means of such traps, and that the tax is not free from being objectionable as a specific property tax on fish traps rather than a tax on the business of fishing with the traps. If this construction of the territorial statute is the correct one, then it may be that the tax is not one on the business of fishing, but is upon the property used in such business. We are of opinion, however, that the broad rule of construction by which we are to ascertain the true intent of the Legislature does not allow this meaning to prevail. The act (Laws

of Alaska, Second Session, 1915, p. 185) by section 1 provides that any person "prosecuting or attempting to prosecute any of the following lines of business * * * shall apply for * * * a license * * * for the respective lines of business as follows: * * * Fish Traps: Fixed or floating, one hundred dollars per annum. So-called dummy traps included." The title of the act is "An act to establish a system of taxation, create revenue, and provide for collection thereof," etc. To "prosecute a designated line of business" means in ordinary acceptation to carry on the kind of business designated. Carrying on the "line of business" of fish traps in Alaska, by common or popular understanding of persons who are at all conversant with fishing in Alaska, is understood to be fishing with fish traps. Hence the words should be given their ordinary meaning as used in connection with the business of fishing in Alaska. Unwin v. Hanson, 2 Q. B. L. R. 115; Lewis' Sutherland on Statutory Construction (2d Ed.) § 389. The inclusion of "dummy traps," which are sham traps not used for fishing, within the business of fish traps, does not affect the question. It may be that, in connection with the preliminary steps of going into the business of fishing with fish traps, dummy traps are first set to hold the desired location. But whatever may be the special use to which the dummy trap is put, the inclusion of it in the business of fishing with fish traps in no way shows any intent to tax fish traps as general property rather than to tax the business of fishing with traps.

[5] We come next to the contention that the validity of the act is affected by the fact that it was passed by the Legislature after that body had been in session more than sixty days. The provision of the Organic Act (section 413, Compiled Laws of Alaska 1913) quoted in the statement we have made prohibits the Legislature from continuing in session longer than 60 days unless convened in extraordinary session by proclamation of the Governor. The Legislature which passed the act under consideration convened on the 1st of March, 1915, at 12 o'clock noon, and it is stipulated that the act was finally passed by both houses of the Legislature and approved by the Governor and was enrolled and filed in the office of the Secretary of State for the territory as now appears in the printed volume of the Session Laws of 1915, c. 76. The Legislature having convened at noon on the 1st day of March, 1915, and having adjourned sine die between 3 and 4 o'clock a. m., sun time, on April 30, 1915, was not in session longer than 60 days, for with Sundays and holidays included, in counting the 60 days, the sixtieth day did not expire until noon of April the 30th. White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

[6] Plaintiff in error says that the imposition of the license tax is an unjust discrimination in favor of fisheries where the business is carried on by means of seines, in that it appears that some of the salmon fisheries operating in Alaska are so situated that the supply of fish necessary to keep the canning plant in operation can be had only by the use of fish traps, while in some other places the operation can only be continued by using seines, and that as conditions are such that the Alaska Pacific Fisheries must use fish traps to get fish for its canneries, to require it to pay a tax, but not to require the

one who uses seines to pay, is an unjust discrimination and denies the equal protection of the laws. This contention is answered by recognition of the fact that the power of Congress is ample in the premises, and as it had the power to provide that all persons catching fish by means of fish traps should pay a certain license tax, and all persons catching fish by seines should pay a different tax, the power transferred is not to be held invalid.

[7, 8] It is said that the plaintiff in error, being engaged in the salmon business and having paid a tax on its output as required by the act of Congress of June 26, 1906, should not now be required to pay a tax on the appliances used by it in connection with such business. The error of this argument rests in the assumption that the tax is a specific property tax, and therefore assessment of it must conform to the uniformity clause of the Organic Act. We cannot agree that a license tax is to be held void for failure to comply with the requirement of uniformity upon the same class of subjects by basing the tax upon an assessment according to value. Nor do we think that the tax violates the provisions of the Constitution of the United States by any discrimination against salmon canneries or fisheries which use traps in favor of those using seines, or that it is to be held by the courts to be confiscatory in that it exacts in some cases a tax as high as ten per cent.

Without further expression of our views upon the points presented, we may add that we have given very close attention to the arguments and briefs of counsel addressed to the important questions involved.

The conclusion we have reached, that there has been no excess of power exerted by the Legislature in the premises, accords, we believe, with the true intent of Congress, which, in giving to the territory legislative power broad enough in its general scope to extend to all rightful subjects of legislation within certain limitations, gave authority to enact laws imposing the license taxes involved as additional to those theretofore imposed by Congress.

The judgment is affirmed.

HOONAH PACKING CO. v. TERRITORY OF ALASKA.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2713.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action by the Territory of Alaska against the Hoonah Packing Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Cheney & Ziegler, of Juneau, Alaska, Warren Gregory, of San Francisco, Cal., and E. S. McCord and W. H. Bogle, both of Seattle, Wash., for plaintiff in error.

J. H. Cobb, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Upon the authority of Alaska Pacific Fisheries v. Territory of Alaska (No. 2709) 236 Fed. 52, — C. C. A. —, judgment of the District Court of Alaska, Division No. 1, is affirmed.

ALASKA SALMON CO. v. TERRITORY OF ALASKA.*

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2720.

1. APPEAL AND ERROR ⊂⊃173(1)—REVIEW—MATTERS PRESENTED FOR REVIEW.
A defense not regarded by the trial court or included in the agreed statement of facts cannot be considered on defendant's appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079, 1093; Dec. Dig. ⊂⊃173(1).]

2. STATUTES ⊂⊃161(1)—REPEAL—EFFECT.
A subsequent statute dealing with the same subject takes effect and supersedes an earlier one.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230, 233, 234; Dec. Dig. ⊂⊃161(1).]

3. LICENSES ⊂⊃7(1)—STATUTES—LICENSE TAXES.
Act Alaska May 1, 1913 (Laws 1913, c. 52), entitled "An act to establish a system of taxation and to create revenue and provide for collection thereof, "which imposes license taxes upon fisheries including salmon canneries, as well as Act April 29, 1915 (Laws 1915, c. 76), amending the former statute and imposing other license taxes, including taxes on fish traps and gill nets, are valid.
[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. ⊂⊃7(1).]

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

Action by the Territory of Alaska against the Alaska Salmon Company, a corporation. There was a judgment for plaintiff, and defendant brings error, and appeals. Affirmed.

Z. R. Cheney, of Juneau, Alaska, Warren Gregory, of San Francisco, Cal., and E. S. McCord and W. H. Bogle, both of Seattle, Wash., for plaintiff in error and appellant.

J. H. Cobb, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for defendant in error and appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case was submitted to the District Court of the Territory of Alaska, Division No. 1, upon an agreed statement of facts, and thereafter judgment was given in favor of the territory, and from such judgment writ of error has been prosecuted.

It appears that the Alaska Salmon Company is engaged in the business of annually operating a salmon cannery and manufacturing canned salmon in Alaska; that during the year 1915 it also maintained and operated at its cannery gill nets; that since the Act of Congress of June 26, 1906 (chapter 3547, 34 Stat. 478), the plaintiff in error has paid the license taxes on its business and output as therein provided, and has complied with all the provisions of chapter 3 of title 7, of the Compiled Laws of Alaska relating to fish and fisheries; that the Legislature of Alaska, by an act approved May

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

*Rehearing denied October 9, 1916.

1, 1913 (Laws 1913, c. 52), and by another act approved April 29, 1915 (Laws 1915, c. 76), imposed licenses and taxes.

The questions presented by the brief of appellant may be stated as follows: (1) The plaintiff in error having complied with all the conditions and paid the license fees imposed by the acts of Congress, is it obliged to apply for a license and pay the license fees and taxes imposed by the act of the Legislature of Alaska approved May 1, 1913? (2) Plaintiff in error having complied with all the conditions and paid the license fees imposed by the act of Congress just hereinbefore referred to, is it obliged to apply for a license and pay the license fees and taxes imposed by the act of the Legislature of Alaska approved April 29, 1915? (3) Is the plaintiff in error, as the owner of a private salmon hatchery, and also engaged in the business of canning salmon in Alaska, by virtue of certificates issued to it by the Secretary of Commerce and Labor for salmon fry liberated from its hatcheries, entitled by virtue of such certificates to have the same applied pro tanto in payment of all license fees and charges not only imposed by the act of Congress referred to, but also by the acts of the Legislature of Alaska?

[1] We need not pass upon the last question, because the agreed statement of facts gives no information upon the matter, nor was it regarded by the lower court as involved in the case.

[2, 3] The act of the Legislature of the territory of Alaska approved May 1, 1913 (Laws 1913, c. 52), was entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof for the territory of Alaska, and for other purposes." Section 1 provided:

> "That any * * * corporation * * * prosecuting or attempting to prosecute any of the following lines of business * * * shall first apply for and obtain a license so to do from the District Court * * * in said territory, and pay for said license for the respective lines of business and trades, as follows, to wit: Fisheries: Salmon canneries, seven cents per case on sockeye and king salmon; one-half cent a case on hump-back, cohoe, or chum salmon."

Many other license charges were fixed by this act which it is unnecessary to refer to, because they are immaterial to the case under consideration.

On April 29, 1915, the Legislature passed an act (Laws 1915, c. 76) to establish a system of taxation, create revenue, and provide for collection thereof, for the territory of Alaska, and for other purposes, and to amend an act entitled "An act to establish a system of taxation, create revenue, and provide for collection thereof for the territory of Alaska, and for other purposes," approved May 1, 1913. This last referred to act provided that application must be made for license to carry on certain designated lines of business. Section 2. License taxes for the business of carrying on a fishery as provided for in the sixth subdivision of section 1 of the act were, for salmon canneries, four cents per case on king and reds or sockeye; two cents per case on medium reds; one cent per case on all others: and by subdivision 7, for salteries license should be 2½ cents per 100 pounds on all fish salted or mild cured, except herring; and on fish traps there should

be paid $100 per annum for fixed or floating traps; and for gill nets, $1 per 100 fathoms or fraction thereof.

If the plaintiff in error has to pay the tax required by the act of 1913, for the years 1913 and 1914 the sum of $4,643.60 will be paid upon salmon packed in those years, and for the year 1915 it would have to pay for salmon packed, $1,158.28, and for gill nets used, $131.75.

Plaintiff in error has paid the license fees imposed by the act of Congress of June 26, 1906, but has declined to apply for or obtain a license from the territory of Alaska as required by the acts of May 1, 1913, and April 29, 1915, basing its refusal to pay upon the ground that, having paid the taxes imposed by the act of Congress, it was not obligated to pay the territory of Alaska upon the same output.

We believe that the act of June 26, 1906, providing for certain license fees and taxes upon the output of fish canneries and regulating the control of the fish industry being subsequent to the act of June 6, 1900 (31 Stat. 321, c. 786), which provided for a tax on the business and trade, was the controlling law in force at the time of the passage of the Organic Law. But we believe that the Legislature was within its authority in passing the act of May 1, 1913, so far as it provided for obtaining a license and for a tax upon the carrying on of the business of a salmon cannery of four cents per case on king and reds or sockeye, and two cents per case on medium reds, and one cent per case on all others. And we also hold that the Legislature of the territory was within its power in passing the act of April 29, 1915, which also dealt with license fees and taxes upon carrying on certain kinds of business, including canneries, gill nets, and fish traps.

In Alaska Pacific Fisheries v. Territory of Alaska (No. 2709) 236 Fed. 52, —— C. C. A. ——, we have considered the principal legal questions here involved, and upon the authority of that case the judgment of the lower court will be affirmed.

So ordered.

ALASKA MEXICAN GOLD MINING CO. v. TERRITORY OF ALASKA.*

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2727.

1. LICENSES ⟸7(1)—FEES—CIVIL ACTIONS.

Laws Alaska 1913, c. 52, § 1, imposes a license fee of one-half of one per cent. on net income above $5,000 per annum upon the business of mining. Section 3 declares that any person, corporation, or company doing or attempting to do business without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and imposes certain penalties. Laws Alaska 1915, c. 76, § 4, provides that special remedies authorized by an act shall not be deemed exclusive, and that any appropriate remedy, civil or criminal, may be invoked in collection of taxes, while section 7, amending the original act, declares that no person, firm, or corporation, shall be relieved of any tax, penalty, or interest accruing under the original act. *Held* that, though the original act did not provide any civil remedy for collection of license taxes, yet the duty and ob-

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

*Rehearing denied October 9, 1916.

ligation to pay them existed, and so civil action might be subsequently authorized without impairing the rights of a taxpayer.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. ⟸7(1).]

2. LICENSES ⟸32(2)—FEES—COLLECTION.

A civil action to recover license taxes imposed by Laws Alaska 1913, c. 52, will not be defeated because evidence outside of the statute is necessary to arrive at the amount on which the per centum of the tax fixed shall be calculated; the amount being susceptible of ascertainment.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. ⟸32(2).]

3. LICENSES ⟸32(2)—FEES—COLLECTION.

That Laws Alaska 1913, c. 52, imposing license taxes, provided for penalties and punishment in case of nonpayment, does not preclude a civil action for recovery of the taxes; the penalties and punishment being provided to discourage evasion of the statute.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. ⟸32(2).]

4. LICENSES ⟸7(1)—STATUTE—VALIDITY.

Laws Alaska 1913, c. 52, § 1, imposes a license tax on the business of mining of one-half of one per cent. on net income above $5,000 per annum. Section 3 of the act declares that any person, corporation, or company, doing or attempting to do business without first having paid the license required, shall be deemed guilty of a misdemeanor, etc. *Held*, that as the intent of the statute is plain, and as a literal enforcement of its provisions would render it invalid, it must be construed as requiring persons engaged in the business of mining to apply for a license and subsequently to pay the license fee based on a percentage of the net income, and, as so construed, the act is valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7, 19; Dec. Dig. ⟸7(1).]

5. CONSTITUTIONAL LAW ⟸42—DEFECTS OF STATUTE—PERSONS ENTITLED TO ATTACK.

Defendant, who made no application for a license to carry on the business of mining, cannot, in a suit to recover the license tax imposed, defeat recovery on the ground that Laws Alaska 1913, c. 52, § 2, declaring that the licenses shall be issued by the clerk in compliance with the order of the court and that the clerk shall keep a full record of all applications and of all recommendations for and remonstrance against the granting of license, and the action of the court thereon, renders the granting of a license purely arbitrary; for defendant, not having applied for a license, cannot have been injured.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸42.]

6. LICENSES ⟸7(2)—WHAT ARE—UNIFORMITY.

The license taxes imposed by Laws Alaska 1913, c. 52, on the business of mining, are not revenue measures pure and simple, and so are not invalid under Organic Act (Act Aug. 24, 1912, c. 387, 37 Stat. 514 [Comp. St. 1913, § 3536]) § 9, providing for uniformity of taxation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 8, 19; Dec. Dig. ⟸7(2).]

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action by the Territory of Alaska against the Alaska Mexican Gold

Mining Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This case was submitted upon an agreed statement of facts by which it appears that the Alaska Mexican Gold Mining Company, a mining corporation, was carrying on a mining business between July 31, 1913, and January 1, 1914, and that during that period it had a net income of $59,655.77; that for the calendar year 1914 it had a net income of $119,953.49. It further appears that the Alaska Mexican Gold Mining Company fully complied with the provisions of the Act of Congress of June 6, 1900, providing for taxes on business and trade in Alaska, by paying thereunder a tax of $3 per annum on each of its 120 stamps. The District Court in Alaska held that the defendant was liable for the license tax imposed by the territory in chapter 52, Session Laws of 1913; that the taxes so due could be recovered in a civil action under the provisions of chapter 76, Session Laws of 1915; and judgment was rendered against the mining company. Upon writ of error the case comes to this court.

The contention of the plaintiff in error is: (1) That no civil liability was created by the provisions of chapter 52 of the act of the territorial Legislature, Session Laws of 1913, and that the provisions of chapter 76 of the Session Laws of the Alaska Legislature of 1915, providing for the collection of the back taxes then due, were void; (2) that chapter 52 of the act of the territorial Legislature of 1913 is void as against the plaintiff in error because it was impossible for plaintiff in error to comply with the provision of such act and apply for and obtain a license as therein provided, in that it could not know and pay in advance the one-half of one per cent. on its net income, and that, in a prosecution for failure to comply with the provisions of the act, the court could not impose a sentence, because the amount fixed as a penalty is too indefinite and uncertain; (3) that the territorial act referred to is void as conferring arbitrary power upon the court or judge to deny the owner of a mining claim the right to work and operate his claim, and thereby the statute seeks to give the power to confiscate the property of one engaged in a lawful pursuit; (4) that the license tax imposed by the act of the Legislature referred to is a revenue measure, and in conflict with that provision of section 9 of the Organic Act which provides that all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and that the assessment shall be according to the actual value thereof; (5) that the act of the territorial Legislature referred to is void for lack of uniformity upon the same class of subjects, in that it exempts from taxation the first $5,000 of the net income.

Hellenthal & Hellenthal, of Juneau, Alaska (Curtis H. Lindley, of San Francisco, Cal., of counsel), for plaintiff in error.

J. H. Cobb, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1-3] By the Act of May 1, 1913, which was to establish a system of taxation, create revenue, and provide for collection thereof, and for other purposes (Alaska Salmon Company v. Territory of Alaska, No. 2720, 236 Fed. 62, — C. C. A. —), the Legislature provided that any person prosecuting any of the following lines of business within Alaska should first apply for and obtain license so to do from the District Court or subdivision thereof in said territory, and "pay for said license for the respective lines of business and trades as follows, to wit: * * * Mining. One-half of one per cent. on net income

over and above five thousand dollars per annum." Section 2 of the act, so far as material, is as follows:

"That the licenses provided for in this act shall be issued by the clerk of the District Court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon."

By section 3 of the act it is provided:

"That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; provided, that each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; provided further, that in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; provided further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings."

The contention that no civil liability was created by the act of 1913 must not be confused with the belief that no duty to pay was imposed by that act. There was a legal command to take out a license before the plaintiff in error prosecuted the "line of business" of mining. It may be assumed that under the law of 1913 the only way the territory had to enforce the duty to pay was by conviction of misdemeanor after failure to pay, and, upon continuing failure to pay, by judgment to collect as in civil suits. But the duty to pay having existed, remedy for the enforcement of the duty or obligation could be provided by legislation subsequent to the time when the duty arose; or if when the duty arose there was a remedy, but it was exclusively confined to criminal prosecution and judgment thereafter, such remedy could be changed or enlarged by subsequent legislative action, or additional remedy could be given, without impairing the rights of the plaintiff in error. Sturges v. Carter, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; Holthaus v. Adams County, 74 Neb. 861, 105 N. W. 632; Hosmer v. People, 96 Ill. 58; State ex rel. Kemper v. St. L., K. C. & N. Ry. Co., 9 Mo. App. 532; Cooley on Taxation (3d Ed.) p. 492 et seq.; Royall v. Virginia, 116 U. S. 572, 583, 6 Sup. Ct. 510, 29 L. Ed. 735.

By section 4 of chapter 76 of the Laws of Alaska for 1915, it was provided that special remedies provided by that particular act or other acts of the Legislature shall not be deemed exclusive, and that

"any appropriate remedy either civil or criminal, or both, may be invoked by the territory in the collection of all taxes, and in civil actions the same penalties may be collected" as were by the act of 1915 provided in criminal actions. Furthermore, it was provided by section 7 of the Act of April 29, 1915, which amended the act of 1913, that the act of 1913 was repealed except in so far as the same was reenacted by the Act of April 29, 1915, but that nothing in the act of 1915 contained "shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the act of which this act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

Construing these statutes together, we find that a civil remedy for the collection of taxes was given by section 4 of the act of 1915, and that, under section 7 of the same act, remedy became available to collect taxes due under the act of 1913. There is no rule which prohibited the territorial Legislature of 1915 from adopting the remedies it did to recover for license taxes prescribed by the law of 1913. Nor does the fact that, in an action of debt for the tax, it may be necessary to resort to sources of information outside of the statute to arrive at the amount on which the per centum of tax fixed by the statute is to be calculated, affect the question; for the statutory charge is certain for the purposes of an action in debt, because it can be made certain through action in court. This principle was upheld in United States v. Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204. It was there held that the penalties in the law then under examination were provided in order to induce the payment of the tax, and not as a substitute for payment. The court said:

"It cannot be supposed that Congress intended, by penalizing delinquency, to deprive the government of any suitable means of enforcing the collection of revenue. * * * Punishment by imprisonment, under section 13, is imposed only where it can be shown that there was an 'intent to evade the provisions' of the act, and while this remedy is appropriate in such a case, and is for the obvious purpose of discouraging evasion, it is without application where, for any other reason, the tax has not been paid and thereby the government has lost its revenue."

The language of section 7 of the act is very explicit in providing that taxes due under the act of 1913 shall be collected and enforced in the same manner that taxes provided for by the act of 1915 shall be collected and enforced. There is therefore a perfectly clear expression that the intention of the Legislature was that the remedy shall be under the act of 1915; and it is settled that the grant of a new remedy in unequivocal terms, even though retroactive, is not necessarily void legislation. League v. Texas, 184 U. S. 156, 22 Sup. Ct. 475, 46 L. Ed. 478; Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; Cook v. United States, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906.

[4] We are unable to agree with plaintiff in error in the argument that chapter 52, above referred to, is void because of an impossibility

to comply with the provisions of the act. It will be readily granted that the act is not as explicit as it should be, and that its application calls for a postponement of the payment of the tax until the amount of revenue from the business taxed can be ascertained; but the fact that it is inartificially drawn and that its exact enforcement may be difficult, ought not to make it invalid, if the language used expresses a plain meaning by the lawmaking body. For many years the collection of license taxes which were imposed by acts of Congress for Alaska was carried on by collecting indeterminate amounts. Act June 6, 1900, c. 786, 31 Stat. 321. The system was not new in the territory, and, in the light of legislative history, not incapable of being put into practical operation; and, the tax being one which could be lawfully imposed, we believe it beyond judicial power to declare the law imposing it to be invalid merely because the Legislature laid down a procedure which, if literally obeyed in the arrangement of the steps required, necessarily would defeat the plain, expressed object of the legislation. The intention being plain, the inartificiality of the law should not result in its overthrow. Johnson v. Southern Pacific, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Cliquot's Champagne, 3 Wall. (70 U. S.) 114, 18 L. Ed. 116; United States v. Stowell, 133 U. S. 1, 12, 10 Sup. Ct. 244, 33 L. Ed. 555.

[5] It is urged that the act should be declared invalid because under its provisions the "action of a court or judge in granting or refusing a license is purely arbitrary and is guided by nothing except the remonstrances and recommendations filed with the application and submitted to him therewith." Reverting to the provisions of the act of 1913, we find that by section 2 thereof the license provided for "shall be issued by the clerk of the District Court * * * in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon." Section 3, following section 2 just quoted, has already been referred to as the clause making provision for penalizing those doing business in violation of the provisions of the act, or without first having paid the license therein required. The procedure contemplated seems to have been as follows: The applicant for a license shall duly file his application with the clerk of the District Court. The clerk shall keep a record of this application and recommendations and remonstrances against the granting of the license applied for. The court must act upon such recommendations and remonstrances, and when the court has acted the license shall be issued by the clerk in compliance with the order of the court or judge. The language in the act of 1913, as just heretofore quoted, is the same as is found in section 2572 of the Compiled Laws of Alaska. In the act of Congress, however, by section 2573, Compiled Laws of Alaska, special provision was made with relation to licenses to be issued for sale of intoxicating liquor; it being required that, before license was granted in such cases, a certain showing had to be made to the satisfaction of the court that a majority of the male and female citizens

over the age of 21 years within a certain distance of the place where the liquor was to be sold had consented to the issuance of the license. This provision apparently only applied to action upon applications for license for disposition of intoxicating liquors. It may be that, as to licenses where the business is in itself lawful, no power under the law of 1913 was given to the court to withhold issuance of license after application was duly made; but, inasmuch as we think it was not an excess of legislative power to require an applicant for license to apply first to the territorial court and to make the court or judge a deciding authority in acting upon the application, a decision on the point suggested is not necessary in this case, because this plaintiff in error has never filed an application for a license, and is therefore in no position at present to assail the validity of the law on the ground of possible abuse of power vested in the court or judge called on to make an order with respect to its application. If, after it shall have applied, the court or judge should deny it a license, it will then be time enough to invoke remedy for any injustice that may have been done.

[6] The contention that the license tax imposed is a revenue measure pure and simple, and as such is in conflict with section 9 of the Organic Act, is involved in the discussion which we have entered into in the case of Alaska Pacific Fisheries v. Territory of Alaska (No. 2709) 236 Fed. 52, —— C. C. A. ——, and we abide by the conclusion reached in that case.

We find none of the objections made to the validity of the law well taken.

The judgment of the District Court is therefore affirmed.

ALASKA PACIFIC FISHERIES v. TERRITORY OF ALASKA. *

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2731.

1. LICENSES ⟸32(2)—LICENSE TAXES—CIVIL ACTION.

While Act Alaska May 1, 1913 (Laws 1913, c. 52), provides no civil action for the recovery of license fees imposed, such action is provided for by the subsequent Act April 29, 1915 (Laws 1915, c. 76), thus license fees due under the original act may be recovered by civil action.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. ⟸32(2).]

2. STATUTES ⟸47—LICENSE TAX—VALIDITY.

Act Alaska May 1, 1913, imposing license taxes on fisheries computed on the output, provides, in section 3, that any person doing or attempting to do business in violation of the act without having first paid the license required shall be deemed guilty of a misdemeanor and shall be fined. *Held*, that as statutes should receive a reasonable construction, and as the doing business without a license is the essential thing prohibited, the statute must be construed, payment in advance being impracticable, as requiring an application for license before the licensee does business and

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

*Rehearing denied October 9, 1916.

a subsequent payment and as so construed is not so uncertain as to be incapable of enforcement.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. ⇐47.]

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action by the Territory of Alaska against the Alaska Pacific Fisheries, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This is an action brought to recover taxes claimed to be due under the act of the territorial Legislature of Alaska for prosecuting the business of fishing for and canning salmon in Alaska between August 1 and December 31, 1913, during which period plaintiff in error canned various quantities of salmon.

The contention of the territory is that by an act of the Alaska Legislature approved May 1, 1913, there became due to the territory $769.48, payable on or before January 15, 1914, and the sum of $2,488.89, with interest, alleged to be due for failure on the part of the plaintiff in error to take out a license to carry on the business of taking and canning salmon during the year 1914; the tax being alleged to be due before January 15, 1915.

Judgment was entered in favor of the territory after demurrer had been overruled and defendant had elected to stand upon the demurrer.

Hellenthal & Hellenthal, of Juneau, Alaska, for plaintiff in error.

J. H. Cobb, Chief Counsel for the Territory of Alaska, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The questions presented are: (1) Does the act of the territorial Legislature of 1913 (Laws 1913, c. 52), which establishes a system of taxation, creates revenue, and provides for collection thereof, for the territory of Alaska, and for other purposes, create any civil liability? (2) Does this act just referred to, taken in connection with the subsequent act of the Legislature of Alaska passed in 1915 (Laws 1915, c. 76), provide for any civil remedy? (3) Is the act of the territorial Legislature of 1913 valid? (4) Can plaintiff in error be held liable in view of the provisions of the act of Congress of June, 1906 (Act June 25, 1906, c. 3547, 34 Stat. 478)?

[1] Counsel for plaintiff in error, in their opening brief, devote much attention to the argument that the act of the Alaska Legislature of May 1, 1913, creates no civil liability, and invoke the ruling of this court in United States v. Jourden, 193 Fed. 986, 113 C. C. A. 606; but under the conditions existing in the present case we do not regard that case as controlling. There the court held that a civil action by the United States would not lie to recover the wholesale fee of a retail liquor dealer who was selling at wholesale in violation of the statute, the court resting its decision upon the ground that a civil action could not be brought because there was no provision, express or implied, in the statutes of Alaska, for the recovery of the license fee by civil action. The case is to be distinguished, in that by the act of the Legislature of Alaska of 1915 there is a civil remedy for the collection of the license tax due under the revenue act of 1913 which is

effectual, as we have pointed out in Alaska Mexican Gold Mining Co. v. Territory of Alaska, 236 Fed. 64, —— C. C. A. ——, No. 2727.

[2] As to the points that the act is invalid because it is indefinite and uncertain and incapable of enforcement, we need add but little to what was said in the case of Alaska Mexican Gold Mining Co. v. Territory of Alaska, supra. A careful reading of section 3 of the act of 1913, which provides that any person doing, or attempting to do, business, in violation of the provisions of the act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined, demonstrates that, when it is considered with the other sections of the act, the doing of business without a license was the essential thing to be prohibited. Where the license called for could be paid in advance, of course it was plainly the mandate of the law that it should be; but, where it could not be so paid because of the indeterminate nature of the amount of the license taxes, obviously the procedure for exacting payment for the license in advance would practically be impossible of application. Hence a construction of the statute whereby payment in advance must be made would make the law absurd. The rule, however, is too often announced that statutes shall receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Oates v. National Bank, 100 U. S. 239, 25 L. Ed. 580. This can be done in the present case by simply giving that reasonable effect to the language of the act which will carry out its unmistakable purpose to compel persons doing any of the businesses enumerated in the statute to apply for a license before doing business and to pay the license tax in advance, if it can be fixed in amount; or, if it cannot be so determined until after a period, then payment is to be deferred until determination can be had. And as the obligation to pay became fixed, and remedy for its enforcement by civil action was granted by the act of 1915, we think the court was correct in holding the law to be valid and the collection enforceable.

In respect to the constitutionality of the law, we shall follow the rule laid down in Alaska Pacific Fisheries v. Territory of Alaska (No. 2709) 236 Fed. 52, —— C. C. A. ——.

The judgment of the District Court is affirmed.

SHEPARD v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1916.)

No. 2669.

1. COMMERCE ⟨⟹4—OFFENSES—STATUTE.
Act Jan. 17, 1914, c. 9, § 1, 38 Stat. 275, declares that after April 1, 1909, it shall be unlawful to import into the United States opium in any form, but that opium and derivatives thereof other than smoking opium may be imported for medicinal purposes. Section 2 provides that if any person shall fraudulently or knowingly import or bring into the United States any opium or derivative contrary to law, or shall receive, conceal, buy, or sell, or in any manner facilitate, the transportation, concealment, or sale thereof, knowing it to have been imported contrary to law, such opium shall be destroyed and the offender punished, and that whenever a defendant is shown to have, or have had, possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction, unless explained. Section 3 declares that on and after July 1, 1913, all smoking opium, or opium prepared for smoking, found shall be presumed to have been imported after the 1st day of April, 1909, and the burden shall be on the accused to rebut such presumption. *Held*, that the act is not unconstitutional in so far as it makes penal the keeping and transportation of opium within the limits of the states as being in conflict with the police powers of the states and not within the powers delegated to the United States.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 3, 5; Dec. Dig. ⟹4.]

2. CRIMINAL LAW ⟹1156(2)—MOTION FOR NEW TRIAL—DISCRETION OF COURT.
The denial of a motion for new trial is within the discretion of the court, and where there is evidence to support the verdict, the denial of the motion is not reviewable on error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3068; Dec. Dig. ⟹1156(2).]

3. CONSPIRACY ⟹43(6)—INDICTMENT—SUFFICIENCY—UNCERTAINTY.
In a prosecution under Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1096) § 37 (Comp. St. 1913, § 10201), for conspiring to violate Act Jan. 17, 1914, § 2, providing that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium contrary to law, or shall receive, conceal, buy, sell, or facilitate the transportation, concealment, or sale of such opium after importation, knowing it to be imported contrary to law, shall be punished, the indictment charged that defendants conspired to commit against the United States the offense of fraudulently and knowingly importing and bringing into the United States from a foreign country, the Republic of Mexico, opium prepared for smoking and to receive, conceal, buy, sell, and facilitate transportation, concealment, and sale of such opium knowing it to be imported contrary to law, which offense is defined by Act Jan. 17, 1914. *Held*, that in view of the specific reference of the indictment to the act, the fact that it omitted the words "after importation," preceding the words "knowing the same to have been imported contrary to law," did not render it uncertain on the theory that, defendants having admitted they were engaged in dealing in opium in Mexico, it did not appear whether the offense was committed in the United States or in Mexico.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 91; Dec. Dig. ⟹43(6).]

4. CRIMINAL LAW ⟹823(15)—TRIAL—INSTRUCTIONS.
Where the court charged that in criminal cases, guilt must be established beyond a reasonable doubt, and that before a conviction can be rendered

each juror must be able to say, in answer to his individual conscience, that he has in his mind arrived at a fixed opinion that the defendant is guilty, an instruction that juries are impaneled for the purpose of agreeing on a verdict if they can conscientiously do so, and that a juror should not hesitate to sacrifice his opinions when convinced they are erroneous, though in so doing he defers to the opinions of others, is not objectionable as failing to impress on the jury that each juror should be individually convinced beyond a reasonable doubt of accused's guilt before convicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⊜823(15).]

5. Criminal Law ⊜823(12)—Trial—Instructions.
A charge that the jury should exercise their power to judge the credibility of witnesses, not arbitrarily, but with legal discretion and in subordination to the rules of evidence, is not objectionable as failing to define legal discretion, where the court proceeded to state the rules of law usually given to guide the jury in judging the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⊜823(12).]

6. Criminal Law ⊜823(14)—Trial—Instructions.
Where the court charged that accused could not be convicted unless found guilty beyond a reasonable doubt from all the evidence, an instruction that, where the evidence is entirely circumstantial, yet is not only consistent with the guilt of accused, but inconsistent with any other rational conclusion, the jury should convict is not objectionable as failing to state that each essential of the crime should be established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1994, 3158; Dec. Dig. ⊜823(14).]

7. Criminal Law ⊜308—Trial—Presumption of Innocence.
While accused at the beginning of the trial is presumed to be innocent, yet whenever the proof shows beyond a reasonable doubt his guilt, then the presumption of innocence disappears from the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. ⊜308.]

8. Criminal Law ⊜789(12)—Trial—Instructions—Reasonable Doubt.
An instruction, defining a reasonable doubt as a doubt based on reason and which is reasonable in view of all of the evidence, and directing jurors to acquit unless they should have an abiding conviction of accused's guilt, such as a person would be willing to act upon in the more weighty and important matters relating to one's own affairs, is correct, and not open to objection that it should have been charged that the abiding conviction which is necessary to justify a verdict of guilty should be such a conviction as one would be willing to act upon in the most important questions of life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1917, 1960, 1967; Dec. Dig. ⊜789(12).]

9. Conspiracy ⊜48—Trial—Instructions.
Where the indictment clearly charged the overt acts as following the conspiracy and done to effect its object, an instruction that it is not necessary for the government to prove that all of the defendants committed overt acts, but if there was a conspiracy as charged and the defendants were parties and any one of the overt acts was committed, defendants should be convicted, is not objectionable as failing to state that the overt act charged must have followed the conspiracy in point of time.

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

10. CRIMINAL LAW ⟸762(2)—TRIAL—INSTRUCTIONS—ADMISSIONS.
In a prosecution for conspiracy, where one of the defendants admitted the conspiracy and the commission of overt acts, plaintiff in error, another of the defendants, cannot complain of an instruction that, so far as such defendant was concerned, he had admitted there was a conspiracy as charged, and that he was a party to it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758; Dec. Dig. ⟸762(2).]

11. INDICTMENT AND INFORMATION ⟸168—CONJUNCTIVE ALLEGATIONS—CONVICTION.
Where an indictment, charging conspiracy to violate Act Jan. 17, 1914, denouncing an offense with respect to the importation of opium, which may be committed in various manners, charged conjunctively the several acts specified by the statute, a conviction may be had upon proof of any one of such acts; for where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 534; Dec. Dig. ⟸168.]

12. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS—REFUSAL.
The refusal of requested instructions covered by those given is not error.

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

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Frederick M. Shepard and another were convicted of the crime of conspiracy to import into the United States smoking opium in violation of law, and the named defendant brings error. Affirmed.

Indictment under section 37 of the federal Penal Code (Act of March 4, 1909; 35 Stat. pt. 1, pp. 1088, 1096), charging F. M. Shepard and A. C. Brown with the crime of conspiracy to import into the United States from Mexico 80 cans of smoking opium, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium, in violation of the act of January 17, 1914 (38 Stat. pt. 1, p. 275). Judgment upon a verdict of guilty against each of the defendants. Frederick M. Shepard, one of the defendants, sues out the present writ of error.

In July, 1914, plaintiff in error was retained as attorney at law to represent and to obtain bail for certain persons who were lodged in the county jail in Los Angeles, charged with the crime of conspiracy to import opium into the United States from Mexico in violation of the laws of the United States. One A. C. Brown was also employed by the same persons for the purpose of obtaining such bail. In connection with their efforts to secure bail, and at the instance of their clients, plaintiff in error and Brown proceeded to Tia Juana, just over the boundary line in the republic of Mexico, where they found 40 five-tael cans of smoking opium which had been concealed by their clients. This opium Brown proceeded to dispose of in Tia Juana for either $32 or $34 per can, making a total sum of either $1,280 or $1,360, and, after deducting his proportion of the proceeds in accordance with a previous understanding with their clients, Brown delivered the balance of $1,000 to plaintiff in error.

A second lot of 53 or 54 cans, concealed in the same vicinity, was searched for, but not found by the plaintiff in error. It appears, however, that a quantity of opium was found in that neighborhood by the defendant Brown and sold.

A third lot was found by the plaintiff in error and the defendant Brown, concealed near Jacumba, in Mexico, about 76 miles east of San Diego, near the boundary line. The defendant Brown subsequently brought this lot to or near Los Angeles, in California, where it was concealed for a time.

Plaintiff in error and Brown were thereafter jointly indicted under section 37 of the federal Penal Code for conspiracy to import into the United States from the republic of Mexico this last-mentioned lot of 80 cans of smoking opium, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium, in violation of the act of January 17, 1914. It is charged as overt acts in the furtherance of the conspiracy that the plaintiff in error and the defendant Brown went from San Diego to Jacumba, Mexico, and that the defendant Brown brought the 80 cans of smoking opium from Jacumba, Mexico, to a point near Los Angeles, Cal. To this indictment defendants Shepard and Brown interposed their several demurrers, which were overruled by the court. On the trial of the case, the jury returned a verdict of guilty as against each of the defendants. Defendant Shepard thereafter moved for a new trial upon certain grounds specified in the motion, and moved in arrest of judgment upon the ground that the act of January 17, 1914, is unconstitutional and void, both of which motions were denied by the court and the defendants each sentenced to imprisonment for the term of one year. Defendant Shepard thereafter sued out the present writ of error.

Charles J. Kelly and S. M. Johnstone, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., of Los Angeles, Cal., M. G. Gallaher, Asst. U. S. Atty., of Fresno, Cal., and J. Robert O'Connor, Asst. U. S. Atty., of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. The indictment in this case contains but one count. The errors assigned relate to the overruling of a demurrer to the indictment, the giving of certain instructions to the jury, the refusal of the court to give certain instructions requested by the defendant, the denial of the motion of defendant for a new trial, and the denial of a motion in arrest of judgment.

Section 37 of the Penal Code of the United States (Act of March 4, 1909, c. 321; 35 Stat. 1088, 1096) provides:

"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."

[1] Section 1 of the act of January 17, 1914, c. 9 (38 Stat. 275, 276) provides:

"That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law."

Section 2 of the same act provides:

"That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative

thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

Section 3 provides:

"That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

The motion in arrest of judgment is based upon the objection that the last-named act is unconstitutional in so far as it attempts to make penal the keeping and transportation of opium within the limits of a state, being in conflict with the police power of the state and not within the powers delegated to the United States. In Brolan v. United States, 236 U. S. 216, 222, 35 Sup. Ct. 285, 59 L. Ed. 544, this objection to the statute was held by the Supreme Court to be so utterly devoid of merit as to be frivolous.

[2] 2. The denial of a motion for a new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised and there is evidence to support the verdict, as in this case, the motion is not reviewable on a writ of error. This has been held so often that we are surprised that the denial of the motion continues to be presented as a ground for the reversal of a judgment. Dwyer v. United States, 170 Fed. 160, 165, 95 C. C. A. 416; Hedderly v. United States, 193 Fed. 561, 571, 114 C. C. A. 227; Pickett v. United States, 216 U. S. 456, 461, 30 Sup. Ct. 265, 54 L. Ed. 566; Holmgren v. United States, 217 U. S. 509, 521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

[3] 3. The demurrer to the indictment interposed by the plaintiff in error was for uncertainty in charging the offense which it is alleged the defendants conspired to commit. Section 2 of the act of January 17, 1914, upon which this indictment is based, provides:

"That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium * * * contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium * * * after importation, knowing the same to have been imported contrary to law," etc.

The indictment charges that the defendants conspired to commit an offense against the United States, to wit:

"The offense of fraudulently and knowingly importing and bringing into the United States, and assisting in so doing, from a foreign country, to wit, the republic of Mexico, opium prepared for smoking, and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of such opium prepared for smoking, knowing the same to have been imported contrary to law, which said offense is defined by the Act of January 17, 1914."

The indictment does not follow the letter of the statute, but omits the words, "after importation," preceding the words, "knowing the same to have been imported contrary to law."

It is argued that this omission is material and important, particularly in this case, where it is admitted that the plaintiff in error and the defendant Brown were engaged in dealing in opium in Mexico in a manner substantially in the words of the statute; that instead of omitting these words from the indictment, the words of the statute should have been amplified so that it should have been distinctly charged (if such was the purpose of the indictment) that the offense which the defendants conspired to commit was to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of opium in the United States, after its importation into the United States, knowing the same to have been imported into the United States contrary to law; that in the absence of such a direct and specific charge, the indictment was uncertain and ambiguous, and did not sufficiently apprise the defendants of the offense which they were charged to have conspired to commit, and was not sufficiently definite to make a conviction or acquittal under the indictment available as a plea in bar to a subsequent prosecution. The plaintiff in error suggests hypothetical cases coming within the wording of the indictment where the agreement might be to receive, conceal, etc., opium in some foreign country (as, for example, Mexico), knowing it to have been imported into that foreign country contrary to law. Again, it is argued that a person might knowingly buy, sell, and facilitate the transportation and sale of opium in a foreign country after such opium had been imported into the United States, and while it still remained in the United States, having been imported contrary to law.

We are of the opinion that the indictment does not cover the hypothetical cases suggested, and that no essential element of certainty is wanting in its form or substance to charge the offense provided in the statute. The remaining statutory words which have been followed in the indictment clearly describe the offense as a conspiracy to import and bring into the United States opium contrary to law, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium. What opium? Opium which the defendants have conspired to import and bring into the United States contrary to law. This allegation can only refer to opium after its importation into the United States. The indictment charges that the defendants conspired to commit "an offense against the United States," and thereupon proceeds to describe the offense, charging the acts following the importation of opium into the United States contrary to law. Moreover, the offense is charged as being defined by the act of January 17, 1914. This, we think, fixes the charge in the indictment with absolute certainty. We are of the opinion that the demurrer was properly overruled.

[4] 4. The court instructed the jury that:

"Juries are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his view or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others."

It is objected to this instruction that it fails to state that each juror individually should be convinced beyond a reasonable doubt that the defendant is guilty before he can vote to convict. The court subsequently stated that:

"In criminal cases guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the government. The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty, in the manner and form as charged in the indictment, beyond a reasonable doubt, and unless they have done so, the jury should acquit. Before a verdict of guilty can be rendered, each member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a fixed opinion, based upon the law and the evidence of the case, and nothing else, that the defendant is guilty."

This was a very clear instruction that the individual judgment of each juror was required.

It is further objected to the instruction that its wording impressed upon the jury to an undue and improper extent their duty to agree upon a verdict. We do not so read the instruction. It is well within the discretion of the trial court to urge a jury to agree upon a verdict, and the court may properly advise the jury that, while they should not surrender any conscientious opinion founded on the evidence, they should lay aside all pride of judgment, and that they should consider their differences in a spirit of fairness and candor, with an honest desire to arrive at the truth and with the view of arriving at a verdict. Allen v. United States, 164 U. S. 492, 501, 17 Sup. Ct. 154, 41 L. Ed. 528; 38 Cyc. 1853, 1854. We are of the opinion that the instruction is correct, and that the objection made to it is without any substantial merit.

[5] 5. It is objected that the court instructed the jury that their power to judge of the credibility of witnesses was not arbitrary, but was "to be exercised with legal discretion, and in subordination to the rules of evidence," without defining what was "legal discretion," leading the jury to infer that "legal discretion" is something different from and more restricted than ordinary discretion. The distinction is hypercritical. The court proceeded to correctly state the rules of law usually given by courts to juries with respect to the credibility of witnesses. By these rules, the jurors were made to clearly understand what was meant by the exercise of "legal discretion" in weighing the testimony of witnesses.

[6] 6. The court instructed the jury that:

"Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict."

It is objected to this instruction that it failed to state that each circumstance essential to the conclusion of guilt must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance, and that the hypothesis of guilt should flow naturally from all the circumstances and be consistent with them all. The instructions of the court with respect to a reasonable doubt covered this objection, and, in particular, where the court instructed the jury that:

"You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt."

[7] 7. The court instructed the jury that:

"The law presumes a defendant charged with a crime innocent until proven guilty beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and in that case find the defendant not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt"

It is objected to this instruction that the court did not instruct the jury that the defendant is presumed to be innocent throughout the entire proceedings and even after all the evidence is produced and until a final ballot is taken by the jury at the conclusion of their deliberations. The instruction given by the court is correct. "A party starts into a trial, though accused by the grand jury of a crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony." Jones on Evidence, vol. 1, § 12d. In Allen v. United States, 164 U. S. 492, 500, 17 Sup. Ct. 154, 41 L. Ed. 528, the Supreme Court stated the rule to be:

"Whenever the proof shows, beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case." The court "gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done." Dunbar v. United States, 156 U. S. 185, 199, 15 Sup. Ct. 325, 39 L. Ed. 390.

[8] It is further objected that the jury were instructed that the "abiding conviction" which the jury should have to justify a verdict of guilty would be such a conviction as the jury would be willing to act upon in the more weighty and important matters relating to their own affairs, instead of the most important matters of life. In Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, the trial court gave this identical instruction, to which there was an exception. The Supreme Court approved the instruction, saying:

"The instruction in the case before us is as just a guide to practical men as can well be given; and, if it were open to criticism, it could not have misled the jury, when considered in connection with the further charge that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they should do so, and in that case find him not guilty. The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion."

This is precisely the qualification which the trial court in this case had given the jury.

[9] 8. It is objected that the instruction of the court with respect to the crime of conspiracy did not state that the overt act charged must have been shown to have followed the conspiracy in point of time, and, further, that it did not require the jury to find that the overt act was done to effect the object of the conspiracy.

The following instruction given by the court we think covers this objection:

"In this connection you are charged that it is not necessary for the government to prove that all of the defendants committed some overt act, but if you find beyond a reasonable doubt that there was a conspiracy as charged in the indictment, and that the defendants now on trial were parties to that conspiracy, and that any one of the overt acts as charged in the indictment was committed as therein alleged, you should find the defendants guilty as charged in the indictment."

The indictment clearly charged the overt acts as following the conspiracy and done to effect the object of the conspiracy.

[10] 9. The court charged the jury:

"In so far as the defendant Brown is concerned, he admits in his testimony that there was a conspiracy as charged in the indictment, and that he was a party to it."

It is objected that this instruction—

"intimated to the jury that the testimony of Brown, being an admission by him that there actually was a conspiracy, should be treated by the jury as the absolute truth, and that all that remained for them to decide was whether or not the plaintiff in error was a party to this conspiracy."

As Brown admitted the conspiracy and he and another had testified to the overt acts in furtherance of the conspiracy, the plaintiff in error was not prejudiced by the instruction, and the intimation was not error. Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91.

[11] 10. The court called the attention of the jury to the offense charged in the indictment against the defendants as a conspiracy to commit various acts in violation of the act of January 17, 1914, in the importation, transportation, and concealment of opium. These acts are in the statute connected together by the disjunctive conjunction "or," and in the indictment by the conjunctive conjunction "and." The court instructed the jury that, while the indictment so charged—

"yet the jury would be authorized to return a verdict of guilty if they believed from the evidence beyond a reasonable doubt that the defendants did, at the time and in the manner as described in the indictment, willfully, knowingly, and unlawfully conspire to fraudulently and knowingly import or bring into the United States, or assist in so doing, opium prepared for smoking, or to receive or conceal or facilitate the transportation or concealment of opium prepared for smoking, knowing the same to have been imported contrary to law."

It is objected that the indictment charged but one offense, while the instruction permitted the jury to consider the indictment as charging the defendants with conspiracy to commit several separate and distinct offenses, and authorized them to find the defendants guilty

if they believed that defendants conspired to commit any one or more of such separate and distinct offenses. The instruction was correct. This charging of offenses in the conjunctive which are in the statute in the disjunctive is in accordance with a well-known rule of criminal pleading. In Bishop on Statutory Crimes, § 244, it is stated:

"The reader remembers the proposition that every case against a defendant must come within all the words of the statute. But this proposition, let us here add, is subject to the qualification that, if there are independent clauses connected by the conjunction 'or,' no more need be done than satisfy one of the alternatives. In such circumstances the indictment either sets out the offense as covered by all the clauses, usually connecting the parts of the allegation by the conjunction 'and' where 'or' is found in the statute, or it states only what falls within one clause, at the election of the pleader; and, whichever form is adopted, the proof need cover only so much of the allegation as constitutes a complete offense."

In 22 Cyc. 380, the rule is stated as follows:

"It is a well-settled rule of criminal pleading that when an offense against a criminal statute may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute. So where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense."

The indictment conforms to this rule, and is therefore not subject to the objection urged by the plaintiff in error.

[12] 11. A number of errors are assigned because of the refusal of the court to give certain instructions as requested by the plaintiff in error. We have examined these instructions, and find that, where they correctly state the law, they had been given in substance by the court. Where they were not so given, they were properly refused, because they did not state the law correctly. We think we have sufficiently reviewed all these questions in what has already been said.

The judgment of the court below is affirmed.

LEIB v. HALLIGAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1916.)

No. 2747.

1. COUNTERFEITING ⟸5—NATURE OF OFFENSE—POWERS OF CONGRESS—MONEY.
Congress, under its constitutional power to provide for the punishment of counterfeiting the securities of the United States, has power to interdict the uttering of bank notes made in the similitude of the Treasury notes of the United States, and may make illegal the possession of such notes with intention to sell or use them, irrespective of the question of whether the notes are valid obligations.
[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. ⟸5.]

2. COUNTERFEITING ⟸2—MONEY—OFFENSES.
Penal Code, § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [Comp. St. 1913, § 10320]), which was Rev. St. § 5430, enacted June 30, 1864, pro-

vides that any person who shall have in his possession, except under authority from the Treasurer or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or use the same, shall be guilty of an offense. The act, further, makes it unlawful for persons to have in their possession for use plates for printing obligations or securities of the United States, etc. Accused was charged with having in his possession an obligation made in part after the similitude of an obligation made under authority of the United States, it being made by attaching and fastening together, back to back, notes purporting to have been issued by the Augusta Insurance & Banking Company of Georgia. The indictment set forth that the obligation as prepared bore on each side words to the effect that the Georgia bank would pay $10 to bearer on demand, and that the instruments bore the date 1860. *Held*, that under the act it is not necessary that there shall be a fraudulent or felonious intent; it being sufficient if accused has in his possession, with intent to use or sell, a paper made or executed, in whole or in part, after the similitude of any obligation or other security issued by the United States, and hence, the instrument, as composed of the two notes, pasted back to back, being similar to a legal tender note, accused is guilty, though the notes in his possession antedated the legal tender notes.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 1–4; Dec. Dig. ⟸2.]

3. HABEAS CORPUS ⟸85(1)—PRESUMPTIONS.

On habeas corpus prayed for on the theory that the indictment did not charge an offense, it will be presumed, accused having been convicted, that the jury found that the averments of the indictment were established by the evidence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸85(1).]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Application by George Leib for a writ of habeas corpus against O. P. Halligan and another. From a judgment denying the writ, applicant appeals. Affirmed.

The appellant appeals from the order of the court below, denying him a writ of habeas corpus on his petition, whereby he sought his discharge from imprisonment on the ground that the indictment under which he was convicted stated no offense against the United States. He was indicted under section 150 of the federal Penal Code. Tht first count of the indictment alleged, in substance, the following: That the said defendant "did knowingly and feloniously have in his possession, with intent to use the same and thereby to defraud some person, or persons, to the grand jury unknown, * * * a certain obligation made in part after the similitude of an obligation issued under the authority of the United States, * * * being then and there made by attaching and fastening together, back to back, two notes purporting to have been issued by the Augusta Insurance & Banking Company, Ga., of the denomination of $10 each, * * * by the use of paste and other substance." The indictment then set forth the printed or engraved matter appearing on the paper, both sides of which were identical, to the effect that: "The Georgia Augusta Insurance and Banking Co. will pay ten dollars to the bearer on demand. Robert Walton, Cashr. Wm. M. D. Antigna, Prest"—also the date March 10, 1860, and twice on each side the figures "10." The indictment alleged that the instrument was in form, color, size, and in the manner and style of display of the printing and engraving thereon, and in its general appearance made and intended to be made after the simili-

tude of an obligation issued under the authority of the United States, "that is to say, after the similitude of a United States legal tender note of the denomination of $10, he * * * well knowing said obligation not to be a genuine and lawful obligation issued under the authority of the United States, and with the intent * * * to use the said obligation by uttering the same as and for a lawful obligation issued under the authority of the United States."

George Leib, in pro. per.

Clay Allen, U. S. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] Section 150 of the Penal Code, which was section 5430 of the Revised Statutes, was enacted June 30, 1864, in an act entitled "An act to provide ways and means for the support of the government, and for other purposes." 13 Stats. 218. The provision thereof which, with the change noted hereafter, is now section 150 of the Penal Code defines a number of offenses committed by: (1) Any one who shall use, or suffer to be used, for printing a plate from which has been, or may be, printed any obligation or other security of the United States. (2) Any one who shall sell or import such plate with intent to use the same for printing. (3) Any one who shall have in his control or possession any such plate, with intent to use the same, or suffer the same to be used in forging or counterfeiting any such obligation or other security. (4) Any one who "shall have in his possession, except under authority from the Treasurer or other proper officer, any obligation or other security made or executed in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same." (5) Whoever shall make a print or photograph of any such obligation or security, or who shall sell or import the same. (6) Whoever, unauthorized by the Secretary, shall have and retain in his control or possession a distinctive paper which has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States.

Upon the question whether the possession of a state bank note or a Confederate bank note may constitute the offense which is made punishable by the fourth clause of section 150, the authorities are in conflict. In United States v. Williams (D. C.) 14 Fed. 550, Judge Dyer held that the words of the statute, "any obligation or other security," must be construed to mean one which on its face purports to be an executed instrument, and that a blank obligation of a mining company, made in similitude of a government bond, but without signature of president or secretary, was not an obligation or security within the meaning of the statute. In United States v. Sprague (D. C.) 48 Fed. 828, the instrument resembled in color, style of printing and engraving, and in general appearance a 5—20 government bond, but it purported to be, not an obligation of the United States, but an obligation of a mining company, though not bearing the signature of any officer of the company. The court ruled that, to constitute the offense, it is not essential that the fraudulent bond or instrument shall, on its face,

purport to be an obligation of the United States, but held that a conviction could not be had upon the instrument, for the reason that, being unsigned, it was not an "obligation or security." In United States v. Stevens (D. C.) 52 Fed. 120, the defendant had in his possession a note issued by a state bank, but the bank had become insolvent and the note worthless. It was charged in the indictment that the note was engraved and printed after the similitude of a United States Treasury bank note. The court held that the possession of such a note, with intent to sell or otherwise use it, constituted an offense under the statute, and that the question of the similitude of the note to an obligation or security of the United States should be determined by the jury. In United States v. Kuhl (D. C.) 85 Fed. 624, the obligation was a Confederate States note, but in its general shape and size it resembled a national bank note, and it bore on its face a vignette and other engraving similar to those found on national bank notes. The court held that while it might occur that the resemblance of a Confederate States note to a note of the national currency, in grouping of vignette, engraving, printing, figures, etc., might be such as to justify the submission to the jury of the question whether the similitude contemplated by the statute exists, an ordinary Confederate States note does not bear that similitude to the national currency. The court said:

"But it will not do to lay down the broad rule that, whenever the similarity just stated exists, there therefore exists a 'similitude' such as the statute contemplates; else all bank notes heretofore issued under state statutes will be found to be obnoxious to the provisions of the statute, and such a holding would prohibit the use of all such bank notes. The framers of the statute could not have thus intended. When we look at the note in question, we find a broad band across one end of its face, whereon the word 'Five' appears in large letters. On its face the words 'The Confederate States of America' appear in large letters. * * * There is, in vignette, in engraving, in lettering, in fact in the detail of the face of the note, no special resemblance whatever to the notes or bills 'issued under authority of the United States.' * * * Congress did not attempt or intend to prohibit and make criminal the issuance of bills by banks, wherever authorized to issue same by state law. To construe the statute as thus claimed would make the possession by the officers of such bank of its own bank notes a crime under such statute."

In United States v. Fitzgerald (D. C.) 91 Fed. 374, it does not appear what the instrument was or purported to be. The court submitted to the jury the question whether or not the printing or the engraving on the paper was in the similitude of any government obligation or security, and said that the resemblance was sufficient for the purposes of conviction if they believed that it would probably deceive a person taken unawares in dealing with a person whom he believed was acting honestly. In United States v. Barrett (D. C.) 111 Fed. 369, Judge Amidon, in a very carefully considered and exhaustive opinion, after reviewing the history of the legislation, held that the possession of a Confederate bill is not a violation of the statute, but that to constitute a violation thereof, the instrument must have been intended in its inception to simulate some obligation or security of the United States, and that the general likeness which one form of money bears to another is not sufficient, but something more is required than gen-

eral appearance or adaptability to deceive. The decision in that case seems to have been influenced, to some extent, by the fact that the statute related only to such instruments as are "engraved and printed" in the similitude of government obligations. The court said:

"Engraving and printing is the only feature which the language of the section covers, the only feature which, as the history of the statute demonstrates, it was intended to cover."

Since that decision, and possibly as the result thereof, Congress has changed the language of the statute, and substituted for the words "engraved and printed" the words "made or executed in whole or in part," and thereby it has broadened the scope of the statute. In United States v. Conners (D. C.) 111 Fed. 734, Judge Bellinger held that the possession of a bank note issued by a state bank constituted no offense against the United States, and said:

"The bills described in this indictment are not in the similitude of any obligation issued by the United States, and the statement in the indictment that they are so does not countervail the facts alleged, which show the contrary."

In United States v. Pitts (D. C.) 112 Fed. 522, Judge De Haven followed the decisions of Judge Amidon and Judge Bellinger. In United States v. Webber (D. C.) 210 Fed. 973, Judge Rudkin, after considering the conflicting authorities, held, in a case in which the paper involved purported to be issued by the "Bank of the Empire State," that it was not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States, nor that the similitude or resemblance should be so great as to deceive experts or cautious men; that it was sufficient if the fraudulent obligation bears such a likeness to any of the genuine obligations or securities of the United States as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observance and care in dealing with a person supposed to be upright and honest.

It will be seen that the line of division of the decisions is on the question whether or not the forbidden instrument must be one which on its face purports, in whole or in part, to be a government obligation, or so closely resembles one as to show that it was made with the intention to simulate it. In ascertaining the intention of Congress it is significant that to constitute the offense defined in the fourth clause of the section, it is not necessary that there shall be a fraudulent or felonious intent. It is sufficient if the accused has in his possession, with the intent to use or sell, the paper which is there described. What the character of that paper must be is not, we think, necessarily ascertained from the other provisions of the section which make unlawful the possession or use of plates from which government obligations may be printed. Nor do we think that the language of the fourth clause, or of any other provision of the section prohibiting acts which might result in forging or counterfeiting United States securities, warrants the conclusion that the fourth clause was intended to be limited to those instruments only which purport to be securities or obligations of the United States, or which so closely resemble them in gen-

eral appearance that they may be said to be made or executed, in whole or in part, after the similitude thereof. In this view it is immaterial whether or not the instrument was criminal in its inception, or was intended to simulate any security of the United States. Possession of the instrument being positively prohibited by statute, guilty intent is not an essential element of the offense, and there is no necessity for any specific intent or motive except the intention to use or sell. Congress, under its constitutional power to borrow money on the credit of the United States and to "provide for the punishment of counterfeiting the securities of the United States," had the power, of course, to interdict the uttering of bank notes made in the similitude of the Treasury notes of the United States, and it follows that it had the power to make illegal the possession of such bank notes with the intention to sell or use the same, irrespective of the question whether they were the notes of solvent banks and of value equal to that of the Treasury notes of the same denominations. This construction of the statute renders illegal the act or occupation of one who has in his possession Confederate States bank notes, or state bank notes, with the intention to sell the same as curios, provided that such notes are, as was charged in the case at bar, in their general appearance made after the similitude of government obligations, for the tendency of such sale and distribution of such paper is to place the same in circulation where it may be used to deceive and defraud. Congress has the same power, and has exercised it to prohibit the possession of "anything whatsoever" in the likeness or similitude as to design, color, or inscription thereon, of any of the coins of the United States with the intent to use, sell, or give away the same.

We reach the conclusion that it is immaterial whether or not the instrument was criminal in its inception or was intended to simulate any security of the United States, or in any of its features purports to be an obligation or security of the United States.

[3] It follows from that conclusion that the judgment here appealed from must be affirmed, for we must take it to be true, as charged in the indictment, and as found by the jury, that the note which the appellant had in his possession, but which we have no opportunity to inspect, was made after the similitude of a United States legal tender note, and that there was such similarity of shape, size, and color, or in the grouping of words, figures, or vignettes as to present the similitude which brings an instrument within the condemnation of the statute, although it cannot, of course, be shown, as was charged in the indictment, that the note was "intended" to be made after the similitude of a legal tender note, for the note was issued in 1860, and before the issue of the legal tender notes.

The judgment is affirmed.

ROSS, Circuit Judge (concurring). I agree to the judgment of affirmance. The sole question presented on the appeal being whether the indictment under which the appellant was convicted states an offense against the United States, it is manifest that we are limited to

a consideration of the charge contained therein, which is, in substance, that at a certain specified time he knowingly and feloniously had in his possession, with intent to use, and thereby to defraud some person, or persons, to the grand jury unknown, two notes purporting to have been issued by the Augusta Insurance & Banking Company of Georgia, of the denomination of $10 each, fastened together by paste or other substance, back to back, which notes were in form, color, size, and in the manner and style of display of the printing and engraving thereon, and in their general appearance made, and intended to be made, after the similitude of an obligation issued under the authority of the United States—

"that is to say, after the similitude of a United States legal tender note of the denomination of $10, he * * * well knowing said obligation not to be a genuine and lawful obligation issued under the authority of the United States, and with the intent * * * to use the said obligation by uttering the same as and for a lawful obligation issued under the authority of the United States."

The written description of the instruments contained in the indictment being supplemented by the charge that in their form, color, size, manner, and style of display and engraving thereon, and in their general appearance, they were made, and intended to be made, after the similitude of an obligation issued under the authority of the United States, and that the possession of said instruments by the defendant was felonious, and with the intent to use and thereby defraud some person, or persons, to the grand jury unknown, I think it clear that it cannot be properly held as a matter of law that the requisite resemblance or similarity does not exist. That question was decided by the jury against the defendant, and as a matter of course its conclusion cannot be reviewed on a writ of habeas corpus. As said in the opinion of the court:

"We must take it to be true, as charged in the indictment and as found by the jury, that the note which the appellant had in his possession, but which we have no opportunity to inspect, was made after the similitude of a United States legal tender note, and that there was such similitude of shape, size, and color, and in the grouping of words, figures, or vignettes, as to present the similitude which brings an instrument within the condemnation of the statute, although it cannot, of course, be shown, as charged in the indictment, that the note was 'intended' to be made after the similitude of a legal tender note, for the note was issued in 1860 and before the issue of the legal tender notes."

Whether by the statute upon which the indictment is based the possession of Confederate States bank notes or state bank notes, with the intent to sell the same as curios, provided that such notes are made after the similitude of government obligations, is prohibited and made a criminal offense is a question which, in my opinion, does not arise upon the record, and therefore I express no opinion upon it.

DAVIS v. FINCH.

(Circuit Court of Appeals, Second Circuit. July 7, 1916.)

No. 296.

1. CORPORATIONS ⟸149—CAPITAL STOCK—NEGOTIABILITY OF CERTIFICATES—FRAUDULENT TRANSFER.

While an innocent purchaser of certificates of corporate stock from one to whom they have been intrusted indorsed in blank is protected as in case of commercial paper, he is not so protected where he purchased in bad faith, with knowledge of the actual ownership of the stock and that the agent was without authority to sell it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546; Dec. Dig. ⟸149.]

2. PRINCIPAL AND AGENT ⟸148(4)—FRAUD OF AGENT—KNOWLEDGE OF PURCHASER.

One whose property has been disposed of through the fraud of an agent clothed with apparent title for a limited purpose need not, in order to recover for the conversion from the purchaser who bought with knowledge of the facts, tender the amount the latter paid.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 537–545; Dec. Dig. ⟸148(4).]

3. TROVER AND CONVERSION ⟸67—ACTION—INSTRUCTIONS.

The charge of the court in an action of conversion and the refusal of requests to charge considered, and *held* without prejudicial error.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 295–303; Dec. Dig. ⟸67.]

Ward, Circuit Judge, dissenting.

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

Action at law by Florence G. Finch against Jonathan R. Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

Appeal by defendant (below) from a judgment entered upon verdict of a jury in favor of plaintiff (below) for the sum of $18,998.43 and costs.

The plaintiff in her first cause of action charges conversion, on January 31, 1913, of 388½ shares of stock of the Finch Manufacturing Company, a Pennsylvania corporation, which was alleged to be worth $123 a share. In her second cause of action she charges conversion, upon February 17, 1913, of 50 shares of the stock of the same corporation, and valued at the same amount. For a third cause of action she charges conversion, upon March 17, 1913, of 30 shares of stock of the same value—the total, with interest, amounting to $57,625.50.

The answer denies the conversion, the alleged value of the stock, and the ownership by the plaintiff of the stock referred to in each cause of action. The answer admits dealings by the defendant with one Mandeville Hall, into whose name the shares of stock had been transferred by the plaintiff, and the further transfer of these stocks by Hall to the defendant, but alleges that they were purchased by the defendant for value and without knowledge of any defect in title. With respect to the stock concerned in the first cause of action, the defendant also alleges that he had, at an earlier date, advanced for Hall as a loan upon the security of said stock the sum of $21,750.

A separate and distinct defense to the alleged first cause of action in the complaint sets forth (with respect to the transaction relating to the acquisition of 388½ shares of stock) that the whole block of stock had been deposited with the defendant by Hall, as security for a loan of $21,750; that thereafter, and

on December 23, 1913, the said Hall repaid $2,500 of this amount and received back 50 shares of that held as collateral; that on January 4, 1913, the defendant purchased 50 shares more of the stock still held as collateral for the sum of $3,750, of which sum $1,000 was paid in cash and $2,750 on account of the previous advances; that on January 14, 1913, the defendant purchased from Hall the balance of 288½ shares of the capital stock previously held as collateral for the sum of $19,906.51, by the payment of $3,236.57 in cash, and by liquidating the balance of the amount previously loaned to Hall. Further, that on September 12, 1912, a contract was made by which, upon the 22d day of October, 1912, the said Hall delivered to the defendant 50 shares of the capital stock of the Finch Company in consideration of services rendered by the defendant in aiding Hall to negotiate loans, purchase a controlling interest in the property of the Finch Company, and in disposing of the real estate of that company. The defendant alleges, as a further part of this defense, that Hall was the actual owner or had the rights of an owner in transferring these various blocks of stock and that the defendant had no knowledge of any claim in dispute of that ownership.

A separate defense to the second and third alleged causes of action is also interposed, to the effect that the defendant in these instances purchased the stock of the said Hall at the rate of $65 per share for 50 shares, on February 8, 1913 (which is the transaction set up in the second alleged cause of action), and at $62.50 for 30 shares of stock on March 6, 1913 (which is the transaction set up in the third alleged cause of action). The defendant alleges that as to these Hall exercised all the rights from which the defendant might properly infer ownership, and that the defendant had no knowledge to the contrary, and that the price paid was the fair and reasonable value of the stock.

The defendant has also interposed a second separate defense to each of the three causes of action, to the effect that the plaintiff is estopped from now setting up any claim of ownership or right to possession of the shares set forth in each of the three causes of action, in view of certain transactions between the plaintiff and the defendant, as well as between the plaintiff and Hall, by which it is alleged that the plaintiff made it possible for Hall to deceive and defraud the defendant, and that the plaintiff has made oral and written statements which she should not be allowed to contradict and by which the defendant was led to believe that Hall had authority as well as right to possession or title to the stock with which he was dealing.

The case was tried before a jury and resulted in a verdict for the plaintiff.

Isaac H. Levy, of New York City (R. B. Wood, John C. Knox, and Ben A. Matthews, all of New York City, of counsel), for plaintiff in error.

Blandy, Mooney & Shipman, of New York City (E. L. Mooney, of New York City, and Eugene M. Gregory, of Newark, N. J., of counsel), for defendant in error.

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

CHATFIELD, District Judge (after stating the facts as above). The trial court allowed this case to go to the jury over the objection of the defendant. In the charge the court stated the various contradictions between the statements of the plaintiff (below) and of the defendant (below) and the witnesses called in support of each, as bearing on the issue of fact.

The exception taken by the defendant to the ruling of the court in sending the case to the jury raises the same propositions which are now urged by the defendant as to the effect of the written instruments offered during the taking of testimony and the objections to parol

evidence explaining or disavowing those instruments on the part of the plaintiff. Such exceptions as were taken to the charge as made, or to the refusals to charge, were similar to those reserved upon the previous rulings of the court in these regards.

The verdict of the jury has found the controversies of fact or contradictions in statement in favor of the plaintiff, so far as these were left to the jury, and this court can therefore consider nothing but the legal propositions presented.

The plaintiff charges conversion of the various shares of stock at those times when the defendant undertook to purchase these stocks from Hall, who, according to the plaintiff's testimony, had not only defrauded and deceived her, but who had caused her to sign the instruments in evidence, as a part of his fraudulent scheme.

The plaintiff offered testimony to show that knowledge was brought home to the defendant, prior to his purchase of these shares of stock, of such a character and sufficient in amount as to apprise him of the fraud which was being perpetrated by Hall in holding himself out as owner of the stock, with the right to sell it absolutely to the defendant, and in having it transferred for any purpose except to obtain a loan for the plaintiff.

As has been stated, the verdict of the jury upon the issues of fact established this knowledge on the part of the defendant, unless the evidence which went to the jury was improperly admitted.

The plaintiff, charging conversion, with knowledge on the part of the defendant of the imperfection in Hall's possession with indorsement in blank, demanded damages from the defendant representing the value of the stock which she charged was thus wrongfully converted. She also offered evidence as to the value of the shares of stock charged to have been converted, and there seems to have been no material error in the admissions of such testimony as was allowed to go to the jury in order to reach a determination on the amount of the verdict, if a verdict for the plaintiff was first agreed upon.

The plaintiff used the testimony as to the value of the stock and the properties which it represented in further proof of her contention that the consideration paid by the defendant for the stock enabled him to obtain that stock at a price so cheap as to explain his eagerness to make the purchase and to justify the plaintiff's charge that the defendant disregarded the facts known to him and which should have put him upon his knowledge as to the defect in title of the man from whom he was making the purchase. These matters all involved questions for the jury, which have been resolved by the verdict in the plaintiff's favor.

The defendant contends that the plaintiff, knowing that the defendant had innocently expended certain amounts in the form of loans upon the stock in question, and that these loans had been made by her agent, Hall, is estopped from charging conversion and from attacking the title of any one who was misled by Hall's possession of the certificates indorsed in blank and by the authority with which he had been clothed.

[1] The defendant contends that the certificates of stock are like negotiable paper when indorsed in blank, citing National City Bank

of Chicago v. Wagner, 216 Fed. 481, 132 C. C. A. 533. He cites Collins v. Gilbert, 94 U. S. 754, 24 L. Ed. 170, Shaw v. Railroad Co., 101 U. S. 564, 25 L. Ed. 892, and Murray v. Lardner, 69 U. S. (2 Wall.) 110, 17 L. Ed. 857, to establish the rule as to a transfer of negotiable paper by a holder to an innocent purchaser.

In Murray v. Lardner, supra, on page 121 of 2 Wall. (17 L. Ed. 857), the court says:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

But in the next paragraph the court says:

"The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect."

In the case of National City Bank of Chicago v. Wagner, supra, an innocent holder of stock certificates taken as collateral was held to be entitled to treat them according to the law of negotiable paper instead of under the rule of caveat emptor, which rule was stated to apply to the purchaser of chattels from one in possession.

But this was on the authority of National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, in which an innocent purchaser was allowed to hold stock certificates as against one whose agent had stolen or converted them when they were intrusted to him indorsed.

In the case at bar the question of fact was not as to the intrusting by the plaintiff; it was rather as to the innocence of the defendant. His knowledge, or facts sufficient to give him knowledge, is established by the jury's verdict, and his plea of good faith, i. e., lack of knowledge, has been decided against him. In other words, he has been held to have acted in bad faith; that is, in fraud.

The trial court overruled the defendant as to the question of estoppel, and we think properly, for the charge of conversion is based upon the later out and out purchase of the stock, which was presented to the jury upon a charge which left to the jury the question of good faith in the making of this purchase and not in the earlier loan transactions. On this the verdict of the jury justifies the action of the court.

But further, when it appeared that the plaintiff had previously authorized certain loans, and when it appeared that her failure to receive a fair return from the amounts borrowed was due to her own mistake and to her deception by Hall, the trial court expressly deducted as a set-off from the amount which the plaintiff could recover, the total of the loans which had been advanced by the defendant to Hall, or for the plaintiff, prior to the time when the defendant had knowledge of the defect in Hall's title. In fact, some of the loans which were deducted were not made until after knowledge on the part of the defendant as to Hall's character, but the action of the trial court in allowing these to be included in the set-off was in the defendant's favor and cannot be urged as error upon appeal.

In addition to the charge by the plaintiff that the defendant had wrongfully converted her stock by purchase after knowledge sufficient to inform him that his actions could not be in good faith, testimony was presented to show that the defendant had dealings with Hall in securing options upon other blocks of stock of the same company, and in attempting to arrange a sale (to be partly for the defendant's benefit) of all of the properties of the company, if control of the stock were gained by Hall and the defendant.

The plaintiff also showed payment by Hall to the defendant for his services with respect to these transactions. In some instances these payments were made before the services were actually rendered, or even while Hall and the defendant were negotiating about matters as to which an agreement was never reached and in which Hall did not keep faith with the defendant.

These matters were all properly left to the jury, and the defendant was fully protected when the trial court ordered the jury to deduct from the amount of any recovery, if a verdict were reached, such sums as the defendant had actually advanced as loans, but which were thereafter credited as a part of the purchase price for the stock when the sale was made by Hall to the defendant. Hall with the defendant's help had the blank shares of stock (indorsed by the plaintiff and then in Hall's possession) transferred to Hall's name, at a time when, as the jury has found, the defendant should have known that Hall did not have authority to convey them outright, or to have them transferred for any purpose except to obtain loans for the plaintiff.

If the sale was in the face of knowledge by the defendant of the limitations upon Hall's authority, then, as these loans were considered paid by taking the amount of the loans as a part payment for the stock, the defendant could ask no more than to be treated as an innocent lender or pledgee, as to any transactions which were not vitiated by his subsequent purchases with knowledge of that which previously he may have had no information concerning.

[2] A person whose property has been converted or disposed of through fraud upon the part of one clothed with apparent title for a limited purpose need not, in order to obtain that property from a person dealing (with knowledge or under circumstances sufficient to put him on notice) with the wrongdoer, tender to the third party the amount out of which the third party has been defrauded in reliance upon the representations of the wrongdoer. This is the customary doctrine in dealing with the purchasers of stolen property and by analogy the propositions held good in the present case.

But a person seeking to recover property to which that person has never lost title may be required to reimburse a second person who has been led to act to the injury of that second person, through the negligence or carelessness of the person seeking to recover the property or the value thereof.

The trial court, it would seem, properly diminished the amount which could be claimed by the plaintiff from the defendant, and allowed to the defendant those items which he might have enforced as a valid lien against the plaintiff, even though he had technically lost his right

to claim that lien by acts which were in effect payment of the advances to him and a subsequent purchase by him of the very property upon which the advances had been made.

The defendant has also excepted to the exclusion by the court of certain amounts expended by the defendant on Hall's account in endeavoring to secure an option upon other stock of the same company, and in borrowing money to replenish his own bank account so as to make the loan. He also excepted because the facts as to $2,700 received from Hall or Davis by an entirely outside party, who had loaned this amount on stock belonging to the plaintiff and which stock was in the hands of the Traders' National Bank, were submitted to the jury.

It does not appear that this stock was a part of that upon which the defendant made loans originally, and the question was properly left to the jury as to whether this expenditure was made by the defendant, and whether the money was advanced by him after the conversion was complete and after knowledge that Hall's right to sell the stock was defective. The same question might have been left to the jury as to some of the other loans which were taken up directly by the defendant; but as the ruling of the trial court was in the defendant's favor, and as the plaintiff has not appealed, these other matters can now be disregarded.

It is unnecessary to discuss in this opinion the various details relating to the visits of the defendant and of an attorney, who represented Hall in some of the transactions, to the plaintiff after Hall's fraud had been discovered by her; nor even the contradiction between the parties as to the statements of the plaintiff at the office of this same attorney, when the plaintiff was to be called as a witness to prove Hall's authority in paying off previous loans made by her upon her stock, and in taking over the stock as her agent or attorney in fact. These matters have been disposed of by the verdict of the jury.

The defendant contends that he has raised by his exceptions the right of the plaintiff to maintain an action in trover, inasmuch as he also contends that she had no more than an equitable cause of action to set aside the transfer of her stock as evidenced by its indorsement in blank, its delivery to Hall, and the agreements into which she had entered with Hall or with Hall and one Story, who seems to have been a party to the early negotiations by which Hall undertook to later effect the purchase of the plaintiff's stock.

The instruments offered in evidence show upon their face that no actual sale was ever consummated to Hall. The instruments were ambiguous and contradictory on their face. Parol evidence as to the character of the transactions could be offered, and, if notice was brought home to the defendant, then the plaintiff was not estopped from testifying as to the real character of the transactions upon the trial. Nor was she estopped from electing to charge conversion and to limit her recovery to such damage as she had suffered by the transfer of apparent title to her stock. As the action was brought with reference to funds of the plaintiff (subject only to certain contract rights) which were converted to the use of the defendant, then the

objection based upon the failure to claim return of the specific thing converted is not valid.

The plaintiff in this action has exercised her right to charge that the defendant had converted to his own use—that is, that he had transferred into his own name—the property which is the object of the action. A claim of damages for that act, equal to the value of the stock, would leave the stock itself in the possession of the defendant, and evidence as to the value of the stock would be admissible in proving the amount of damage. In this way the charge of the court appears to have been correct, and, as has been said before, when the court deducted the amount of the defendant's loans and thereby left the plaintiff with recourse only against Hall for such amounts as she had failed to receive from these loans, the defendant was thereby given all the protection to which he had a right.

[3] The defendant lays great stress upon the charge of the court, as follows:

"But if Mr. Davis, without intending to perpetrate a fraud, nevertheless in view of all the facts and circumstances acted in a manner in which a prudent man would not act under similar circumstances and thereby lacked good faith, then he is responsible without any reflection upon his uprightness or integrity as a man and a citizen of this or any other community."

Again, the court charged the jury that, after notice of Hall's character, a doctrine similar to that of caveat emptor applies. And, again, after illustrating what was meant by the rule of prudence in the conduct of one's own affairs, the court said:

"In order to test what prudence is, you will say to yourselves, 'After this telephone conversation, how would a prudent man act in conducting his own affairs, in a similar transaction?' "

These particular sentences as charged were not specifically excepted to, but the defendant did take exception to a refusal to charge a fifth request "as framed," and to the charge of the court that a person might be guilty of conversion without doing things which would hold him up to obloquy or contempt in the community in which he lives.

The fifth request was as follows:

"Fifth. In order to entitle the plaintiff to recover, the jury must be satisfied by a preponderance of evidence that the defendant, in purchasing the stock from Hall, acted in bad faith and with the intent to commit a fraud upon the plaintiff. The fact that the defendant did what the evidence shows was done to ascertain the relationship of Hall to the plaintiff may be considered in favor of the defendant as in evidence of his good faith. Even if the jury should find that what Davis did in this behalf was not the most that could have been done, indeed even if Davis was negligent, the verdict should still be for the defendant unless the jury believe that Davis was acting in fraud of Miss Finch."

The defendant now urges that the charge of the court was insufficient and prejudicial, in that it left to the jury merely the determination of the defendant's good faith, instead of instructing them as requested.

It appears from the record that a demurrer to the complaint had been interposed prior to the trial. It was held upon argument of this

demurrer that good faith was a defense, and that it need not be denied in the allegations of the complaint.

The fifth request to charge quoted above appears to have been presented to the court before the taking of evidence was completed. The refusal of the court to change its charge, and its declination to charge the fifth request as framed, occurred after the defendant had claimed the right to close the summing up, and after the plaintiff as well as the court had acquiesced in the statement that the defendant was to be allowed to show his good faith as an affirmative proposition for the jury's consideration. But even under these circumstances the court did charge:

"If Mr. Davis in good faith made the purchases and possessed himself of this stock he is entitled to keep the stock." And again: "If you decide that at the time when Mr. Davis made the purchases, first, that Hall had the right to sell, or, secondly, that Davis purchased in good faith, then your verdict will be for the defendant. If, on the other hand, you find that Hall did not at the times of the purchases have the right to sell, and that Davis did not act in good faith tested by the rules that I have several times stated, then you will find a verdict for the plaintiff."

It appears from the entire charge that the question of prudence was presented to the jury merely as the standard from which they should view the defendant's conduct in testing whether or not his acts were those of one acting in good faith. The jury were to determine whether the defendant, using the knowledge which he had in the way in which a prudent man would, then satisfied them of his good faith, or whether, on the contrary, his failure to consider the information in his possession was equivalent to bad faith or what, if intentionally done, would be fraud upon the plaintiff.

The court's charge was in this respect not prejudicial, and the attempt of the court to indicate to the jury that the defendant might be guilty of fraud, and still not have so acted as to make himself an object of contempt or disgrace to his neighbors, could not have injured the defendant in the jury's eyes. Their findings upon the facts as charged disposed of the question, and it is impossible to believe that the jury would have failed to render the same verdict if the court had not expressed the opinion that the defendant might be guilty of the conversion and still be considered by his neighbors as incapable of an intentional and deliberate theft.

The defendant seeks to carry over the test of prudence (which the court limited to the acts of the defendant in failing to learn further about what should have been of itself sufficient warning), into a suggestion that the court led the jury to believe that the plaintiff was entitled to a verdict merely if the defendant was not prudent in the sense of being suspicious of Hall, even though the acts suspected would not affect Hall's title to the stock.

It is impossible to believe that the jury misunderstood the judge's charge in this respect, or that the issue was not fairly presented. The defendant is in the possession of property which was converted to the use of the defendant, as charged in the complaint, by the defendant jointly with Hall, and which upon the election of the plaintiff to claim damages equal to the value of the stock, and upon proof by the plain-

tiff that the defendant's title was transferred through a wrongdoer, could not estop the plaintiff from showing the wrong and repudiating the apparent transfer of title if the property was found in the hands of a person having knowledge of the circumstances, or reason to believe that the circumstances existed, particularly if any sums advanced by this third party in good faith are restored by the result of the litigation.

The judgment is affirmed, with costs.

WARD, Circuit Judge (dissenting). When the plaintiff proved, as the jury has found she did, that Hall had swindled her out of the stock in question, the defendant was bound to show that he had purchased it from Hall in good faith for value. The defense is not that certificates of stock indorsed in blank are negotiable instruments like commercial paper, but that the plaintiff's conduct was such as to estop her from asserting her title to the stock against the defendant. The certificates were not lost by or stolen from her, but were put by her deliberately in the possession and absolute control of Hall. As soon as the defendant was put upon inquiry as to Hall's character, he applied over the long distance telephone to the plaintiff for information about Hall and his relations to the stock. The plaintiff certainly then expressed the most implicit confidence in Hall as her agent, and the only doubt is whether she confined his agency to pledging the stock for her account as distinguished from selling it for her, and whether, if she did, the defendant appreciated the distinction. It was a question for the jury to say whether thereafter the defendant acted in good faith. But I think the court below erred in charging the jury that the test of good faith was whether the defendant acted as a prudent man should have acted, and that this objection was sufficiently raised by exception to the court's refusal to charge the defendant's fifth request. Negligence is not proof of want of good faith unless so gross as to be consistent only with bad faith. Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857. The charge was in this respect very prejudicial to the defendant, and I think the judgment should be reversed.

SHEA et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. October 13, 1916.)

No. 2818.

1. CRIMINAL LAW ⊂⊃113—FEDERAL COURTS—DISTRICT COURT—JURISDICTION. Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]) § 37, formerly Rev. St. § 5440, provides that, if two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each of them are guilty, while Rev. St. § 731, declares that, when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be punished in either district as if wholly committed therein. Defendants entered into a conspiracy in Toledo, Ohio, where one of them

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

was located for some time, and pursuant to such conspiracy inserted an advertisement for a farm in a Michigan paper. The owner of a farm, who replied by mail to the advertisement, was induced to come to Toledo, and was there led to bet on horse races in a bogus turf exchange, the conspirators representing to him that they were in communication with a syndicate controlling most of the horses, that the results of the races were fixed in advance, and that they were given by the management the names of the horses which were picked to win. *Held*, that as some of the overt acts of the conspiracy to defraud in which the mails were used, including the consummation of the conspiracy, their victim of course losing, occurred in Ohio and others in Michigan, the District Court of Ohio had jurisdiction of a prosecution for the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⊜113.]

2. CRIMINAL LAW ⊜371(1)—EVIDENCE—OTHER OFFENSES.
In such case, proof that defendants operated another bogus turf exchange in a different building in Toledo, fleecing another victim whom they secured through personal solicitation of one of their number who became acquainted with him, instead of advertising for replies, is admissible in evidence, the schemes in the main being the same, to show defendants' intent and motive, notwithstanding such evidence showed defendants to be guilty of another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊜371(1).]

3. CRIMINAL LAW ⊜369(1)—EVIDENCE—ADMISSIBILITY.
In such case, as the evidence tended to show that the bogus turf exchanges in both buildings were under common ownership and operation and as part of a common scheme or plan, evidence of the operation of the second exchange was admissible to raise an inference that those operating it were also parties to the first scheme to defraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. ⊜369(1).]

4. CRIMINAL LAW ⊜371(1)—EVIDENCE—ADMISSIBILITY.
In such case, though proof of intent was not necessary, the evidence is admissible; the fact that the jury may find a case without it being no ground for rejection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊜371(1).]

5. CRIMINAL LAW ⊜369(1)—EVIDENCE—OTHER OFFENSES.
Proof that defendants participated in a scheme to induce a bank to advance money for the temporary purchase of corporate stocks which they claimed they had knowledge would be bought in at an advance was admissible to show the intimate relations between the parties to the alleged conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. ⊜369(1).]

6. CRIMINAL LAW ⊜1169(11)—APPEAL—HARMLESS ERROR.
But in such case, where the court in admitting evidence of the confidence game remarked that it might be considered as tending to show that defendants were in that instance attempting to defraud, and further charged that certain testimony and exhibits might be considered on the presumption of innocence, and whether or not defendants were all birds of a feather, the admission of the evidence, in view of the charge referred to, was prejudicial error tending to cause a conviction on charges not included in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. ⊜1169(11).]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

John J. Shea and others were convicted for conspiracy to use the United States mails in pursuance of a scheme to defraud, and they bring error. Reversed and remanded.

See, also, 224 Fed. 426, 140 C. C. A. 120.

H. W. Fraser, of Toledo, Ohio, for plaintiffs in error.

John S. Pratt, Asst. U. S. Atty., of Toledo, Ohio.

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

KNAPPEN, Circuit Judge. Plaintiffs in error complain of their conviction upon indictment, under section 37 of the Criminal Code of the United States, for conspiracy to use the United States mails in pursuance of a scheme to defraud, condemned by section 213 of the Criminal Code (Comp. St. 1913, § 10383).

On the trial the following facts appeared without dispute:

On August 14, 15, and 16, 1914, there was published in a Detroit newspaper the following notice:

"Gentleman will invest from $30,000 to $50,000 in modern fertile farm; must be unincumbered. State size and acreage and full particulars in first letter. Owners only. Agents need not answer. Address Box R-20, News."

The advertisement was read on August 16, 1914, by one Rundle, a farmer living in Oakland county, Mich., who replied by mail to the advertisement. Two or three weeks later he was called upon at his home by one Collier, who claimed to be the mining engineer (from California) of "the Guggenheims," and to be representing them in the prospective purchase of a farm to be occupied by their nephew. Pursuant to telegram from Collier, Rundle met the latter at Toledo, Ohio, September 21st, and was there introduced by him to one "Sherman" (said to be defendant Arthur), who was represented to be the secretary of Mr. Guggenheim. The sale was there agreed upon, "Sherman" giving Collier what purported to be a certified check for $10,000 to be applied on the price when the sale should be consummated. Afterwards Collier and Rundle met on the street in Toledo a man called "Hudson," whom Collier claimed to know. The result was that the three went to rooms in the Denison building fitted up to represent a turf exchange, where "Hudson" explained that the "syndicate" owned most of the horses which took part in the races, and controlled their result, wiring Hudson each day by cipher code which horses to bet on. After Collier had "won" a bet of a dollar, he pretended to bet the $10,000 "certified check" which Arthur had given him, and to which "Hudson" appeared to add another $10,000. This $20,000 "bet" was announced as won, together with a profit of $50,000. Payment of the $70,000 ticket was refused until it could be ascertained whether the $10,000 "certified check" was good. Collier professed unwillingness to have it cashed for fear the Guggenheims would learn where it was done, and proposed to Rundle to give him a part of the profit on the bet if he would help raise the $10,-

000. Rundle accordingly went home and raised $3,000, returned to the "turf exchange," and there paid the amount to Collier, who claimed to have meanwhile secured $7,000 from "Sherman" (Arthur). After Rundle had, at Hudson's request, bet $500 of the latter's money (winning $1,000, which was apparently paid to Hudson), Collier claimed that he (Collier) had bet not only the $10,000 (of which Rundle's $3,000 was a part), but the $70,000 "ticket" and had lost the entire amount through an alleged misunderstanding of the betting instructions. Rundle was thus swindled out of his $3,000. The "turf exchange" was shown to have been simply a fraudulent pretense; the telephone and telegraph instruments connecting nowhere.

One Millard, a farmer living near Rundle, also saw the advertisement in question in August and answered it by mail. He was later called upon by Collier on September 5th and 17th, who told a "Guggenheim" farm-purchase story in substance as related to Rundle. The Millard transaction went no further than an agreement upon the purchase price, because of Millard's refusal to add Collier's commission to the price of the farm, and to bring the commission with him to Toledo.

The indictment charged as participants in the conspiracy not only the three plaintiffs in error here, but Arthur, Hathaway, Collier, Taylor, and others; the conspiracy charged being a scheme to defraud by substantially the means used in the case of Rundle (including false claims that Collier and "Sherman" represented the Guggenheims), the overt acts charged (aside from the publication and purpose of the advertisement) relating to the Rundle transaction. None of the defendants except Shea, Brereton, Homer, Hathaway, and Arthur seem to have been taken into custody. Arthur pleaded guilty. Shea, Brereton, Homer, and Hathaway were convicted and sentenced. Hathaway does not prosecute error.

There was substantial testimony tending to show that each of the five defendants named participated in the conspiracy. (The intention to use the mails was fairly inferable from the advertisement itself, which brought at least two responses by mail.) Homer is shown to have purchased furniture for the turf exchange rooms in the Denison building, and to have personally rented the rooms in question, under the name of "Fuller." There was testimony identifying Hathaway as the "manager" of the turf exchange in the Denison building at the time of the Rundle transaction, and as having been with Homer when the rooms were rented. There was a partial identification by Rundle of defendant Brereton as the "Hudson" who assisted in the transaction in the Denison building turf exchange. Shea had an office in the Spitzer building, which seems to have been headquarters for defendants Homer, Baldwin, Adams, and perhaps others. In this office were found at the time of the arrest (October 5, 1914) suit cases containing what was apparently the paraphernalia of the turf exchange in the Denison building, as well as in the Nasby building later referred to (these exchanges having been then lately dismantled), including cloth "blackboards," telephone and telegraph instruments, racing forms, and paper cut the size of United States bills, and with

wrappings, bearing the printed name of a bank. Paper "money" of this kind was shown to have been cut for defendant Taylor in the summer of 1914. There was evidence that defendant Shea was in the Nasby building on the day the furniture was moved out, and he was identified by Hoblitzel as the cashier of the "turf exchange" in the Nasby building (to be hereafter mentioned). There was also evidence having some tendency (though by no means conclusive) to identify Shea as the one who delivered the advertisement at the newspaper office in Detroit on August 13th.

[1] 1. Defendants asked direction of verdict in their favor upon the ground that the District Court for the Northern District of Ohio (in which district Toledo is situated) had no jurisdiction of the offense. Section 37 of the Criminal Code (formerly section 5440 of the Revised Statutes) provides that:

"If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall" be punished in the manner prescribed.

Section 731 of the Revised Statutes provides that:

"When any offense against the United States is begun in one judicial circuit 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."

Although a mere conspiracy, without an overt act done under it, is not criminally punishable under section 37 of the Criminal Code, yet the rule is now settled that, in view of that section and section 731 of the Revised Statutes, prosecutions for conspiracy may be maintained either in the district in which the conspiracy was entered into, or in any district in which an act was done to effectuate the object of the conspiracy. Hyde v. Shine, 199 U. S. 62, 76, et seq., 25 Sup. Ct. 760, 50 L. Ed. 90; Hyde & Schneider v. United States, 225 U. S. 347, 356, et seq., 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; Brown v. Elliott, 225 U. S. 392, 400, et seq., 32 Sup. Ct. 812, 56 L. Ed. 1136; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, et seq., 35 Sup. Ct. 291, 59 L. Ed. 705; United States v. Rabinowich, 238 U. S. 78, 86, et seq., 35 Sup. Ct. 682, 59 L. Ed. 1211.

The indictment charged that the conspiracy was entered into at Toledo, and three of the overt acts alleged are charged to have been committed there. We think the record would naturally justify an inference that the conspiracy was entered into at Toledo; Shea had lived there for several months and had an office there from which he carried on a so-called advertising agency. Adams, who apparently lived in Toledo, acted for Shea in renting the office mentioned, and apparently spent considerable time there. Both Arthur and Hathaway seem to have been intimate with Shea and in the habit of making his office their headquarters. The connection of Homer and Hathaway with the renting and furnishing of the "turf exchange" has already been mentioned, as well as the making in Toledo of the "paper money" on Taylor's order.

But the acts done in Toledo in furtherance of the conspiracy were enough to give jurisdiction to the court below, which was not lost by the previous closing of the "door of repentance" through the taking of letters from the mails in another jurisdiction.

The motion to direct verdict was properly denied.

[2-4] 2. Complaint is made of the admission of testimony relating to the so-called "Hoblitzel incident," which in substance, according to the tendency of the proof, was this: Hoblitzel, who did not live in Toledo but was there on business of his own, fell in with a stranger (said to be defendant Brown) with whom he became intimate, and by whom he was later introduced to a man (claimed to be defendant Collins) who pretended to be acting for a syndicate of gamblers in betting on the turf exchange, with the result that Hoblitzel was taken to a fictitious "turf exchange" in the Nasby building, where he was ultimately defrauded of $5,000 through a transaction of the same general nature as that of Rundle, including a final bet on the wrong horse; the main features of difference as respects the turf exchange transaction, and so far as important here, being that the exchange in Hoblitzel's case was in the Nasby building instead of in the Denison building, and that it was Hoblitzel's check for $5,000 which had to be made good before the previous winning could be paid over instead of the certified check of Collier's in the Rundle case. Hoblitzel's testimony tended to identify Taylor as manager and Shea as one taking part in the operations of the exchange. The admission of this testimony is said to violate the rule which forbids testimony of other and distinct offenses, and not to fall within the exception which admits evidence of acts of a similar character at or about the same time, with like alleged fraudulent purpose, as bearing upon defendant's motive or intent; for example, as proving a fraudulent or criminal scheme. Mutual Ins. Co. v. Armstrong, 117 U. S. 591, 598, 6 Sup. Ct. 877, 29 L. Ed. 997; Wood v. United States, 16 Pet. 342, 360, 10 L. Ed. 987; Olson v. United States (C. C. A. 8) 133 Fed. 849, 854, 67 C. C. A. 21; Sapir v. United States (C. C. A. 2) 174 Fed. 219, 98 C. C. A. 227; Breese v. United States (C. C. A. 4) 203 Fed. 824, 829, 122 C. C. A. 142; Worden v. United States (C. C. A. 6) 204 Fed. 1, 5, 122 C. C. A. 315. The exception referred to is peculiarly applicable to charges of conspiracy to defraud.

The Hoblitzel transaction is said to differ essentially from the charge in the indictment before us, especially in that the Hoblitzel incident involved neither the pretended purchase of a farm nor the use of the mails. But speaking broadly, the wrong charged is a conspiracy to defraud, by fake betting on pretended horse races. The other two features just referred to are merely means to that end. In ascertaining, therefore, the motives or intentions of defendants in the Rundle and Millard transactions, and whether those transactions evidenced a criminal scheme, a similarity of means in getting the victim into the exchange is not the necessary test of relevancy, nor is such similarity so pertinent a test as the identity of the means finally resorted to, viz. the fake horse-race betting. The Hoblitzel incident directly tended to show the existence of a scheme, participated in by several of the

defendants, to defraud by such bets—a scheme even broader than in Rundle's experience, because involving a second exchange and connecting defendants not directly shown to have been concerned with the Rundle incident. Hoblitzel's experience occurred on August 17th, and during the few days immediately following, and so had a direct bearing upon the motives and intentions of defendants in the Rundle turf exchange transaction, and thus upon the question of the existence or nonexistence of the conspiracy charged. It is not a complete answer that proof of intent was not necessary, because the facts of the Rundle transaction showed fraudulent intent. Evidence is not made inadmissible because a jury might have found a case proven without it. Moreover, as the record would sustain a finding that the exchanges in the Nasby and Denison buildings, respectively, were under common ownership and operation, and part of a common scheme or plan, it was open to inference that those operating at the exchange in the Nasby building were also interested in that maintained in the Denison Block, and were thus involved in the conspiracy charged, and the evidence was admissible for that purpose. The proof was thus not merely of a "similar offense." Parker v. United States (C. C. A. 2) 203 Fed. 950, 952, 122 C. C. A. 252; People v. Grutz, 212 N. Y. 72, 77, 105 N. E. 843, L. R. A. 1915D, 229, Ann. Cas. 1915D, 167; People v. Molineux, 168 N. Y. 264, 293, 61 N. E. 286, 62 L. R. A. 193.

[5, 6] 3. There was admitted, against defendants' objection and exception, testimony relating to the so-called Kehoe incident. This testimony tended, at the most, to show an attempt by Shea, Homer, and Brereton to defraud, by means of a scheme whereby some bank was to be induced to advance money for the temporary purchase of a large block of the stock of the Consolidated Radium Mining Company, under a claim of inside information that the mining company stood ready to buy the stock at a price much greater than the block in question could be had for. The alleged fraudulent negotiations were opened on October 2, 1914, with Kehoe, who, scenting a confidence game, exposed it three days later, before any fraud was effected. The arrests in the instant case followed at once.

One objection to the admission of this testimony is that the fraud sought to be shown was of an entirely different nature than that charged in the indictment, and was thus directly within the general rule which forbids proof of the commission by defendants of crimes distinct from and independent of the crime charged.

In admitting the Kehoe testimony, the court said it might be considered "as tending to show that the particular defendants named in the transaction were attempting to defraud Kehoe," and apparently in connection with evidence of the intimacy of the defendants jointly indicted and their association in the fraudulent transaction. As only Shea, Homer, and Brereton are prosecuting error, any question of the effect of the Kehoe testimony on the other defendants is, of course, out of the case. Properly limited as to purpose, proof of intimate relations between plaintiffs in error would be relevant. But we think the jury would naturally understand from the admission of the testimony, without other limitations than stated, that they were at liberty

to consider the alleged guilty connection of plaintiffs in error with the Kehoe matter as evidence of their guilt of the conspiracy charged in the indictment. Indeed, in the charge to the jury, to the statement that certain testimony and exhibits might be considered as determining whether the defendants are "all birds of the same feather," and "with the view of determining the likelihood of their being engaged in just such a transaction as charged in this indictment," the court added:

"Because the very first inquiry that any honest juror will make, when he is told that these defendants are protected by the presumption of innocence, is this: With this presumption of innocence shielding them, is it likely that he would engage in any such scheme as that charged in this indictment? So, inevitably, it is competent for the jury to get any index that is available to the character of the defendant on trial, because the kind of a man the defendant is is a very important question affecting the ultimate question whether he is guilty of the crime charged."

No effective exception was taken to the charge. But we think the instruction merely illustrates the effect which proof that a defendant has been guilty of other offenses (although separate and distinct from that for which he is on trial) would naturally have upon the mind of a juror. While testimony otherwise competent and relevant is not to be excluded because it may incidentally show a defendant guilty of another offense (Moore v. United States, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Tucker v. United States [C. C. A. 6] 224 Fed. at page 840, 140 C. C. A. 279, and cases there cited), yet, subject to certain limitations, the law does not permit proof of other and entirely distinct offenses merely for the purpose of showing that the defendant has a generally criminal disposition or character, or a character likely to make him commit the crime for which he is on trial (Prettyman v. United States [C. C. A. 6] 180 Fed. 30, 36, 103 C. C. A. 384, and cases there cited; Boyd v. United States, 142 U. S. 450, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 80, 14 Sup. Ct. 22, 37 L. Ed. 1003; Sorenson v. United States [C. C. A. 8] 168 Fed. 785, 794, 94 C. C. A. 181; Fish v. United States [C. C. A. 1] 215 Fed. 544, 551, 132 C. C. A. 56, L. R. A. 1915A, 809; People v. Schweitzer, 23 Mich. 301, 303).

We have given considerable thought to the question whether, in view of the showing of intimate connection between plaintiffs in error, the Kehoe incident was admissible as tending to show a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, such proof falling within the recognized exceptions to the general rule excluding proof of similar offenses (People v. Molineux, supra, 168 N. Y. at page 293, 61 N. E. 286, 62 L. R. A. 193); or, on the theory that the Kehoe and Rundle schemes should be considered as merely species of a genus which embraced confidence games generally, and thus that proof that plaintiffs in error were engaged in the Kehoe transaction would tend to identify them as likewise engaged in the Rundle affair. But the Kehoe matter was of an entirely different nature from that for which the defendants were on trial, except as both may be classified generally as confidence games. And we are constrained to think that evidence of the alleged fraudulent mining-stock

scheme has no direct tendency to prove a scheme to defraud through fictitious horse-race bets, except as it tends to show the character or disposition or manner of life of plaintiffs in error to be such as to make them likely to commit the fraud charged in the indictment.

We therefore think the admission of the testimony in question worked prejudicial error for which the judgment of the District Court must be reversed, as respects plaintiffs in error, and the record remanded to that court, with directions to award them a new trial.

BUTTNER v. ADAMS et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2650.

1. CORPORATIONS ⟸253—STOCKHOLDERS—LIABILITY—MERGER.

Under Const. Cal. art. 12, § 3, declaring that every shareholder of a corporation or a joint association shall be individually or personally liable for such proportion of all its debts and liabilities incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, the liability of a stockholder is primary like that of a member of a partnership and not secondary; therefore a judgment against the corporation does not merge in it the right of action against the shareholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1024–1030; Dec. Dig. ⟸253.]

2. ADMIRALTY ⟸20—JURISDICTION OF FEDERAL COURT—MARITIME TORT.

A seaman employed on a vessel of a California corporation was injured. He recovered judgment against the corporation which became bankrupt, and thereupon he filed a libel against the shareholders of the corporation. *Held*, that as their liability was primary under the California Constitution, and as the cause of action was a maritime tort, the federal court having jurisdiction of admiralty cases had jurisdiction of the libel, the stockholders being responsible for the tort, not as sureties, but as principals.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 216, 225, 231; Dec. Dig. ⟸20.]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Libel by Louis Buttner against Mary A. Adams and others. From a judgment of dismissal, libelant appeals. Reversed and remanded.

H. W. Hutton, of San Francisco, Cal., for appellant.

A. E. Cooley, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant, a seaman, while at sea and employed on a vessel of the Pacific Shipping Company, a California corporation, received personal injuries through the alleged negligence of the shipping company. To recover damages therefor,

he filed in the court below a libel in personam against the stockholders of the shipping company, stating therein the names of the stockholders and the number of shares held by each, alleging the injury he had received through the negligence of the shipping company, and alleging further that on April 3, 1913, he had filed a complaint in the superior court of the state of California to recover damages for his injuries, that on September 15, 1914, he had recovered a judgment against the Pacific Shipping Company therefor, in the sum of $5,000 and costs, and that prior to the date of the judgment the shipping company had become bankrupt, and was without property. Exceptions to the libel were sustained, and the libel was dismissed on the ground that the liability of the appellees had been merged in the judgment for $5,000, which the appellant had recovered, and that the present suit cannot be regarded as a suit upon the original unliquidated claim for damages, but it is an action on a judgment not of a maritime character, and therefore there is no jurisdiction in admiralty.

[1] We think that the decision of the court below is based upon a misconception of the purpose and effect of the California law of stockholders' liability. That state is one of the very few in which the liability of stockholders is not collateral but is original, and partakes of the nature of the liability of partners. The result is that an action at law lies "directly against the shareholders as against partners on their joint contract," and need not be predicated on a judgment against the corporation. 10 Cyc. 678. The Constitution of California (article 12, § 3) provides:

"Each stockholder of a corporation, or joint association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association."

In Young v. Rosenbaum, 39 Cal. 646, the court said:

"The stockholders are not sureties of the corporation, but are principal debtors. * * * A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it. The remedy against the corporation may, for some cause, be suspended, or perhaps barred, without impairing the remedy against the stockholders, because the liability of the latter is primary, and is conditional or contingent only in this, that there must be a subsisting debt against the corporation."

The decisions in that case and in M. H. C. & M. Co. v. Woodbury, 14 Cal. 265, have since been consistently followed by that court. Sonoma Valley Bank v. Hill, 59 Cal. 107; Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; Hunt v. Ward, 99 Cal. 613, 34 Pac. 335, 37 Am. St. Rep. 87; Western Pac. Ry. v. Godfrey, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825; Eva v. Andersen, 166 Cal. 420, 137 Pac. 16. In the case last cited the court said:

"It is settled in California that a stockholder's liability accrues immediately upon a debt being contracted by the corporation. A creditor therefore need not resort to the assets of the corporation before proceeding against the stockholders."

In Thomas v. Matthiessen, 232 U. S. 221, 236, 34 Sup. Ct. 312, 58 L. Ed. 577, the court, referring to the nature of the defendant's liability as a shareholder under the law of California, said, "The defendant was a principal debtor," and cited Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

The adoption of the California law and the construction of its provisions seems to have been influenced by the stockholders' liability law of New York as it then was. That law was that:

"The stockholders shall be liable in their individual capacity for the payment of the debts of such company, * * * to be recovered of the stockholder who is such when the debt is contracted." Freeland v. McCullough, 1 Denio (N. Y.) 414, 43 Am. Dec. 685; Conklin v. Furman, 57 Barb. (N. Y.) 484.

Similar provisions are found in some of the earlier laws of Connecticut and South Carolina, in both which states shareholders were held to be original debtors and liable in the same manner as though there had been no incorporation. Southmayd v. Russ, 3 Conn. 52; Bank v. Bivingsville Cot. Mfg. Co., 10 Rich. (S. C.) 95.

Such being the peculiar nature of the stockholder's liability, we think it necessarily follows that the liability of the shareholders in the present case is not merged in the judgment, and that, by obtaining a judgment against the corporation, the plaintiff has waived none of his rights to pursue the stockholders upon their individual liability.

[2] The tort upon which the libel is based was of a maritime nature, committed on navigable waters, and admiralty would have had jurisdiction of a libel against the shipping company to recover damages therefor. Has admiralty jurisdiction of the present suit to recover damages from the stockholders? In opposition to the jurisdiction, it is said that the suit is one to recover, not for tort, but on a liability created by state statute, and therefore there is no jurisdiction, citing The Manhasset (D. C.) 18 Fed. 923; The Steamboat Orleans v. Phoebus, 11 Pet. 175, 9 L. Ed. 677; and Pacific Surety Co. v. L. & S. T. & W. Co., 151 Fed. 440, 80 C. C. A. 670. In the case last cited it was held that a bond given by the charterer of a vessel to secure his performance of the conditions of the charter party which neither required nor authorized the surety to perform such contract in case of the default of the principal, but merely to respond in damages for its breach, is not a maritime contract, and that an action thereon is not within the jurisdiction of admiralty. The court said that the sole obligation of the bond "is for the payment of money arising out of a breach of the terms of the preexisting charter party, in no sense for a specific performance of such terms." The decision would be applicable to the appellees' contention here, if the suit were brought against defendants who were liable as sureties or guarantors of a debt of the corporation; but the decision distinctly intimates that admiralty would have jurisdiction if the bond had required the surety to perform the contract in case of the default of the principal. In the case at bar the obligation of the corporation is the obligation of the stockholders. In The Manhasset

it was held that a state statute which gives a right of action in personam does not thereby give a right of action in rem in a similar case in admiralty, and in The Steamboat Orleans several questions of jurisdiction were discussed, but none which is pertinent to the question here involved.

It is true that, although the liability of stockholders under the law of California is primary, it is a liability created by statute. The Supreme Court of that state has so held. In Green v. Beckman, 59 Cal. 545, the court adopted the language of Chief Justice Waite in Terry v. Little, 101 U. S. 216, 25 L. Ed. 864, and said: "The individual liability of stockholders in a corporation is always a creature of statute." See, also, Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; and Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047. It must also be the law in California, as elsewhere, that the liability of stockholders, while statutory in origin, is contractual in its nature and not penal. Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; Whitman v. Oxford National Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. While the admiralty jurisdiction cannot be enlarged by state enactment (The Lottawanna, 21 Wall. 558, 22 L. Ed. 654), it is well settled that the maritime law may be changed by state enactment conferring rights of action arising out of marine torts resulting in death (The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973). Such being the case as to torts resulting in death, no good reason is seen why the admiralty court may not have jurisdiction of a cause to recover damages for personal injuries resulting from a marine tort against those whom the state law declares shall be primarily liable to respond in damages therefor. The stockholders of the shipping company were not tort-feasors and were in no wise implicated in the tort, but they are liable to respond in damages therefor for the reason that the law makes them directly answerable for the debts and liabilities of the corporation. We hold that a liability so created by state law and arising out of a marine tort is subject to the jurisdiction of a court of admiralty. It is believed that this view of the question does not contravene any decision of a federal court, or result in prejudice to the uniform administration of maritime law.

The decree is reversed, and the cause is remanded for further proceedings.

ROSS, Circuit Judge, dissents.

THLINKET PACKING CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2623.

1. INDICTMENT AND INFORMATION ⟸128—SUFFICIENCY—SEVERAL OFFENSES.
Under Laws Alaska 1913, c. 39, providing that, where there are several charges against any person for the same act or transaction or for two or more acts of the same class of crimes, the whole may be joined in one indictment in separate counts, one charged with violating Act June 26, 1906, c. 3547, 34 Stat. 478, regulating fisheries of Alaska, cannot complain that the indictment, which was in several counts, included more than one offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 403–413; Dec. Dig. ⟸128.]

2. FISH ⟸13(2)—OFFENSES—STATUTE.
Act June 26, 1906, c. 3547, 34 Stat. 478, regulating fisheries of Alaska, provides, in section 5 (Comp. St. 1913, § 3632), that it shall be unlawful to fish for, take, or kill salmon except by rod, spear, or gaff in Alaskan waters from 6 o'clock Saturday evening of each week until 6 o'clock of the Monday morning following, and that the gate, mouth, or tunnel of all stationary and floating traps shall be closed and 25 feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered so as to permit the free passage of salmon and other fish. Section 13 (section 3642) provides that any person, company, or corporation violating any provision of the act or any regulation established in pursuance thereof shall on conviction be punished, etc. *Held*, that a violation of the statute with respect to lowering or opening the webbing or net of the heart of traps is an offense though no fish were taken, and a prosecution cannot be defeated on the theory that such provisions were merely directory.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 23; Dec. Dig. ⟸13(2).]

3. FISH ⟸13(2)—OFFENSES—WHAT CONSTITUTES.
In such case, one who violated the act by failing to raise or lower the webbing or net of the heart of the trap is, though he was not engaged in fishing, guilty of the offense denounced, which consists of the obstruction of the stream; hence the indictment need not charge that defendant was engaged in fishing.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 23; Dec. Dig. ⟸13(2).]

4. CRIMINAL LAW ⟸901—TRIAL—MOTION FOR DIRECTION OF VERDICT—WAIVER.
Where defendant, after the denial of his motion, for directed verdict on the ground of insufficiency of the evidence, introduced evidence, the motion was waived where it was not renewed at the close of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. ⟸901.]

5. FISH ⟸15—OFFENSES—INDICTMENT—SUFFICIENCY.
In a prosecution for violating Act June 26, 1906, § 5, regulating salmon fishing in Alaskan waters, but excepting certain named waters, an indictment charging an offense, in that defendant failed to raise or lower the netting of the heart of his trap in a named stream as required, is sufficient, where the description of the location of plaintiff's traps showed that it was not in the excepted waters.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 27–30; Dec. Dig. ⟸15.]

6. FISH ⊂⊃13(2)—OFFENSES—DEFENSES.

In such case, as the act prohibits fishing for salmon between Saturday evening and Monday morning save with rods, spear, or gaff, and also requires netting in the hearts of traps, to be raised or lowered, so as to give the fish free passage, defendant, having failed to raise or lower the netting of its traps, cannot escape conviction on the ground that its fishing was done in the authorized manner.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 23; Dec. Dig. ⊂⊃13(2).]

7. FISH ⊂⊃13(2)—OFFENSES—STATUTE.

It is not a compliance with the act requiring 25 feet of the webbing or net of the traps on either side next to the pot to be lifted or lowered in such manner to permit free passage of fish for the owner of a trap to lower or lift 25 feet of the web in a V-shape, but a whole section 25 feet long of the net or webbing should be raised or lowered.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 23; Dec. Dig. ⊂⊃13(2).]

8. CRIMINAL LAW ⊂⊃885—VERDICT—RECOMMENDATION TO MERCY—STATUTE.

In a prosecution under the act, intent is no defense; mere failure to comply constituting the crime. Therefore the fact that the jury which convicted the owner of a fish trap recommended clemency on the ground that there had been a substantial compliance with the section, 25 feet having been raised or lowered in a V-shape, does not invalidate the conviction on the ground that the recommendation which was made after a colloquy between the court and foreman constituted a special verdict inconsistent with conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. ⊂⊃885.]

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

The Thlinket Packing Company was convicted of violating Act June 26, 1906, for the protection and regulation of fisheries in Alaska, and brings error. Affirmed.

On June 26, 1906, Congress adopted an act entitled "An act for the protection and regulation of the fisheries of Alaska." Section 5 of the act (Comp. St. 1913, § 3632) is as follows: "That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the delta of Copper river, Bering Sea, and the waters tributary thereto, from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following, or to fish for, or catch, or kill in any manner or by any appliances except by rod, spear, or gaff, any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed, the gate, mouth, or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes." Section 13 (Comp. St. 1913, § 3642) provides that "any person, company, corporation, or association violating any provision of this act or any regulation established in pursuance thereof shall, upon conviction thereof, be punished by a fine," etc.

The plaintiff in error, a corporation, was convicted under three indictments, each with several counts charging it with the violation of the statute at the various places mentioned in each count, charging in each count that within the hours prohibited in section 5, it did unlawfully and wrongfully maintain and operate for fishing a certain trap, describing the same, without having 25 feet

of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

M. G. Munly and Robert N. Munly, both of Portland, Or., and Winn & Burton, of Juneau, Alaska, for plaintiff in error.

James A. Smiser, U. S. Atty., and John J. Reagan, Asst. U. S. Atty., both of Juneau, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1-3] Error is assigned to the order overruling the demurrer of the plaintiff in error to the indictment, which was interposed on the grounds: First, that more than one offense is attempted to be charged therein; and, second, that no offense against the United States is charged. As to the ground of demurrer that more than one crime is charged in each indictment, it is sufficient to point to the statute of the territory of Alaska, approved April 26, 1913, providing that when there are several charges against any person for the same act or transaction, or for two or more acts of the same class of crimes, the whole may be joined in one indictment in separate counts. Session Laws of Alaska 1913, p. 65. The second ground of demurrer is based on the fact that the indictment contains no averment that the plaintiff in error was actually fishing or catching fish, also upon the contention that the provision of section 5 in regard to requiring that 25 feet of the webbing or net of the heart of traps shall be lifted or lowered so as to permit the free passage of salmon and other fishes is directory only, and disobedience thereto is not made a crime by the act. It is true there is no express provision in the statute which declares that it shall be unlawful to operate a trap unless the net is lifted or lowered in the manner prescribed therein; but section 5 distinctly provides that 25 feet of the webbing or net of the heart of each trap on each side of the pot shall be lifted or lowered so as to permit the free passage of fish, and section 13 provides that any one who violates any provision of the act or any regulation established in pursuance thereof shall, upon conviction, be punished. In other words, there is a plain command of the statute and a plain provision that disobedience thereto is punishable. Such a statute is not directory only. Nor was it necessary to allege, further than was charged in the indictment, that the plaintiff in error was actually fishing or taking fish. It was sufficient to allege that it "did unlawfully and wrongfully maintain and operate for fishing a certain trap." If the plaintiff in error was engaged in any kind of fishing, and operated traps therefor, it makes no difference whether it was seeking to take salmon or other fish, for the trap in either case constituted the obstruction to the passage of fish which it was the object of the statute to prevent. We hold that the indictments were sufficient.

[4] Error is assigned to the denial of the motion of the plaintiff in error, made at the close of the testimony for the prosecution, either that the jury be directed to bring in a verdict for the plaintiff in error, or that the proceeding be dismissed for want of evidence to es-

tablish any of the counts in the indictments. The motion repeated the objections to the indictments that were presented in the demurrers. Other grounds of the motion were that there was no evidence to establish the charges, that it was not alleged in the indictments that the localities where the fishing was done were not in places which were excepted from the operation of the statute, or that the fishing was not done by the means excepted in the statute—that is, by rod, spear, or gaff—and that there was no evidence to show that the plaintiff in error did not open its traps sufficiently to allow the passage of salmon and thereby comply with the spirit of the statute. As to the questions of fact which were presented as ground for the motion, it is sufficient to say that they were waived by the act of the plaintiff in error in thereafter proceeding to offer its testimony in defense, and by failing to renew the motion at the close of the trial. Gould v. United States, 209 Fed. 730, 126 C. C. A. 454; Sandals v. United States, 213 Fed. 569, 130 C. C. A. 149; Stearns v. United States, 152 Fed. 900, 82 C. C. A. 48.

[5, 6] The objection that the indictments do not negative the exceptions contained in the statute and show that the fishing was not done in the excepted waters, viz. Cook Inlet, the delta of Copper river, and Bering Sea, is sufficiently answered by the language of the indictments which charges that the traps were maintained "in the waters of Icy Straits near the mainland," and then followed descriptions of the location of each trap with reference to certain named islands, so that it can be clearly seen that the locations of the traps were within the prohibited waters. And if, indeed, the fishing which was done by the plaintiff in error was done with rod, spear, or gaff, it does not follow therefrom that the plaintiff in error was not maintaining and operating traps equipped with nets which it failed to raise or lower in violation of section 5 of the act.

[7] Error is assigned to the refusal of the court to grant certain requested instructions. The instructions which were refused differ in no material respect from the instructions given, except that the court refused to charge that the statute does not mean that 25 feet of the net must be lifted or lowered vertically, but that it is sufficient if 25 feet of the web is lifted or lowered in a V-shape, and in such a manner as to permit the free passage of salmon and other fishes. In this connection, exception was taken also to the illustration used by the court in charging the jury, in which he compared the raising and lowering of the net as required by the statute to the raising and lowering of a window sash. We are not convinced that the construction given by the court to the language of the statute was erroneous. Section 5 plainly provides that 25 feet of the webbing or net of the heart of such traps on each side of the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If the statute had said no more than that the webbing of the net shall be lifted or lowered in such manner as to permit the free passage of salmon, it might be held that the command would be complied with by lowering the net to make a V-shaped opening, provided that such an opening permitted the free passage of fish. But the stat-

ute enacts that the 25 feet of the net shall be lifted or lowered, which plainly means that a section 25 feet in length of the body of the net shall be raised or lowered. Such being the language of the statute, the court below did not err in denying the requested instructions or in using the illustration which is objected to.

[8] The jury evidently believed that the plaintiff in error by lowering the net in a V-shape had complied with the spirit, but not with the letter, of the law; for, when their verdict had been returned, the foreman asked the court if it were possible to modify the same, and said that the jury thought that, while the defendant had violated the letter of the law, it had not violated the spirit of it. Thereupon the jury obtained the permission of the court to insert in the verdict a recommendation to the clemency of the court. The plaintiff in error contends that, by virtue of the colloquy which attended the handing in of the verdict, it should be held that the jury found a special verdict which is contrary to and should control the general verdict. The verdict of the jury as filed was that they found the defendant "guilty as charged in the indictment with a recommendation for clemency." What they said in open court may be taken as the expression of their opinion that the plaintiff in error, while violating the statute, had nevertheless so lifted or lowered its nets as to permit the free passage of fish during the closed hours. But in statutes such as this, enacted for the protection of fish, it is the letter of the law rather than its spirit which all fishermen are called upon to obey. The fisherman is not allowed to offer a substitute or to adopt a means of protection which he thinks is just as good. If the legislative body makes no exception to a clear declaration of its will, the presumption is conclusive that it intended none. United States v. Missouri Pac. Ry. Co., 213 Fed. 173, 130 C. C. A. 5. Where the offense is malum prohibitum, the doing of the inhibited act constitutes the crime. The only fact to be determined by the jury is whether the accused did the act. No evil intent is essential to constitute the offense. A simple purpose to do the forbidden act is sufficient. Armour Packing Co. v. United States, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

We find no error.

The judgment is affirmed.

SMITH v. ROBINS.

In re COX-BLODGETT DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. September 20, 1916.)

No. 4551.

1. APPEAL AND ERROR ⊜1067—HARMLESS ERROR—INSTRUCTIONS.
Defendant lent a sum of money to an officer of a corporation, and one-half of the loan was paid with a check, drawn on the funds of the corporation. After the corporation's bankruptcy its trustee sued to recover the amount of the payment on the theory that, the corporation not being indebted to defendant, the payment was without consideration. Defendant contended that the money lent to the corporate officer was by him transferred to the corporation under an agreement that such sum should be applied on his indebtedness to the corporation, and that if the borrower was unable to discharge the loan the corporation would do so. The court charged in effect that if the officer borrowed the money for his own use, and not for the benefit of the corporation, repayment of the loan out of the corporate funds was without consideration, so that defendant would be liable, but, if the money was borrowed for the benefit of the corporation, defendant was not liable. *Held* that, in such case, the refusal of a charge suggesting to the jury consideration of the question whether defendant knew or had reason to know that the officer, in making repayment to him, was using the funds of the corporation, did not injure plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⊜1067; Trial, Cent. Dig. § 475.]

2. CORPORATIONS ⊜432(6)—LOAN TO OFFICER—PAYMENT—RECOVERY—EVIDENCE—MATERIALITY.
In such case, while the evidence of the officer's indebtedness to the corporation before securing the loan might be relevant on whether he secured it for the corporation or himself, the exclusion of the evidence of indebtedness without any showing as to time was proper, for it would confuse the jury and evidence as to indebtedness after the loan was inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1731, 1743, 1762; Dec. Dig. ⊜432(6).]

3. CORPORATIONS ⊜413—OFFICERS—AGREEMENT—ENFORCEMENT.
Where a corporate officer secured a loan from defendant and delivered the proceeds to the corporation under an agreement that the corporation should repay the loan, which was for its benefit, an enforceable obligation requiring repayment by the corporation was created, so that the corporation's trustee in bankruptcy could not recover payments made to defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1647-1649; Dec. Dig. ⊜413.]

4. CONTRACTS ⊜330(3)—PROMISES—ENFORCEMENT.
A promise made for a valuable consideration to a third person for the benefit of another is one which in equity, if not in law, may be enforced by the third person directly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1592-1594, 1596, 1602, 1603; Dec. Dig. ⊜330(3).]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by O. Z. Smith, as trustee in bankruptcy of the estate of the Cox-Blodgett Dry Goods Company, against Raymond Robins. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Jean Madalene, of Wichita, Kan. (S. B. Amidon, of Wichita, Kan., on the brief), for plaintiff in error.

C. G. Yankey, of Wichita, Kan. (R. L. Holmes and W. E. Holmes, both of Wichita, Kan., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. O. Z. Smith, plaintiff below and plaintiff in error here, brought this action as trustee of the estate of the Cox-Blodgett Dry Goods Company in bankruptcy, to recover from the defendant, Raymond Robins, the sum of $12,583.33, alleging in his petition that on or about January 1, 1913, the Dry Goods Company, a corporation of the state of Kansas and doing business in Wichita in that state, which was about a year later adjudicated a bankrupt, executed its check for $12,583.33, payable to Robins, and delivered the same to him, who afterwards collected it and received the amount of money called for therein; that the Dry Goods Company was at the time not indebted to Robins for that or any amount of money, but that it was so paid to him without any consideration received by it therefor; that thereby the defendant Robins became indebted to the Dry Goods Company in that amount of money as for money had and received to its use.

The defendant answered the petition, admitting that he received the amount of money sued for in the way and manner alleged in the petition, but denied that it was so received by him without any consideration paid therefor; and for a further defense he alleged that in March, 1912, he loaned to one Thomas Blodgett the sum of $12,500 for the use and benefit of the Dry Goods Company and took the note of Blodgett therefor; that Blodgett, on receipt of the money so loaned to him, turned it over to the Dry Goods Company, which afterwards used it for its own purposes; that, although the loan was made to and in the name of Thomas Blodgett, it was in fact made to and became the debt of the Dry Goods Company; that the transaction was conducted in Blodgett's name pursuant to an express agreement and understanding that, if Blodgett would borrow the money from defendant and turn the same into the treasury of the Dry Goods Company for its use, the Dry Goods Company would repay the same to the defendant, or such part thereof as Blodgett was unable to pay, when required to do so by the defendant; that the Dry Goods Company, pursuant to its obligation so incurred, in January, 1913, paid, at the request of defendant, the amount of $12,583.33, the balance then due on the loan so made; that the payment was made pursuant to the aforesaid agreement and understanding, which constituted the real consideration for the payment of the money now sued for by the Dry Goods Company to Robins.

Plaintiff in his reply denied the allegations of the defendant's an-

swer, and thereby the simple issue was joined whether the Dry Goods Company received the money borrowed in the name of Blodgett, and assumed the obligation of paying it back to defendant, or whether it was an individual transaction with Thomas Blodgett only. The case came on for trial to a jury, when, after plaintiff had introduced evidence tending to make a prima facie case, the defendant took the affirmative and produced evidence tending to show the following facts:

That Robins was a wealthy philanthropist, residing in the city of Chicago, and engaged generally in social work and promoting industrial improvements; that he, in January, 1912, was in Wichita, Kan., interesting himself generally in working out programs for assisting several Western cities in inaugurating certain industrial improvements. He there met Thomas Blodgett, the treasurer of the Dry Goods Company, a man of considerable importance in Wichita, who was also interested in working out certain industrial improvements in Wichita, and after an investigation of about a week Robins entered into negotiations with Blodgett for loaning to him money to inaugurate an overall factory in connection with the business of his company at Wichita, and for working out in that city a program of wages and conditions for a model factory for the West. While there Robins met Mr. Cox, the president of the company, and went through several departments of the business of the company, and, becoming satisfied that it was a strong going concern, in a subsequent interview with Blodgett, agreed to loan him $25,000, provided satisfactory security could be furnished to work out the scheme they had been talking about. Robins then left Wichita for a trip throughout the West, where he was engaged in similar work.

After he left, Blodgett informed Cox, the president of the company, fully of Mr. Robins' offer, and Cox agreed with Blodgett that it would be best for him to borrow the money, but Cox insisted that as Blodgett was largely indebted to the firm, and as the firm then needed the money, it should, when secured, be turned over to the company by him in payment, or partial payment, of Blodgett's indebtedness, for the use of the company in its general business. This was agreed to by the two officers of the company, on condition and with the distinct understanding and agreement then made that if Blodgett could not pay the money back to Robins when due, or when Robins required it, the company would make the payment and charge the amount so repaid back to the account of Blodgett; and thereupon Blodgett advised Robins, who was then in California, that he would like the money. It was accordingly remitted to him, and he forthwith turned it over to the Dry Goods Company for its use, and Blodgett's account was credited with it—all as agreed to between Blodgett and Cox. It is needless to say that Robins does not appear to have been advised of this agreement between Blodgett and Cox.

Blodgett, on receiving this money on March 7, 1912, executed his personal promissory note for $25,000, payable to Robins six months after date. Some time prior to its maturity Robins advised Blodgett that, as he was about to go to Europe for an extended trip, he would

like to have the note paid at maturity, September 7, 1912. This demand, though a surprise, was met by a promise to pay one-half of it ($12,500) at maturity, and with a request that the payment of the balance be postponed for three months, or until December. This, after some correspondence, was agreed to. On September 20, 1912, Blodgett raised $12,500 and paid the same to Robins as agreed, and when the balance became due in December he was not able to provide for its payment in full, but did, some time before that, deposit $10,000 with the company in preparation for its payment. On January 1, 1913, the company, at the request of Blodgett, by its secretary and bookkeeper, who was duly authorized to sign checks for the company, drew a check upon its funds in the bank for the balance then due on the note, with interest, namely, $12,583.33, and sent the same to Robins, by whom or his agent it was duly received and collected. This is the payment alleged to have been made by the company to Robins without consideration, for the return of which Robins is now sued by the trustee of the company.

The plaintiff then produced additional evidence tending to prove the contrary, and to show that the loan was simply an individual loan to Blodgett, creating only an obligation on his part to repay it and that the company assumed no such obligation. During the progress of the trial evidence was offered by plaintiff tending to show the amount of Blodgett's indebtedness to the company at various times prior to or after the transaction in question, which was excluded by the court as immaterial to the issues presented by the pleadings. Counsel for plaintiff then requested the court to charge the jury as follows:

"That the form of check sued on was sufficient to convey notice to Raymond Robins that the check was drawn on the funds of the corporation, and that the same was being used in the payment of the personal debt of Blodgett"

—and also requested the court to give several other instructions of the same general character—all of which, however, presented the same legal proposition. These instructions the court refused to give, and, proper exceptions being saved, then charged the jury, amongst other things, as follows:

"Now, the undisputed facts are, gentlemen, that in the month of March, 1912, the defendant in this case loaned to Mr. Blodgett the sum of $25,000 and took the note of Mr. Blodgett, and in so far as that transaction was concerned it was a personal transaction between Mr. Blodgett and the defendant in this case, and so far as that transaction was concerned the defendant in this case could hold no one but the maker of that note for its payment. But this is not an action to recover the contents of that note, because that note, so far as the defendant is concerned, has been paid, canceled, and satisfied. The question in this case is whether the defendant has received this sum that is now sued for in this case, of $12,583.33, * * * from the Cox-Blodgett Dry Goods Company, for which it received no consideration. If so, it may recover this money. If not, it cannot recover it from the defendant in this case. * * *

"Again, it is contended the president of the company and Mr. Blodgett, who borrowed this money personally from the defendant in this case, talked it over and agreed the money should be borrowed personally by Mr. Blodgett, and that it should be used for the benefit of the corporation, and was so used, and that the Cox-Blodgett Dry Goods Company, having received the

benefit of it, would pay it back, or assist in paying it back. So now, gentlemen, you see what there is in this case. This was the individual obligation of this man Blodgett. It was not a debt, so far as Mr. Robins was concerned, of the Cox-Blodgett Dry Goods Company; and if, as charged in this petition, without any consideration to the Cox-Blodgett Dry Goods Company Mr. Blodgett, an officer of that company, took the money of the Cox-Blodgett Company and paid his individual debt, without any consideration to Cox-Blodgett Company, as charged in this petition, if you believe that—and the burden of proving that is on the plaintiff—* * * if the greater weight of all the credible evidence shows that without any consideration to the Cox-Blodgett Company Mr. Blodgett took, or caused to be taken out of the money of the Cox-Blodgett Company this $12,583.33 to pay his own individual debt, then that was the money of the Cox-Blodgett Company and went to pay an obligation they did not owe. If that is true, the plaintiff in this case must recover.

"On the other hand, if Mr. Blodgett borrowed this money from the defendant for the use and benefit of the Cox-Blodgett Company, and Mr. Blodgett, when he received this money, turned it into the Cox-Blodgett Company, and it had the use of it, it ought to pay it, and the defendant in this case ought not to pay it back, because it is very proper, if the firm did get the use of the money, that it should pay it back."

The court also charged the jury as follows:

"The fact that this check was made by the Cox-Blodgett Company that went to pay this money would cast no suspicion on the transaction, because Mr. Robins, the party to whom the money was coming, like any other person, would presume that Mr. Blodgett had the money in the hands of the company with which to pay this money."

To the giving of these charges, and each specification thereof, plaintiff's counsel duly excepted. The jury, as already stated, found a verdict for the defendant on which judgment was entered.

The only assignments of error relied on and argued by counsel for plaintiff in error are these: (1) The action of the court in refusing to give the instruction requested by plaintiff's counsel, heretofore set out, and in charging the jury to the contrary; and (2) the action of the court in excluding evidence as to the state of account between Blodgett and the Dry Goods Company, and especially evidence showing that Blodgett owed the company $84,000.

[1] The instruction, so requested to be given and so refused by the court, is in the following words:

"* * * The form of the note sued on herein was sufficient to convey notice to Raymond Robins that the check was a check drawn on the funds of a corporation and that the same was being used in payment of the personal debt of Tom Blodgett."

There was no error in refusing to give this instruction, or in giving the contrary advice to the jury, as found in the charge. The instruction was foreign to the only issues created by the pleadings, and imposed upon the plaintiff a burden he was not required to carry, and a greater burden than the court, in its charge, imposed upon him. The court, in its charge, told the jury, in effect, that if Blodgett borrowed the money for his own use, and not for the use and benefit of his company, the repayment of the loan out of the funds of the company was without consideration, and defendant was liable to the plaintiff for the return of the money so paid to him. But, on the other hand, if

Blodgett borrowed the money for the use and benefit of the Cox-Blodgett Company, and Mr. Blodgett, when he received it, turned it over to the company and the company had the use of it, it ought to have paid it, as it did, and the defendant ought not to be required to pay it back. This charge clearly advised the jury that defendant was liable for the return of the money if it was borrowed by Blodgett for his own use, and not for the use of the company, whether he (the defendant) knew or had reason to believe Blodgett was making use of the company's money for his own purposes or not. How, then, could plaintiff have been injured by the court's failure to suggest to the jury any consideration of whether defendant knew or had reason to believe Blodgett was so using the funds of the company? Certainly plaintiff was not injured by the refusal to give the instruction requested by him.

[2] Did the court err in excluding evidence relating to the state of account between Blodgett and the Cox-Blodgett Company, and especially in excluding proof offered to the effect that Blodgett owed the company $84,000? Before considering this assignment the state of the record should be carefully noted. Counsel for plaintiff, in asking questions relating to this subject, stated, on inquiry by the court, that he was not able to fix any time when Blodgett was so indebted to the company, or to fix any specific dates when the accounts were taken. He said, "We cannot state whether it occurred before or after" the transactions involved in this case, but said we "should let the jury say when it occurred." The court then sustained an objection excluding the evidence, stating at the same time:

"I will allow you to prove anything occurring before, if you can prove anything occurring before."

The court was right. Any evidence of the kind offered relating to the state of accounts between Blodgett and the company prior to the time of the transaction might have been remotely relevant to the inquiry whether Blodgett borrowed the money from Robins for his own use or for the use of the company. This, however, is doubtful; but certainly no such distantly related evidence should have been permitted without so fixing the time before March, 1912, when the money was borrowed, as to have been influencive with Blodgett in securing the money. For want of definiteness as to time, the evidence was clearly inadmissible. If admitted, it could have served no other purpose than that practically avowed by counsel for plaintiff, namely, to confuse the jury. There was no error in excluding it.

Some other arguments are made by counsel in their brief, to which we have given careful consideration, and find nothing in them which warrants a reversal of this judgment. The court, in its charge to the jury, reduced the case to the simple issue created by the pleadings, excluding all collateral or confusing propositions, and in this way the jury got some real help from the court, and brought in what seems to us an intelligent and correct verdict.

[3] We have so far confined ourselves closely to the pleadings in the case and to the actual proceedings of the trial under those pleadings; but it may not be amiss to observe that the promise made by the presi-

dent of the Cox-Blodgett Company to repay the money borrowed from Robins for the use and benefit of the company, and actually so used by the company, created an obligation on the part of the company to pay the money to Robins, supported by abundant authority. We have held in the cases of Cherry v. City National Bank, 75 C. C. A. 343, 144 Fed. 587, Flower, Trustee, v. Commercial Trust Co., 138 C. C. A. 580, 223 Fed. 318, and Leonard v. State Exchange Bank of Elk City, Oklahoma, 236 Fed. 316, 149 C. C. A. 448, that facts of the kind just recited are sufficient to subject the Cox-Blodgett Company to direct liability to Robins for the amount of money so borrowed and so used.

[4] Moreover, a promise made for a valuable consideration to a third person, for the benefit of another, is one which in equity, if not at law, may be enforced by the third person directly. Most clearly, then, the voluntary payment by one so legally obligated to make it is supported by a sufficient consideration.

The judgment is affirmed.

ELLIS v. TREAT et al. *

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2758.

1. SPECIFIC PERFORMANCE ⟸126(3)—ACTIONS—RIGHT TO—VARIANCE.

The courts cannot make contracts for parties, and a decree of specific performance must conform to the precise contract between the parties; therefore, under a complaint seeking specific performance of a contract, whereby defendant was to transfer mining claims to a corporation and to deliver to complainants a percentage of the stock, a decree of specific performance, directing defendant, the corporation not having been formed, to transfer such percentage of the claims to complainants, is invalid.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 401; Dec. Dig. ⟸126(3).]

2. ESTOPPEL ⟸56—EQUITABLE ESTOPPEL—HOW RAISED.

Where defendant, having agreed to transfer the mining claims to a corporation to be formed and to deliver a percentage of the stock to complainants, leased the claims, the incorporation being abandoned, under an instrument reciting that complainants were the owners of a percentage of the property, defendant is not estopped, complainants not having changed their position, from denying that they had title to any part of the claims.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. ⟸56.]

3. SPECIFIC PERFORMANCE ⟸28(1)—CONTRACTS—INDEFINITENESS.

Specific performance of the contract must be denied, where it did not fix the amount of the capital stock of the proposed corporation, the number or value of its shares, the number of its directors, the place of its business, its powers or its duration, for the contract is too indefinite to be enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61, 65, 66; Dec. Dig. ⟸28(1).]

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

*Rehearing denied October 23, 1916.

4. SPECIFIC PERFORMANCE ⇐119—RIGHT TO—PERFORMANCE BY COMPLAINANT.
Where complainants were to dispose of 10 per cent. of the capital stock, the proceeds of which was to be used in development work and it did not appear when specific performance was sought that complainants were then able to make such sale, the project having been delayed because of their previous inability, specific performance must be denied; complainants not showing that they were able to do equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. ⇐119.]

5. EQUITY ⇐66—MAXIMS—DOING EQUITY.
Under the rule that he who seeks equity must do equity, specific performance, which is a discretionary remedy, will be denied, where complainant does not, on his part, show compliance with the substantial conditions of a contract.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. ⇐66.]

6. SPECIFIC PERFORMANCE ⇐14—RIGHT TO—DENIAL.
Specific performance of a contract to convey mining claims to a corporation to be formed and to deliver to complainants a percentage of the total shares will be denied, because calling for action by persons other than those who are parties to the contract, necessitating intervention of directors, etc.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 33, 41; Dec. Dig. ⇐14.]

7. SPECIFIC PERFORMANCE ⇐62—RIGHT TO—TRANSFER OF CORPORATE STOCK.
Specific performance of a contract to convey shares of corporate stock will be denied, unless the facts show an unusual and exceptional situation in which damages will be inadequate; therefore, where it did not appear that damages would be inadequate, specific performance of a contract to convey mining claims to a corporation to be formed, and transfer a percentage of the shares to complainants, will be denied.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 188; Dec. Dig. ⇐62.]

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Bill by George C. Treat and others against H. E. Ellis. From a decree for complainants, defendant appeals. Reversed and remanded, with directions to dismiss.

On May 15, 1907, the appellant, the owner of the Mystic lode mining claim, entered into an agreement with the appellees Treat and Smith, whereby the latter advanced $500 to pay for shipping five tons of ore from said mining claim to a smelter. Treat and Smith were to receive back their $500, and also one-fourth of the net returns from the smelter, and in case those returns were insufficient to repay said $500 to Treat and Smith, they were to have a lien on the mining claim to secure the same. They received nothing from the smelter returns. On July 9, 1908, the parties entered into an agreement whereby the appellant was to deed eight mining claims, including the Mystic mining claim to a corporation to be called the Mystic Gold Mining Company. The whole of the capital stock of the corporation was to be issued to the appellant, and he was to transfer to Treat and Smith 20 per cent. thereof, and to turn over to the treasurer of the corporation an additional 20 per cent., to be sold to pay for development work, etc. Treat and Smith agreed to pay all the expenses of incorporating the company, recording and filing necessary papers, and to receipt in full for all claims they had against the appellant, and "to give whatever time and attention that might be necessary to the proper organization of said corporation and the sale of said stock." Articles of incorporation were prepared by Smith, but were not executed. The parties

were unable to sell any of the stock, and no stock was ever issued. On June 5, 1909, one Crane secured an option on the mining claims, with the right to lease the same for a period of six years. In the option it was provided that 85 per cent. of the royalty under the lease was to be paid to the appellant, and the remainder to Treat and Smith. The option was not carried out, and on July 23, 1909, Miller, trustee, was substituted for Crane, and a lease was made which recited that the appellant was a four-fifths owner, and Treat and Smith each owned 10 per cent. of the mining claims. The lessee paid to the appellant under the lease something over $50,000, and to Treat and Smith about $7,000, but surrendered possession of the premises in July, 1914. In May, 1915, the appellees began their suit against the appellant for specific performance of the contract of July 9, 1908, alleging that, owing to the stringency of the money market and the difficulty that would be experienced in selling treasury stock of the proposed corporation to advantage, it was decided by all the parties to the contract of July 9, 1908, to await a more opportune time to form the corporation, and that, while awaiting that time, the leases were made to the mining claims, with the understanding that at the termination thereof the corporation would be formed, and the contract of July 9, 1908, would be carried out. The prayer of the complaint was that the appellant specifically perform the contract of July 9, 1908, or that he convey to the appellees Treat and Smith each an undivided one-tenth interest in all of the eight mining claims, and that the said appellees be adjudged and decreed to be the owners of an undivided one-fifth interest in all machinery, tools, equipment, buildings, and improvements placed on said mining claims.

The answer of the appellant alleged that about two months after the execution of the contract of July 9, 1908, Treat and Smith informed the appellant that they could not carry out their part of the contract, and asked him to pay them the money which he owed them, and that it was then specifically agreed between the parties that the contract of July 9, 1908, should be abandoned, and that Treat and Smith should hold the mining claims of appellant as security for the money formerly owing to them, from the payment of which the appellant was to have been released under the terms of the contract of July 9, 1908. The decree adjudged Treat to be the owner of, and entitled to, the immediate possession of an undivided one-tenth interest, and that Smith and Archibald, to whom Smith had transferred a one-half interest, were each the owner of, and entitled to the immediate possession of, an undivided one-twentieth interest of the eight mining claims, and required the appellant to convey said interests to the respective appellees.

T. C. West, of San Francisco, Cal., and Charles Ganty, of Valdez, Alaska, for appellant.

Donohoe & Dimond and Lyons & Ritchie, all of Valdez, Alaska, and Smith, Newcomb & Worthington, of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The assignments of error bring in question the sufficiency of the complaint to state a cause of suit, and the propriety of the decree which was rendered thereon. The decree is clearly erroneous, for the reason that it is unsupported by the allegations of the complaint. It does not appear from the complaint that the appellant ever promised or agreed to convey to the appellees Treat and Smith any interest in the mining claims. What the appellant agreed to do was to convey to a corporation thereafter to be formed eight mining claims, in consideration of all the stock of the corporation, and thereafter to transfer to the appellees 20 per cent. of the stock. The decree treats the contract as a contract to convey an interest in real estate, which it is not. It is an agreement to transfer personal property. No principle of the

law of specific performance is more thoroughly established than that the decree must conform to the precise contract made between the parties. A court will not make a contract for them. 36 Cyc. 789; Gachet v. Morton, 181 Ala. 179, 61 South. 817; Philadelphia & Reading Railroad v. Lehigh Navigation Co., 36 Pa. 204. The fact that the lease of the mining property contained the recital that the appellant and Treat and Smith were the owners of the property cannot be held to estop the appellant now to dispute the appellees' claim of title. The essential elements of estoppel are lacking. It is not shown that Treat and Smith relied on any admission of their title by the appellant, or that they changed their position as to the property in any way, and there is no proof that the original contract was ever changed.

It remains to be considered whether, under the allegations of the bill, and the prayer for such other and further relief as may be just and equitable, the appellees are entitled to a decree for the specific performance of the contract which they pleaded. There are several reasons why such relief must be denied them:

[3] 1. The contract as pleaded is too indefinite and uncertain to justify a decree of specific performance. It contains no mention of the amount of the capital stock of the proposed corporation, the number or value of its shares, the number of its directors, the place of its business, its powers, or its duration. It is the accepted rule that the minds of the parties must have met upon all the terms of the contract the specific performance of which is sought to be enforced. Pressed Steel Car Co. v. Hansen, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; Jones v. Patrick (C. C.) 145 Fed. 440; Williams v. Stewart, 25 Minn. 516; McKnight v. Broadway Investment Co., 147 Ky. 535, 145 S. W. 377; Schenck v. Ballou, 253 Ill. 415, 97 N. E. 704, Ann. Cas. 1913A, 251; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000; Tharp University v. Komus Realty Co., 159 Ky. 386, 167 S. W. 136; Ward v. Newbold, 115 Md. 689, 81 Atl. 793, Ann. Cas. 1913A, 919; Strack v. Roetzel (Okl.) 148 Pac. 1017.

[4, 5] 2. The appellees have never performed the covenants which were to be kept and performed by them. They allege in their complaint that performance was rendered impossible by the stringency of the money market, and the difficulty which would probably have been experienced in selling the treasury stock. There is nothing to show that conditions are any better at the present time, or that the appellees now are, or ever will be, able to sell the treasury stock. While the appellant was to part with 20 per cent. of his stock, which in a sense may be said to represent one-fifth of his mining property, he was to receive, as part of the consideration therefor, the benefit of the proceeds of another 20 per cent. of the stock to be sold by the services of the appellees and applied to the development of the mines. Specific performance is not a matter of right, but rests in the sound judicial discretion of the court, and before it may be awarded, it must appear that the complainant on his part has complied with the substantial conditions of the contract, under the rule that he who seeks equity must himself do equity. Washington Irr. Co. v. Krutz, 119 Fed. 279, 56 C. C. A. 1; Cronen v. Moore, 210 Fed. 239, 127 C. C. A. 57.

[6] 3. Even if the contract were specific and certain, we are of the opinion that within well-settled principles which govern specific performance, equity should withhold the specific relief here sought, on the ground that the complaint calls for the performance of acts which require the participation of others not parties to the contract or to the suit, such as the execution of articles of incorporation, the election of a board of directors, the adoption of resolutions, and other details of corporate action. A court of equity will not, for instance, compel a corporation to buy in its stock in order to carry out an agreement whereby it has promised to pay for a lease of lands in stock. Smith v. Flathead River Coal Co., 64 Wash. 642, 117 Pac. 475. Nor will it require the specific performance of an agreement to enter into a copartnership. Pomeroy Specific Performance of Contracts, § 290; Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. Ed. 547. Nor will it compel a defendant to buy real estate in order to carry out his contract to convey the same. Laubengayer v. Rohde, 167 Mich. 605, 133 N. W. 535.

[7] 4. While this is a suit to compel the creation and organization of a corporation, and the transfer of a portion of its stock after issuance, it is, so far as the appellee's interest therein is concerned, a suit to compel the transfer of stock. It is the rule that a decree for the specific performance of a contract to convey shares of stock in a corporation will be denied unless the facts pleaded and shown present an unusual and exceptional situation in which damages will be inadequate. Bernier v. Griscom-Spencer Co. (C. C.) 169 Fed. 889. In Bacon v. Grosse, 155 Cal. 481, 132 Pac. 1027, Judge Sloss, for the Supreme Court of California said:

"Undoubtedly it is the general rule that equity will not compel the delivery of specific personal property wrongfully withheld, nor enforce the specific performance of a contract to sell chattels, unless it is shown that money damages for the breach of the obligation would not afford adequate relief. Senter v. Davis, 38 Cal. 450; Harle v. Haggin, 131 App. Div. 742, 116 N. Y. Supp. 51; Civ. Code, § 3387. This rule has often been applied to actions involving corporate stock, the rule declared being that the plaintiff will be denied specific relief in the absence of proof that he would derive some peculiar advantage from the possession of the particular stock which he seeks to retain."

The decree is reversed, and the cause is remanded, with instructions to dismiss the same.

MATHER v. STOKELY.

(Circuit Court of Appeals, First Circuit. September 13, 1916.)

No. 1167.

1. COVENANTS ⟸125(1)—COVENANT OF SEISIN—ACTION FOR BREACH—DEFENSES.

The defendant in an action for breach of a covenant of seisin is entitled in reduction of damages to the benefit of any profits derived from the land by plaintiff, and for which by reason of lapse of time he is not liable.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 231, 232, 234; Dec. Dig. ⟸125(1).]

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2. JUDGMENT ⇐414—RELIEF AGAINST IN EQUITY—DEFENSES ARISING AFTER JUDGMENT.

Where, after rendition of judgment against the defendant in an action for breach of covenant of seisin, and before satisfaction, the title of plaintiff, who had remained in undisturbed possession and use of the land, was made good by the running of the statute of limitations, defendant may maintain a suit in equity to enjoin enforcement of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 780; Dec. Dig. ⇐414.]

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

Suit in equity by John L. Mather against Hattie N. Stokely. Decree for defendant, and complainant appeals. Reversed.

Hollis R. Bailey, of Boston, Mass., for appellant.

Theobold M. Connor, of Northampton, Mass. (David H. Keedy, of Amherst, Mass., on the brief), for appellee.

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

MORTON, District Judge. [1] This is a suit in equity to enjoin the respondent from enforcing a judgment obtained in an action at law by her against the complainant in the District Court for breach of covenants of seisin and good right to convey contained in a deed from him to her of a tract of timber land in Florida, comprising about 1,100 acres. The present case was heard upon demurrer, and a decree was entered dismissing the bill. The complainant has appealed. The bill was amended before the hearing, and it was the amended bill that was dismissed. The judgment in the action at law has not been satisfied in whole or in part. An interlocutory injunction restraining the enforcement of the judgment until further order was issued as prayed for.

The gist of the amended bill is that upon receiving the deed the respondent, Stokely, immediately entered into possession of the tract described in it and has continued in possession of the same ever since; that she and her grantees have been exercising thereon, without disturbance from any one, the rights of cutting timber and of turpentining, and she has realized therefrom upwards of $7,500; and that the Florida statute of limitations has run in her favor against the owners and holders of the paramount title to the land since the trial and assessment of damages in the action at law. The bill prays, among other things, that it may be decreed that the respondent is entitled to only nominal damages, and that she may be permanently enjoined from enforcing the judgment by taking out execution, or otherwise.

The action at law (Mather v. Stokely, 218 Fed. 764, 134 C. C. A. 442) must be taken to have decided that there was a breach as alleged of the covenants of seisin and of good right to convey. That question is therefore concluded. The complainant does not contend that it is not, and he does not seek in the present suit to review the correctness of that decision. It must also be taken as decided in that

case that, upon the facts appearing there, the rule of damages was the consideration paid for the land and interest from the date of payment.

[2] This case, however, presents a different question from any that arose in that action, viz. whether, the statute of limitations having run in the grantee's favor since the trial and assessment of damages in that case, and the judgment being still unsatisfied in whole or in part, the complainant is entitled to relief in equity to prevent the enforcement of the judgment. It is not contended, and indeed could not be, that the running of the statute since the verdict would operate as a bar to the maintenance of that action.

An objection, somewhat preliminary in its nature, which would, if well taken, be fatal, is urged. It is that the facts now relied on could have been taken advantage of in the action at law, and that the complainant has therefore been guilty of laches. The short answer to that objection is that, according to the allegations of the amended bill, which, for the purposes of the hearing on the demurrer, must be taken as true, the statute of limitations had not run, as to the land, at the time of the trial, and the complainant could not then have availed himself of the facts now alleged in reference thereto, in reduction of damages, or otherwise. Neither could he have taken advantage of them, as of right, if at all, on a motion in arrest of judgment, or for a new trial. They would have had to be introduced into the case as a new issue, which had come into existence since the verdict, something which the Supreme Judicial Court of Massachusetts said in Marshall v. Merritt, 13 Allen, 274, concerning a motion for leave to file a supplemental answer setting up a settlement after verdict, it knew of no practice to authorize.

There can be no doubt that if the statute had run in favor of the respondent at any time down to the trial and the actual assessment of damages, or if it had appeared that the respondent had received profits from the land for which, by lapse of time, she was no longer accountable to anybody, the complainant would have been entitled to introduce evidence of the same in reduction of damages, though he would still have remained liable for nominal damages. In Cornell v. Jackson, 3 Cush. (Mass.) 506, 511, the court said, in considering the matter of damages for breach of the covenant of seisin:

"If, by any means, the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages pro tanto."

That was a case where, after action had been brought, title to a part of the land accrued to the plaintiff by way of estoppel under a covenant of warranty contained in the deed. In Whiting v. Dewey, 15 Pick. (Mass.) 428, 434, 435, also an action involving a breach of the covenant of seisin, it was held that although the general rule was that the purchase money, with interest, was the measure of damages, nevertheless, inasmuch as the plaintiff had received profits from the land for which, by reason of the lapse of time, he was no longer liable, such profits should be deducted from the purchase money and interest. It would seem in that case that the time had expired be-

fore the action was brought, but there is no reason for thinking that the rule would have been laid down any differently if the time had lapsed after, instead of before, the commencement of the action. The matter is summed up in 2 Sutherland on Damages (3d Ed.) § 599, p. 1722, as follows:

"Whatever the covenantee realizes as a benefit from the conveyance to him will diminish the actual loss. If the title is made good by the statute of limitations, and there has been no actual disturbance or injury, the damages would be merely nominal. Though in these cases the cause of action accrues upon the execution of the deed, the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring afterwards, even up to the actual assessment of the damages, tending to increase or diminish them, may be given in evidence and considered by the jury."

See Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Morrison v. Underwood, 20 N. H. 369; Dickey v. Weston, 61 N. H. 23; Garfield v. Williams, 2 Vt. 327, 329; Catlin v. Hurlburt, 3 Vt. 403, 409; Miller v. Hartford & S. Ore Co., 41 Conn. 112; Noonan v. Ilsley, 21 Wis. 140; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Wilson v. Forbes, 13 N. C. 30, 39; Pate v. Mitchell, 23 Ark. 591, 79 Am. Dec. 114; 3 Washburn on Real Property (6th Ed.) § 2410; 3 Sedgwick on Damages (8th Ed.) § 978; Rawle on Covenants for Title (4th Ed.) 265. This rule is applied in numerous cases in contract and tort, and would seem to rest on sound principles where the damages themselves do not constitute the cause of action, but are the consequences that flow from it.

There can be no doubt, also, that it comes within the purview of jurisdiction in equity to afford relief in a proper case from the enforcement of a judgment that has been rendered at law.

It is said by Harlan, J., in Marshall v. Holmes, 141 U. S. 589, 591, 12 Sup. Ct. 62, 64 (35 L. Ed. 870), quoting from Marshall, C. J., in Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 336, 3 L. Ed. 362, that:

"Any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not have availed himself in a court of law, * * * will justify an application to a court of chancery."

The present would seem to be a case eminently proper for the exercise by a court of equity of its power to restrain the enforcement of a judgment rendered at law. The effect of the demurrer taken in connection with the allegations of the amended bill is to constitute an admission on the part of the respondent that she has been in possession of the tract described in the deed from immediately after receiving the deed down to the present time, exercising the right of cutting timber and of turpentining, and has realized therefrom upwards of $7,500, and that the statute of limitations has run in her favor since the time of the assessment of damages, so that she has acquired an indefeasible title to the land. If the complainant is not granted the relief which he seeks, the result will be that he will have to pay back the full consideration which he received, although the respondent has acquired in the meantime, without any expense or trouble on her part, by mere adverse possession, full title to the land,

and has already received in the way of profits more than she paid, plus interest, for which sums she is no longer accountable to any one. Such a result should be avoided if it can be, and we think that it can.

It is plain, as before suggested, that, if the statute had run in the grantee's favor before the trial and the assessment of damages, that fact could have been shown in reduction of damages. No good reason can be given why this right to benefit by the running of the statute should be limited to the action at law, or why the complainant should be denied relief because the statute has run since the trial and assessment of damages instead of before. So to hold, would put it in the power of the covenantee, by bringing action before the statute had run, to deprive the covenantor of any opportunity to show that the statute had subsequently run in favor of the covenantee, and that the latter had received profits which should in equity and good conscience go as reduction of the damages. This is enough to show that there cannot be any such limit or bar to the relief which is sought, unless there is some other ground on which it should be refused.

The respondent contends that her bringing of the action at law operated to prevent the running of the statute and the acquisition by her of a title by adverse possession. But, in the first place, there is nothing in the Florida statute (see 3 Washburn on Real Property [6th Ed.] p. 150), by way of exception or otherwise, to prevent the running of it in her favor because she brought suit for the breach of the covenants of seisin and good right to convey; and, in the next place, her admission that she has been in possession, cutting timber and turpentining over, so far as appears, the whole tract, can have, it seems to us, no less effect than occupancy by the erection of buildings would have had in respect to the land so conveyed, acts which she would not have been permitted to falsify by a disclaimer, or plea of non tenure. Proprietors of Locks and Canals v. Nashua & Lowell R. R., 104 Mass. 1, 10, 6 Am. Rep. 181.

It is, no doubt, true, as the respondent contends, that upon satisfaction in full by the complainant of the judgment, the respondent would be estopped from asserting any title under her deed as against him to the tract described in it. But as the case stands the complainant is not and cannot be required to satisfy the judgment; and the contention has therefore no force or effect. The objection that neither the profits received, nor any part thereof, nor the title acquired by the respondent, came from the complainant, is fully met by the cases referred to above.

We have thus far dealt with the case as concerning the title to the land only. The bill also refers to rents and profits of the land alleged to have been received by the respondent; but it does not allege that at the time of the trial and assessment of damages the statute of limitations against personal actions had not run in her favor, nor that she was at that time still liable to the paramount owner for such rent and profits. If her liability was then barred, the amount of the rent and profits could have been shown by Mather and applied

in reduction of damages (cases supra); and he is not now entitled to equitable relief in respect thereto.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the appellant recovers his costs of appeal.

PUTNAM, Circuit Judge, concurs in the result.

BOSTON & M. R. R. v. TITCOMB.

(Circuit Court of Appeals, First Circuit. August 29, 1916.)

No. 1186.

1. NEGLIGENCE ⟸122(1)—ACTIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Under the rule of the federal courts, the burden of proving contributory negligence in an action for personal injury rests on the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221, 229, 233, 234; Dec. Dig. ⟸122(1).]

2. RAILROADS ⟸333(1)—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Deceased was struck and killed by the engine of a train on defendant's railroad as he was walking over a crossing in the evening. He was familiar with the crossing, and the path by which he approached it ran for some distance parallel to or near the tracks. The whistle cord on the engine was broken, and the whistle was not sounded for the crossing; but the bell was rung continuously, and the headlight could be seen for half a mile before the crossing was reached. Deceased was a young man in full possession of his senses. *Held*, that he was chargeable with contributory negligence in failing to look before going upon the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1080, 1083; Dec. Dig. ⟸333(1).]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by Edward S. Titcomb, administrator of the estate of Charles F. Gray, deceased, against the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Reversed.

Leslie P. Snow, of Rochester, N. H. (Hughes & Doe, of Dover, N. H., on the brief), for plaintiff in error.

Andrew Jackson, of Rochester, N. H. (Jackson & Hurlburt, of Rochester, N. H., and Remick & Jackson, of Concord, N. H., on the brief), for defendant in error.

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

DODGE, Circuit Judge. Charles F. Gray was struck and killed on April 15, 1914, by an engine drawing a passenger train, at or near the Knight Street grade crossing in Rochester, N. H. The defendant

in error, his administrator, hereinafter called plaintiff, recovered judgment against the railroad in the District Court for the benefit of Gray's widow and parents, dependent on him for support, under New Hampshire Public Statutes, c. 191, §§ 8–13. The railroad seeks here to reverse the judgment because of the trial judge's refusal to direct a verdict in its favor, refusals to rule in accordance with its requests, and the admission of certain testimony against its objection.

The train was a local passenger train from Boston, due at the Rochester Station, half a mile or more north of the crossing at 6:47 p. m. It was about 13 minutes behind time, and a connection was to be made at Rochester. The evidence was conflicting as to its rate of speed, but the jury might have found that it was running over 40 miles an hour, twice as fast as it usually ran at that place.

In trying to whistle for the Hancock Street crossing, half a mile south of the Knight Street crossing, the whistle cord on the engine had broken, and four whistling posts, including that for the Knight Street crossing, had been passed by the engine, before Gray was struck, without sounding any whistle. That a finding of negligence on the railroad's part for the above failure to sound the whistle would have been warranted by the evidence is not disputed. There was, however, uncontradicted evidence that the bell was kept ringing from the time the whistle was disabled.

[1] The burden was not upon the plaintiff to prove Gray's due care, but upon the railroad to prove that Gray's negligence contributed to cause his death, according to the ordinary rule in the federal courts. Central Vt. Ry. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. We find nothing in the New Hampshire statute under which the suit is brought making due care on the part of the person killed a fact necessary to be shown in order to obtain the recovery allowed.

[2] Gray had left his house alone a few minutes before 7 o'clock on the same evening, to go to a moving picture exhibition. His house was east of the tracks and south of the Knight Street crossing. The exhibition he intended to visit was west of the tracks. His usual way of reaching it was by a path running at first diagonally toward the tracks, then for about 130 feet parallel with, and 15 or 20 feet distant from, them, then by a smaller path intersecting the first about 30 feet from the crossing, running diagonally across the railroad location along the easterly side of the tracks to the crossing, thence, by the crossing, over the tracks. By going diagonally across the tracks so as to reach the crossing west of the first track, instead of keeping on its easterly side until the crossing was there reached, distance could be saved, there was nothing in the way to prevent doing this, and people sometimes did it.

With the exception of one witness who saw Gray on the path not far from his house, no witness called by the plaintiff saw him after he had left his house until he was found lying on the ground on the northerly side of Knight street, several feet easterly from the railroad tracks, so badly injured that he died within two hours. He was found

there immediately after the train had passed the crossing; and in passing it the brakes on the train had been suddenly applied, so as to bring the train to a full stop north of the crossing before it had reached the Rochester Station. None of the plaintiff's witnesses saw the train strike Gray, or undertook to say where he was when it struck him.

The planking at Knight street crosses several tracks; that upon which the train which struck Gray was running being the one furthest to the eastward. Evidence offered by the defendant tended to show that Gray was seen a few seconds before the train struck him, north of the point at which the smaller path diverged from the path parallel with the tracks, walking near the easterly side of the track referred to, toward the crossing, "at the edge of the ties," according to one witness, or "outside the rail on the ties," according to another. The evidence referred to tended to show either that he had not actually reached the planked crossing when struck, or at most left it doubtful whether he had actually reached it or not. We assume in the plaintiff's favor that he had reached the planking before he turned across the track and was not a trespasser when struck. The engineer of the train testified, as to his first sight of Gray:

"I saw him step into the light of my headlight, step out of the darkness into the light of my headlight, about 30 feet from the front end of the engine."

According to the testimony from both sides, the sky was overcast, but there was no rain. Although it was misty, and some of the witnesses called it foggy, there was no dispute that the headlight of an approaching train could have been seen without difficulty, by any one who looked, from the easterly side of the tracks at Knight street, at least as far south as the Hancock street crossing, one-half a mile away along a straight track; or that a like view for the same distance, unobstructed except by the usual telegraph poles, could have been had from any point on the smaller path last above mentioned, or from any point on the path parallel with the tracks out of which it led. That in approaching the crossing Gray had ample opportunity to see whether or not the track was clear of trains approaching from the southward, and within half a mile of the point where he was intending to cross, there could be no doubt whatever.

Gray, employed at the time in a shoe factory in Rochester, was a young man, in full possession of his senses, and was perfectly familiar with the locality. At the Knight street crossing there were no gates, but there were gates at the Main street crossing, 87 feet further north; these were down, having been lowered for this train, and they had lanterns on them.

In our opinion, the only reasonable conclusion permitted by the undisputed facts was that failure on Gray's part to exercise ordinary care for his own safety was the cause of his death. The crossing and its surroundings were well known to him, as he approached it the headlight of the train was plainly visible, if he had used his senses he could not have failed to see and hear the train, even though it did not whistle, and in order to see it he had only to look around; yet he went

upon the track directly in front of it. A freight train bound southward was moving over the crossing upon the westernmost track. It had just cleared the crossing, and it is said that this might have confused him or distracted his attention. But this circumstance, like the fact that it was dark at the time, seems to us one which called upon him for special caution before going upon the tracks at all. We are unable to consider this or any of the circumstances shown sufficient to excuse his want of care in going upon them when he did. There was nothing in the circumstances which can reasonably be supposed to have deceived him into thinking that no train was likely to be passing at that time. Horan v. Boston & Me. R. R., 183 Fed. 559, 106 C. C. A. 535.

The presumption that Gray stopped, looked, and listened before he went upon the track, we think overcome by the circumstances shown; these being in our opinion such that there could have been no injury had the injured person taken reasonable precautions for his own safety. Tomlinson v. Chicago, etc., Ry. Co., 134 Fed. 233, 67 C. C. A. 218; Rollins v. Chicago, etc., Ry. Co., 139 Fed. 639, 71 C. C. A. 615; Wabash, etc., Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352.

Evidence tending to show, as was claimed, that Gray had been habitually careful about stopping, looking, and listening when approaching this crossing on previous occasions, was admitted against the defendant's objection. In the view we take of the case, we need not consider the question of its admissibility. We think it insufficient in any event to justify any conclusion that he used due care upon this occasion.

Nor can we regard the evidence as sufficient to warrant the jury in finding that there was gross and willful disregard of the rights of others on the railroad's part, such as rendered it liable whether Gray's negligence contributed to his injury or not.

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 plaintiff in error recovers its costs of appeal.

J. HOMER FRITCH, Inc., et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1916.)

No. 2683.

1. ESTOPPEL ⊂=117—EVIDENCE—ADMISSIBILITY.
Where plaintiffs claimed that under their acceptance of defendant's request to extend the time of an option to purchase a vessel, defendant was estopped to deny extension of the charter party and the court ruled that plaintiffs need not establish the good faith of their negotiations for sale to others, evidence of negotiations in good faith is properly excluded.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307; Dec. Dig. ⊂=117.]

2. ESTOPPEL ⊂=117—EVIDENCE—ADMISSIBILITY.
Where plaintiffs asserted defendant was estopped to deny that the charter party for a vessel was extended, evidence that the extension of defendant's option to purchase deprived them of interest on the purchase price of the vessel which would have been realized on sale to others is properly excluded, where there was no evidence that such sale would have been consummated but for the extension.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307; Dec. Dig. ⊂=117.]

3. ESTOPPEL ⊂=62(2)—OFFICERS—ACTS OF ESTOPPEL.
The rule that the government is not estopped by the acts of its agents or officers applies only where such acts are fraudulent, unauthorized, or mistaken.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 152; Dec. Dig. ⊂=62(2).]

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

For former opinion, see 234 Fed. 608, —— C. C. A. ——.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1, 2] The plaintiffs complain of the conclusion of this court that there is "no evidence that the plaintiffs would have chartered the vessel or used it, or would have done otherwise with it than they did but for the option." It is earnestly insisted that the court below excluded evidence, proffered by the plaintiffs, which, if admitted, would have shown that this conclusion is incorrect. They point to the ruling of the court below on the question propounded by the plaintiffs:

"Will you state what was the nature of the negotiations you then had pending for the sale of the Homer to other parties in the event that the sale to the government did not go through."

This was offered "to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel." The court below ruled that they were not required to show good faith, and excluded the offered testimony. Again the plain-

tiffs offered in evidence a "memorandum" of date September 15, 1911, which was an option in which, in consideration of $1,000 paid by the holder thereof, he was given the right to purchase the steamer within 15 days after the expiration of the government's option, on paying therefor $7,000 in cash and executing notes for $27,000, the notes to draw interest at 6 per cent. The option further provided that if the purchase was not completed within 15 days after notice of the government's failure to exercise its option, the $1,000 payment should be forfeited to the plaintiffs. It is said that the evidence so offered, if admitted, would have shown that the plaintiffs were deprived of the interest on $34,000 for 30 days, and were therefore injured in that amount. But the plaintiffs offered no proof that the option to purchase was ever carried out, or that the proposed purchasers would, but for the government's option, have entered into an immediate contract of purchase; and, although the plaintiffs offered evidence that during the month of September they had negotiations with other parties looking toward the sale of the steamer, they did not show, or offer to produce, any specific evidence that those negotiations would have resulted in a sale, or that the plaintiffs were in any way injured by their reliance upon the understanding that the charter was extended. In short, it is clear that it was the government's option to purchase, which admittedly was extended, which primarily prevented any immediate sale of the steamer, and until that option expired the plaintiffs were powerless to sell, and that the supposed extension of the charter added nothing to the other obstacle which stood in the way of the sale.

[3] We entertain no doubt of the correctness of our view that the plaintiffs here could only recover in an action upon a showing that, relying on their understanding of the contract, and the defendant's acquiescence therein, they suffered loss by changing their position to their injury. The rule that the government is not estopped by the acts of its agents or officers applies only where such acts were fraudulent, unauthorized, or mistaken. Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; Whiteside v. United States, 93 U. S. 247, 256, 23 L. Ed. 882. In this case the Secretary of Commerce and Labor was apparently acting within the scope of his authority. The rules, governing the construction and operation of contracts generally, apply to contracts entered into by the government. 39 Cyc. 742. In United States v. Stinson, 197 U. S. 201, 25 Sup. Ct. 426, 49 L. Ed. 724, the court said:

"The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

The petition is denied.

COLUMBIA GRAPHOPHONE CO. v. SEARCHLIGHT HORN CO.*

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2759.

1. PATENTS ⊂⊃148—INFRINGEMENT—ESTOPPEL.
Where the holder of two patents for the same subject-matter procured a reissue of the earlier one, and defendant, who infringed the second one, in no wise changed its position, such reissue did not operate to estop the holder of the patent from denying that all rights under the second patent passed and became merged in the reissued patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 200, 221, 222; Dec. Dig. ⊂⊃148.]

2. PATENTS ⊂⊃82—INFRINGEMENT—ESTOPPEL.
That complainant, the owner of two patents for phonograph horns, asserted that one of them was the first patent in the field and dominated the art, does not, where defendant in no wise changed its position, operate as an abandonment of rights under the second patent, estopping it from enjoining defendant's infringement thereof.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 105–107; Dec. Dig. ⊂⊃82.]

3. PATENTS ⊂⊃328—VALIDITY—ANTICIPATION.
The Nielsen patent, No. 771,441, for a flower-shaped phonograph horn, the body being composed of longitudinally arranged strips of metal, provided at their edges with longitudinal outwardly directed flanges, whereby the strips were connected, the body portion of the horn being provided on the outside with longitudinally arranged ribs, held not anticipated by the Gersdorff patent, No. 453,798, for an improved funnel, which was constructed in a somewhat similar manner at the point where the body connected with the nozzle, but was intended to fulfill a different purpose; the mode of construction of the horn being to prevent tintinnabulation by decreasing vibration, while the construction of the funnel was to render it easily cleaned.

4. PATENTS ⊂⊃162—INFRINGEMENT—ESTOPPEL.
That complainant, before acquiring the patent which it claimed was infringed, gave it a narrow construction, does not estop complainant from asserting a broader construction after acquisition and claiming defendant's infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 237; Dec. Dig. ⊂⊃162.]

5. APPEAL AND ERROR ⊂⊃1009(2)—REVIEW—FINDINGS.
A finding by the trial court will be deferred to on appeal, where the evidence does not convincingly point to a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3971; Dec. Dig. ⊂⊃1009(2).]

6. PATENTS ⊂⊃289—INFRINGEMENT—ACQUIESCENCE.
Though complainant's predecessor, the owner of the patent infringed, did not take steps to enjoin infringement on being informed by defendant that it would continue to manufacture devices which had been pointed out to them as infringing, yet as defendant did not in any way change its position, complainant is not thereunder estopped from enjoining future, and recovering for past, infringement; complainant's predecessor having

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

*Rehearing denied October 9, 1916.

delayed proceedings because of insufficient funds to carry on a costly litigation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⇐289.]

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 the Searchlight Horn Company, a corporation, against the Columbia Graphophone Company, a corporation. From an interlocutory decree for complainant, defendant appeals. Affirmed.

The appellant appeals from an interlocutory decree in a suit upon letters patent, No. 771,441, issued October 4, 1904, to Peter Nielsen, for a phonograph horn. The court below found that Nielsen was the original and first inventor of the invention described in the letters patent; that the said letters patent are good and valid as to claims 2 and 3 thereof, as to which infringement was alleged; that the invention covered by those claims is of value and utility; that within six years prior to the commencement of the suit the appellant infringed said claims by selling horns for phonographs containing and embodying the invention described therein. Thereupon the court enjoined the appellant from making, using, or selling any horn containing the invention described in said claims, and referred the case to a master to take an accounting of the profits received by the appellant and to assess the damages sustained by the appellee by reason of the infringement. The said claims are as follows:

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardy directed flanges whereby said strips are connected and whereby the body portion of the horn is provided on the outside thereof with longitudinally arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other, and tapered in the usual manner, said horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described."

C. A. L. Massie, of New York City, and Charles E. Townsend and Arne Hoisholt, both of San Francisco, Cal., for appellant.

John H. Miller, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant contends that claims 2 and 3 were anticipated by the prior art, that they represent no patentable invention and have no patentable utility or novelty, that the court below erred in finding that the appellant had infringed said claims, and that the said court erred in not sustaining the appellant's plea of laches. The patent here involved has several times been before this court in controversies with parties other than the appellant here. Sherman Clay & Co. v. Searchlight Horn Co., 214 Fed. 86, 130 C. C. A. 562, and Id., 214 Fed. 99, 130 C. C. A. 575; Pacific Phonograph Co. v. Searchlight Horn Co., 214 Fed. 257, 130 C. C. A. 627. The first of those cases was brought here upon a writ of error after a jury had found a verdict sustaining the

validity of the patent and finding its infringement. It is said, however, that the present case presents new parties and new defenses, sustained by new evidence. The new defenses are said to be the estoppel of the appellee by virtue of its attitude toward the Villy reissue patent, and its declarations concerning the same, the double use of the Gersdorff patent, and the laches of the appellee. The new evidence is said to refute the theory of the Nielsen horn's advantage in overcoming the tintinnabulation and avoiding the vibratory features of other horns and the metallic sound produced thereby.

[1, 2] The Villy patent, No. 739,954, issued on September 29, 1903, was for a folding horn made in tapering sections, and in general shape it was similar to the horn in suit. On February 24, 1905, the appellee's predecessor in interest, the United States Horn Company, acquired the Nielsen patent, and soon thereafter acquired the Villy patent. On October 26, 1905, the United States Horn Company applied for a reissue of the Villy patent, and on January 30, 1906, reissue letters patent, No. 12,442, were granted. On January 4, 1906, the appellee purchased from the United States Horn Company both the Nielsen and the Villy reissue patents. It is urged that the fact that the United States Horn Company applied for and obtained the Villy reissue patent, while owning the Nielsen patent, had the effect to transfer to the Villy patent all credit for the subject-matter defined by the claims of the Nielsen patent, and to estop the appellee, the assignee of the United States Horn Company, from asserting the contrary.

Estoppel is also claimed from the fact that the appellee, after acquiring the Nielsen patent, issued a circular in which it said, "All of the so-called flower horns made by our aforesaid competitors are flagrant infringements of said patents" (that is, of the Villy reissue patent and the Nielsen patent), and the fact that the appellee affixed to the metal horns which it sold the patent dates of both those patents, and in a letter asserted the Villy folding horn to be "acoustically the most perfect horn," and in another letter asserted that "the Nielsen patent and the Villy reissue patent are the earliest flower horn patents." We are unable to discover in any of these features of the evidence ground of estoppel against the appellee. The statement that all other flower horns were flagrant infringements of the two patents which the appellee owned may fairly be interpreted as meaning that some of the competing horns infringed one and some infringed another of the two patents. The statement that the Villy horn was acoustically the most perfect horn may have been true, and yet that fact could have no bearing upon the appellee's right to maintain the present suit; and the statement that the Nielsen patent and the Villy reissue patent are the earliest flower horn patents contains no element of estoppel.

The final answer to all these alleged matters of estoppel is that it is not shown that the appellant at any time relied upon any of the said statements, or was misled thereby, or acted thereon to its disadvantage or otherwise. Nor can the acts and declarations of the appellee or its predecessors in interest be construed as an abandonment

or relinquishment to the public of any of the features of the Nielsen patent. It would have been no defense to the appellant if, indeed, the appellee had, as the appellant claims, asserted that Villy's was the first patent for a "flower" horn, that it was a patent for a metal horn, and that it, rather than Nielsen's, dominated the art. That attitude of the appellee to its patents, if proven, would not have affected its rights in the present suit, in the absence of a showing that the appellant was misled or injured thereby.

[3] We find no merit in the contention that the appellee's patent is anticipated by the patent to Gersdorff, of June 9, 1891, No. 453,798. That was a patent for an improved funnel, the claims of which had to do only with certain attachments, a strainer and a ventilating device. For the purpose of constructing the funnel so that it could be easily cleaned, it was made preferably without a transverse joint at the juncture of the body thereof with the nozzle, but was made slightly tapering at that point, and this result was attained by making the funnel of three longitudinal parts, the sections being united along their side edges by bending the same to form flanges and interlocking and soldering the flanges together, "thus forming longitudinal seams"; but in the nozzle, which was triangular in shape, the sections were united by soldering, instead of interlocking, thus forming continuous smooth seams. In other words, the inventor adopted the best available means for attaching together the three pieces of metal which formed the funnel. Above the nozzle, where a smooth surface was unimportant, they were fastened together in the simplest method known to the tinner's art, while in the nozzle, in which it was desired to secure a smooth surface, the joints were soldered. There was nothing in all this to suggest the Nielsen phonograph horn, the central thought of the inventor of which was to produce by means of exterior ribs a resistance to vibration, which it was believed, and as witnesses maintain, interfered with the transmission of sound from the phonograph.

[4] Also without merit is the contention that the appellee should be denied an injunction because of its former attitude toward a certain horn called in the record the "parabolic" horn, which it was selling before it purchased the Nielsen patent. That was a knock-down horn, made in four sections, fastened together by screws, so that it could be taken apart and its pieces packed away. When the parts were assembled the horn was fluted and flower-shaped, and bore some resemblance to the Nielsen horn, with the exception that the longitudinal strips were not tapered outwardly only, but were tapered both inwardly and outwardly. The fact that the appellee placed this horn on the market, claiming it to be different from any other horn, may, indeed, as the appellant contends, serve to show the very limited construction which the appellee placed upon the Nielsen patent before it bought it. But if the appellee entertained that opinion at that time, it is not thereby estopped to present to the court at this time its view of the extent and scope of the Nielsen patent.

[5] The appellant in its answer alleged that the patent in suit is

without utility, and that a horn constructed in conformity therewith presents no acoustical advantage whatever over the ordinary and well-known horns of the same dimensions. Much testimony was adduced to sustain that defense. There was also much testimony to the contrary—testimony tending to prove that the Nielsen horn would do away with the mechanical, vibratory, metallic sound usually produced in the operation of such machines. The decree of the court below comes to us supported by the finding of that court that the invention protected by claims 2 and 3 is of "value and utility," which means that the court below found against the appellant on the particular defense so pleaded. While it may be true, as the appellant contends, that the marked success and general use of the Nielsen horn is owing to its graceful shape and artistic appearance, rather than to any acoustical advantage which it possesses, the evidence does not convincingly point to that conclusion, and therefore, under the well-settled rule, we are not justified in disturbing the finding of the court below.

[6] In the answer it was alleged that the appellant had purchased from others all the horns it had dealt in; that prior to 1906, and continuously ever since, Hawthorne & Shebele and other metal manufacturers had openly and notoriously made and sold such horns; that the appellant, together with the Victor Company and the Edison Company, had openly and notoriously used and sold the same; and that the appellee and its predecessor in interest, who had full knowledge of said acts, made no protest, except that in 1906, the appellee's predecessor notified Hawthorne & Shebele and the Victor Company that they had infringed, to which they replied that the patent was invalid, and that they would continue their manufacture. The answer alleged that, in view of those facts, the appellant had been led to believe, and was justified in believing, that its vendors had the right to manufacture said horns and sell the same, and that, relying on the conduct of the appellee and its predecessor in interest, and their acquiescence in the said acts of others, the appellant was induced to expend large sums of money in acquiring for the benefit of its customers the horns understood now to be complained of. Wherefore the appellant alleged that the maintenance of the present suit is contrary to equity and good conscience. In brief, the answer alleged that because the appellee knew of the alleged infringement, and, when the appellant and others refused to desist from infringement, it failed to bring a suit to enjoin further infringement, and because the appellant continued to buy and sell infringing horns, the present suit is barred by the appellee's laches.

Other than the fact that the appellant continued to buy and sell the horns, and continued to deny the validity of the appellee's patent, there is no evidence in the case that the appellant relied upon the conduct of the appellee and its predecessor in interest, or was thereby induced to expend money, to its injury, or to change its position for the worse. It does not follow, from the allegation that the appellant expended large sums of money in buying horns which it sold to its customers, that the horns were not sold to customers at such a price

as to yield a profit to the appellant, even after it shall have paid royalties thereon to the appellee. There is nothing in the defense so pleaded which requires consideration, except the question whether the delay in bringing the suit amounts to laches which should bar the appellee. It was stipulated between the parties hereto that within six years prior to the commencement of this suit the appellant sold the horns which were alleged to infringe the appellee's patent, and it was in evidence that as early as 1906 the appellee's predecessor in interest notified the appellant and the manufacturers named in the answer of their claim that their rights in the Nielsen horn were being infringed, and that all of those companies so notified denied the infringement and denied the validity of the Nielsen patent, and said that the owners of the patent "would have to go to the courts before any particular one would stop making the horn." There was evidence, and it was not controverted, that the appellee's predecessors were without the necessary funds to commence litigation, that the expense of litigation would have been very great, and that it was not until April, 1910, that they placed the matter in the hands of an attorney, who brought the first suit early in 1911. In short, large and powerful manufacturers were infringing the device, and the owner of the patent was without funds to carry on an expensive litigation. But the owner's delay was accompanied by no act to induce the appellant to believe that its infringement was acquiesced in, and by no act amounting to estoppel. The bare fact that the appellant and others, with full knowledge of the appellee's claim, trespassed with impunity on the rights of the appellee for years, is no defense to a suit for an injunction and an accounting for the trespasses. Taylor v. Sawyer Spindle Co., 75 Fed. 301, 22 C. C. A. 203; Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 53 C. C. A. 341; Empire Cream Separator Co. v. Sears, Roebuck & Co. (C. C.) 157 Fed. 238; Valvona-Marchiony Co. v. Marchiony (D. C.) 207 Fed. 386; Davis v. A. H. Reid Creamery & Dairy Supply Co. (C. C.) 187 Fed. 157; Benthall Mach. Co. v. National Mach. Corporation (D. C.) 222 Fed. 918; Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74.

We find no error. The decree is affirmed.

SENECA CAMERA MFG. CO. v. GUNDLACH-MANHATTAN OPTICAL CO.

(District Court, W. D. New York. September 6, 1916.)

1. PATENTS ⟸174—CLAIMS—CONSTRUCTION.
The inventor of a new and useful device, simpler, cheaper, and more efficient than any previous device in that art, is entitled to have the claims of his patent interpreted so as to afford protection from infringement by colorable alterations or mere changes in form, which do not operate differently, or achieve a different result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 249; Dec. Dig. ⟸174.]

2. PATENTS ⟸234—INFRINGEMENT—WHAT CONSTITUTES.
The Goddard patent, No. 801,078, for a clamping device for lens fronts for cameras, being a combination, with a lens front having an extension provided with slots, of a clamping device adapted to clamp and hold the lens front in adjusted position on the runway or guide of the camera bed, *held* infringed by defendant's device, manufactured under the Miller patent, No. 1,042,023, which was a mere colorable alteration of complainant's device, using the same principles to achieve the same result.

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

In Equity. Bill by the Seneca Camera Manufacturing Company against the Gundlach-Manhattan Optical Company. Decree for complainant.

Havens & Havens, of Rochester, N. Y. (James L. Norris, Clarence A. Bateman, and John S. Powers, all of Washington, D. C., of counsel), for complainant.

Frank Keiper, of Rochester, N. Y., for defendant.

HAZEL, District Judge. This is an action for infringement of letters patent No. 801,078, dated October 3, 1905, and granted to Joseph Goddard, for a clamping device for lens fronts for cameras, and the principal defense is noninfringement. The patent has three claims, but claim 1 only is in issue. It reads as follows:

"1. In a camera, the combination with a lens front having an extension provided with slots, of a clamping device adapted to clamp and hold the lens front in adjusted position upon the runway or guide of the camera bed, said clamping device comprising a pair of clamping fingers fulcrumed in the slots of the extension of the lens front and having hooklike portions adapted to engage the runway or guide, and lever or grasping portions exposed for manipulation, and a spring interposed between said clamping fingers and adapted automatically to cause the hooklike engaging portions of said fingers to engage the runway or guide."

The claim is fairly descriptive of the invention; the various elements being combined to coact and co-operate to achieve the desired result.

[1, 2] Although the patentee has not made a generic invention, he has, nevertheless, as shown by the record, made a distinct improve-

ment upon lens fronts for cameras by making them adjustable toward or away from the plate or film, thereby securing greater accuracy in focusing, and making it possible to retain them in the proper plane while pictures are being taken. The patentee has invented, as stated in the specification, a simple, economical, and efficient clamping device—simpler, cheaper, and more efficient, I think, than the clamping devices for camera lens fronts of the prior art. The claim is therefore entitled to an interpretation of such fair scope as will protect it from infringement by colorable alterations, or from change of form which does not operate differently or achieve a different result.

But the defendant insists that the characteristic feature of the invention is the spring lever arranged above the base plate *5* (see specification and drawings) and interposed between the finger portions *10*, and it is argued that the patent is limited to a lever placed above the spring of the base plates to enable the bent portions of the levers to draw the base down on the runway, guide, or track from below, using the outer walls of the slot *6* as fulcrums, and using the inner walls as fulcrums when the lever *10* is pressed against the spring; that, as defendant in its construction does not use long, narrow, openings or slots of the kind which permit play to the levers, and as the particular openings in its base plate are incapable of functioning in the same way as in complainant's patent, infringement is avoided. But I think this would be viewing the invention too narrowly. The new results achieved by the patentee herein were due, not only to the interposition of the spring between the levers, but to the combination of the clamping means with the lens front and their coaction with the runway or guide. The parallel slots, the clamping fingers, and the spring interposed between them comprise, I think, the principal features of complainant's invention. By their adaptation, as described in the specification, the clamping levers were fulcrumed in the slots, and the grasping lever firmly positioned above the lens front extension while the runway or guide engaged the clamping portion, and thus under the spring action between the levers the latter was caused to grip and release the runway for sliding or moving the lens front forward or backward to any desired position and holding it there firmly, without its being in any way tilted or put out of the focal plane.

None of the prior patents to Gibbs, Brownell, Hutchings or Case discloses or even suggests a combination or arrangement of elements for attaining the result in question. The various elements were old, perhaps, one or more being found in different prior camera structures or other devices; but in none are contained the combination and arrangement of parts in suit. We are concerned here with a combination producing a novel and useful result, as distinguished from a mere assemblage of old elements functioning separately, and without achieving a result that is attainable only by combined action and operation. It is therefore entirely immaterial that one or more, or even all, of the elements of complainant's patent were known or separately used in connection with other lens fronts.

The claim in controversy is no doubt embodied in defendant's construction, which has a lens front with an extension provided with openings or slots, a clamping device for clamping the track or guide and holding the lens in adjusted position upon it. The clamping device is provided with clamping fingers, is fulcrumed midway of its length in openings or slots, and has a hooklike portion below the extension for engaging the runway or guide, while the grasping lever, as in complainant's patent, extends upward above the extension for moving the lens front forward or backward on the runway. Moreover, in defendant's adaption there is a spring positioned between the clamping device, which is arranged automatically to cause the hooklike portion *8* (see specification, Miller patent) of the clamping fingers to engage the edges of the runway for holding the lens front in the adjusted position.

There was much discussion as to whether the spring of defendant's device was interposed between the clamping fingers, and whether the base extension was provided with slots within the proper meaning of those terms; but I think the claim in controversy should not be construed so illiberally as to enable the defendant to avoid the patent by merely reversing the arrangement of the spring, or by placing it under the base plate, instead of interposing a U-shaped spring between the clamping fingers and above the base plates, as in complainant's patent, nor by cutting a rectangular or square portion out of the base plate or forward extension of the lens in lieu of the narrow parallel slots, or by making the forward extension of the plate in two pieces, instead of in one piece. While the narrow slots of the Goddard patent function to fulcrum the clamping fingers, they also serve the purpose of holding them firmly in position, thus performing the double function of clamping the lens front to the guide or runway and maintaining it in true alignment with the focal plane. Although defendant's construction is somewhat different, it nevertheless contains all the essential elements of the combination in suit, coacting and operating in substantially the same way as in complainant's, and achieving the same result. Infringement is not avoided by arranging a central plate on the base plate extension, for then the clamping fingers are, in my judgment, fulcrumed in slots or openings, and are caused to perform the functions of the clamping fingers of the Goddard patent in suit.

Defendant attaches importance to the grant of Miller patent, No. 1,042,023, in evidence, under which its lens fronts are manufactured; but, assuming such patent valid for certain specific features, it must nevertheless be considered as subordinate to complainant's patent in suit, and is therefore immaterial on the question of infringement. Ryder v. Schlichter, 126 Fed. 487, 61 C. C. A. 469; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 C. C. A. 185.

Claim 1, under consideration, is held valid and infringed by the lens fronts made and sold by the defendant company. A decree for infringement and an accounting may be entered, with costs.

UNITED STATES DRAINAGE CO. v. MANAHAN.

(District Court, D. New Jersey. October 11, 1916.)

No. 418.

1. WITNESSES ⇐324—IMPEACHMENT—RIGHT TO IMPEACH.
Where complainant called defendant as its own witness, it thereby estopped itself from contending that defendant was unworthy of credit.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1097; Dec. Dig. ⇐324.]

2. PATENTS ⇐328—VALIDITY—PRIOR ART.
Patent No. 962,723, for an auxiliary tool for use in connection with spades, intended to provide a device which will facilitate the removing of sods from trenches, particularly in marsh lands, *held*, in view of the prior art and common usage, to be invalid for want of invention, and also not to be infringed.

In Equity. Suit by the United States Drainage Company against Jesse P. Manahan. Bill dismissed.

Munn & Munn, of New York City, for complainant.
Francis C. Lowthorp, of Trenton, N. J., for defendant.

ORR, District Judge. This is an ordinary patent suit. The plaintiff is a corporation and citizen of the state of New York. The defendant is a citizen of the state of New Jersey. The parties are competitors in taking contracts for the drainage of marsh lands. The work done by them has been largely in the state of New Jersey, in connection with the efforts of the local authorities to destroy, or diminish, at least, the mosquito pest.

[1, 2] The plaintiff is the owner of United States letters patent No. 962,723, for an auxiliary tool for use in connection with spades, issued on June 28, 1910, to Edwin M. Skinner, whose original application for such patent was filed Jan. 30, 1908. The plaintiff charges the defendant with infringing two claims of the said patent. The defendant denies the validity of the patent in view of the prior art, and of course denies infringement thereof.

In the specifications the patentee states as follows:

"My invention relates to an auxiliary tool for use in connection with spades, and has for its object to provide a device which will facilitate the removing of sods from a trench. In digging trenches, particularly in meadows and marsh lands, as the spade is moved to remove the sod, a vacuum tends to form between the spade and the transverse wall of the trench. Unless this vacuum is destroyed, it is almost impossible to remove the sod, and my invention is particularly intended to overcome and destroy such vacuum."

After a description of the drawings annexed to the patent the patentee further states:

"In digging trenches in meadows or marsh lands, as the blade of the shovel is moved in the arc of a circle to remove the sod, a vacuum is produced between the back of the spade and the transverse wall of the trench, which, as before stated, must be destroyed before the sod can be easily removed from the trench. In operation the shovel or spade is first forced into the ground until the blade has been completely imbedded therein, after which the shovel or spade is forced away from the workman, loosening the sod and thus leaving a

space between the lateral or transverse wall of the trench and the rear face of the blade of the shovel. Into this space my auxiliary tool or venting device is introduced, after which the handle of the spade is again drawn toward the workman, and then forced in the arc of a circle, and the sod is easily lifted from the trench. The auxiliary tool or venting device during this operation forms a bearing for the shovel, so that the rear face of the shovel blade is maintained out of contact with the transverse wall of the trench. The air rushes into the space between the said rear face of the blade and the said lateral wall of the trench, and also through the grooves or channels *D* in the opposite faces of the auxiliary tool, so that any vacuum which may be formed is readily destroyed."

The claims involved are as follows:

"1. In combination with a tool for digging trenches, a removable venting device adapted for insertion at the rear of said tool.

"2. In combination with a tool for digging trenches, a removable back bar adapted for insertion at the rear of said tool."

In view of the state of the prior art, each of said claims is invalid for want of invention. No particular kind of tool for digging trenches is required by the patent. Prior publications in the prior art show a variety of spades and trenching tools adapted for the digging of trenches. In an article on Agriculture in the ninth edition of the Encyclopædia Britannica, published in 1889, the drainage of lands receives a great deal of attention, and some of the tools then used for that purpose are illustrated. While they are not like the tools indicated by the drawings of the patent in suit, yet their difference from the ordinary spade indicates that the person engaged in draining would use such form of trenching tool as would best accomplish his purpose. Any person who has used even an ordinary spade in wet sod and earth remarks a greater difficulty in such use of the spade than in dry sod and earth. Such difference, which is due to suction or lack of fulcrum, does not worry the user of the tool. None can be so ignorant as not to know that the soft, moist earth and sod immediately back of the spade or tool does not give him sufficient leverage to raise the spade with its load. The insertion of a barrel stave or any other suitable piece of wood will afford a firmer rest for the back of the spade, and enable the user to raise the load on the spade more easily.

This is all that the patentee has accomplished in this case. He calls his device, which is inserted at the rear of the tool and which affords leverage, a "venting device." Such terminology should not give him a monopoly of a simple device, which the evidence discloses had been in use long prior to his application. The inventive faculty was not required in effecting the combination of the claims. There was no new or original idea disclosed by him.

This court is not unmindful of the scrutiny required of parol evidence of prior use offered to overcome the presumption arising from the issuance of a patent. The evidence in this case must be held to have reached the standard required, and the effect intended, for the following reasons:

First. The use of a piece of wood or stone inserted back of the spade for purposes of leverage is the natural and probable thing which

any man would do to enable him to remove the wet earth from the ditch.

Second. A great number of witnesses testified clearly and positively to early uses of such combination long prior to the date of the patent.

Third. The times and places of such uses were clearly stated, and the names and residences of persons in being who were not called, and yet who could testify with respect to such uses were stated with such clearness that the plaintiff upon rebuttal should have been able to offer some satisfactory proof to the contrary, if defendant's witnesses were not reliable.

Fourth. The plaintiff called as its own witness the defendant, and thereby estopped itself from contending that the defendant was unworthy of credit. Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421. The two claims, therefore, of the patent in suit, are invalid.

With respect to infringement, the defendant does not use a venting device like that described in the patent. He uses, when necessary, a device consisting of a pointed piece of wood upon which a cross-piece is laid. The cross-piece prevents the piece of wood which is placed back of the spade from falling into the trench, and at the same time affords some leverage in the use of the dredging tool. Even if the patent should be narrowly construed and limited to the particular "venting tool" or "back bar" described therein, the defendant could not be held as an infringer.

The bill must be dismissed, at the cost of the plaintiff.

In re SCHWARZ.

(District Court, E. D. Pennsylvania. October 13, 1916.)

1. ALIENS ⟸68—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT.

Declarations of intention to become a citizen, being confided by act of Congress to the custody of the clerk of the District Court, are part of the records of the court and may, as other such records, be amended.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

2. ALIENS ⟸68—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT—EVIDENCE.

As no record of the court should be changed unless the fact of error as it stands clearly appears, and the state of the record as it should be has been shown with like clearness, a declaration of an alien's intention to become a citizen cannot be amended as to the name, merely on the alien's testimony that owing to his lack of knowledge of English his name was not properly written and he did not discover the mistake.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

In the matter of the application of Karl Schwarz for naturalization. Sur petition to amend declaration of intention. Leave to amend denied.

Robert S. Shaw, of Philadelphia, Pa., for petitioner.

Thomas B. Shoemaker, Chief Naturalization Examiner, of Philadelphia, Pa., opposed.

DICKINSON, District Judge. The applicant is found to have complied with all the precedent conditions of admission to citizenship, except that he was not able to show the required preliminary declaration of intention to become a citizen. He met this with the explanation that he had in fact duly filed such a declaration, but through an error the name of Charles Summer was written as the signatory instead of his proper name, Karl Schwarz, and that the error was due to his then inability to read or write English characters, and he affixed his mark, supposing he was affixing it to his own name and not to the name there written.

To make this explanation effective, he now files his petition to have the declaration amended.

This application meets objection based on two grounds: One, the absence of power in the court to allow the amendment; and, the other, that the proofs of error are not sufficient to move the court to make the amendment assuming that it possessed the power to do so.

[1] The view advanced in support of the first ground of objection is that declarations of intention are no part of the records of this court, but are confided by the act of Congress to the custody of the clerk of the court as they might have been intrusted to any other United States official, and the mere coincidence that the designated custodian is also clerk of the court does not make the papers a court record. Any discussion of this question is uncalled for and out of place because it has already been determined, and we will follow the ruling as made.

[2] Respecting the second question, no record of the court should be changed unless the fact of error in the record as it stands clearly appears, and the state of the record as it should be has been shown with like clearness. The inconvenience to which an individual may be subjected is overborne by the wisdom of the general rule and the necessity for complying with it.

The record asked to be changed was made March 14, 1911. The evidence we have on which to change it is the statement of the applicant himself. The question presented in such a case is not one of the truth or sincerity of the applicant, but whether it is a wise or safe rule to change a record without requiring at least as high a measure of proof as would be required to reform any writing. Inconvenience to the applicant is to be regretted, but this consequence cannot be avoided.

Leave to amend is, accordingly, refused.

LOUISVILLE & N. R. CO. et al. v. WRIGHT, Comptroller General.

(District Court, N. D. Georgia. October 7, 1916.)

TAXATION ⟸98—PROPERTIES—SITUS.

A Georgia corporation executed a lease of all its property, which required the lessee, in order to guarantee performance, to deposit in such place and manner as the president of the lessor corporation might designate $1,000,000 in bonds, the security, though substitution of securities might be made, to be at all times kept on deposit. The lease was assigned to complainants, two railroad companies, and they operated the demised railroad property. The required bonds were deposited in New York. *Held*, in view of the purpose of the requirement, and despite the fact that complainant corporations operated the demised property under a name similar to that of the lessor, the bonds deposited in New York had no situs in the state of Georgia for taxation, on the theory that they constituted capital invested in the demised property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 196–198, 200; Dec. Dig. ⟸98.]

In Equity. Bill by the Louisville & Nashville Railroad Company and another against William A. Wright, Comptroller General. Injunction granted as prayed.

See, also, 199 Fed. 454.

Jos. B. Cumming and Cumming & Hull, all of Augusta, Ga., and Alex. C. King, and King & Spalding, all of Atlanta, Ga., for complainants.

Clifford Walker, Atty. Gen., Pierce Bros., of Augusta, Ga., and George Westmoreland, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a bill in equity filed by the Louisville & Nashville Railroad Company, a corporation created, organized, and existing under the laws of the state of Kentucky, and the Atlantic Coast Line Railroad Company, a corporation created, organized, and existing under the laws of the state of South Carolina, against William A. Wright, comptroller general of the state of Georgia, seeking to restrain the said comptroller general from seeking further to collect certain taxes from the two complainant corporations.

In 1881 the Georgia Railroad & Banking Company, a Georgia corporation, executed a lease to William M. Wadley, in which it leased for a term of 99 years all of its property. This lease contained the following provisions:

"In order to guarantee the performance of the agreements and covenants hereinbefore made by the party of the second part, said party of the second part further covenants for himself and assigns to deposit, in such place and such manner as the president of the party of the first part may designate, one million dollars in bonds of the United States or in other bonds of equal value, said deposit to be kept up to the clear market value of one million dollars. Provided, the said party of the second part, and his assigns, shall have the privilege of collecting for his or their own benefit the income of said bonds and of changing the kind of bonds from time to time and substituting for bonds other and different security, provided such other and different securi-

ty be first approved by the party of the first part; also covenants for himself and assigns that his and their legal rights and privileges under this indenture shall be so preserved by him that the deposit of one million dollars as security for the due and faithful performance of the terms and conditions of this indenture shall remain and continue so subject during the entire term of said lease, without impediment or embarrassment growing out of the distribution or want of representation of the estate of the party of the second part, or any of his assigns; and that it is the true meaning of these presents that said deposits of security shall at all times remain as a guaranty for the covenants of this indenture, and liable to any proceeding at law or in equity to enforce the rights of the party of the first part, without let, hindrance or delay on account of the death of the party of the first part, or any of his assigns, testate or intestate, and that the death of the party of the first part, or any of his assigns, testate or intestate, or the failure of any of the legal representatives of his or their estate, shall be no excuse whatever for the performance or nonperformance of any of the covenants or agreements of the party of the second part."

Shortly after the execution of this lease William M. Wadley transferred the same to the Louisville & Nashville Railroad Company, and it in turn, in 1899, transferred a half interest to the Atlantic Coast Line Railroad Company. Thereupon the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company deposited bonds amounting to $1,075,000 with the Farmers' Loan & Trust Company of New York, a corporation of that state. These bonds were so deposited in compliance with the provision of the contract which has been quoted above; that is, for the purpose of guaranteeing the faithful performance on the part of the lessees of the agreements and covenants made in the contracts.

The comptroller general of the state of Georgia, in November, 1915, demanded of these lessees a return of this property, that is, the $1,075,000, for taxation. Upon their refusal to make such return he assessed the $1,075,000 of bonds for taxation at their face value against complainants, the lessees of the Georgia Railroad & Banking Company with headquarters at Augusta, Ga.

The old Georgia Railroad & Banking Company is now being operated by the lessees using the trade-name of the Georgia Railroad in carrying on the business of said railroad. These railroads, as lessees, have made annual returns to the Railroad Commission of Georgia and to the comptroller general of Georgia, of certain property for taxation in the name of "Georgia Railroad, lessee organization."

The question in the case is whether or not this property, these bonds so placed with the Farmers' Loan & Trust Company of New York, have a situs in Georgia for taxation. Counsel for the comptroller general rely on the case of Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619. What was decided in that case can, I think, be gathered from the first headnote, which is as follows:

"While technically municipal bonds, deposited with the Insurance Commissioner under the laws of Ohio, regulating the right of foreign companies to do business within the state, are investments in bonds, they are also a part of the capital stock of the company invested in Ohio and required to be so invested for the security of domestic policy holders, and for the purposes of

taxation to be considered as part of the capital stock of the company and included within the statutory definition of personal property required to be returned by foreign and domestic corporations for taxation."

I do not consider this case an authority upholding the action of the comptroller general in the present instance, because the case cited deals with securities placed by the insurance company in Ohio for the better securing of the policy holders of the company in that state. The securities were physically in the state of Ohio, and were held to be a part of the capital of the company employed in its business in that state.

The contention here by counsel for the comptroller general is that the bonds deposited with the trust company in New York in compliance with this contract, and for the purpose of securing its performance, are capital invested in Georgia on which the lessees operate in Georgia. This I understand to be their contention, that while the bonds are physically in the state of New York, they are constructively in the state of Georgia, and a part of the capital with which these lessees transact their business. I do not understand this case of the Scottish Union & Nat. Ins. Co. v. Bowland, nor the case subsequently decided by the Supreme Court, Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853, also cited for the defendant, nor the case of Western Assur. Co. of Toronto v. Halliday, by the Circuit Court of Appeals, Sixth Circuit, 126 Fed. 257, 61 C. C. A. 271, or any of the other cases cited here, to be authority for the position taken that these bonds, physically in New York, and the property, one half of the Louisville & Nashville Railroad Company of Kentucky and the other half of the Atlantic Coast Line Railroad Company of South Carolina, are in the state of Georgia for the purpose of taxation. They were placed in the hands of the Farmers' Loan & Trust Company to be held as security for the faithful performance of their contract with the Georgia Railroad & Banking Company. They are not capital invested in the business carried on by the lessee companies in Georgia, but they are security for their compliance with their contract to carry on the business of the railroad company and to pay the rental. It seems to me that the position in which these bonds stand, deposited by the two complainant companies as security for their contract, is entirely different from that of the securities and obligations in the three cases to which I have referred. The situs of securities like these, for the purpose of taxation, follows, as a general rule, the residents of the owner, and it requires an entirely different status from that which exists here to change the rule and make them taxable elsewhere.

It is contended for the comptroller general here that the effect of the transaction between the two lessee railroad companies is to create a partnership between the two, doing business in Georgia under the name of the Georgia Railroad. On the other hand, it is contended that they are merely tenants in common of the property of the Georgia Railroad & Banking Company. I do not think it is very material here which contention is correct. It is sufficient to say that, whether it is a partnership, or whether they have become, by the con-

tract, tenants in common, the bonds deposited with the trust company in New York to secure, on their part, the faithful performance of the lease do not become a part of the capital with which they transact their business in Georgia. They were a prerequisite to the undertaking to transact business here, and not a part of the capital which entered into the business, or a part of the capital with which it has been carried on.

The use by the lessee companies of the name "Georgia Railroad," in the operation of the railroad in Georgia is merely the adoption of this as a trade-name, and in no way affects, it seems to me, the liability of these securities in New York for taxation here. Neither does the return under the name of the "Georgia Railroad" to the Railroad Commission of Georgia, or the return to the comptroller general of money unquestionably liable for taxation, affect the question here.

My conclusion is that the bonds of these two companies, placed as they have been, are not subject to taxation in Georgia; consequently the complainants are entitled to an injunction, and the same will be granted as prayed.

WALTER M. STEPPACHER & BRO., Inc. v. KARR.

(District Court, E. D. Pennsylvania. October 13, 1916.)

No. 1381.

1. TRADE-MARKS AND TRADE-NAMES ⟸95(3)—UNFAIR COMPETITION—INJUNCTION.

   Where defendant's label on its shirts was a colorable imitation of complainant's trade-mark, complainant is entitled to an injunction without establishing that any person had been actually deceived.

   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. ⟸95(3).]

2. TRADE-MARKS AND TRADE-NAMES ⟸95(3)—UNFAIR COMPETITION—RIGHT TO INJUNCTION.

   Complainant used the word "Emery" written in script as a trade-mark for its shirts. Thereafter defendant began the manufacture of shirts, using the word "Emerald" to indicate its brand. At first the word "Emerald" was written in script, but thereafter was written in Roman or block numerals. *Held* that, while defendant's label when in script and copying the slant of complainant's trade-mark was such as was likely to mislead ordinarily cautious buyers into believing that they were purchasing complainant's shirts, complainant is not entitled to have enjoined the use of the word "Emerald," when the form of the letters is entirely different, because the first four letters of the word "Emerald" were the same as the word "Emery."

   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. ⟸95(3).]

In Equity. Bill by Walter M. Steppacher & Bro., Incorporated, against I. Joseph Karr, trading as Karr Bros. Decree for complainant granting part of the relief sought.

E. Hayward Fairbanks and J. Bonsall Taylor, both of Philadelphia, Pa., for plaintiff.

Furth, Singer & Bortin, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The bill charges infringement of the plaintiff's trade-mark registered January 21, 1913, under Act Feb. 20, 1905, c. 592, 33 Stat. 724, and prays for an injunction and accounting of profits and damages. The facts are as follows:

The plaintiff is a corporation organized in May, 1914, and is engaged in the business of manufacturing and selling shirts. The business was established in 1879 by Walter M. Steppacher, who manufactured and sold shirts under the trade-mark "Emery." Walter M. Steppacher, upon May 12, 1891, obtained registration of the trade-mark "Emery" in the following form:

And in his declaration it is stated that the style of lettering is unimportant, and that the essential feature of the trade-mark is the word "Emery." Walter M. Steppacher was succeeded in business by the firm of Walter M. Steppacher & Bro. That firm, after the passage of the Trade-Mark Act of February 20, 1905, under date of September 19, 1912, made application for and obtained registration of the word "Emery" as a trade-mark for dress and negligee shirts in the form shown in the accompanying drawing as follows:

They set forth in their statement that they were the owners of the previous trade-mark registered by Walter M. Steppacher, and stated that the trade-mark is applied or affixed to the goods by being woven into fabric which is attached to the same, by printed labels on which the trade-mark is shown, and by being printed on boxes and wrappings for the goods.

The plaintiff, Walter M. Steppacher & Bro., Inc., since its incorporation has acquired the business, good will, and business property of Walter M. Steppacher & Bro., including, by duly recorded assignment, the title to the registered trade-mark No. 89,963 for "Emery." The business of the plaintiff's predecessor, Walter M. Steppacher, in the manufacture and sale of shirts under the trade-mark "Emery," amounted in the first year to approximately $30,000. The business has increased until during the year 1914 the plaintiff transacted business approximating $1,000,000. It has spent during the 5 years preceding the filing of the bill $100,000 in advertising "Emery" shirts in magazines and trade journals, and, during the 36 years since the business was commenced, it and its predecessors have expended approximately three-quarters of a million dollars in advertising and introducing the "Emery" shirts. The plaintiff and its predecessors have always employed the trade-mark "Emery" as it appears on the trade-mark registration; that is, formed in script and with a slant, as appears in the drawing accompanying the registration. The label is attached to the yoke of the shirt. The trade-mark "Emery" has been used in the plaintiff's advertisements in the Saturday Evening Post, Collier's, and

other magazines, in lettering in the same form of script, and with the same slant, as in the registration, accompanied by various printed matter and illustrations representing shirts of the plaintiff's manufacture.

The defendant has been conducting the business of manufacturing shirts in Philadelphia since January 1, 1913. Some time during the year 1913 he began attaching to the yoke of the shirt a label containing the word "Emerald" in the following form:

Frank C. Brooker, one of the plaintiff's sales agents, some time prior to October, 1913, saw in a store in Germantown a shirt manufactured and sold by the defendant with the above-described label upon its yoke, and, during the summer of 1914, Walter M. Steppacher saw in a store in Atlantic City a shirt manufactured and sold by the defendant with a similar label.

The defendant was thereupon notified by the plaintiff of its alleged exclusive rights to the word "Emery." The defendant thereupon, before suit was brought, changed the form of lettering of the label "Emerald" from script to block and continued to mark the shirts manufactured and sold by him with the word "Emerald" in the following forms:

The defendant's father, Jacob A. Karr, had been in the business of manufacturing shirts in Philadelphia from 1888 to 1905. The defendant, his father, and another witness testified that shortly after the elder Karr began to manufacture shirts, and until he went out of business, he used the word "Emerald" as one of the brands upon his shirts. The defendant, I. Joseph Karr, was not the successor to his father's business, and, if Jacob Karr did so use the brand, he ceased to use it in 1905, eight years before the defendant began its use. There was no production in evidence of any such brand. The defendant has, since the registration of the plaintiff's mark on January 21, 1913, been engaged in the manufacture and in interstate and intrastate sale of shirts under the label "Emerald," but has not used the script lettering since notice of the plaintiff's alleged rights. He still has on hand, however, labels containing the script lettering and uses the block type of lettering under notice to the plaintiff that he does so without prejudice to his rights to resume the use of the script lettering.

[1, 2] There is no direct evidence of any confusion of goods, except from the testimony of Mr. Steppacher and Mr. Brooker that they were at first deceived by the similarity of the defendant's brand to that of the plaintiff. There is no evidence of any loss of sales by the plaintiff, nor of the extent to which the defendant has used the word "Emerald" in either style of lettering. If the defendant's label is a colorable imitation of the plaintiff's trade-mark, the plaintiff is entitled to an injunction against its use. It is not necessary for the plaintiff to establish by evidence that any person has actually been deceived by the imitation. The question is whether there is a liability to deception through the defendant's use of the word "Emerald." It is not in exact similitude, but the similar form of the script lettering, the

similar slant of the word, and its general appearance, are such that it can be seen at a glance that the defendant's label in script would be likely to mislead ordinarily cautious purchasers in the ordinary course of purchasing the goods and induce them to suppose that they were purchasing the "Emery" shirt manufactured by the plaintiff. So long as the defendant confines his use of the word "Emerald" to Roman or block type in such form as he is at present using, I see no cause to anticipate that any ordinarily cautious purchaser would be likely to be deceived. The only similarity, then, would be in the identity of the first four letters in the word "Emerald" with those in the word "Emery." The word "Emerald," standing alone, would not suggest the word "Emery" in appearance or meaning. It is not necessary to decide whether the plaintiff's predecessor's claim in the statement accompanying the registration of a right to use the word "Emery" in any form is well founded, for the defendant has not used the word "Emery," but an entirely different and distinct word. So long as he does so and does not attempt a colorable imitation of the plaintiff's trade-mark, the plaintiff cannot complain, for it has no monopoly in the use of any other word than "Emery," merely because the first four letters of such word are identical with the first four letters in the word "Emery."

The plaintiff is entitled, therefore, to an injunction restraining the defendant from the use of the word "Emerald" in the script form in which it has been used by him, or in any form resembling the plaintiff's trade-mark, to an accounting and to an order for the destruction of the offending labels.

A decree in favor of the plaintiff may be entered accordingly.

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(District Court, S. D. California, S. D. November 24, 1915.)

No. 376.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT.

Under Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), declaring that no common carrier engaged in interstate commerce shall require or permit any employé subject to the act to remain on duty for a longer period than 16 hours and when such employé shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted to again go on duty until he has had at least 10 consecutive hours off duty, provided that the requirement shall not apply in case of casualty or unavoidable accident, or where the delay was the result of a cause not known to the carrier at the time the employé has left the terminal, and it could not have been foreseen, the carrier is forbidden, not only from requiring or permitting employés to remain on duty more than 16 hours, but bound to relieve them after they have been on duty for such time, and to escape the penalty for permitting or requiring employés to remain on duty more than 16 hours must show that such excess service was required by some unforeseen casualty, etc., and could not have been prevented by the

exercise of that high degree of care consistent with the purpose of the act in the equipment and operation of its railroad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.]

2. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE ACT—CONSTRUCTION.
Under the Hours of Service Act, a railroad company, where its train is delayed by reason of unforeseen casualty, etc., may continue the train crew in service so as to operate the train to such a point where, having due regard to all the circumstances, the crew might be relieved and allowed to take the rest required, but the carrier cannot permit or require employés to continue to the end of their run, though had it not been for such unforeseen delay, the run would have been completed within the time fixed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.]

At Law. Action by the United States of America against the Atchison, Topeka & Santa Fé Railway Company. On motion for directed verdict. Verdict directed against defendant.

Albert Schoonover, U. S. Atty., of Los Angeles, Cal., and Roscoe F. Walter, Special Asst. U. S. Atty., of Washington, D. C.

Paul Burks; of Los Angeles, Cal., for defendant.

BEAN, District Judge. [1, 2] The motion for a directed verdict in this case raises the question as to whether the defendant company has accounted by its testimony for the excess service. It is admitted that the crews on these several trains were actually on duty in excess of the time limited by the statute. The burden is therefore upon the defendant to show that that excess service was justified by the exception contained in this act. This act provides that it shall be unlawful for any common carrier, its officer or agent, subject to this act, to require or permit an employé subject to the act to be or remain on duty for a longer period than 16 consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for 16 hours, he shall be relieved and not required or permitted to again go on duty until he has had at least 10 consecutive hours off duty: Provided, however, that this requirement shall not apply in 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 the employés at the time the employés left the terminal and which could not have been foreseen.

In support of the motion two points are made: First, that the evidence does not show that the excess service on these three several trains was due to the delays relied upon, the argument being that the testimony shows that the ordinary running time between these terminals was about 12 or 12½ hours, and delays accounted for are 2 hours and some minutes in one instance and an hour and some minutes in the other two, and that that is not sufficient to make up the difference between 12½ hours and the actual time the crew was on duty. On the part of the defendant it is insisted that the testimony is sufficient

to carry the case to the jury, and that the jury ought to be called upon to determine whether from this record it has brought itself within the exception.

Now, so far as the causes of these delays are concerned, and the defendant's responsibility for them, it is unnecessary, as I view this testimony and interpret the statute, for the court to express any opinion as to whether the evidence is sufficient to carry the case to the jury.

The purpose of this statute, as the title plainly imports, is to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés, on the theory, I assume, that experience has shown that by excessive periods of duty the employés become fatigued and careless, or more or less careless, thus causing accidents leading to injuries and destruction of life and property. The statute, therefore, should receive a construction to carry out the purpose intended by Congress.

It will be observed that it not only prohibits a carrier coming within its provisions from requiring or even permitting an employé subject to this act to remain on duty longer than the time specified therein, but it also provides that when the employé shall have been continuously on duty for 16 consecutive hours, he shall be relieved and not required or permitted again to go on duty until he has had the requisite time for rest, except in cases of casualty or unavoidable accident, or the act of God, or a delay which was the result of a cause not known to the carrier or its officer or agent in charge of the employé at the time the employé left the terminal, and which could not have been foreseen. The statute therefore not only imposes upon a carrier what might be denominated a negative obligation, forbidding it from requiring or permitting an employé to remain on duty, but imposes an affirmative duty to relieve such employé after 16 hours of consecutive service, unless it is prevented from doing so by some of the matters specified in the proviso in the statute. Now, the manifest purpose, as I see it, of this statute, was to absolutely prohibit a carrier from requiring or permitting an employé to remain on duty longer than the time specified therein, and to require it to relieve such employé at the expiration of such time unless its delay in doing either of these things comes within the proviso of the statute and was due to one of the causes specified in the exception. In other words, as I understand the statute, the carrier is exempt from liability for excess service when, in case of casualty, unavoidable accident, the act of God, or any other matter specified in the proviso, it necessarily requires or permits an employé to remain on duty beyond the time specified.

Now, therefore, it appears that the train crew has been on duty more than 16 hours consecutively. It is incumbent on the carrier to show by proof that the excess time could not have been prevented by it by the exercise of that high degree of care in the matter of its equipment, the operation of its road, consistent with the purposes to be accomplished by this act and the practical operation of the road. And, as I understand the statute and construe the decision of the Court of Appeals of the Ninth Circuit, and especially in what is referred to as the Salt Lake Case (San Pedro, L. A. & S. L. R. Co. v. U. S.) 220

Fed. 737, 136 C. C. A. 343, the carrier is required to relieve the crew at the expiration of 16 hours, or as soon thereafter as it can do so by the exercise of the degree of care to which I have alluded. I suppose that it could continue the service so far as might be necessary to permit the train to be operated to a point, having due regard to all the circumstances and surrounding facts, where the train crew could be relieved or allowed to take the rest required by the statute; but I do not understand that it may permit or require an employé to continue to the end of his run, although but for some delay due to a matter referred to in the proviso or covered by the proviso in the statute, he would have been able to complete the run within the time specified.

Now, I know this statute is susceptible of different constructions, and that in some instances it has been held that where the delay is due to one of the causes specified in the exception that it in effect suspends the operation of the statute as to that particular run, and that the carrier may permit the employé to continue to the end of his run. But I do not concur in that view of the statute, and I feel constrained to follow what I understand to be the decision of the Court of Appeals of this circuit and to hold that the defendant in this case has not shown a legal excuse for the admitted excess service. The case of the United States against the Northern Pacific Railway Co., 215 Fed. 64, 131 C. C. A. 372, is not in conflict with this view. In that case the delay was caused by a wreck due to an admittedly unavoidable cause, and the company was charged with permitting the train crew to return to work without first having had the requisite number of hours of rest, and the court held as a matter of fact from the testimony in the case that a sufficient excuse was shown for the failure of the dispatcher to check up the service of the different crews, and that the company ought not to be held liable under the circumstances shown by that record for the excess service. But that was a pure question of fact shown by the testimony, and which the court deemed sufficient to bring the case within the exception.

Under these views, the motion for the directed verdict will be allowed.

HUNT v. SOUTHERN RY. CO.

(District Court, W. D. South Carolina. April 15, 1916.)

1. RAILROADS ⇐337(3)—CROSSING ACCIDENTS—PROXIMATE CAUSE.

A highway was carried over defendant's tracks by an overhead bridge 20 to 30 feet wide, the approach of which was about 200 feet long. Barriers had been erected on each side of the approach next to the bridge between 60 and 80 feet long. Plaintiff's intestate, driving along the highway, had nearly reached the end of the bridge, when his horse became frightened by a passing switch engine and began backing. The horse backed across the bridge, down the approach beyond the barriers, and finally backed the buggy over the embankment, intestate meeting his death in the resulting accident. *Held*, that the proximate cause of the injury was the frightening of deceased's horse, and not any defect in

construction of the approach to the bridge, the horse being frightened by the necessary noise and smoke of defendant's engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1092; Dec. Dig. ⊂⊃337(3).]

2. RAILROADS ⊂⊃305(2)—CROSSING ACCIDENTS—PROXIMATE CAUSE.
In such case the railroad company is not liable for the frightening of the horse; the animal being frightened by the ordinary smoke and steam resulting from the operation of the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 969, 970; Dec. Dig. ⊂⊃305(2).]

3. RAILROADS ⊂⊃337(2)—CROSSING ACCIDENTS—PROXIMATE CAUSE.
In such case, though the railroad company was negligent in not placing barriers on the approach, the fact that the horse backed down the approach for a long distance beyond the barriers which had been erected constituted an intervening cause, freeing the railroad company from liability, as when the horse first took fright intestate was in a place protected by barriers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1091; Dec. Dig. ⊂⊃337(2).]

At Law. Action by W. E. Hunt, as administrator of the estate of J. H. Hunt, deceased, against the Southern Railway Company. Motion for nonsuit granted, and complaint dismissed.

Ansel & Harris, of Greenville, S. C., for plaintiff.
Cothran, Dean & Cothran, of Greenville, S. C., for defendant.

JOHNSON, District Judge. This is an action for $10,000 damages on account of the alleged wrongful death of the intestate, John H. Hunt, caused, as alleged, by the negligence of the defendant. The circumstances of the injury, sustained on May 1, 1914, and alleged to have resulted in the intestate's death on May 23, 1915, a year later, were these: The deceased was driving a horse and buggy on a public highway leading into the city of Greenville. He was on that part of the highway constituting the approach to an overhead bridge over the defendant's railroad. The approach was some 200 feet in length, and from 30 to 40 feet wide. At the end of the bridge it was perhaps 15 feet high, and ran out to grade at the other end of the approach. Barriers had been erected on each side of the approach next to the bridge, variously estimated at from 60 to 80 feet long. The deceased was accompanied by a Mrs. Hunt, the wife of his grandson. She was the only eyewitness to the occurrence, and testified that as the horse got within 10 or 15 feet of the end of the bridge, it became frightened at a switch engine passing under the bridge, making much noise and emitting smoke. The horse began backing, cut the buggy to the left, turned completely around, facing in the opposite direction, and backed the buggy over the embankment at a point where there were no barriers, causing the injury complained of.

It appeared that the bridge had been constructed by the defendant about the year 1897, under an arrangement with the city of Greenville, for the purpose of eliminating a grade crossing which had been

in existence for many years near that point. The contract between the railroad company and the city of Greenville was introduced in evidence by the plaintiff, together with a plat of the surroundings and a resolution of the county commissioners, authorizing the closing of the street at the old crossing. The location was beyond the city limits, but as the city was anxious for the railroad company to locate its terminal and shops at the station in the city and to extend its yard to the location in question, the city agreed to secure the necessary rights of way for the diversion of the street or road, which was done. The railroad company obligated itself to construct and maintain the bridge, and the testimony was to the effect that the county authorities constructed the approaches on each side; there was no testimony as to who constructed the barriers.

At the close of the plaintiff's testimony the defendant moved for a nonsuit upon various grounds stated in writing which is filed with the record. I shall pass upon one only of these grounds, and base my rulings solely upon it, and that is that there is no testimony to show that the alleged negligence of the defendant in failing to erect barriers on the approaches was the proximate cause of the injury.

There are two acts of negligence charged against the defendant: (1) The operation of its engines under the bridge, "blowing the whistle, exhausting steam, and making noises" calculated to, and which did, frighten the horse; (2) the failure to erect barriers on both sides of the approach so as to prevent frightened animals from backing off the embankment.

[1] It appears to me clearly from the testimony of Mrs. Hunt that the horse was frightened at the smoke of a switch engine which was being operated under or near the bridge; and, assuming without deciding that under the allegations of the complaint, which makes no reference to smoke thus caused, the plaintiff can rely upon that as an act of negligence, I am clearly of the opinion that under the South Carolina decisions, the emission of smoke under the circumstances being the cause of the fright of the horse and itself not being an act of negligence, the fright of the horse, and not the defect in the construction of the approach to the bridge (the absence of barriers), was the proximate cause of the injury.

[2] It is the settled law of South Carolina, as shown by the cases of Acker v. Anderson County, 20 S. C. 495; Brown v. Laurens County, 38 S. C. 282, 17 S. E. 21; Mason v. Spartanburg County, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887; Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843; Blakely v. Laurens County, 55 S. C. 422, 33 S. E. 503; Settlemeyer v. R. Co., 91 S. C. 147, 74 S. E. 137, reinforced by numerous decisions from Massachusetts, Maine, Pennsylvania, Michigan, Wisconsin, West Virginia, and other states cited in a note at 2 Ann. Cas. 178, that under these circumstances the fright of the horse could not be deemed the proximate cause, or a proximate cause, unless the fright had itself been the result of a negligent defect in the bridge or a negligent operation of the engines of the defendant. There is no contention on the part of the plaintiff that the fright of horse was occasioned by any defect in

the construction or maintenance of the bridge. As to the operation of its engines: The bridge spans the railroad yard, where there are many tracks, and where, as alleged in the complaint, freight and passenger trains and switch engines at all times of the day pass back and forth. It is impossible to operate trains at such a place without the noise complained of, and it is well settled that:

"A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains or the noises incident to the running of trains and the operation of the road." 3 Elliott on Railroads, § 1264.

There was nothing in the testimony to show that the noises complained of, and, I may add, the smoke, were other than those incident to the orderly operation of the defendant's trains. The construction of the bridge was a great public service, eliminating a grade crossing with the inconveniences and danger incident thereto, particularly over a part of the railroad yard, and should be upheld rather than burdened with obligations which do not exist with reference even to a grade crossing. I conclude, therefore, that the fright of the horse is attributable to the legitimate operation of the defendant's engines, which, of course, could not be its negligence, and that consequently such fright, and not the failure to erect barriers as complained of, was the proximate cause of the intestate's injuries.

[3] Even if it should be held that it was the duty of the defendant, under the circumstances, to erect barriers along the embankment —a point which I do not decide—it is significant that from the testimony of Mrs. Hunt the horse began backing at a point 10 or 15 feet from the end of the bridge, backed the entire length of the barriers, 60 or 70 feet, and to a point 12 or 15 feet beyond the end of the barriers. If this be true, the intestate had passed the point of danger safely, and only reached it by the subsequent uncontrollable action of the frightened horse, evidently an intervening independent cause.

It is therefore ordered, that the motion for a nonsuit be, and the same is hereby, granted, and that the complaint be dismissed, with costs.

SWEETSER v. EMERSON.

(Circuit Court of Appeals, First Circuit. October 18, 1916.)

No. 1230.

1. STATUTES ⇐235—CONSTRUCTION—PUBLIC STATUTES.
A public statute relating to the military power of the government should be liberally construed so as to make such power effective.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 316; Dec. Dig. ⇐235.]

2. STATUTES ⇐235—CONSTRUCTION—ABSURD RESULTS.
Rules of strict and literal construction may be departed from, in order that absurd results may be avoided, and to insure that the statute shall be effective for the purposes intended.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 316; Dec. Dig. ⇐235.]

3. STATUTES ⇐216—CONSTRUCTION—LEGISLATIVE INTENT.
While debates in the Legislature may be considered in determining the legislative intent, individual expression of members of the Legislature will not establish such intent, in enacting a statute.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 292; Dec. Dig. ⇐216.]

4. ARMY AND NAVY ⇐5½—MILITIA—SERVICE OF UNITED STATES.
Const. art. 1, § 8, declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion, and to make provision for organizing and disciplining the militia and for governing such part thereof as may be employed in the service of the United States. Dick Law Jan. 21, 1903, c. 196, 32 Stat. 775, as amended by Act May 27, 1908, c. 204, 35 Stat. 399, authorized the President to call into service the state militia. Act June 3, 1916, for the national defense, establishing the National Guard, and intended to increase the efficiency of the militia, provides in section 58 that the National Guard shall consist of the regular enlisted militia armed and equipped as provided by the act. Section 70 provides that enlisted men in the National Guard of the several states and territories serving under enlistment contracts containing an obligation to defend the Constitution of the United States and to obey the orders of the President, shall be recognized as members of the National Guard under the provisions of the act for the unexpired portion of their enlistment contracts, and that, when any such enlistment does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed a new enlistment contract, etc. Members of the Massachusetts militia, who had taken an oath to faithfully observe and obey the laws for the regulation of the government of the volunteer militia of the commonwealth, and to support the Constitution of the United States, were called into active service by the President to repel invasion by a foreign foe. *Held* that, as the latter statute should receive a liberal construction, members of the Massachusetts militia who did not elect to sign a new enlistment contract are nevertheless, until the expiration of their terms, subject to being called into active service to repel invasion or put down insurrection, etc.
[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 5; Dec. Dig. ⇐5½.]

Putnam, Circuit Judge, dissenting.

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

Petition by Alexander M. Emerson for writ of habeas corpus against Warren E. Sweetser. From an order discharging the petitioner, respondent appeals. Order vacated, with directions that petitioner be returned to military custody, from which he was taken.

George W. Anderson, U. S. Atty., of Boston, Mass. (Major S. T. Ansell, Judge Advocate, of Washington, D. C., and Lewis Goldberg, Asst. U. S. Atty., of Boston, Mass., on the brief), for appellant.

Henry Wheeler, of Boston, Mass. (Harry Le Baron Sampson, of Boston, Mass., on the brief), for appellee.

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

ALDRICH, District Judge. The rights involved in this case have reference to the question how far the statute of 1903, known as the Dick Law, which was designed to promote the efficiency of the militia, and was amended in 1908, was affected by the subsequent act of Congress of June 3, 1916, known as the National Defense Act, and entitled "An act for making further and more effectual provision for the national defense, and for other purposes."

The general question is whether the act of June 3, 1916, supersedes such prior laws and regulations, and repeals such provisions of the Dick Law, as amended, as authorized the President, in cases of invasion or emergency, to call out and use the organized state militia as a military force to help repel invasion and suppress insurrection, and whether in consequence thereof, under operative provisions of the act of 1916, it is left altogether at the option or election of members of the organized militia of the several states to sign a new enlistment contract or not, and to take an oath of allegiance to the United States of America or not, and to obey the orders of the President of the United States and of the Governor or not, and in the event of an election not to sign a new enlistment contract and take the oath, whether it results from such election that the militiaman, in respect to the unexpired term of his original enlistment, is mustered out and relieved altogether from obligation to respond to the federal emergency call of the President for military aid.

While certain conditions justify rules of technical and strict construction, the particular situation here makes the question more one of interpretation, to be influenced and controlled by the broad and important inquiry whether, under the National Defense Act of June 3, 1916, the purpose of Congress was to weaken or strengthen the federal military arm; and an ascertainment of that character necessarily involves grave consideration of questions of public and private rights and of public policy as well.

[1-4] It is quite likely, if the questions as to these statutes were to be determined under rules of strict and literal construction, that the conclusion reached by the learned judge of the District Court upon careful reasoning, would be quite justifiable; but we are not concerned with that view, because we think that a public statute of this character, which relates to the vital question whether the military power of the government shall be potential and effective in the hands

of the constitutional authorities, or is to be contingent upon the option of constituent members of the lawful military organizations, is one to be determined under broad rules of liberal construction.

In the situation presented, and under rules of liberal construction, the purpose of Congress would be quite controlling, and in ascertaining the purpose of Congress in its efforts under the Dick Law to promote the efficiency of the militia, and under the National Defense Act to make further and more effectual provision for the national defense, it must be assumed that Congress was actuated by the fundamental idea that governments are created for the protection of the rights and liberties of peoples and properties within their domain—that the use of military force may sometimes become necessary, and that to effect the object of governments they should be so maintained as to make the military force effective in the face of imminent exigencies of government emergencies and peril.

An interpretation of the National Defense Act of June 3, 1916, which would strike down all pre-existing laws as to military obligations under pre-existing contracts for national defense through militia service, would be contrary to the usual course of legislation designed to strengthen the Army, and would be so plainly contrary to the necessary idea of government defense and protection, that it would not be adopted unless it was so plainly expressed as to make it manifestly appear that Congress intended weakness rather than strength. Nothing short of clear and apt words would justify such an interpretation of a statute, intended to operate for greater efficiency and greater effectiveness, as would make it operate, through an overthrow of government rights, for less efficiency and less effectiveness.

While there was doubtless no thought in Congress that the voluntary militia plan contemplated by the National Defense Act of 1916 should be used to coerce enlistment into broader fields, it is quite as obviously clear that there was no congressional thought that a failure to do so would operate to set the organized militia of the several states at large from the limited service upon which its members had already entered. So, as we view it, we have no question at all relating to the duty of members of the organized militia to engage in the broader service, but have the single question whether, under reasonable construction, the voluntary election not to do so operates to discharge its members altogether from federal obligations of military service.

It is a familiar principle that rules of strict and literal construction may be departed from in order that absurd results may be avoided, and to the end that a statute shall be effective for the purposes intended.

In order to construe a statute of this character, therefore, there must be an ascertainment of what Congress intended; and such ascertainment is to be made under recognition of the fundamental and essential idea that chief among government purposes is that of so organizing and reorganizing its military force as to adequately safeguard itself and its people against domestic and foreign dangers.

It would seem quite consistent with the contemplated scheme for military strength and defense to hold that the National Defense Act of 1916 was intended to leave it at the election of the members of

the organized state militia, and of the National Guard of the several states, to remain in the service for the full term of their enlistment for purposes of repelling invasion and suppressing insurrection, or to enter upon the broader field for a longer term. And it seems to us that it would be obviously inconsistent with the scheme for national defense and efficiency to hold that the exercise of the right of election by the militiaman, against the broader field and longer term, should operate to absolve him altogether from prior obligations entered into according to then existing laws.

If the exercise of such a supposed right by a single militiaman operates that way, as a consequence it would of course operate that way in respect to the contracts of the militiamen of the organized militia and the National Guard of the several states, throughout the nation, who should elect not to enter upon the broader service; and thus it would result that it would be at the option of the organized militiamen, and the National Guard of the several states, in respect to their prior engagements, to respond to the President's call or not.

If the exercise of the right of option not to enter upon the broader service is attended with the dire consequence that the militiaman is discharged from the obligations of his prior federal engagement, it, in effect, rests entirely with the constituent members of the organized militia, and the National Guard of the several states, themselves to disorganize and disband the organized militia force, with the result that the central government must in the end rely for its military power upon the Regular and Volunteer Army and what is distinctively designated as the National Guard. Under such a view, a very substantial and essential part of the federal government's military power would be bound only by a rope of sand.

To get at the meaning of the National Defense Act of 1916, it becomes necessary to consider somewhat the relative rights of the federal and state governments under the Dick Law, and under prior laws in respect to the federal military arm. This is so, because, if the relations are not altogether revolutionized or stricken down by the National Defense Act of 1916, they define the obligation which the militiaman and the state National Guard man assumed when he became a member of the organized militia or the National Guard of his state, and took the oath then prescribed by law.

There is no occasion to go much into the history of the earlier discussions as to what constitutes the primary militia, as distinct from the organized militia, or much into the earlier controversies as to the power of the President to use the organized state militia as a federal military force, because, as stated by the learned judge of the District Court, and indeed as conceded, unless existing obligations were dissolved by the act of Congress of 1916, the petitioner was bound under his engagement of service to respond to the call of the President and render service when needed to suppress insurrections within the national domain, or to repel invasions.

Article 1, section 8, of the Constitution of the United States declares that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and it also empowers Congress to make provision

for organizing and disciplining the militia, and for governing such part thereof as may be employed in the service of the United States.

While the Massachusetts volunteer militia oath contains no express obligation to obey the orders of the President, those who become members of the militia expressly swear that they will faithfully observe and obey the laws and regulations for the government of the volunteer militia of the commonwealth and the orders of all officers elected or appointed over them, and that they will support the Constitution of the United States.

No question being made here against the idea that the organized militia and the National Guard of the states, under laws and obligations existing prior to June 3, 1916, might be invoked by the President as a military force for certain federal purposes within the national domain, we have no occasion to refer to that aspect of government military strength further than to refer to the power as something which had existence as a government force, to be called out by the President through the Governors of states, and used under military orders in such fields as the prior laws and the nature of the engagement for service contemplated.

We now come to a consideration of the provisions of the act of June 3, 1916, which the petitioner particularly urges in support of his contention that the effect of the National Defense Act was to supersede the old and to create a new and widely different military system, and to discharge all federal obligations of such members of the organized militia and of the National Guard of the states as do not enlist for a longer term and broader field of service than that contemplated by the contract of service under prior existing laws and regulations.

The provision upon which the petitioner chiefly relies is that of section 70, and the particular language is that:

> "Enlisted men in the National Guard of the several states, territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States, and to obey the orders of the President of the United States, shall be recognized as members of the National Guard under the provisions of this act for the unexpired portion of their present enlistment contracts. When any such enlistment does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment."

And the proposed oath provides for a more extended term of service, for allegiance to the United States of America, and the state, and that such enlisted man shall obey the orders of the President of the United States and of the Governor.

It is quite true that section 70 declares, as to members of the National Guard of the several states, whose enlistment and oath do not contain the broader obligation, that they shall not be recognized as members of the National Guard until they have assumed the broader obligation by signing the enlistment contract and taking the oath prescribed; but we look upon this as merely declaratory of the fact that they shall not be recognized and classed in the National Guard, distinctively designated as such, and we do not view such declaration as at all inconsistent with the idea that they shall remain in the class of serv-

ice into which they had in fact previously entered. In short, upon mobilization and under election, not being recognized as members of that body of men known as the National Guard, the militiamen, by operation of law, are relegated to that branch of the service to which they belong, and in which they are bound to perform certain federal military duty.

Viewed in the light of the manifest purpose of the whole scheme of Congress for greater federal military efficiency, saying, if members of the National Guard of the several states shall elect otherwise, that they shall not be recognized as members of a distinct branch of the United States Army, falls far short of saying, or meaning, that a militia organization of a state, so far as federal rights are concerned, may be disbanded under the option of its members, and that federal obligations for service may be altogether rescinded at their free will.

Organized militia existed in Massachusetts, and, being under obligations to respond to an emergency call of the President, when mobilized, was subject to regulations established by Congress under the express provisions of the federal Constitution in respect to organization and discipline, and, of course, reorganization.

Under the theory of ample federal constitutional power, through Congress, to organize, reorganize, and discipline the organized militia of the states, and upon the theory of adequate means of segregation under the provisions of the National Defense Act of June 3, 1916, through military orders, there are no obvious reasons for not merging those who voluntarily elect to enter upon the broader and longer service into units of the National Guard for service both within and beyond the national boundaries; and under the same theory we see no reason why those who elect not to enter upon the broader and longer service, but must serve the term for which they enlisted, may not be lawfully merged into designated military units for service in the narrower field contemplated by the original enlistment within the boundaries, and for the purpose of protecting the national borders from invasion and of suppressing insurrection.

Great stress is laid upon section 58 of the act of June 3, 1916, which apparently limits the constituency of the National Guard. It is true that section 58 does declare that the National Guard shall consist of the regularly enlisted militia, armed and equipped as provided by the act of June 3, 1916.

But, we look upon this, however, as intended to establish a particular standard in that branch of the service known as the National Guard, and we think the reasonable theory is that this provision has reference to an intended distinctively classified and standardized branch of the federal service, and that the broader provision of section 1 of the same act creates a larger scope, and has reference to an organization of a wider constituency—that of the Army of the United States, which may consist of other land forces, such as are now or may be hereafter authorized by law, aside from and in addition to the Regular Army, the Volunteer Army, the officers of the Reserve Corps, the enlisted Reserve Corps, and the National Guard.

Thus, under such broad provision, it is obvious that there may well be units of military land forces other than those particularly enumer-

ated, and these land forces may well be the organized militia land forces under federal engagement to help put down insurrections and repel invasions.

Obviously, the National Guard, as distinctively classified and standardized, is intended to be a constituent part of the broader organization known as the Army of the United States; but that being so by no means necessarily carries with it the idea that the organized militia and National Guard of the several states may not be distinctively recognized as military forces to be mobilized under constitutional military orders, regulations, and designations, and, being organized into military units for the unexpired term, may not be utilized for defending the national bounds and for suppressing insurrection within.

The enacting section of the National Defense Act of June 3, 1916, unquestionably contemplates a broad scope for the exercise of power in respect to military organizations and compositions under constitutional limitations. Indeed, it is expressly and clearly declared that the Army of the United States shall consist of certain enumerated branches and such other land forces as are now or may hereafter be authorized by law. Thus, under this section, the United States Army, under its broad creation as a generic organization, may well be composed, as it would seem, not only of the Regular Army, the Volunteer Army, the National Guard, and the other enumerated branches, but such other, and any number, of constituent military suborganizations of land forces not enumerated, as may now or hereafter be authorized by laws not offending the Constitution of the United States or the Constitutions of the states.

We look upon sections 58 and 70 as intended to classify and standardize a particular branch of the national military force, and not as provisions intended to supersede the older system in its entirety, and to relinquish altogether the rights of the federal government in respect to the obligations of members of the organized military forces of the states which may be constitutionally used for certain kinds of national defense.

While the general and expressed object of the statute of 1916 was a more formidable national defense, through greater efficiency and effectiveness of military force, among the unquestionable purposes of classification and standardization of that particular branch of the United States Army distinctively known as the National Guard, was that of creating a status which should become the basis for providing for, and for regulating emoluments, disbursements, and pensions in that branch of the military service, and for caring for widows and orphans.

The act of 1916, being one for national defense, and one for more effectual provisions to that end, and Congress, upon its passage, being under the weight of well-known existing conditions of foreign menace, and in the presence of a recent invasion by an organized military body of armed men from a foreign country, the view is an impossible one that Congress intended to make it optional with the whole, or any substantial part, of the organized military force of the states, under obligation to aid the federal government in repelling invasion and suppressing insurrection, to march or not, at will, in furtherance of the duty

which they had previously assumed, and for which they had been maintained in part by the government making the emergency call for help.

The President's communication of June 18, 1916, to Governor McCall, invoking military aid, was based upon the possibility of further aggression upon the territory of the United States, and it is quite apparent that both the President and the Secretary of War had in mind conditions which might necessitate reorganizations and subdivisions of the militia force, because, in the call upon the Massachusetts executive for military aid, it was expressly set forth, among other things, that, if "tactical divisions are later organized," requisite and additional staff officers, with rank as prescribed, will be called into service.

While debates upon a pending legislative bill have considerable potency upon questions of legislative intent, individual expression does not necessarily mean an expression of the intent and understanding of the legislative body. It is true that some of the expressions in the colloquial debate, upon the bill in question, between Mr. Hill and Mr. Hay, have a tendency to sustain the view urged by the petitioner in respect to the intention of Congress; but the colloquy ends with a deliberate expression by Mr. Hay that section 22 applies to unorganized militia which in the future may undertake to become organized militia under the provisions of the act.

Such is the view, in substance, which we take of the statute in question, that it keeps out of the National Guard, as distinctively standardized, such members of the militia as do not voluntarily engage for the higher obligations, and that it refers to future organizations and to greater efficiency and effectiveness, rather than to the idea of breaking down existing obligations for service; and it is in this sense that we cannot accept section 61 in respect to the right of states to maintain troops in time of peace as a mandate imposing itself upon organizations, obligations, and rights existing at the time of the passage of the act in question. It is only in the aspect that it has some bearing upon the question of construction that we refer to that section at all.

The argument on the one side that it has reference to existing state organizations, and therefore relieves from obligation, and puts out of service, all members of the militia and of the National Guard of the states not enlisting for the longer term and taking the oath to obey the orders of the President, prescribed by section 70 of the National Defense Act, and the argument of the other side, upon constitutional ground, that, if it means that, its operation would be destructive of the right of the states to maintain troops, raises a question not necessarily pertinent to this case, and one which we need not consider, because, whatever it means, its only weight here is in aid of the interpretation of the scope and meaning of the statute in respect to obligations of service under prior enlistments, and we give it consideration in that respect.

It is our conclusion that the so-called National Defense Act of 1916 was intended to give greater efficiency and effectiveness to the federal military force, through classification and standardization under military regulations and orders based upon existing rights and obligations, rather than one intended to operate to the end that members

of the organized militia, and of the National Guard of the states, who do not see fit to voluntarily enlist for a longer term and assume the broader obligations which might require them to go beyond the national bounds, should be absolved from the duty of responding to the emergency call of the President and the mobilization orders of the Governor in discharge of the obligations into which they had entered, and from the narrower service which they had already assumed under existing laws—that of serving a specified term within the national domain under the lawful orders of the President.

It results, therefore, that when the petitioner had elected not to enlist for the longer term and for the broader service, though not recognized as distinctively a member of the National Guard, that he was still in the service for the federal purposes contemplated at the time he enlisted in the Massachusetts militia and took the oath to obey all laws and regulations for the government of the volunteer militia of the commonwealth, to obey the orders of all officers, and support the Constitution of the United States.

The petitioner being in service for such federal purposes, he was not entitled to be discharged upon habeas corpus.

The order of the District Court is vacated, with directions that the petitioner be returned to the military custody from which he was taken.

PUTNAM, Circuit Judge (dissenting). It seems to me that the act of June 3, 1916, is too positive and precise to be modified by construction in the manner attempted by the opinion of the court, and I therefore conclude that the decrees and orders of the District Court should be affirmed, and dissent to that extent from the opinion of the court in this case.

SWEETSER v. LOWELL.

(Circuit Court of Appeals, First Circuit. October 18, 1916.)

No. 1231.

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

Petition by Alfred P. Lowell for writ of habeas corpus against Warren E. Sweetser. From an order for the discharge of petitioner, respondent appeals. Order vacated, with directions that petitioner be returned to military custody.

George W. Anderson, U. S. Atty., of Boston, Mass. (Major S. T. Ansell, Judge Advocate, of Washington, D. C., and Lewis Goldberg, Asst. U. S. Atty., of Boston, Mass., on the brief), for appellant.

Henry Wheeler, of Boston, Mass. (Harry Le Baron Sampson, of Boston, Mass., on the brief), for appellee.

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

ALDRICH, District Judge. In this case the conclusion is the same as that reached in the Emerson Case (No. 1230) 236 Fed. 161, —— C. C. A. ——, and the order, therefore, will be the same.

The order of the District Court for the discharge of the petitioner is vacated,

with directions that he be returned to the military custody from whence he was taken.

PUTNAM, Circuit Judge. My dissent here is upon the same ground as that stated in No. 1230.

CENTRAL LIFE SECURITIES CO. et al. v. SMITH et al.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1916.)

No. 2104.

1. JUDGMENT ⊜91—CONSENT DECREES—EFFECT.

Upon a bill filed in Maine, the domicile of the principal corporate defendant, a consent decree for the appointment of a receiver was entered upon such defendant's answer. Subsequently an ancillary bill was filed in the federal court for the Northern district of Illinois and on principles of comity a similar decree was entered. *Held*, that such defendant could not, having consented to the appointment of the receiver, attack either decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 150; Dec. Dig. ⊜91.]

2. JUDGMENT ⊜91—CONSENT DECREE—RIGHT TO ATTACK.

The bill filed in the Maine court set up grounds other than fraud, which under the Maine laws were sufficient justification for the winding up of the principal corporate defendant and the appointment of a receiver. Such allegations were admitted by the answer, but the order, appointing receivers to wind up the affairs of such defendant, declared that the decree was entered without prejudice to the determination of any of the issues presented by the bill as amended, and without prejudice to the claims and assertions of any purchaser of stock as to rights existing, or that might exist, by reason of fraud or illegality in the organization of the corporation or of the sale of its stock, and without prejudice to the determination of the relative rights and demands of all persons or corporations, whether as creditors or stockholders. *Held*, that as the decree might be sustained without reference to the charges of fraud contained in the original bill, the reservation did not entitle the principal defendant to attack the consent decree on the theory that the original bill was subsequently amended so that the allegations originally appearing were disputed and disproven by those of the amended bill.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 150; Dec. Dig. ⊜91.]

3. CORPORATIONS ⊜170—STOCK—ISSUANCE—CONSIDERATION.

Where a corporation which was without assets exchanged its stock for that of a second corporation, there was no consideration to uphold the exchange, and the first corporation is not entitled, on distribution of assets of the second, to share as a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. ⊜170.]

4. CORPORATIONS ⊜377(2)—AUTHORITY OF—PURCHASE OF STOCK OF OTHER COMPANIES.

Rev. St. Me. c. 47, § 6, authorizes the formation of corporations to carry on any lawful business, excepting corporations for banking, insurance, etc. Section 51 provides that any corporation organized under the chapter may purchase, own, sell, assign, transfer, or dispose of shares of the capital stock of any other corporation of that state or other states. *Held*, that the permission was restricted to acquisition of the stock of corporations carrying on those businesses which a corporation organized under

chapter 47 might carry on, and so a corporation thus organized could not acquire the stock of a corporation organized to do an insurance business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1532; Dec. Dig. ⊂⊃377(2).]

5. CORPORATIONS ⊂⊃377(2)—STOCK OF OTHER COMPANIES—RIGHT TO ACQUIRE.
Where the statutes of the state of its creation do not authorize a corporation to acquire the stock of other corporations, such power is clearly restricted, and any acquisition is improper.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1532; Dec. Dig. ⊂⊃377(2).]

6. CORPORATIONS ⊂⊃377(2)—POWERS OF CORPORATIONS—LOCAL LAWS.
A Maine corporation, organized under Rev. St. Me. c. 47, § 6, authorizing the formation of corporations to carry on any lawful business, is not entitled, by virtue of its charter, to acquire the stock of an Illinois corporation, where the acquisition of such stock was illegal under the Illinois laws, as the Illinois laws would govern the validity of the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1532; Dec. Dig. ⊂⊃377(2).]

7. CORPORATIONS ⊂⊃642(1)—"DOING BUSINESS WITHIN" STATE—WHAT CONSTITUTES.
A foreign corporation, in so far as it holds the stock of a local corporation, is doing business within the state of the local corporation's domicil.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521; Dec. Dig. ⊂⊃642(1).

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

8. CORPORATIONS ⊂⊃80(12)—STOCK SUBSCRIPTIONS—REPUDIATION.
Where the promoters of corporations organized in Maine and Arizona intended by means thereof to acquire the stock of an Illinois life insurance corporation, the Maine corporation to hold such stock, subscribers to the preferred stock of the Maine corporation may, on discovering the nature of the scheme, repudiate their subscriptions and recover back the subscription price, the project being illegal, or, in case the funds of such corporation are insufficient to satisfy their demands, share pro rata in the assets.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ⊂⊃80(12).]

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

Suit by William E. Smith and others against the Central Life Securities Company and others. From the decree, defendants appeal. Affirmed.

Appellees sought a money judgment against, and a receiver for, the Central Life Securities Company, a Maine corporation, and also sought to wind up its affairs. Application was first made to the Supreme Judicial Court of the state of Maine against the appellant Central Life Securities Company, where temporary receivers were appointed. Upon an amended bill and upon the answer of said company and upon its consent the court entered a decree appointing receivers and directing them to wind up the affairs of said company. Complainants also filed in this jurisdiction an ancillary bill similar to the one filed in the Maine court, and it appearing that due comity required the entry of a similar decree in this jurisdiction, a somewhat similar order was entered.

The receivers appointed reduced the assets to cash, and their reports have been approved. The chief controversy on this appeal arises over the distribution of the balance.

The contentions worthy of special consideration arise out of the claims of the Central Agency Company, Western Agency Company, Atlantic Agency Company, Eastern Agency Company, and Thomas Rhodus for participation in this balance.

The court ordered a reference, and full and complete findings and conclusions were made by the master. To these findings and conclusions appellants filed exceptions, which were considered by the court in a careful opinion, and a decree entered March 8, 1913, followed. These findings and conclusions are too lengthy to be here set forth in full. The findings of the master as corrected by the decree are well supported by the evidence.

The capital stock of the Central Life Securities Company was of the par value of $2,500,000, one-half being preferred stock and one-half common stock. No distinction existed between common and preferred stock excepting over the right to dividends. While its charter gave it authority to pursue many lines of business the chiefly advertised business of the Central Life Securities Company was to assist in promoting the business of the Republic Life Insurance Company, an Illinois corporation. The five agency companies, also appellants herein, were organized under the laws of Arizona for the purpose of acting as general agents for placing life insurance business, and doing such other business as their respective charters and the laws of Arizona permitted. Each agency company was capitalized at $1,000,000, divided into $800,000, common stock and $200,000 preferred stock, excepting one which had $100,000 of preferred stock and the balance common stock.

Another corporation was organized by the same parties, known as the Mercantile Securities Company, and from the sale of its preferred stock it was proposed to purchase the stock of a bank. Another corporation, known as the Bankers' Consolidated Corporation, was expected to own the stock in a chain of country banks. Both of these corporations were to hold some of the stock in the aforementioned five agency companies. The amount realized from the sale of the preferred stock of the Central Life Securities Company was $887,249.94, which preferred stock sold at a premium.

The common stock of the Central Life Securities Company was, through the American Trading Company also controlled by the same parties, transferred to the said five agency companies, and $1,250,000 par value of the latter named companies was turned over to the Central Life Securities Company. No other consideration is apparent for the transfer of the common stock of the last-named company. The sale of the stock and the conduct of the business of all of these companies organized as a part of the scheme was at all times in the hands of and under the control of Rhodus Bros.

In addition to the aforesaid companies these same Rhodus Bros., by means of their trading companies and some of the aforesaid companies, promoted and managed the business of the following companies: Nevada & Eastern Gold Mining Company, Boise King Placers Company, Mina Grande Mining Company, Moose Creek Gold Mining Company, Mines Development Company, National Rheostat Company, Merced Copper Company, Federal Mercantile Agency Securities Company, Mercantile Securities Company, the Finance Company of America, the American Trading Company, the Independence Zinc Mining Company and several others.

A policy of exchanging stock, one for the other, was pursued. The chief business of these companies was to sell stock. Enormous sums were paid in commissions and for expenses. Frequently the cost of selling the stock exceeded the amount realized from such sale.

The Republic Life Insurance Company was an Illinois Corporation, the object of which was to conduct a life insurance business. A large sum of money of the Central Life Securities Company was paid to said Republic Life Insurance Company for the preferred stock of the latter company. The Insurance Company wrote life insurance to the amount of about $200,000, of which about 25 per cent. was upon the lives of the Rhoduses and the agents of the various interlocking companies. The principal activity of said company consisted in getting the names of so-called representative men willing to take insurance in said company but with an understanding that certain special privileges followed. It appeared conclusively that the balance in the hands of the receivers

of the Central Life Securities Company, available for distribution, was not sufficient to pay in full the preferred stockholders.

The complainants proceeded upon the theory that the sale of preferred stock to them was fraudulent, and asked that the moneys paid in by them be returned from the assets in the hands of the receivers, and if a sufficient sum be not realized in this manner, that they have judgment for the balance against said company. The court fixed a time in which all claimants might present their claims. Nearly all of the holders of preferred stock filed their claims for the amounts paid by them for said stock. The agency companies also filed their claims for participation in said fund, basing their claim upon their holding the said common stock. The appellant Thomas Rhodus asked for an allowance of his claim for moneys alleged to have been paid for preferred stock. Although the Central Life Securities Company consented to the appointment of receivers to wind up its affairs, it now seeks by this appeal to attack the decree appointing the receivers, and denies all the claims of fraud set up in the complainants' bill.

By the decree appealed from, the preferred stockholders of the Central Life Securities Company, who seasonably filed their claims, were permitted to share pro rata in the balance in the hands of the receivers. The claim of the appellant Thomas Rhodus was disallowed because the court found that he paid nothing for his said preferred stock. The claims of the agency companies, all similar in character were entirely disallowed. A further statement of the facts appears in the discussion.

Samuel Shaw Parks, of Chicago, Ill., for appellants.

Charles R. Holden, of Chicago, Ill., for appellees.

Before EVANS, Circuit Judge, and ANDERSON and GEIGER, District Judges.

EVANS, Circuit Judge (after stating the facts as above). The appellant Thomas Rhodus complains because the master disallowed his claim for moneys alleged to have been paid for preferred stock of the Central Life Securities Company. Whether any money was so paid by the appellant Thomas Rhodus for preferred stock was purely a matter of fact. The report of the master in this respect was confirmed by the judge, and we are convinced that the evidence justifies the conclusion that Thomas Rhodus paid nothing for the preferred stock held by him. He is therefore not entitled as a holder of said preferred stock to participate in the funds in the hands of the receivers.

[1] The Central Life Securities Company attacks the order made in the Supreme Judicial Court of the state of Maine, and also made in these proceedings, wherein receivers were appointed to wind up the affairs of said appellant, contending that the bill originally filed in the Maine court was subsequently amended so that the allegations originally appearing were disputed and disproven by the allegations appearing in the amended bill. Appellant contends that these facts clearly establish a plan to wreck said company, and such conduct constituted a fraud upon the court. In other words, it is claimed a temporary receiver was appointed upon a bill proven false by the allegations in the amended bill.

Without inquiring in detail into the difference between the original bill and the amended bill, it is sufficient to say that the decree appointing the receivers in these proceedings, was entered upon the consent of the said Central Life Securities Company. The decree

appointing the receiver in the Maine court was upon the answer of the said Central Life Securities Company, and without objection from the duly authorized representatives of said company. We are therefore constrained to hold that the said appellant is in no position to attack the validity of either decree.

[2] It appears that the order, appointing the receivers to wind up the affairs of the company, contained the following provisions:

"It is further ordered and decreed that this decree shall be, and it is hereby, entered without prejudice to the determination of any of the issues presented by the bill of complaint herein, as amended and supplemented and without prejudice to the claims and assertions of any purchaser of stock as to rights existing, or that may exist, by reason of any fraud or illegality that may be hereafter found or adjudged to have existed in the organization of said corporation, or the sale of its stock; and without prejudice to the determination of the relative rights and demands of any and all persons or corporations whether as creditors or as stockholders, etc."

The appellant contends that this reservation conclusively establishes its right to contest the sufficiency of the proof to support the allegations in the bill for the appointment of a receiver. We think otherwise. The decree appointing the receivers was upon consent of said appellant. Other grounds than fraud, recognized by the statutes of Maine as sufficient justification for the winding up of a corporation, clearly appear in complainants' bill, and are admitted in the answer. See chapter 85, Laws of 1905. The decree appointing the receivers can be sustained without any reference to, or consideration of, the allegations of fraud and misrepresentation contained in the original bill. The reservation above quoted merely preserves the right of claimants to litigate the question of fraud so far as that question became relevant to the determination of the issue of priority of claims when final distribution was ordered. Clearly no other effect was intended, and none can be given to the reservation in this decree.

[3] The claims of the agency companies are all of similar character. Each filed its claim with the receivers pursuant to the order of the court, directing all claimants to present their claims within a designated time. Each of said agency companies claimed a right to participate in said fund because of the ownership of common stock of the Central Life Securities Company of the par value of $250,000. Together the five agency companies owned all of the common stock of said company.

The precise question presented is whether the holders of the common stock shall be permitted to share pro rata with the holders of the preferred stock of said company.

The holders of preferred stock predicate their claim upon a disaffirmance of the contract by which such stock was issued. Acting upon the theory that the scheme of incorporation and the plan of the promoters was fraudulent, it is claimed that the corporate entity is not even that of a de facto corporation. The holders of preferred stock, therefore, make claim to the fund on hand which they alone produced, and ask it to be apportioned in accordance with the amount actually paid into said fund rather than on the basis of the par value of the preferred stock so held. All holders of preferred stock who

filed claims consented to the entry of the decree, directing distribution upon this basis. The preferred stockholders further contend that the holders of common stock paid nothing therefor, and on this theory are not entitled to participate in the balance now in the hands of the receiver. The court correctly denied the holders of the common stock all right to participate in the funds of the defunct company. The agency companies paid nothing for the common stock of the Central Life Securities Company. True, there was an interchange of common stock, but there was nothing back of the stock of the agency companies when they transferred a portion of their common stock for all of the common stock of the Central Life Securities Company. Under all of the evidence in this case we conclude there was a total failure of consideration for the issuance of the common stock of the Central Life Securities Company to the agency companies.

[4] The preferred stock of the Central Life Securities Company was all illegally issued. An actual fraud on the corporation laws of Maine and Illinois was committed. The charter issued to the agency companies by the state of Arizona was not authorized by the corporation laws of said state.

The Central Life Securities Company was organized under chapter 47 of the Revised Statutes of Maine. Section 6 of said chapter 47 provides that:

"Three or more persons may associate themselves together by written articles of agreement, for the purpose of forming a corporation to carry on any lawful business, * * * and excepting corporations for banking, insurance, the construction and operation of railroads or aiding in the construction thereof, and the business of savings banks, trust companies," etc.

While section 51 of chapter 47 of the Revised Statutes of Maine provides that:

"Any corporation organized under this chapter * * * may purchase, hold, sell, assign, transfer * * * or otherwise dispose of the shares of the capital stock * * * created by any other corporation or corporations of this or any other state"

—we conclude that the appellant Central Life Securities Company was not authorized to purchase stock in a corporation organized to conduct an insurance business, much less, as in this case, to purchase all of, or the controlling interest in, an insurance company. We conclude that section 51 of said chapter 47 authorized the purchase of stock in companies that followed any line of business authorized by said chapter 47, but did not authorize the purchase of stock in companies that transacted a business which was not permitted by said chapter 47. Franklin Co. v. L. S. Bank, 68 Me. 43–47, 28 Am. Rep. 9; 1 Cook on Corporations, § 236. While the Central Life Securities Company was authorized to conduct various kinds of business, its chief business, as advertised and as actually conducted, was to secure control of the Republic Life Insurance Company, and thereby indirectly engage in the life insurance business.

[5] All the agency companies were organized under the laws of Arizona. An examination of the statutes of this state fails to disclose any express authority for a corporation organized under its

laws to hold or vote stock of other corporations. With the statutes of the state silent on this subject the power of a corporation to hold stock of another corporation is clearly restricted. First National Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537; People v. Chicago Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; People v. Union Gas Co., 254 Ill. 359, 409, 98 N. E. 768, Ann. Cas. 1916B, 201; 7 Ruling Case Law, § 528; Irvine v. Chicago, Wilmington & Vermillion Coal Co., 200 Fed. 953, 119 C. C. A. 333.

[6] The laws of the state of Illinois likewise do not permit, except for a very limited purpose not present in this case, the holding of stock by one corporation in another. Converse v. Emerson Co., 242 Ill. 619, 90 N. E. 269; Converse v. Gardner Co., 174 Fed. 30, 98 C. C. A. 16. In the present case the Maine corporation, not only bought stock in an Illinois corporation, but it practically owned the entire stock of said Illinois corporation. This being unlawful in Illinois, the purpose was not a lawful purpose in the state of Maine. It is only for the purpose of carrying on a lawful business that a corporation in the state of Maine may be organized under chapter 47.

[7] The Central Life Securities Company in holding the stock of the Republic Life Insurance Company was doing business in Illinois. Col. Trust Co. v. M. B. Works, 172 Fed. 313, 97 C. C. A. 144; Dittman v. Dist. Co. of Am., 64 N. J. Eq. 537, 54 Atl. 576; Martin v. Ohio Stove Co., 78 Ill. App. 105.

[8] The purpose and plan of the promoters was clear. They sought to do indirectly what they could not do directly. The entire scheme was illegal.

It affirmatively appears that the holders of the preferred stock, whose claims were allowed in this court, were not active participants in this illegal scheme. It further appears that when the true facts were disclosed they acted promptly in repudiating the scheme.

Where the illegal scheme is thus promptly repudiated by the stockholders, they may recover the moneys by them paid to the company, and if the assets are insufficient to pay them in full, they are permitted to share pro rata in the fund on hand. Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55.

The decree is therefore affirmed.

VALLERY v. DENVER & R. G. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1916.)

No. 4663.

1. RECEIVERS ⟸167—POWERS—RIGHT TO MAINTAIN SUIT.

An order of a federal court in a foreclosure suit appointing a receiver for all of the property of a railroad company, in accordance with the prayer of the bill and with the consent of the company, was within the jurisdiction of the court, and is not void as against collateral attack even

as to property which as afterward determined was not within the mortgage, and the receiver, under the authority conferred by his appointment, may maintain a suit with respect to such property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 320; Dec. Dig. ⊂⊃167.]

2. COURTS ⊂⊃264(3)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT BY RECEIVER.

Where the court and all parties treated the receivership suit as being also for the benefit of general creditors, who proved their claims therein, such suit by the receiver is ancillary and within the court's jurisdiction without regard to the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec Dig. ⊂⊃264(3).]

3. CORPORATIONS ⊂⊃180—STOCK CONTROL OF ANOTHER CORPORATION—TRUST RELATION—SUIT BY RECEIVER FOR ACCOUNTING.

A corporation which owns all or a majority of the stock of another corporation, which it thereby controls, is a trustee of the assets of the latter so far as relates to its creditors and bound to the exercise of the utmost good faith, and on allegations of fraud such creditors or a receiver representing them may maintain a suit for an accounting against the controlling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665–673; Dec. Dig. ⊂⊃180.]

4. EQUITY ⊂⊃66—SUIT BASED ON FRAUD—CONDITIONS PRECEDENT—TENDER.

When a complainant seeks to set aside a transaction for fraud, it is not necessary nor his duty to tender any sums which it may appear that the parties guilty of the fraud have disbursed, but it is sufficient if he offers to do equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 180–190; Dec. Dig. ⊂⊃66.]

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

Suit in equity by George W. Vallery, as receiver of the Colorado Midland Railway Company, against the Denver & Rio Grande Railroad Company and others. Decree for defendants, and complainant appeals. Reversed.

Clayton C. Dorsey and Pierpont Fuller, both of Denver, Colo. (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, George A. H. Fraser, and Gerald Hughes, all of Denver, Colo., and Joline, Larkin & Rathbone, of New York City, on the brief), for appellant.

Russell G. Lucas, of Denver, Colo. (Henry McAllister, Jr., and Elroy N. Clark, both of Denver, Colo., on the brief), for appellees.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. In order to properly understand the questions which are before us for decision, a brief statement of the proceedings in the court below will be made. The complaint was filed March 16, 1915. April 5, 1915, the defendants filed motions to dismiss. October 26 and 27, 1915, the motions were argued and submitted. December 2, 1915, the plaintiff filed a motion for leave to file a supplemental complaint. January 17, 1916, an order was entered

granting the motions to dismiss, and the complaint was dismissed accordingly. On the same day the plaintiff filed a motion to stay and vacate the order dismissing the complaint and for leave to file an amended complaint. February 8, 1916, the motions filed December 2, 1915, and January 17, 1916, were overruled. The plaintiff thereupon appealed from the order dismissing the complaint and also from the orders made on February 8, 1916. By stipulation the several appeals have been consolidated and are to be heard on one record.

[1] The points relied on to sustain the decree dismissing the complaint are as follows: (1) Want of jurisdiction; (2) the receiver had no title to maintain the action; (3) the facts stated in the complaint do not constitute a cause of action. The first two points may be considered together, as they are based upon the same facts and reasoning. There being no diversity of citizenship or a federal question in the case, the jurisdiction of the court and the right of the receiver to maintain the action must depend upon the fact as to whether this action is ancillary to and dependent upon the action brought by the Central Trust Company against the Colorado Midland Railway Company in which action the plaintiff was appointed as receiver. By stipulation we may refer to the record in said action, in determining the questions now under discussion. The original complaint in the receivership action was filed December 13, 1912, and the receiver was appointed the same day with the consent of the defendant therein. It cannot be denied but that the order appointed him receiver of all the property of whatever kind and description belonging to the Colorado Midland Railway Company, and authorized him to take possession of the same and to institute suits for the protection thereof.

It is claimed, however, that this order must be limited and construed with reference to the complaint in the action in which the order was made, and that as thus limited and construed it will appear that as the action was simply one to foreclose a mortgage, the court had no jurisdiction or authority to appoint a receiver of any property not subject to the lien of the mortgage, and that as this court held in Trust Co. v. D. & R. G. R., 219 Fed. 110, 135 C. C. A. 12, that the 7,371½ shares of stock of the Rio Grande Junction Railway Company in controversy in the present action was not subject to the lien of the mortgage, the receivership did not and could not extend to it. A third and supplemental complaint was filed in the receivership suit July 15, 1913, and the receivership was continued and extended under said amended and supplemental complaint with all the powers in the receiver that had theretofore been granted. By special order authority to bring the present suit was granted to the receiver. We do not deem it necessary or profitable to enter into a review of the decisions which the industry of counsel have presented in the briefs upon this question. It would seem that the application of elementary principles to the facts must determine that the receiver had a right to commence this action, and that the court had jurisdiction thereof. When the District Court made the order appointing the receiver, it had jurisdiction of the subject-matter and the parties. The complaint prayed for a receiver of all the property of the Midland Company, and the amend-

ed complaint prayed for a deficiency judgment which would seem to be inevitable from the allegations of the complaint. With the consent of the defendant Midland Company the court extended the receivership over all its property. The plaintiff in the action claimed a lien upon the stock in controversy in this action so that the order when it was made was not only in conformity to the desire of all parties to the action, but was also consistent with the pleadings. The order therefore was not void, and as against a collateral attack like that now made it must be held to have given the receiver title to maintain this action. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; Gunby v. Armstrong, 133 Fed. 417, 66 C. C. A. 627; Platt v. N. Y. & S. B. Ry. Co., 170 N. Y. 451, 63 N. E. 532; Miller v. Brown, 1 Neb. (Unof.) 754, 95 N. W. 797; Grand Trunk Ry. Co. v. Central Vermont Ry. Co. (C. C.) 85 Fed. 87; Horn v. Pere Marquette Ry. Co. (C. C.) 151 Fed. 626; 34 Cyc., pp. 164, 165.

[2] All parties before the trial court in the receivership suit, including general creditors, have treated the same as being for the benefit of general creditors as well as the bondholders. The District Court itself has so treated it and notice to all creditors to present claims has been given. The decision that the stock sued for in the present action was not covered by the lien of the mortgage did not determine that it did not belong to the Midland Company. Whether the Midland Company has any interest therein is the principal issue in the present action. If it has no interest therein, then the plaintiff will fail. We think it clearly appears from what has been said that the present action is ancillary to the receivership, and that the court had jurisdiction. We now turn to the complaint to ascertain whether it states a cause of action against the defendants or either of them. Upon this question little need be said.

[3] Laying aside the question of the present interest of the Midland Company in the 7,371½ shares of the Junction Company stock, let us examine the allegations of the complaint with reference to this stock prior to the sale thereof by the trust company to the Denver & Rio Grande. The complaint alleges that, beginning with the year 1907, the Denver & Rio Grande, controlling a majority of the directors of the Junction Company and one-half of the board of directors of the Midland Company, inaugurated a practice pursuant to which the Denver & Rio Grande and the Midland Company, instead of paying to the Junction Company the full amount of 30 per cent. of the gross earnings from business on the railway of the Junction Company, as required by the terms of the agreement between the parties, paid only such portion of said 30 per cent. as was sufficient to cover interest on bonds and other fixed charges and also to pay a dividend of 5 per cent. upon the outstanding stock of the Junction Company; that the payments of rentals at all times since 1907 have been much less than 30 per cent. of said gross earnings required to be paid as rentals to the Junction Company; that pursuant to this practice the unpaid balance required to make up a total payment from each of said companies for each year of 30 per cent. of said gross earnings has been carried as a charge in favor of the Junction Company, and

against each of said lessee companies and as an accumulated surplus in favor of the Junction Company in which the holders of the stock of said Company were entitled to participate; and that such surplus at the end of the fiscal year of 1912, to wit, November 30, 1912, amounted in the aggregate to $642,010.89; that by reason of the accrued rentals so uncollected the Denver & Rio Grande became indebted to the Junction Company in the sum of $503,160.96, and the Midland Company in the sum of $138,849.93, and the Midland Company by reason of its ownership of 7,371½ shares of the stock of the Junction Company became entitled to a dividend out of said surplus of $237,544, which exceeds in the sum of $98,694, the amount due by the Midland Company to the Junction Company for unpaid rentals for the use of said line of railway; that, at all times during and since the year 1907, the ratio of the gross earnings of the Denver & Rio Grande from the use of the Junction line to the gross earnings of the Midland Company therefrom for each of said years has far exceeded the ratio of the number of shares of stock of the Junction Company owned by the Denver & Rio Grande, to the number of shares of such stock owned by the Midland Company.

The complaint prays for an accounting between the Midland, the Junction, and the Denver & Rio Grande Companies, concerning this matter, and that the amount of dividends, if any, over and above the rentals due from the Midland Company, be ascertained, and the plaintiff have judgment therefor if any such balance exists. We are unable to perceive any reason why the creditors of the Midland Company are not entitled to this, providing the allegations of the complaint are true, and for all purposes of this appeal they must be so considered.

We now come to a consideration of the allegations of the complaint with reference to the acquirement of title by the Denver & Rio Grande to the 7,371½ shares of stock of the Junction Company. The complaint, when much detail of statement is laid aside, substantially charges that the Denver & Rio Grande Company about June 15, 1911, having obtained control of the directorate of the Midland Company, assumed full control of said company and its business, and being in full control, as aforesaid, entered into a scheme to obtain for its own use and benefit at an inadequate price said 7,371½ shares of the Junction Company's stock, then owned by the Midland Company, and thereby fraudulently and in breach of its trust to despoil the Midland Company thereof; that at this time the Midland Company was insolvent and the stock of the Junction Company owned by it was its only valuable free asset; that pursuant to said fraudulent scheme the Denver & Rio Grande caused the directors of the Midland Company at a meeting held on June 28, 1911, to adopt a resolution authorizing the borrowing for said Midland Company of not exceeding $575,000; that shortly thereafter the Midland Company under the direction and control of the Denver & Rio Grande made a loan from the Equitable Trust Company of New York, and issued therefor three promissory notes payable on demand without grace in the sums of $180,000, $100,000, and $200,000, respectively. The payments of said notes were secured by the pledge to the Equitable of said 7,371½ shares of the Junction

Company under severe and harsh conditions; that the Denver & Rio Grande in the fall of the year 1912, after said loans were made and the notes issued by false statements, which are detailed in the complaint, caused the Equitable to immediately demand payment of the notes, at a time when it it was difficult for the Midland Company to respond, and also in the same way caused the Equitable to sell said shares of the Junction Company upon five days' notice; that the Denver & Rio Grande being in full control of the Midland Company and dictating all its acts was a party to the demand for payment of the notes and the sale of said stock, and, instead of trying in any way to obtain further time for the payment of the notes or to protect from sale and forfeiture of said shares of stock, took such action as prevented those who were endeavoring to pay off the notes from paying the same or preventing a sale of said stock, and at the sale by the Equitable bid in the 7,371½ shares of Junction stock for the sum of $405,432.50, it being alleged in the complaint that the stock at the time of the purchase thereof by the Denver & Rio Grande including the withheld dividends thereon, was worth not less than $1,000,000.

Under the allegations of the complaint, the Denver & Rio Grande, at the time of the several transactions in regard to the pledge and sale of this stock, was a trustee of the assets of the Midland Company so far as the creditors of the company were concerned, and, admitting that the Denver & Rio Grande owned all the stock of the Midland Company, it was bound to act in the utmost good faith towards the creditors of the latter. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 127 C. C. A. 184, affirmed in 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; Louisville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; Barrie v. United Rys. Co., 125 Mo. App. 96, 102 S. W. 1078; Meeker v. Iron Co. (C. C.) 17 Fed. 48; Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 11 C. C. A. 320; Sweeny v. Grape Sugar Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; Noyes on Intercorporate Relations, § 124; Cook on Corporations, vol. 3, § 658; Thompson on Corporations, vol. 7, §§ 8502, 8503.

It was the duty of the Denver & Rio Grande to make every effort to prevent a foreclosure and sale of the pledged stock. Canton Roll & Machine Co. v. Rolling Mill Co. of America, 168 Fed. 465, 93 C. C. A. 621; Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492; Clark and Marshall on Priv. Corp. vol. 31, § 763. As to the conduct of the Denver & Rio Grande in the pledging and purchase of the stock in question being inequitable, the following cases are in point: Farmers' Loan & Trust Co. v. New York & N. Ry. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; De Neufville v. New York & Northern Ry., 81 Fed. 10, 26 C. C. A. 306; Alexander v. Relfe, 74 Mo. 495; Jackson v. Ludeling, supra. A court of equity disregards the mere frame work behind which fraud is sought to be concealed by looking through the same to the actual transaction.

[4] This is not a case where equity would require the plaintiff to

make a tender in money of the amount paid by the Denver & Rio Grande at the foreclosure sale of the stock. Fraud is alleged, and the plaintiff is but an officer of the court seeking to obtain property belonging to the Midland Company for the benefit of its creditors. To require the plaintiff to make a tender might defeat the action. When a plaintiff seeks to set aside a transaction for fraud, it is not necessary or his duty to tender any sums which it may appear that the parties guilty of the fraud have disbursed. The complaint offers to do equity, and, the whole case being before a court of equity, if the plaintiff is granted any relief the court at the same time may make the granting of the same conditional upon the doing of equity by the plaintiff, to the defendants. Just what form the relief will take, if any is granted, will depend upon the facts when they appear. It is sufficient now to say that the facts pleaded entitle the plaintiff to a hearing as to their truth.

We have examined the exhaustive brief of counsel for the defendants, but we think a large portion of the same would be more in point if the case was here on pleadings and proofs. In regard to the appeals from the order which denied an amendment to the bill, it may be doubted whether there was any error in granting the same considering the time in the progress of the suit when the motion was made, and also that it was an application addressed to the sound discretion of the trial court; however, as we will reverse the judgment dismissing the complaint, we think it right, in order that the trial court may feel itself free as to any future amendments, to reverse the order refusing to grant the amendment.

The judgment dismissing the complaint and the other orders appealed from are reversed, and the case remanded, with instructions to the trial court to overrule the motion to dismiss the complaint, allowing the defendants to answer the same if they are so advised.

SMITH, Circuit Judge. I concur in all of the foregoing opinion, except in the reversal for failure to allow the filing of a supplemental petition as asked December 2, 1915, and the refusal of leave to file an amended complaint on the application of January 17, 1916.

In view of the history of this case including the history of Central Trust Co. v. Denver & Rio Grande R. Co., 135 C. C. A. 12, 119 Fed. 210, and the fact that the complaint was filed March 16, 1915, and the motion to dismiss was filed within three weeks thereafter, and said motion to dismiss was not heard until October following, and the application to file a supplemental bill was not filed until more than a month after the submission, and the application to file an amended bill was not filed until more than two months after the motion to dismiss was argued and submitted, it was discretionary with the trial court to allow or refuse the applications. 1 Enc. U. S. Sup. Ct. Repts. 303. And such discretion was not abused. I do not mean that, in view of the reversal, the District Court could not grant such applications if now renewed, but there is no reversible error in having refused them at the time made.

CLEARWATER COUNTY et al. v. PFEFFER.

(Circuit Court of Appeals, Eighth Circuit. July 31, 1916.)

No. 4636.

1. COUNTIES ⊂=187—DRAINAGE BONDS—MINNESOTA STATUTE.

Gen. St. Minn. 1913, § 5542 et seq., authorize counties to issue and sell drainage bonds, and provide that the proceeds, together with assessments collected for ditches, shall be placed in a general ditch fund, to be used in the construction of ditches, whether county ditches, or judicial ditches extending into more than one county, and in payment of the bonds as they mature. It is further provided that, in case there is insufficient money in the fund to meet bonds when they mature, any other available funds in the treasury may be used, and afterward replaced from the ditch fund. *Held*, that such provisions do not authorize a county to set apart the proceeds of bonds sold, and appropriate the same to the construction of a particular ditch, leaving unpaid matured bonds previously issued, but that when drainage bonds mature they are entitled to payment from any money in the general ditch fund, from whatever source derived.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 293–295; Dec. Dig. ⊂=187.]

2. COUNTIES ⊂=188—PROCEEDINGS TO ENFORCE JUDGMENT AGAINST—DEFENSES.

In a proceeding to enforce a judgment against a county, obtained on county bonds which are primarily payable from a particular fund, it is not a defense that there are outstanding county warrants, where it is not shown that they are payable out of such fund, or that they are due and payable under the state statutes, or that, if they were, they are entitled to preference in payment over the judgment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 296–299; Dec. Dig. ⊂=188.]

3. BANKS AND BANKING ⊂=134(2)—DEPOSITS—APPLICATION TO DEBTS DUE BANK.

The right of a banker to charge up to a depositor without his order the amount of his note, or other obligation to pay, before it is due, is conditioned on the latter's insolvency.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 354; Dec. Dig. ⊂=134(2).]

4. COUNTIES ⊂=226—ACTIONS AGAINST—EXECUTION AND ENFORCEMENT OF JUDGMENT.

An execution on a judgment against a county or other public corporation may not be lawfully issued and levied on the funds or property acquired by it in its governmental capacity, unless expressly authorized by statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 365; Dec. Dig. ⊂=226.]

5. COUNTIES ⊂=226—ACTIONS AGAINST—EXECUTION AND ENFORCEMENT OF JUDGMENT.

Gen. St. Minn. 1913, § 677, provides that, when a judgment is recovered against a county, no execution shall issue unless after a stated time the judgment has not been paid as therein required. This statute was in force June 1, 1872, at the time of the enactment of Rev. St. U. S. § 916 (Comp. St. 1913, § 1540), which provides that "the party recovering a judgment in any common-law cause in any Circuit or District Court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is

held." *Held*, that the issuance of an execution by a District Court at once on the entry of a judgment against a Minnesota county, and its levy upon the funds of the county, were unauthorized and ineffective.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 365; Dec. Dig. ⟸226.]

6. MANDAMUS ⟸154(2)—PETITION—ENFORCEMENT OF JUDGMENT AGAINST COUNTY.

A mere error in form of procedure in a federal court is not fatal, and a proceeding for the enforcement of a judgment against a county by the issuance and service on the county officers, on petition of the judgment plaintiff, of a citation to show cause, although such proceedings were in aid of an unauthorized levy of an execution, may be treated as a proceeding in mandamus, and such writ may be issued therein, where the petition is sufficient, and only questions of law are in issue.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. ⟸154(2).]

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

Action at law by Charles Pfeffer against the County of Clearwater and others. From an order made in proceedings in aid of execution, defendants bring error. Reversed.

William A. McGlennon, of Bagley, Minn. (Charles Loring and G. A. Youngquist, both of Crookston, Minn., on the brief), for plaintiffs in error.

Arthur M. Keith, of Minneapolis, Minn. (Joseph R. Kingman, Norton M. Cross, and Thomas F. Wallace, all of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. This writ of error challenges an order of the court below that the Clearwater County State Bank and the First National Bank of Bagley pay, out of the funds standing in them to the credit of the county treasurer of Clearwater county, amounts sufficient to satisfy an execution issued on the judgment which the plaintiff recovered against the county on May 6, 1915, for $12,522.20 and costs. The order is attacked on four grounds: (1) That there were no funds in the treasury of the county available to pay this judgment; (2) that there were and had been ever since May 5, 1915, unpaid warrants of the county outstanding to the amount of $67,973.89; (3) that there were in the hands of the Clearwater Bank ever since that date unpaid warrants of the county to the amount of $15,000; and (4) that the execution issued on the judgment and the levies under it upon the funds and credits of the county were unauthorized and void.

Were there funds in the treasury of the county available to pay the judgment? The pertinent statute of Minnesota provides that:

"When any judgment is recovered against a county * * * no execution shall issue, except as herein provided; but, unless reversed, the same shall be paid from the funds in the treasury, if there be any available." Gen. Stat. Minn. 1913, § 677.

On the petition of the plaintiff in the judgment, the court below issued to the county of Clearwater, to its county auditor, to its county

treasurer, and to the banks, an order to show cause why they should not pay this judgment out of the funds of the county in their hands. The county auditor and county treasurer answered for themselves and the county by their affidavits to the effect that the judgment was based on county bonds issued to construct a drainage ditch under chapter 258, General Laws of Minnesota 1901, and chapter 315, General Laws of Minnesota 1903, and General Statutes of Minnesota 1913, § 5542 et seq., that there were in the treasurer's hands raised under that law available to pay the judgment $1,716.77, that there were no other funds available to pay the judgment, but that there were also in the treasurer's hands $19,501.63, money of the county raised by the issue and sale of bonds of the county in anticipation of taxes for the construction of judicial ditch No. 1, that this ditch was in course of construction, that when "said ditch is completed and the contractors paid under their contracts the money will be insufficient to pay the warrants drawn against said fund and moneys," and that the officers of the county are forbidden by the statutes to use the moneys in any fund for any other purpose than that to which it is devoted by the statutes creating it.

[1] The first question, therefore, is: Was this $19,501.63 available to pay the plaintiff's judgment, or was it set apart as a special fund to pay contractors for constructing the judicial ditch yet to be made? The bonds upon which this judgment is founded and the bonds issued to raise the $19,501.63 are the direct obligations of the county. Van Pelt v. Bertilrud, 117 Minn. 50, 52, 134 N. W. 226.

"Said county board," reads the statute, "shall have power to negotiate said bonds as they shall deem for the best interest of said county, but for not less than their par value. The proceeds from the sale of all such bonds shall be placed in a general ditch fund which is hereby created. Such county board shall provide moneys for the payment of the principal and interest of said bonds as they severally mature, which moneys shall be placed in the general ditch fund, into which fund it may transfer any surplus moneys remaining in the general revenue fund or other funds of the county which can properly be used for the purpose of this act, into which fund shall also be paid all moneys received from the payment of any liens created under the provisions of this act. And such board is hereby authorized to pay drainage bonds issued under the provisions of this chapter out of any available funds in the county treasury, when the moneys on hand in the general ditch fund of the treasury are insufficient to meet the payment of bonds issued in ditch proceedings when the same mature, but the fund from which such moneys have been taken or used for the payment of bonds as they mature shall be replenished with interest at the rate of six per cent. per annum from collections of unpaid assessments for ditches, drains or water courses constructed under any proceedings had hereunder." General Laws of Minnesota 1903, pp. 557 558, and amendments; General Statutes of Minnesota 1913, § 5542.

A judicial ditch is one which extends into more than one county. The judge apportions the cost of the ditch between the counties (section 5559), and the power and duty of the county to collect the assessments upon the property in the case of a judicial ditch, to issue bonds to anticipate these collections, to place the proceeds of these bonds and the moneys collected from the assessments (section 5625) in the general ditch fund, and out of that fund to pay any of its drainage bonds that mature, whether issued for county or judicial ditches (section 5542), and any damages for the taking or injuring of land in the con-

struction of any ditch whatever (section 5627), are the same in the case of the construction of a judicial ditch as in the case of the construction of a county ditch. No intention is manifested and no provision is made by the statutes to keep the proceeds of bonds issued or of assessments or liens collected for any particular drainage ditch, whether county or judicial, separate from the proceeds of bonds issued or of assessments collected for other such ditches in the county, or to appropriate the former to the payments of the bonds issued for or the costs of that particular ditch in preference to other obligations of the county to pay liabilities arising from bonds or otherwise out of the construction of ditches.

On the other hand, the statutes create a general ditch fund. They require the county officers to pay into that fund all moneys derived by the county from all bonds issued for the construction of all county and all judical ditches (section 5542), all moneys derived from the collection of assessments or liens made for all such ditches (sections 5542, 5625), all surplus funds remaining in the general revenue fund, or other funds of the county, which can properly be used for drainage purposes (section 5542), and the moneys which the county is commanded to provide for the payment of the principal and interest of all its drainage bonds as they mature (section 5542). They require the county to pay its drainage bonds as they mature and the damages for the taking of and the injury to property in the construction of the ditches out of this general ditch fund, if there is sufficient there so to do, and, if not, out of the general revenue fund of the county (sections 5542, 5627). Therefore they required this county to place this $19,501.63 in the general ditch fund, and it did so.

It is no answer to the claim that this fund thereby became available to pay this judgment on the matured drainage bonds of this county that the county or its officers intended to neglect or refuse to pay its past-due drainage bonds and to use this money to pay future debts it was making for another drainage ditch that was yet to be constructed. This statute required it to apply any funds in its general ditch fund available to the payment of its matured drainage bonds, and the county was without the right to refuse so to do and to apply these moneys to pay future debts not yet accrued. The statutes neither created nor empowered the county to create any lien upon or trust in this $19,501.63, or in any other moneys in its general ditch fund, for the preferential benefit of those who had contracted to build the contemplated judicial ditch, and there was no such lien or trust. Where neither the statutes nor the bonds issued thereunder limit the funds from which their payment shall be made, all the funds of the municipality or quasi municipality issuing them not specifically appropriated by, or by authority of, law to the payment of other debts or claims of the corporation issuing them, are available to pay them. Vickrey v. City of Sioux City (C. C.) 115 Fed. 437, 440. And our conclusion is that this $19,501.63 was available under the true construction of that term in these statutes to pay, and the statutes imposed the duty upon the county and its officers to pay, out of that fund the judgment of the plaintiff on his past-due drainage bonds.

[2] The answer of the county and its officers by the affidavits of the latter stated that there were and are outstanding and unpaid warrants drawn on the county treasurer aggregating $67,973.89. But this fact is no defense to the claim of the plaintiff to payment of his judgment out of the moneys in the general ditch fund: (1) Because the affidavits neither alleged nor claimed that these warrants are payable out of that fund, and the presumption is that they are not, for the affidavits alleged that there is in the hands of the county treasurer $1,716.77 raised under the drainage statutes above cited, and which, therefore, must be in this general ditch fund which is available to pay the plaintiff's judgment. If this $1,716.77 is available to pay the plaintiff's judgment notwithstanding these unpaid warrants, by the same mark the $19,501.63 must be in like manner available; (2) because it does not appear from the answer of the county and its officers that these warrants have been presented for payment, or that payment has been demanded, or that they are due; and (3) because it does not appear that the owners of such warrants have any legal right to or equitable ground for a priority or preference of payment over the plaintiff, and it is no defense to the claim of one creditor for payment that his solvent debtor owes others.

[3] The answer of the Clearwater County State Bank to the order to show cause was that it had $12,000 to the credit of the treasurer of the county, but that at all the times in question it had and still has in its hands unpaid warrants of the county drawn on the treasurer for the aggregate amount of $15,000, for the payment of which it claims a lien on the fund it holds to the credit of the county. But this claim of a lien is untenable. In the first place, the bank does not allege or prove that it was the owner of any of the warrants, and, if it was not, it could have neither a lien on the credit of the county with it nor a set-off on account of these warrants. The affidavit in response to the order to show cause goes no farther than to state that the bank "has in its hands unpaid warrants of the auditor," etc. Again, the time when a county warrant is due is when the treasurer sets apart a sufficient sum to pay it, and, if it bears interest, gives notice to stop the interest. General Statutes of Minnesota 1913, § 870; Pauly Jail Bldg. & Mfg. Co. v. Jefferson County, 160 Fed. 866, 870, 88 C. C. A. 48, 52. There is no averment or claim that these warrants are due, and no allegation or claim that the county is insolvent. The right of a banker, sometimes loosely styled a lien, to charge up to a depositor, without his order, his note or other obligation to pay before it is due, is conditioned on the latter's insolvency. Irish v. Citizens' Trust Co. (D. C.) 163 Fed. 880, 886; Wunderlich v. Merchants' National Bank, 109 Minn. 468, 471, 472, 124 N. W. 223, 27 L. R. A. (N. S.) 811, 134 Am. St. Rep. 788, 18 Ann. Cas. 212. And there is no allegation in the answer of the bank of the insolvency of the county. The bank, therefore, had no lien on the funds it held to the credit of the county.

[4, 5] The plaintiff's judgment was rendered on May 6, 1915, an execution was issued upon it, and in June and July, 1915, the marshal levied this execution on the funds of the county in the hands of its treasurer and on the credits which the county had in its depositories,

the Clearwater State Bank, where its credit was $12,836.26, and the First National Bank of Bagley, where its credit was $12,847.97. The statutes of Minnesota provide that:

"When any judgment is recovered against a county, * * * no execution shall issue except as herein provided; but, unless reversed, the same shall be paid from funds in the treasury, if there be any available; if not, the amount thereof shall be levied and collected as other county charges, and, when so collected, shall be paid to the person in whose favor the judgment was rendered, upon the delivery of a proper voucher therefor. If payment is not made within thirty days after the time the treasurer is required by law to make settlement with the auditor next after the rendition of such judgment, execution may issue, but the property of the county only shall be liable thereon." Section 677.

The defendants contend that the execution and the levies were unauthorized and void, and the plaintiff cites Canal & Claibourne Street Railroad Co. v. Hart, 114 U. S. 654, 661, 662, 5 Sup. Ct. 1127, 29 L. Ed. 226, and insists that they are valid, and that the provisions of the statute which stay execution until 30 days after opportunity to levy and collect taxes to pay it have expired are inapplicable to this case. In the Canal, etc., Railroad Company's Case, Hart obtained a judgment in the Circuit Court of the United States against the city of New Orleans on March 3, 1882. On March 15, 1882, pursuant to a general statute of the state of Louisiana, Hart caused the issue of a fieri facias in that suit, and under it caused the seizure in the hands of the railroad company of the property, effects, and credits of the city, and thereupon such proceedings were had that judgment against the railroad company, the garnishee, followed a judgment against the city. In the Supreme Court the judgment against the railroad company was assailed on the ground that when the fi. fa. was issued there was no law which authorized its issue against the city of New Orleans. The issue of the fi. fa. against the city was authorized, however, by the general laws of Louisiana on June 1, 1872, when section 6 of chapter 255 (17 Stat. 197) of the act of that date, now section 916 of the Revised Statutes, took effect. That section reads in this way:

"The party recovering a judgment in any common-law cause in any Circuit or District Court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

The state of Louisiana had by section 2 of a special act passed March 17, 1870 (Laws Ex. Sess. 1870, No. 5), prohibited the issue of any writ of execution or fi. fa. from any of the courts of that state against the city of New Orleans. The Supreme Court held that this special act was not adopted by section 916, but that that section adopted only the general laws of the state, providing remedies for the enforcement of judgments in like causes—that is to say, in causes of the same general class as that specially under consideration. This decision is clearly irrelevant and inapplicable to the case in hand, because the same general provision of the statute of Minnesota which now exists

regarding the issue of executions upon judgments against counties was in effect in that state in 1872, when section 916 was enacted (Statutes of Minnesota 1866, p. 114, § 83; Statutes of Minnesota 1878, p. 135, § 91), and it controlled then, as it controls now, the issue of executions in causes like that here in hand; that is to say, all causes in the general class of which this cause is one.

It is a general rule that an execution on a judgment against a public corporation may not be lawfully issued and levied on the funds or property acquired by it in its governmental capacity unless expressly authorized by statute, because it holds such funds and property in trust for the public uses and purposes for which it obtained them. The execution and the levies in the case in hand were not expressly authorized, but were expressly prohibited by statute, and they were therefore unauthorized and ineffective. 3 Abbott, Municipal Corporations, p. 2575, § 1167; Jordan v. Board of Education, 39 Minn. 298, 39 N. W. 801; State ex rel. v. Foot, 98 Minn. 467, 108 N. W. 932.

[6] A right judgment, however, though rendered for a wrong reason, may be sustained. There were in the general ditch fund in the treasury of this county, and in the hands and control of its auditor and treasurer, ample funds available to pay the plaintiff's judgment, and the statute required them to pay it out of these funds. The power was conferred and the duty was imposed upon the court below to require and command them so to do. It might have done this by means of an alternative writ of mandamus, followed after a hearing by a peremptory writ of mandamus. In view of the fact, however, that no issue of fact arose in the proceedings in hand, and that the issues of law were submitted, heard, and decided without objection on petition and answer, the petition, order to show cause, answer, and final order, so far as the county and its officers are concerned, had every essential attribute of a proceeding in mandamus, and the court below was not without power or duty to require and command them to make the payment in this proceeding. Section 954, U. S. Revised Statutes (section 1591, U. S. Comp. Stat. 1913), provides:

"That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses."

The petition was in all respects sufficient to warrant writs of mandamus. It set forth the judgment, the funds of the county in the possession of the auditor and treasurer sufficient to pay the judgment, prayed an order on them and on the county to show cause why an order should not be made requiring them to do so, and why such orders as the court should deem proper should not be made. The order to show cause was issued and served upon the county and its officers. They appeared and answered by the affidavits of the auditor

and treasurer, and therein admitted that they had $1,716.77 in their control in the county depositories available to pay the judgment, and showed that they had more than $19,000 lawfully available for that purpose, as has been decided, although, while admitting the possession and control of this fund, they denied its availability, and this presented the only question of law on the merits of the case for the decision of the court below. After a full hearing on this petition and answer, the court made an order that the judgment should be paid out of the funds to the credit of the county in the banks. Here were lawful proceedings, ample to sustain, and the legal right in the plaintiff to have, an order on the county to pay this judgment, on the county auditor to issue orders or warrants on the county treasurer to pay it (State ex rel. v. Foot, 98 Minn. 467, 108 N. W. 932), and on the county treasurer to make such payment to the plaintiff or his attorneys. But the final order made by the court is not to that effect. It is that the banks pay to the United States marshal the amount necessary to satisfy the execution on the judgment out of the credits in them to the county, or to the county treasurer, on which he levied.

As the execution and the levies were unauthorized, this order must be reversed, and the cause must be remanded to the court below, with directions to dismiss the banks, and to enter an order on the petition and on the answer of the county and its officers, directing and commanding the county of Clearwater to pay said judgment, directing and commanding the county auditor of said county to issue county warrants or orders in due form on the county treasurer of said county, directing him to pay to the plaintiff, or to his attorneys in this case, out of the funds of the county in his control, amounts sufficient to pay and satisfy said judgment, and to deliver the same to the plaintiff's attorneys, and directing and commanding the county treasurer to obey such warrants or orders, and on presentation thereof by the plaintiff or his attorneys to pay to him or them out of the funds of the county amounts sufficient to satisfy and pay the judgment of the plaintiff; and it is so ordered.

CLAIBORNE v. BROPHY.

(Circuit Court of Appeals, Fourth Circuit. May 12, 1916.)

No. 1414.

1. BROKERS ⟸57(2)—RIGHT TO COMMISSION—SUFFICIENCY OF SERVICES.
While the mere fact that a broker authorized to sell property introduces or otherwise brings together the owner and one who becomes the purchaser does not entitle him to compensation, it will do so if such bringing together is the procuring cause of the sale, although the owner takes the negotiations into his own hands and accepts a lower price.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. ⟸57(2).]

2. BROKERS ⟸88(2, 3)—ACTIONS FOR COMPENSATION—QUESTIONS FOR JURY.
In an action by a broker to recover a commission on the sale of the stock of a coal-mining company, evidence that defendant, who employed

him, was substantially the owner of the stock, and that defendant personally made the sale to one who was an officer of a corporation with which plaintiff had been negotiating, of which fact he had advised defendant, *held* sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. ⊂⊃88(2, 3).]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at law by Herbert W. Claiborne against John S. Brophy. Judgment for defendant, and plaintiff brings error. Reversed.

Willis B. Smith, of Richmond, Va. (Bartlett, Poe, Claggett & Bland, of Baltimore, Md., on the brief), for plaintiff in error.

Robert R. Carman, of Baltimore, Md. (J. Walter Lord, of Baltimore, Md., on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge. This suit was instituted in the District Court of the United States for the District of Maryland. The plaintiff in error (plaintiff below) sued the defendant in error (defendant below) upon the common counts and upon a special count. Under the special count he claimed $8,250, 5 per cent. commission on $165,000, the price paid for the capital stock of the Cirrus Coal & Coke Company in the sale of which the plaintiff claimed that he was the procuring cause.

The testimony in the case consists mainly of letters. It appears that the plaintiff at the time of the transaction in question resided in Richmond, Va., was engaged in the real estate business, and made a specialty of coal, timber, and iron properties. In June, 1911, he received a letter from the defendant, who was at that time president of the Cirrus Coal & Coke Company, calling his attention to the fact that the Cirrus Coal & Coke Company was for sale, and offering him a commission of 5 per cent. if he should find a purchaser. In the letter it was distinctly stated that the property had not yet been offered for sale and that a one-half interest in the same could be purchased for $135,000, and that the entire stock could be acquired for $275,000. On August 14, 1911, in response to an inquiry from the plaintiff, the offer was renewed in the following language:

"The price of the property will be $275,000, out of which we can allow you a 5 per cent. commission. The terms of sale would be one-half cash, the balance in equal payments running one, two, or three years at 6 per cent. interest. The property has been offered to others; hence this price is subject to prior sale."

This letter was signed by the defendant as general manager for the receiver of the Cirrus Coal & Coke Company; the company in the meantime having been placed in the hands of a receiver. On February 29, 1912, the offer was renewed in the following language:

"Have received your favor of the 28th inst. stating that you have several parties interested in the purchase of Cirrus Coal & Coke Company property

and wish to know if the price of $275,000 is the minimum, and in reply will say that it is. We will allow you a 5 per cent. commission if you consummate a sale at this price."

Under date of March 14, 1912, the plaintiff notified the defendant that L. E. Tierney, secretary-treasurer and general manager of the Elkridge Coal & Coke Company, had written him that he had sent his engineer to inspect the Cirrus Coal & Coke Company, and that he had submitted all data in his possession to Mr. Tierney and had interested him in the coal property, and that he hoped that he would have favorable advice from him in a few days with reference to the purchase of the property. On the 15th of March, 1912, this letter was acknowledged from the defendant's office, and in the acknowledgment it was stated that the defendant was absent from the office, but that he was expected to return home the next day, at which time the plaintiff's letter of March 14th would be referred to him.

On April 13, 1912, the plaintiff was notified by the defendant that the property had been sold and that the new owner had taken charge on the 1st of April. On April 15, 1912, the plaintiff wrote the defendant asking for the name of the purchaser, whether a corporation or private individual, and on the 20th of April, a reply was received stating that the purchaser was Mr. Isaac T. Mann and that he was at that time operating the property. It appears that Mr. Isaac T. Mann was the president of the Elkridge Coal & Coke Company, of which Mr. Tierney was secretary-treasurer and general manager, and was also president of the corporation called Pocahontas Consolidated Collieries Company, Incorporated. The testimony shows that the plaintiff brought the Cirrus Coal & Coke Company property to the attention of both of the above-mentioned corporations, of which Mr. Mann was president.

It also appears from the testimony of Mr. Mann that at the time he purchased the entire capital stock and bonds of the Cirrus Coal & Coke Company, on March 25th, for $165,000, he intended to offer the stock and bonds to the Pocahontas Consolidated Collieries Company, Incorporated, at the price for which he had acquired them, and that he subsequently carried out his intention, and that his offer was accepted by the Pocahontas Consolidated Collieries Company, Incorporated, on April 24, 1912, and the stock and bonds were transferred to it for the amount of the original purchase, to wit, $165,000. The plaintiff made demands upon the defendant for his commission on the sale, and, the same being denied, he instituted this suit. After hearing the testimony, the court below held that there was not sufficient legal evidence to entitle the plaintiff to recover, and directed a verdict in favor of the defendant.

[1] We deem it important to consider briefly the law bearing upon the question as to whether under the circumstances of this case the plaintiff would be entitled to recover in the event he should establish the facts as alleged in his complaint by a preponderance of the evidence. In the case of Howard v. Street, 125 Md. 299, 93 Atl. 926, the court quoted with approval the following language from Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706:

"We understand the rule to be this (in the absence of proof of usage): That the mere fact of the agent having introduced the purchaser to the seller, or disclosed names by which they came together to treat, will not entitle him to compensation; but if it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands, so as to deprive him of his commission."

In referring to the case of Livezy v. Miller, 61 Md. 336, the court quotes with approval the following:

"'It is well settled with the authorities generally, and in this state, that a broker is entitled to his commissions if the sale effected can be referred to his instrumentality. * * * If the agent is the procuring cause of the sale made, he will be awarded his commissions.' * * * The fact that the appellant took the negotiations into his own hands, and changed the terms, could not affect the agent's right to commissions, provided he was the procuring cause of the sale."

The case of Lincoln v. McClatchie, 36 Conn. 136, is very much in point. In that case it was shown that the defendant had placed in the hands of the plaintiff, a real estate broker, for sale a house. Among other things, it was stipulated that the house should be sold for the sum of $6,500, out of which plaintiff was to receive 1 per cent. commission for his services. It was also agreed that in the event the defendant sold the house himself that he would not be liable to plaintiff for commissions, and that the plaintiff was not to advertise the house. It further appears that plaintiff, subsequent to that date, advertised that he had houses for sale on a street in the vicinity where defendant's house was located. A party residing on such street, being anxious to find a house near by for a friend, saw the advertisement, and in an interview with the plaintiff was informed that defendant's house was for sale. The party receiving such information informed his friend that the property in question was for sale, and he entered into negotiations with the defendant for the house, which resulted in the purchase of the same for the sum of $6,400. It further appeared that the purchaser was not known to the plaintiff at all, and the action of the party who gave the purchaser the information was wholly voluntary. The court in that case held that the plaintiff was entitled to recover. Anderson v. Cox, 16 Neb. 10, 20 N. W. 10, is to the same effect.

[2] In view of what we have said, did the court below err in holding that the plaintiff had not offered sufficient legal evidence to justify the jury in finding that he was the procuring cause of the sale by the defendant of the Cirrus Coal & Coke Company to Isaac T. Mann? The plaintiff insists that the evidence offered in the court below, while conflicting, was such as to warrant the jury in finding a verdict in his favor, and he therefore invokes the rule that where the evidence is such that fair-minded men may reasonably differ as to the inference to be drawn therefrom that it is solely within the province of the jury to determine the issue thus raised.

In the case at bar it is insisted by defendant that the stock was purchased by an individual whom the plaintiff had never seen or talked to, nor to whose attention the property had never been brought by

him. Usually in suits of this character the name of the purchaser is disclosed to the broker, or he has been brought to the purchaser directly. It appears that in this instance neither the name of Isaac T. Mann nor the Pocahontas Consolidated Collieries Company, Incorporated, were disclosed to the owner by the plaintiff; it further appearing, as we have already stated, that the plaintiff did not know Isaac T. Mann, nor had he had any correspondence with him.

However, it does appear that the plaintiff had had correspondence with the Pocahontas Consolidated Collieries Company, Incorporated, and L. E. Tierney, secretary-treasurer and general manager, and that he had brought to the attention of these parties the property which was afterwards sold; that he had actually notified the defendant that Tierney not only knew about the property, but had sent an engineer to inspect it. It further appears that the defendant was notified by plaintiff in a letter dated March 14th that Tierney, with whom he had been corresponding in regard to this particular property had, as we have stated, sent an engineer to inspect it. In this connection it should be remembered that Isaac T. Mann was president of the Elkridge Coal & Coke Company, and also the president of the Pocahontas Consolidated Collieries Company, Incorporated. It further appears that on the 20th day of March, 1912, a note for $50,000 of the Cirrus Coal & Coke Company, indorsed by Smith and McKee and the defendant and his brother, became due, which resulted in financial embarrassment to the defendant, owing to the fact that the note was secured by a deposit of $100,000 of the bonds of the Cirrus Coal & Coke Company, the bank which held this note having ordered the collateral to be sold. At the sale these bonds were purchased by a third party, from whom they were afterwards purchased by the defendant for $59,000. It appears that at that time, in order to meet an emergency which confronted the defendant, he went to Isaac T. Mann for the purpose of inducing him to purchase the Cirrus Coal & Coke Company, which was owned and controlled by the defendant and his brother.

It is insisted by the plaintiff that the defendant went to Mann, because he knew that he was president of the Elkridge Coal & Coke Company, and, further, because he had been informed on the 17th day of April by the plaintiff that the Elkridge Coal & Coke Company contemplated the purchase of the Cirrus Coal & Coke Company, insisting, among other things, in corroboration of the statement that it desired to purchase this property and that it had sent an engineer to make a thorough inspection and report. It further appears that the sale of this property was made on March 23d as a result of the negotiations between Mann and the defendant. It also appears that this sale was made only six days after the defendant had received this information from the plaintiff. The plaintiff insists that the fact that Mann was president of both the Pocohantas Consolidated Collieries Company, Incorporated, and the Elkridge Coal & Coke Company, raises the question as to whether the defendant went to Isaac T. Mann on the 23d of March because of this information, and if the jury should infer from the circumstances as shown by the evidence

that such was the case it would be warranted in finding that the plaintiff was the procuring cause of the sale.

In this connection it is insisted by defendant that he did not know that Mann was president of either of the companies. On the other hand, it is urged by the plaintiff that this statement is not conclusive, inasmuch as the jury, under the circumstances, might find against the defendant on this point. It is further insisted by plaintiff that the fact that Mann and the defendant were engaged in the same business and were on intimate terms should have been submitted to the jury as tending to sustain the contention of the plaintiff, even if, as a matter of fact, Mann had no knowledge of the services that plaintiff had rendered in attempting to sell this property, the vital question being as to whether the defendant had knowledge of the efforts of plaintiff. It is well settled that where one who has employed another to secure a purchaser for his property he cannot avail himself of the services of the agent and make the sale of the property by virtue of the information that he has received from the agent and thereby deprive the agent of his commissions.

It is insisted by defendant that, inasmuch as this property was sold for a less sum than the price named to the plaintiff, the plaintiff is thereby barred from recovering anything for his services. The fact that this property was sold for a less sum than the amount named to the plaintiff cannot affect the plaintiff's right to recover. One who has employed an agent to sell his property at a fixed sum, and on account of financial stress or otherwise takes the matter into his own hands and sells the property at a less price, cannot thereby avoid the obligation he is under to pay plaintiff a commission. Howard v. Street, supra.

However, it is insisted by defendant that inasmuch as it appears by the pleadings that plaintiff was employed by defendant, and the testimony only tends to prove that the contract of employment was between plaintiff and the Cirrus Coal & Coke Company, he would not be entitled to recover. On the other hand, it is insisted by plaintiff that this contention is without merit; that while the letter of June 11, 1911, was signed by the Cirrus Coal & Coke Company, J. S. Brophy, the letters of August 14, February 29, 1912, and March 15, 1912, were signed by J. S. Brophy, general manager for the receivers; that the contract of employment was for the sale of the capital stock of the corporation, which was owned substantially by the defendant; and that therefore it was in fact the defendant who employed plaintiff, and that it was he who accepted plaintiff's labors, and who is therefore liable to plaintiff for the value of his services as set forth in the three counts for work and labor and for money paid and for money received. It is also insisted by plaintiff that the defendant was in reality the corporation, and that this is shown by the testimony to the effect that the receiver knew nothing of the sale, and that at the time of the sale no application had been made to the court for authority to make the same.

However, we think the court below erred in refusing to submit to the jury the evidence offered by the plaintiff which tended to show

that plaintiff was entitled to recover from defendant for such services as he may have rendered as the procuring cause of the sale of this property.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with instructions to proceed in accordance with the views herein expressed.

Reversed.

UNITED STATES v. CALCASIEU TIMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1916.)

No. 2851.

1. PUBLIC LANDS ⟸138—PATENTS—TRANSFER.

Though patent to public land was secured through fraud and misrepresentation, it cannot be attacked by the government where, after institution of a suit against the patentee, the land was transferred to a purchaser for value, in good faith, without notice of the pendency of the suit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. ⟸138.]

2. COURTS ⟸363—FEDERAL COURTS—EQUITY—PRACTICE.

Act La. No. 22 of 1904, provides that the pendency of an action in any court, state or federal, affecting the title, or asserting a mortgage or lien upon immovable property, shall not be construed as notice to third persons not parties, unless a notice of the pendency of the suit shall have been filed in the mortgage office of the parish where the property to be affected is situated. Rev. St. U. S. § 914, expressly exempts equity cases from the operation of the conformity statute, with the result that in such cases the pleading and procedure does not follow the state practice, but is uniform in federal courts. Patentee of land, against whom a suit in the federal court for the cancellation of the patent on the ground of fraud and misrepresentations was pending, transferred the land to a bona fide purchaser for value and without notice of the pendency of the suit. No lis pendens, as required by the Louisiana statute, was filed, though the land was located in that state. *Held* that, as the acquisition and ownership of real estate and all means by which title thereto is transferred is exclusively governed by the laws of the state in which the property is situated, the purchaser cannot be charged with notice of the pendency of the suit in the federal court under the rule that a decree in equity is binding on one who purchases property which is the subject of controversy from defendant in the suit while it is pending, and after service of process on him.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⟸363.]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Bill by the United States against the Calcasieu Timber Company and others. From a decree dismissing the bill, the United States appeals. Affirmed.

On August 20, 1907, a patent of the United States for a quarter section of land in Rapides parish, Louisiana, was issued to Martha E. Marler. On January 24, 1908, a bill was filed in the District Court for the Western District of Louisiana by the United States against the patentee for the cancellation of that patent on the ground that it was obtained by fraud and misrepresentation.

The cancellation of the patent was decreed in that case. While that suit was pending, and after the service of subpœna therein, as shown by the marshal's return, on the sole defendant therein, she executed a deed of conveyance to one Kirkpatrick of the land described in the patent. Through mesne conveyances the Calcasieu Timber Company acquired the claim of Kirkpatrick under the deed to him. The bill in this case, filed by the United States against the Calcasieu Timber Company and others, after averring that the fraud and misrepresentation of the patentee in obtaining the patent, and the fact of the filing and pendency of the suit against her, were known to Kirkpatrick and to his grantee, who conveyed to the Calcasieu Timber Company after the decree in the suit against the patentee was rendered and recorded, that the plaintiff was in possession of the land described in the patent, and that the conveyances through which the defendant claims the land constitute a cloud on the plaintiff's title, prayed the cancellation of those conveyances, that the decree rendered in the suit against the patentee be decreed valid and of binding effect against the defendants in this suit, and that the plaintiff's title to the land mentioned be quieted. The answers of the defendants put in issue the allegations above mentioned, denied that process was served on the patentee in the suit against her, and set up the failure to file notice of the pendency of that suit, as required by the Louisiana statute. The appeal is from a final decree dismissing the bill.

George Whitfield Jack, U. S. Atty., of Shreveport, La.

L. J. Hakenyos, Nauman S. Scott, and H. H. White, all of Alexandria, La., and Laird Bell, of Chicago, Ill., for appellees.

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

WALKER, Circuit Judge (after stating the facts as above). The dismissal of the bill was based upon a finding that there was no service of process on the defendant in the above-mentioned suit against the patentee for a cancellation of the patent. We are not of opinion that the evidence warranted such a finding. Assuming that that return was impeachable in this case, we do not deem it necessary to say more of the evidence of its falsity than that it was not so clear and unequivocal as is required to overthrow the return, supported as it was by the explicit and circumstantial testimony of the officer who made it and by other evidence of its verity. 32 Cyc. 517.

[1] But the decree is not to be reversed if the evidence in the case was such as to require a dismissal of the bill. The bill was not maintainable if Kirkpatrick, through whom the timber company claims, was a purchaser of the land for value and in good faith, without notice of the suit pending against his vendor, the patentee, or of any infirmity in the latter's title. It was contended in behalf of the plaintiffs that Kirkpatrick had both actual and constructive notice of that suit and of the patentee's fraud and misrepresentation in obtaining the patent. We do not think that the evidence sustained the averments of the bill to the effect that Kirkpatrick actually knew of the pendency of that suit and of his vendor's misconduct, which was alleged therein. The evidence was such as to require a finding that Kirkpatrick was a good-faith purchaser for value, unless he was chargeable with constructive notice of the suit against his vendor.

[2] The contention that he had constructive notice of that suit is sought to be supported by invoking the rule that a decree in an equity suit is binding upon one who purchases the property which

is the subject of controversy from a defendant in the suit while it is pending and after service of process on the defendant vendor. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; 2 Pomeroy's Eq. Jur. §§ 633, 635. This contention cannot prevail if the Louisiana lis pendens statute, enacted in 1904, is applicable. That statute is as follows:

"1. That, on and after January 1, 1905, the pendency of an action in any court, state or federal, in the state of Louisiana, affecting the title, or asserting a mortgage or lien upon immovable property, shall not be considered or construed as notice to third persons not parties to such suit, unless a notice of pendency of such action shall have been made, filed or registered, in compliance with this act.

"2. * * * That the notice above referred to shall be in writing, signed by the plaintiff or his attorney, stating the name of the court in which the suit has been filed, the title and number of the suit, date of filing same, the object of the suit and the description of the property sought to be affected thereby; and said notice shall be recorded in the mortgage office of the parish where the property to be affected is situated, and shall have effect from the date of filing.

"3. * * * That in the rendition of judgment in such suit or action, if judgment be given against plaintiff's claim, it shall provide for the cancellation of said notice at plaintiff's expense, and as part of the costs of suits.

"4. * * * That all laws or parts of laws in conflict with this act be and the same are hereby repealed from and after January 1, 1905, at which time this act shall take effect."

Act 22 of 1904 of the state of Louisiana.

It is argued that the rule above referred to is one of federal equity procedure, which is not subject to be changed by state legislation. It is true that the rule is one of procedure in that it prescribes what is required, when a different requirement is not prescribed by a paramount authority, to make the decree in an equity suit effective against, not only the parties to it, but others who deal with the subject of the suit while it is pending. It also is true that equity causes are expressly excepted from the operation of the conformity statute (R. S. U. S. § 914), with the result that the practice, pleadings, and forms and modes of procedure in such causes are uniform in the United States courts, and are not governed by state laws, statutory or customary. But the federal system of equity procedure and practice is not of such paramount force that a rule which is a part of it may be given such effect as to nullify a law of a state on a subject within the exclusive domain of state law. Where the substantive law to be administered by the court is that of the state in which the court sits, that law prevails, rather than a rule of procedure with which it conflicts. It is well settled that the acquisition and ownership of real estate and all the means by which the title to it is transferred from one person to another, whether by deed, by will or descent, or by judicial proceedings, and the construction and effect of all instruments intended to convey it, are governed exclusively by the laws of the country or state in which the property is situated, and that such laws of the several states, being rules of property, are binding upon and are to be applied by the federal courts. Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 24 L. Ed. 858; McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup.

Ct. 974, 31 L. Ed. 795; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Suydam v. Williamson, 24 How. 427, 15 L. Ed. 978; 1 Bates, Federal Equity Procedure, § 70.

The statute above set out explicitly prohibits the pendency of an action in any court, state or federal, in the state of Louisiana, affecting the title, or asserting a mortgage or lien upon immovable property, being considered or construed as notice to third persons not parties to such suit, unless a notice of the pendency of such action shall have been made, filed, or registered, in compliance with the statute. The statute prescribes a rule to govern in determining the effect to be given to a conveyance of real estate made by a party to a pending suit involving it to one not a party to the suit. It forbids the pendency of the suit being considered or construed as notice to such a grantee unless the notice provided for by the statute shall have been given. If, under the facts of the instant case, notwithstanding the failure to comply with the statute above set out, notice of the pendency of the suit against the patentee is imputed to her vendee, who was not a party to that suit, and the decree in that suit is held to conclude such vendee and those claiming under him, the result would be to make a judicial decree purporting to cancel the title to land in Louisiana effective against one not a party to the suit in which the decree was rendered, though a statute of the state excludes him from the operation of the decree, and to deprive a conveyance of land by the holder of the record title to it of the effect given to it by the law of the state in which the land is situated. The law applicable to the question presented stands in the way of such a result. The law of the state determines the operation and effect of the patentee's deed; and the conclusion is that a rule of practice or procedure prevailing in the court in which a controversy on the subject arises cannot properly be so applied as to override that law. The question presented in this case was not decided in Romeu v. Todd, 206 U. S. 358, 27 Sup. Ct. 724, 51 L. Ed. 1093, but expressions found in the opinion in that case are in harmony with the conclusion just stated.

The language of the statute above set out clearly shows that it was intended to apply to suits in the United States courts as well as to suits in the courts of the state. The provisions of the statute are such that no obstacle is left in the way of a suitor in a United States court complying with the requirements prescribed to charge one not a party to the suit with notice of its pendency. The reasons which led to the conclusion in the case of King v. Davis (C. C.) 137 Fed. 222, that a Virginia lis pendens statute was not intended to apply, and did not apply, to suits in the United States courts in that state, do not exist under the facts of this case.

The decree appealed from is affirmed.

MAXEY, District Judge, was prevented by illness from participating in the decision of this case.

CHICAGO, B. & Q. R. CO. v. SCHRIMPF.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1916.)

No. 4657.

1. EVIDENCE ⊂=554—HYPOTHETICAL QUESTION—ADMISSIBILITY.

In an action against a railroad company for the death of a passenger, which it was claimed resulted from the negligence of the company in unnecessarily exposing him, it appeared that the passenger, after rallying from an attack of congestion of the lungs, was sent to his home by train, and while being carried on a cot in the baggage car he was chilled when both doors of the car were open, though he was warmly dressed and covered with furs and blankets. A medical expert answered a long hypothetical question in favor of the plaintiff. On cross-examination, the expert testified that in answering the question he assumed that deceased was unprotected from the draft, but admitted that a person might be so protected from a draft as to suffer no injuries. *Held* that, as the statements of the medical expert with reference to protection in a draft were indefinite, the answer cannot be stricken on the theory that it was not based on the facts stated therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2375; Dec. Dig. ⊂=554.]

2. CARRIERS ⊂=281—CARRIAGE OF PASSENGERS—CARE.

Where the railroad company was advised of the condition of the passenger, it was bound to exercise care commensurate with his condition, and the worse he was the more care he was entitled to.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093–1097, 1241; Dec. Dig. ⊂=281.]

3. CARRIERS ⊂=320(3)—CARRIAGE OF PASSENGERS—ACTIONS—JURY QUESTION.

Whether a railroad company negligently exposed a sick passenger, who was being carried on a cot in the baggage car, so that his death resulted therefrom, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. ⊂=320(3).]

4. CARRIERS ⊂=346(2)—ACTIONS—EVIDENCE.

In an action against a railroad company for the death of a passenger, who was in a weakened condition when he started on a journey, evidence *held* insufficient to show that the passenger, who was exposed and chilled through the negligence of the company, was not in a condition to make the trip.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1401; Dec. Dig. ⊂=346(2).]

5. CARRIERS ⊂=343—CARRIAGE OF PASSENGERS—DEFENSES—PLEADING.

In an action for the death of a passenger, who was being carried on a cot in the baggage car of a train, which it was claimed resulted from the railroad company's negligence in unnecessarily exposing him to the elements, so that he was chilled, the answer alleged that, if the passenger was in any way injured by reason of drafts playing upon him while on the train, such injury was in part caused by his negligence and those attending him. *Held* that, under such answer, the claim that deceased in making, and his medical adviser in advising, the trip, were guilty of negligence, cannot be urged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1398; Dec. Dig. ⊂=343.]

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

Action by Sophia Schrimpf, as administratrix of the estate of Gustav C. Schrimpf, deceased, against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Morton Barrows, of St. Paul, Minn. (Barrows, Stewart & Ordway, of St. Paul, Minn., on the brief), for plaintiff in error.

W. M. Jerome, of Minneapolis, Minn. (Ueland & Jerome and O. F. Greiner, all of Minneapolis, Minn., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The plaintiff in error was defendant in the District Court, and the defendant in error was the plaintiff there, and they will be styled here as in the lower court. This suit was originally brought in the district court of Hennepin county, Minn., and was removed by the defendant to the United States District Court. The suit is for damages for wrongfully causing the death of Gustav C. Schrimpf and resulted in a verdict and judgment for the plaintiff and defendant sued out a writ of error.

The jury had a right to find from the evidence that Gustav C. Schrimpf lived with his wife—that is, Sophia Schrimpf—at Robbinsdale, a suburb of Minneapolis. In the fall of 1913 he secured employment in a lumber yard at Bay City, Wis., which is 55 miles southeast of Minneapolis, on the Chicago & Minneapolis line of the defendant, and is 44 miles southeast of St. Paul. He worked in the lumber yard and lived at the hotel at Bay City until about March 15, 1914. On that date he called Dr. Robey, a physician of Bay City. The doctor found him in bed complaining of a severe cold and congestion of the lungs. The chief symptom was trouble with the smaller bronchial tubes. He had a slight fever. For a few days he became slightly worse; then he commenced to improve until the 26th day of March, when the doctor considered him out of danger. All the time he was generally confined to his bed. He was able to be up every day, however, and go to the toilet unattended. During the latter part of this time his fever was very slight, his temperature being from normal to one degree above, and most of the time was normal, and the lungs were practically cleared up. He still had a slight disturbance, or cough. On March 26th he was deemed well enough to take home. He got out of bed and with the assistance of his wife dressed himself. Being somewhat unsteady from the time spent in bed, he walked down stairs with an attendant on each side, who rendered him slight assistance in steadying him. He had on heavy winter underwear and an ordinary suit of clothes and a heavy overcoat and heavy cap. He was placed upon a cot with a heavy blanket or rug over him, and a fur-lined overcoat over that. He was then carried across the street about 50 feet to a baggage car of defendant. Deceased was then placed in the St. Paul baggage car. His physician remained with him there, his wife and son going into the passenger car. It took about 2 to 5 minutes to take

him from the hotel and place him in the baggage car. They left the hotel after the train pulled in, and so no time was lost except the 2 to 5 minutes referred to from the time he left the hotel until he was placed in the baggage car. The train carried two baggage cars, one called the Minneapolis and one the St. Paul car. The latter car was dropped at St. Paul, but the deceased was, perhaps for sufficient reason, put in the latter car, thus necessitating his transfer to the other car at St. Paul. The day was cold, disagreeable, inclement, damp, and wintry; but there was no falling weather. When the train reached St. Paul it was necessary to remove the baggage and express matter destined for that city from the Minneapolis car, so as to make room for the deceased, and this was done with both cars, probably to save time. It was 15 minutes or more after the car reached St. Paul before the baggage and express had been disposed of and they came to remove deceased to the Minneapolis car. During all the time deceased was lying in the front part of the car with his head toward the rear and about one foot in advance of the doorways. The doors were both wide open, and a cold and heavy wind blowing across the car. No reason is shown for having the doors on opposite sides of the car both open, but it was, of course, necessary to have the door open on one side while the contents of the car were removed. Deceased during this time complained of discomfort, of being cold. He commenced to be more congestive in the lungs and had more difficulty in breathing. His train finally took him to Minneapolis, where in a closed Red Cross automobile ambulance he was taken out to Robbinsdale to about 20 feet from his house door. He was then carried into his home, which was steam-heated. On the following morning he displayed symptoms of pneumonia, and he continued to grow worse until April 5th, when he died of lobar pneumonia.

[1] It is claimed that he was negligently exposed to a draft while at St. Paul, and that this exposure produced the pneumonia of which he died. Dr. Colp was the attending physician after the deceased reached Robbinsdale, and not only testified to the condition of the deceased up to the time of his death, but answered a long hypothetical question favorably to the plaintiff. There was considerable dispute as to the exact form of this question, and after it was finally amended there was no objection made to it. On cross-examination the witness testified as follows:

"Q. Then, if the body of a man is protected by clothing or rugs or overcoats so that his body is not exposed to the draft, and it is not very cold, it might be that a draft wouldn't affect him very much? A. That is very true. Q. And it would follow from that, wouldn't it, that you could protect a man from the ill effects of a draft, if he was thoroughly covered and keep his face out of the draft? A. Yes, sir; if he was thoroughly covered. Q. Now, in answering this hypothetical question, what did you assume to be the fact in that respect as to his protection from the draft? A. I assumed that he wasn't protected, that he was unprotected, that this draft blew over him, and might have struck the chest and the neck. Q. And that those parts of the body were unprotected? A. Yes, sir."

The defendant then moved the court to strike out the opinion of the doctor, on the ground that it was not based upon the facts stated in the hypothetical question, and was not consistent with the facts

brought out in plaintiff's case. This motion was denied. It must first be borne in mind that what the doctor said as to the protection from draft was indefinite and vague. Protection is a relative term. The slightest covering over the face of the patient would be some protection. Adequate protection is quite another thing. The words "protection" and "protected" are nowhere in the hypothetical question. The evidence itself is not clear on that subject. It shows the degree of protection we have already indicated, but does not show whether his face and neck were covered with the blankets or the fur overcoat. Under the circumstances we cannot say that his answer to the hypothetical question was not based upon the facts stated in it, nor can we say that it is not consistent with the facts brought out in plaintiff's case.

[2, 3] It is next urged that there was no evidence to warrant the verdict, but in this we cannot concur. It is true he had been sick; but, of course, that did not authorize any one to give him a fatal blow. There seems to have been no necessity for having the doors open on opposite sides of the car when he was lying at St. Paul, and if one of the doors had been kept closed the draft would have been nominal. In his condition the company was bound, not only to high care, but to such care commensurate with his condition, and the worse he was the more care was due him from the railroad company. Both Dr. Robey and Dr. Colp, who attended him, testify in their opinion it was this exposure that caused his death. It is true that Dr. Staples testified for defendant to the contrary; but there was not only sufficient evidence to go to the jury, but apparently a preponderance of the evidence that defendant's negligence caused the decedent's death. The defendant cites numerous Minnesota cases upon this subject, none of which appear to be in point.

[4] It is next contended that the deceased was guilty of contributory negligence in taking the trip in his disabled state. He was not negligent in the selection of his physician, and his doctor testifies he was well enough to make the trip, and that he so advised the deceased. The defendant asks us to first set aside this testimony, and then to hold that the doctor was negligent in consenting that deceased make the trip, and that his negligence will be imputed to the deceased. In the first place, we cannot find from the evidence that deceased was not in condition to make the trip, and this disposes of the whole question of contributory negligence. It is not necessary for us to express an opinion as to whether, when one employs a physician who negligently advises him to take a trip, and then employs a carrier to take him on the trip, the negligence of the physician can be imputed to the patient, so as to defeat a recovery by him against the carrier for its negligence. It is laid down in a standard law publication that:

"While the negligent act or omission of the person injured ordinarily defeats recovery, the rule is subject to the exception or qualification that, although such person has been guilty of negligence in exposing himself to danger, yet he may recover if defendant, after knowing of such danger could have avoided the injury by the exercise of ordinary care and fails to do so, as in such case the negligence of the person injured is not the proximate cause of the injury, and the negligence of defendant becomes the proximate cause." 29 Cyc. 530.

Even if the doctor was negligent, and his negligence was imputed to the deceased, it would not defeat a recovery under this holding.

[5] A further reason for refusing to sustain this point is the condition of the pleadings. The only allegation of negligence on the part of the deceased was as follows:

"3. Further answering the complaint, the defendant alleges that if the said Schrimpf was in any manner or degree injured or damaged by reason of any draft blowing upon him while upon the said train, that the said injury or damage was in part at least caused by the negligence and want of care of the said Schrimpf and the persons attending him."

This allegation was not sufficient to set up supposed contributory negligence by the persons attending him, not while on the trip, but advising him to take the trip. O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289, 45 N. W. 440.

No error is made to appear, and the judgment of the District Court is affirmed.

JUNEAU FERRY & NAVIGATION CO. v. MORGAN et al.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2732.

MUNICIPAL CORPORATIONS ⟸719(4)—WHARVES—POWER TO LEASE.

In the absence of specific legislative authority, beyond that conferred by Comp. Laws Alaska, 1913, § 627, which authorized it to construct and maintain wharves, a municipal corporation in Alaska has no power to lease a wharf owned by it to a ferry company for its exclusive use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1532; Dec. Dig. ⟸719(4).]

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

Suit in equity by C. P. Morgan, R. B. Cochran, and H. Johansen, copartners as the Island Ferry Company, against the Juneau Ferry & Navigation Company. Decree for complainants, and defendant appeals. Reversed.

J. H. Cobb, of Juneau, Alaska, for appellant.

George Irving and Z. R. Cheney, both of Juneau, Alaska, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The complaint of Morgan and others, appellees here, to be called plaintiffs, doing business as the Island Ferry Company, of Alaska, sets up that on November 1, 1915, the common council of the town of Douglas, Alaska, leased to them a certain float and premises, and that plaintiffs took possession under the lease, but that on November 13, 1915, the defendant, operating a ferry between Juneau and Douglas, Alaska, wrongfully entered upon the float and premises by landing its boat thereat for the pur-

pose of discharging freight and passengers to the exclusion of plaintiffs.

The lease was executed by the city of Douglas, a municipal corporation, by Peter Johnson, president of the common council and ex-officio mayor, to the Island Ferry Company for certain premises owned and controlled by the town and described as:

"That certain float and landing adjoining the city dock on the north side of the same, together with all piling and structures incident and appurtenant to the same and necessary for the maintenance of said float; and also the gangway and necessary approaches to said float with the right of ingress and egress to and from said float by land and water."

The lease runs for a year from November 1, 1915, at an annual rental of $300 payable in monthly installments. The lessees agreed to keep the premises in clean condition in accordance with the ordinances of the town, and at the end of the time are to yield up the property in good condition. There was a covenant not to sublet or sell or assign without the consent of the town.

The defendant, Juneau Ferry & Navigation Company, answered, contending, substantially, that the lease was executed without authority; that the float involved was a part of the public dock on the navigable waters of Gastineau Channel constructed by the municipality of the city of Douglas, Alaska, some time previous; that there was no authority in the city council to grant a special or exclusive privilege to any person; and that it was the purpose of the common council and of the lessees to create a special privilege and operation for the ferryboat belonging to the lessees, and especially to the detriment of the business of the Juneau Ferry & Navigation Company.

At the hearing it appeared that several years before this controversy arose the town of Douglas built a dock and a float, the float being about 40 feet long and resting in the water on the north side of the dock, but that, as the winds and seas came upon the float as it was situated, the city took it from the north side and put it on the south side of the dock, added to it, and kept it for public uses. About the time that this was done, a man named Murray had a float which was useless to him, and he gave it to the town. The officials of the town took this given float and put it on the north side of the city dock. The Juneau Ferry & Navigation Company, appellant, used the float on the south side, to which the public has access. The real purpose of putting the float on the north side was to encourage a ferry in opposition to that operated by the Juneau Ferry & Navigation Company, the object being stated by a member of the city council in this language:

"Q. And tell the court positively now, if you can, just what the float was built for; make it a precise answer. A. It was built for lease or rent for the benefit of the city of Douglas and for the citizens of Douglas.

"Q. For the purposes of an independent ferry? A. Independent ferry; yes, sir.

"Q. Why was that done? A. Well, in the first place, we thought it a good investment; in the second place, to reduce the fare between Douglas and Juneau.

"Q. And you as councilman at that time were acting for the public good? A. People of Douglas; yes, sir."

The south float was for landing, and open to everybody, ferries or individuals; and, while the south float is larger and more sheltered, the evidence tends to show that the north float is more convenient for landing.

The Juneau Ferry & Navigation Company used a dock and a float of their own on the south side. The evidence also tends to show that, after the lease of the float on the north side to the Island Ferry Company, some of the boats of the Juneau Ferry & Navigation Company were landed at the north float, and that there was more or less interference by the Juneau Ferry & Navigation Company with the exclusive enjoyment of the leased property.

The evidence is that the effect of leasing the north float to the Island Ferry Company was to bring about a competition with the Juneau Ferry & Navigation Company boats and a reduction in the cost of ferriage which, naturally, operated advantageously to the public.

The lower court granted injunction restraining the Juneau Ferry & Navigation Company from landing its boats at the float on the north side of the dock or in any wise trespassing or occupying the same. The Juneau Ferry & Navigation Company appeals.

That the premises leased constituted a wharf is fairly within our decision in Sesnon Company v. United States, 182 Fed. 573, 105 C. C. A. 111. The real question involved, therefore, is: Had the municipality power to enter into the lease of the public float or dock with the necessary approaches thereto?

The grant of power to municipalities in Alaska with respect to wharves is in the following clause:

"That the said common council shall have and exercise the following powers: * * * Fourth, to provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves." Section 627, Compiled Laws of Alaska.

We are not advised of any further expressed powers.

The rule is that the power to lease corporate property held by a municipality for public use cannot ordinarily be wholly or partly diverted to a possession or use exclusively private without specific legislative authority, and that a town cannot lease a part of a public dock to a private concern, nor can a city which has condemned private property for use as a wharf lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain. McQuillin on Municipal Corporations (1912) § 1145.

In People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 19 L. Ed. 844, it was laid down that municipal corporations are doubtless invested with subordinate legislative powers to be exercised in the passage of ordinances for local purposes connected with the public good, but they are merely derivative, and are subject at all times to the legislative control, and the general rule is that powers given to municipal corporations cannot be delegated to others nor be effectually abridged by any act of the municipal corporation without the express authority of the Legislature. And it was there held that such corporations invested with the power to lay out, open, alter, repair,

and amend streets within the corporate limits cannot, without more power, grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such right is void.

In Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, the general doctrine applicable was stated by the Supreme Court as follows:

"In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use."

In Illinois & St. Louis Railroad & Canal Co. v. St. Louis, Fed. Cas. No. 7007 (12 Fed. Cas. 1199), Judge Dillon held that an ordinance, by which municipal authorities undertook, without express legislative authority therefor, to surrender to a private corporation or person their control over a public wharf for a fixed period, that is, the right to occupy a portion of the public wharf with a grain elevator for fifty years, without reserving right to resume possession and regulate charges, was void.

In People ex rel. Swan v. Doxsee, 136 App. Div. 400, 120 N. Y. Supp. 962, the Supreme Court of New York had this case before it: The town of Islip was authorized to purchase docks and to acquire sites and to build docks and bulkheads for public use, and the trustees of the town were given by law supervision of docks and landing places with the power to prescribe rules and regulations for the use thereof by the public. The town bought a dock and took title, to be held for the use of the town. Previous to the acquisition of the dock by the town of Islip, a corporation had maintained upon it an icehouse and platforms by agreement with the then owner. When the town acquired it, the trustees of the town entered into a lease granting to the corporation the exclusive use of those portions of the dock occupied by its structures for a term of ten years at an annual rental of $100. A proceeding was brought to require the trustees to remove the icehouse structure of the corporation from the dock on the ground that it was an unlawful obstruction to the public use of the dock. The Supreme Court said:

"The broad question brought up by this appeal is whether a municipality may by leave or license permit property acquired or held by it for 'the public use' to be wholly or partly diverted to a possession or use exclusively private without specific legislative authority."

In considering the question, the court treated the icehouse in question as not interfering with any then present actual demand or necessity of the public use, and regarded the position of the relator as presenting the point that the existence of the icehouse constituted an interference pro tanto with the public right to the use of the entire wharf. It was decided that the trustees of the town holding the wharf for

public use had no power to permit a corporation or person to maintain any structure on the public dock for its exclusive private use. The court mentioned the fact that by the early statutes of the state of New York the public authorities were given power to lease, not the wharves themselves, but simply the right to collect wharfage, and that even under such leases it had been held unlawful to obstruct free passage over the wharf by the erection of any structure thereon of a private nature. The court cited the case of City of St. Paul v. Chicago, etc., Railroad Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184, as holding that, while there is a difference in the use of a public street and that of a public wharf to the extent that on a public wharf it might be permitted to erect a structure for the receipt, delivery, or temporary storage of goods while in transit, provided it were common to the use of all on the same terms, it would at the same time be unlawful to give a particular person or corporation the right to occupy a levee as a site for its warehouse solely for its own business and to the exclusion of the general public.

"It seems clear, * * *" continued the court, "that the dock in question which is under the charge of the respondents was acquired and is held for a general public use for landing purposes, and that such public use is the primary use for which it was acquired and is maintained. To permit any part of it to be occupied exclusively by an icehouse structure used for a purely private business is a violation of the public right and of the statutory duty imposed upon the respondents to regulate the use of the wharf for and by the public. The whole wharf is held for the public use, and not simply a part of it. Sound public policy forbids that there should be any power to divert a part thereof to a private use; for, once such power being assumed, the dangers which may follow either from favoritism or ill judgment may speedily hamper or practically destroy the fundamental purpose of the public use."

Bateman et al. v. City of Covington, 90 Ky. 390, 14 S. W. 361, decided in 1890 by the Court of Appeals of Kentucky, is very close to the instant case. The city of Covington leased to Bateman and another for five years a part of its wharf on the Ohio river, a small strip of land between the river and a parallel street. Under the terms of the lease the lessees were given complete control of the wharf, binding themselves to use the ground for wharf privileges only. Upon a test of the power of the city, the court held that there was no authority in the city to make such a contract, or to deprive the public of the use of the wharf, and said in this connection:

"We perceive no authority in the city charter or any legislative enactment empowering the city to make such a contract, or to deprive the public of its use. The city has the power to impose certain duties upon those availing themselves of wharf privileges, and to make such regulations as may be necessary to keep the wharf in repair for public use; but it has no power to confer such absolute control to an individual who leases it for his own private use. The city must control the use, and for this purpose may place the ground in charge of a wharfmaster, or some agent who acts for the city, that the public may enjoy the use. A city has the exclusive control of its streets, and a like control over its wharfs; and, in appropriating the use of either for the benefit of a private person, to the exclusion of the public, it is going beyond its power, and such a contract is void. The city is a mere trustee for the public, and all have the right to use streets and wharfs; one citizen having the same right as another. 2 Dill. Mun. Corp. §§ 659–661. When a city undertakes to confer on a private individual such a right in streets or wharfs,

without legislative authority, as will produce a conflict between the public and the private use, the act is ultra vires; and, as said in the case of City of Louisville v. Bank, 3 B. Mon. 138: 'It would be almost as reasonable to sell and appropriate as private property the river itself as the ground lining its margin. The object of the town or the city owning this ground is to benefit its facilities as a highway.' In this case, the right to the use or control is, in effect, abandoned by the city, and the right to the possession claimed by the appellants on the one side, and Shinkle on the other. * * * The use and control of public highways, such as streets and wharves, etc., belonging to the city, cannot be surrendered by contract to a private individual, to the exclusion of the public. Such highways are public property, intended for public use, and placed under the control of the city government for the benefit of the public; and any other disposition of such property, without special authority conferred by the lawmaking power, must be disregarded."

The rule of the Kentucky case was formulated in a case less doubtful than the present one, for in the lease there considered the lessees were obligated to use the ground for wharf privileges only; whereas, under the terms of the Douglas lease, the city has endeavored to surrender control of the float and its approaches without requiring any obligation from the lessees to use the premises leased for any designated purpose. As the lease reads, there is nothing to prevent the lessees from ceasing to use it for ferriage purposes, or, if they use it for ferry purposes, from exacting any tolls they see fit to demand from persons whom they transport. Such a transfer of exclusive use and control we believe to be in excess of the power of the town. We do not wish to be understood, however, as holding that it is not within the power of the town to lease wharf privileges for such a purpose as was apparently contemplated in the execution of the lease herein involved, namely, to furnish to the traveling public a convenient and economical landing place. But there cannot lawfully be what in effect is an abandonment by the town of the right to control and regulate. Macdonnell v. I. & G. N. R. Co., 60 Tex. 590.

The order of injunction must be reversed. So ordered.

TITLOW et al. v. McCORMICK.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2653.

BANKS AND BANKING ⟸166(1)—INSOLVENCY AND RECEIVERS—RECOVERY OF TRUST FUNDS.

Complainant deposited for collection with the bank for which defendant became receiver certain school district warrants. The bank collected the same in three installments, in each case depositing the checks received to its credit in a different correspondent bank. Between the time of such deposits and its failure, some months afterward, it overdrew its accounts with two of such correspondents for purposes not shown. In the third correspondent bank it maintained a deposit at all times until its failure; the amount at that time being the smallest, and less than the collection deposited. *Held*, that the collections constituted a trust fund, recoverable by complainant from the receiver, in so far as it could be traced into his hands, and that in the case of the third bank complainant was entitled to recover the amount remaining in the account at the time

of the failure, but that in the case of the other two deposits nothing was recoverable, although the bank at the time of closing and at all times prior thereto had cash on hand greater in amount than the collections; there being no presumption that the collections ever went into such cash fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 575, 577; Dec. Dig. ⟸166(1).]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by Anna E. McCormick against A. R. Titlow, as receiver of the United States National Bank of Centralia, and the United States National Bank of Centralia. Decree in part for complainant, and defendants appeal. Modified and affirmed.

On the 22d day of August, 1913, the appellee, who was then the owner of certain school warrants issued by school district No. 9 of Lewis County, state of Washington, left them with the United States National Bank of Centralia for collection; the bank giving her this receipt therefor:

"Tacoma, Wash., Aug. 22, 1913.

"Received from Mrs. Anna E. McCormick for collection, the following warrants issued by school district No. 9, Lewis county, Washington [stating the various warrants and their respective amounts].

"The United States National Bank, Centralia, Wash.,

"C. S. Gilchrist, Vice President."

On the 31st of January following the school district mentioned issued a call for the presentation for payment of warrants Nos. 3331, 3297, 3298, and 3299, aggregating, with interest, $1,659.54, which warrants were among those left with the bank by Mrs. McCormick, and which warrants the bank thereafter presented to the proper officer of the county for payment, and received in payment thereof a check of the treasurer of the county in favor of the bank, drawn on Coffman, Dobson & Co., bankers at Chehalis, Wash., for $1,747.04, which amount included some other small items. The bank thereupon sent the check to Coffman, Dobson & Co., with instructions to deposit the amount of it to its credit, which was done—the appellant bank charging Coffman, Dobson & Co. with a like amount, the two banks being correspondents. Including the amount of this check, the appellant bank then had to its credit with Coffman, Dobson & Co. $5,046.20.

Subsequently and on the 11th of April, 1914, the school district issued another call for its outstanding warrants, which included all of the balance of the warrants owned by the appellee and so left by her with the appellant bank for collection. Three days thereafter, to wit, April 14, 1914, the bank presented all of those warrants to the county treasurer of Lewis county for payment, which were thereupon paid to the appellant bank by four checks, two on the Security State Bank of Chehalis, one for $3,598, and one for $1,765.06, and two on Chehalis National Bank of Chehalis, one for $4,912.41, and the other for $4,061.77; each of the four checks being dated April 14, 1914. The appellant bank thereupon deposited the two checks in its favor on the Security State Bank, aggregating $5,363.06, with that bank, receiving credit to itself therefor on an overdraft (in excess of the amount of the deposit) which then stood against the appellant bank on the books of the Security State Bank. The other two checks, amounting in the aggregate to $8,974.18 were on the next day, to wit, April 15, 1914, deposited by the appellant bank to its credit with the Bank of California of Tacoma, including which deposit there then stood upon the books of the latter bank to the credit of the appellant bank $19,988.02—the Bank of California of Tacoma being a reserve agent and correspondent of the appellant bank. That credit was, however, drawn upon in the regular course of business between the two banks, so that, when the appellant bank suspended and passed into the hands of the receiver, its balance with the Bank of California of Tacoma was but $1,585.36.

At the time the doors of the appellant bank were closed, which was not until September 19, 1914, it had actual cash on hand amounting to $27,899.81, and it had cash items of $4,539.63, a balance with its reserve agents amounting to $45,613.94, and a balance with banks not reserve agents of $21,486.16, making a total of $90,627.96. Notwithstanding the receipt by the appellant of the money for the appellee's warrants months before, and the disposition of it above detailed, it appears from the record that only six weeks before its failure this so trusted bank when applied to by the appellee's agent for information respecting the warrants, informed him that they had not been collected.

R. P. Oldham and R. C. Goodale, both of Seattle, Wash., for appellants.

Elmer M. Hayden, Maurice A. Langhorne, and Frederic D. Metzger, all of Tacoma, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). We regard it as clear that the relation of cestui que trust and trustee existed between the appellee and the appellant bank. In the similar case of American Can Company v. Williams, 178 Fed. 420, 422, 101 C. C. A. 634, 636, the Circuit Court of Appeals for the Second Circuit said:

"The relation of cestui que trust and trustee undoubtedly existed between the plaintiff and the Fredonia Bank. The bank violated every duty which it owed the plaintiff. The proceeds of the plaintiff's drafts held by it or its agents constituted trust funds which might be followed into the hands of the receiver, if they could be traced."

Authorities to this effect are so numerous as to make their citation unnecessary.

In the present case the two checks dated April 14, 1914, aggregating $5,363.06, received by the United States National Bank of Centralia for certain of the warrants of the appellee and deposited by that bank in the Security Bank of Chehalis, was at once credited by the latter on an overdraft of the United States National Bank of Centralia, and was thus dissipated. While the latter bank thus got the benefit of the appellee's money to that extent in the payment of its own debt to the Security State Bank, obviously no part of it could have passed into the hands of the receiver of the insolvent bank, and as a matter of course it is impossible that any of it could be traced there.

In Schuyler v. Littlefield, Trustee of Brown & Co., 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, it was distinctly adjudged by the Supreme Court that where one has deposited trust funds in his individual bank account, and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. It was in that case further adjudged, as it has been in many others, that one seeking to charge a fund in the hands of a trustee for the benefit of all creditors as being the proceeds of his property, and therefore a special trust fund for him, has the burden of proof, and if he is unable to identify the fund as representing the proceeds of his property, his claim must fail, as all doubt must be resolved in favor of the trustee who represents all creditors. This court also so held in the case of In re J. M. Acheson Co., 170 Fed. 427, 95 C. C. A. 597.

For that portion of the money of the appellee so used by her trustee in fraudulently paying in part its own debt to the Security State Bank of Chehalis, the court below therefore rightly refused her a preference over the general creditors of the insolvent bank.

The first money received by the United States National Bank of Centralia on the appellee's warrants, as has been seen, was on February 4, 1914, when it received the check on Coffman, Dobson & Co. for $1,747.04, which was with other checks deposited in that bank by the United States National Bank of Centralia two days thereafter. The next day, February 7, 1914, the United States National Bank of Centralia had on deposit with Coffman, Dobson & Co., including the money of the appellee, a balance of $6,053.43, which credit balance was reduced from time to time until, on the 14th of April, 1914, the account of the United States National Bank of Centralia with Coffman, Dobson & Co. was overdrawn, so that the portion of the appellee's money deposited by the United States National Bank of Centralia with Coffman, Dobson & Co. was likewise completely dissipated more than five months prior to the failure of the former bank. It is true that there was evidence going to show that at the time of the deposit of the appellee's money with Coffman, Dobson & Co. by the United States National Bank of Centralia, the latter bank had in its vaults $66,381.40, cash items on hand $4,654.85, with reserve agents and banks not reserve agents $67,700.16, making a total of $138,736.41; but there is no evidence even tending to show that any of that trust money ever in fact reached the United States National Bank of Centralia, or ever passed into the hands of the receiver of its assets.

The court below, in holding as it did that the appellee is entitled to a preference over the general creditors of the insolvent bank for such of her money as was deposited with Coffman, Dobson & Co., based its ruling upon a presumption that the appellee's money was drawn from Coffman, Dobson & Co. by the United States National Bank of Centralia into its own bank, and was there wrongfully mingled with its own funds, and was on hand at the time its property passed into the hands of the receiver, citing in support of that conclusion the decision of this court in the case of Merchants' National Bank v. School District No. 8, 94 Fed. 705, 36 C. C. A. 432. In that case it appeared from the findings of the master that on July 1, 1896, certain coupon bonds of school district No. 8 of Meagher county, Mont., which it had issued in the aggregate sum of $14,000, became due and payable, and that prior to that date, and for the purpose of refunding and paying those bonds the school district had issued a second series of coupon bonds in the aggregate sum of $13,000, and had sold them to one Palmer, of Helena, Mont., for $13,056; that on the 11th of the same month Palmer deposited with the Merchants' National Bank of Helena, "as a special deposit to the credit" of the school district, the sum of $13,056 under an agreement between Palmer and the officers of the bank that that money should be paid out only in the redemption and payment of the prior coupon bonds which matured July 1, 1896, and that an account should be opened therefor, known as the "Redemption Account White Sulphur Springs School District Bonds";

that in pursuance of that agreement an account was opened upon the books of the bank designated "Bonds of Meagher County"; that the officers of the bank knew that the $13,056 so received from Palmer was the proceeds of the said refunding bonds, and that the same was applicable only to the redemption of the said matured bonds. On February 13, 1897, the bank became insolvent and its receiver took possession of its property and assets, among which was cash in the sum of $19,533, he having thereafter collected from other assets $200,000 more, the total of which was insufficient to pay in full the indebtedness of the bank. Not only was the deposit of those school funds made under and pursuant to the specific agreement above stated, but the money was deposited and received in direct violation of a provision of a statute of the state expressly prohibiting such deposit and receipt. In affirming the action of the trial court in awarding to the school district the full amount of its deposit as against the general creditors of the insolvent bank, this court said:

"The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds. The fact that it did place it with other funds, and that at the time when its doors were closed there was not in its possession a separate fund in accordance with the understanding had when the deposit was made, cannot prejudice the rights of the appellee, so long as it can be shown that a sum of money equal to the amount so deposited remained in the possession of the bank, and was there when the receiver took possession. It will be presumed that of the funds so on hand $13,056 belonged to the appellee. Moreland v. Brown, 30 C. C. A. 23, 86 Fed. 257; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115, 59 Am. St. Rep. 572. It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of $13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3d the Helena bank had with the Boston bank a credit of $39,011.60, against which it drew on that day the sum of $10,000, leaving a balance of $29,011.60, which was not further reduced until July 13th, when a draft for $8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for $13,056, and requested that an account be opened, as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay to the Helena

bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of $13,056, and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district. * * * The school district could not, and did not, part with its title to the money, nor did it lend the same to the bank. The general principles which govern this case were considered by this court in the cases of Spokane County v. First Nat. Bank of Spokane, 16 C. C. A. 81, 68 Fed. 979, and Moreland v. Brown, 30 C. C. A. 23, 86 Fed. 257. In the former case it was held that the depositor of a fund intrusted to a bank, by which it has been misapplied, is not entitled to a general lien upon the assets of the bank for the repayment thereof, but that he can follow the same, so far as it can be traced in the possession of the bank, either in its original form or in forms to which it has been converted, or into a general fund, with which it has been commingled, and that his right to recover it in the latter instance will depend upon whether or not a sum of money still remains in the possession of the bank equal to the amount so due him; it being the presumption of the law that, if moneys have been disbursed out of such fund, it was the money which the bank had the right to pay out, and not the money which was intrusted to it in a fiduciary capacity."

It is obvious that the facts of the case just referred to were very different from the facts of the present one. There the bonds were sold in Boston, and the money realized thereon deposited in a bank of that city which was the correspondent of the Helena bank, which Boston bank promptly notified the Helena bank that the amount so deposited had been placed to its credit, by letter received by the bank at Helena within 11 days after the sale made by the school district to Palmer, whereupon the Helena bank gave the personal account of Palmer a credit on its books for the full amount of the proceeds of the sale of the bonds, and Palmer gave that bank his personal check for the same amount, and the account was thereupon opened on the books of the bank in accordance with the specific agreement of the parties.

Here that portion of the trust money in question that was deposited by the United States National Bank of Centralia with Coffman, Dobson & Co., was so deposited February 6, 1914, with which bank it had on deposit the next day $6,053.43, the entire amount of which, however, including the trust money, it withdrew by April 14, 1914, and on which day its account with Coffman, Dobson & Co. stood overdrawn. This was, as has been said, more than five months before the United States National Bank of Centralia suspended and before its affairs passed into the hands of the receiver. There is no evidence even tending to show that a dollar of that portion of the trust money ever passed to the trustee, nor, indeed, is there any proof as to the purposes for which it was withdrawn from the bank of Coffman, Dobson & Co., or what was done with any of it. Upon such a state of facts, it is, we think, very clear that no presumption can be indulged that any of that money ever reached the vaults of the United States National Bank of Centralia, and certainly none that any of it ever passed into the possession of the receiver of its assets. The necessary conclusion is that the court below was in error in awarding the appellee a preference over the general creditors of the insolvent bank

in respect to that portion of the trust money deposited by it with Coffman, Dobson & Co., and dissipated on or before April 14, 1914. State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, —— C. C. A. ——.

In Brennan v. Tillinghast, 201 Fed. 609, 614, 120 C. C. A. 37, 42, the Circuit Court of Appeals of the Sixth Circuit said:

"It is true that in the case of blended moneys in a bank account, consisting in part of trust funds, from which there have been drawings from time to time, it has been held, in favor of the cestui que trust, as a presumption of law, that the sums first drawn out were from the moneys which the tort-feasor had a right to expend in his own business, and that the balance which remained included the trust fund, which he had no right to use. In re Hallett's Estate, 13 Ch. D. 696, 727; Board of Commissioners v. Strawn [157 Fed.] at page 51 [84 C. C. A. 553, 15 L. R. A. (N. S.) 1100]. It is clear, however, in the first place, that this is a mere presumption, which will not stand against evidence to the contrary. Board of Commissioners v. Strawn [157 Fed.] at page 51 [84 C. C. A. 553, 15 L. R. A. (N. S.) 1100]."

What has been said with respect to the deposit with Coffman, Dobson & Co. applies equally to the deposit of that portion of the trust money made by the United States National Bank of Centralia with the Bank of California of Tacoma and thereafter withdrawn by the former bank, the purpose of such withdrawals and where the money went not being in any way shown by the evidence. The record does show, however, that such deposit of the United States National Bank of Centralia with the Bank of California of Tacoma was not entirely dissipated, but that there remained of such deposit at the time of the suspension of the former the sum of $1,585.36, which passed into the hands of the receiver of its assets, and as to which only the appellee is, in our opinion, entitled to a preference over the general creditors of the insolvent bank.

The cause is remanded, with directions to the court below to modify the judgment in accordance with the views above expressed, and, as so modified, it will stand affirmed.

GILLETTE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4563.

1. PROSTITUTION ⟸1—WHITE SLAVE ACT—"DEBAUCHERY"—"ENGAGE IN PRACTICE OF DEBAUCHERY."

Act June 25, 1910, c. 395, § 3, 36 Stat. 825 (Comp. St. 1913, § 8814), declares that any person who shall knowingly persuade, induce, entice, or cause to be persuaded, induced, or enticed, any woman or girl to go from one state to another in interstate or foreign commerce, for the purpose of debauchery, or for any other immoral purpose, or with the intent and purpose that such female shall "engage in the practice of debauchery," or any other immoral practice, shall be punished. *Held*, that two distinct offenses are charged, one mere sporadic immorality, or "debauchery," which word, while including all kinds of excessive indulgences in sensual

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

pleasures, is in the statute restricted to sexual immorality, and the other the practice of, or habitual indulgence in, such offenses.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⟸1.]

2. CRIMINAL LAW ⟸1036(8)—APPEAL—SUFFICIENCY OF EVIDENCE.

It is an unsafe practice to rely on the appellate court to consider a question not decided below, and a conviction will be not reversed on appeal for the insufficiency of the evidence, where that question was not raised below, unless necessary to prevent a failure of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2641; Dec. Dig. ⟸1036(8).]

3. PROSTITUTION ⟸1—WHITE SLAVE ACT—EVIDENCE.

Under an indictment charging the offense of inducing a female to go in interstate commerce from one state to another with the intent that such female shall engage in the *practice* of debauchery and illicit sexual relations, it was no offense for accused, who had already invited prosecutrix to dinner, to have her come from Fargo, N. D., to Moorhead, Minn., for dinner, being in Moorhead on other business, though they became intoxicated in Moorhead, and on return to Fargo had sexual intercourse.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⟸1.]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Arthur Gillette was convicted of unlawfully, knowingly, and willfully inducing and enticing a girl to go from one state to another for the purpose of debauchery, and he brings error. Reversed, and new trial ordered.

George A. Bangs, of Grand Forks, N. D. (George R. Robbins, of Grand Forks, N. D., on the brief), for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Hillsboro, N. D., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. Gillette was convicted and sentenced to the penitentiary upon an indictment charging the following offense:

"Did unlawfully, knowingly, and willfully induce and entice, and cause to be persuaded, induced and enticed, a certain girl, to wit, one ———, to go from the city of Fargo, in the state of North Dakota, to the city of Moorhead, in the state of Minnesota, by, over, and upon the line of the Fargo-Moorhead Street Railway Company, for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid ——— should engage in the practice of debauchery and illicit sexual relations with the said Arthur Gillette, and the said Arthur Gillette did then and there in furtherance of said purpose cause and aid and assist in causing said ——— to go and to be carried as a passenger over the line of the Fargo-Moorhead Street Railway Company, which was then and there a corporation engaged in the business of a common carrier of passengers in interstate commerce between the state of North Dakota and the state of Minnesota."

The evidence at the trial, taken in its most unfavorable aspect against Gillette, was substantially as follows: The girl at the time of the alleged offense was in her nineteenth year. She was living with her

mother, sister, and two brothers at Galesburg, N. D. On February 3, 1914, Gillette asked the girl to go with him to Fargo, N. D., and she consented. Gillette gave her $1.50 with which to pay her fare. They arrived at Fargo the same evening, and both registered at the same hotel, but occupied separate rooms. They attended the theater in the evening; came back to the hotel about 11 o'clock p. m. Gillette wanted to go to the girl's room, but she refused him this privilege. Gillette had offered the girl money at Galesburg as the price of sexual intercourse. On the morning of February 4, 1914, Gillette left the hotel after inviting the girl to dine with him in the evening. Nothing was said as to where they would dine.

About noon of the same day Gillette met the state's attorney of Traill county, N. D., at the Great Northern depot in Fargo, and went with him to the Comstock Hotel in Moorhead, Minn. Gillette at this time was in the employ of the state's attorney as a detective for the specific purpose of investigating the character of the house where the girl lived in Galesburg. The alleged reason for going to Moorhead was that their consultation would be more private. At about 5 o'clock of the day in question Gillette telephoned the girl from the Comstock Hotel in Moorhead, and told her to "hurry up and catch that car for Moorhead; that he was at the Comstock, and for me to come there and have supper with him." The girl accepted the invitation and went to Moorhead. Meeting Gillette at the Comstock Hotel, they both went to the grill room and had supper at Gillette's expense. Both drank intoxicating liquor, and the girl became intoxicated. Gillette requested the girl to stay at the Comstock, but she refused. They both returned to the hotel at Fargo about midnight, and according to the girl's testimony Gillette had sexual relations with her that night. The girl had been living the life of a prostitute for about two years, and the house where she lived at Galesburg was adjudged to be a house of ill fame.

The girl testified on cross-examination that she really came to Fargo at the time in question to meet a man other than Gillette. The girl had visited Moorhead before for the purpose of eating and drinking. Gillette paid the girl $5 when he left the hotel in Fargo on February 5th.

[1] The charge as pleaded in the indictment seems to be a combination of the first and second clauses of section 3 of the act of Congress approved June 25, 1910 (36 Stat. 825). That section, so far as the charge against Gillette is concerned, reads as follows:

"That any person who shall knowingly persuade, induce, entice, * * * or cause to be persuaded, induced or enticed, * * * any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of * * * debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of * * * debauchery, or any other immoral practice, whether with or without her consent."

The indictment charges that Gillette—

"did unlawfully, knowingly, and willfully induce and entice, and cause to be persuaded, induced, and enticed, a certain girl, to wit, ———, to go from the city of Fargo to the city of Moorhead, * * * for the purpose of debauchery and for an immoral purpose, to wit, that ——— aforesaid should engage in the practice of debauchery and illicit sexual relations with the said Arthur Gillette."

It thus appears that Gillette was charged with the offense described in the second clause of section 3. In other words, after charging him with inducing and enticing the girl to go to Moorhead, and causing her to be persuaded, induced, and enticed to go there, for the purpose of debauchery and for an immoral purpose, the pleader proceeds and defines what Gillette's particular purpose was in enticing the girl to go to Moorhead, and that purpose is alleged to have been that the girl should engage in the practice of debauchery and illicit sexual relations with Gillette. We refer to this language of the indictment for the reason that the statute describing the offense charged uses the words "with the intent and purpose," while the language of the first clause of the section simply uses the word "purpose." We do not stop to consider whether the word "purpose" is equivalent to the words "intent and purpose," but simply call attention to the fact that, in order to convict Gillette of the offense charged against him, the statute requires that the enticing of the girl to go to Moorhead should be with the intent and purpose, although the indictment says nothing about intent, other than what may be included in the word "purpose."

We are of the opinion that to engage in the practice of debauchery and illicit sexual relations is a different offense than the offense mentioned in the first clause of section 3. To engage in the practice of debauchery and illicit sexual relations would seem to indicate a continued course of illicit sexual relations, such as living with a woman in a state of concubinage; otherwise there would have been no necessity for using the language in the second clause of section 3, as the language used in the first clause would have been sufficient. The word "debauchery" is a word of broad signification. It includes all kinds of excessive indulgence in sensual pleasures of any kind, such as gluttony and intemperance; but the word is used in the statute with reference to immoral sexual relations.

[2] The question of the sufficiency of the evidence to warrant a conviction of the crime charged was not raised in the trial court; but the point is urged here, and we are cited to the following cases which authorize the investigation of such a question where the point has not been raised in the trial court: Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705. In this circuit the following cases are cited to the same effect: Williams v. United States, 158 Fed. 30, 88 C. C. A. 296; Keeley v. Mining Co., 169 Fed. 598, 95 C. C. A. 96; Humes v. United States, 182 Fed. 485, 105 C. C. A. 158; Pettine v. Ter. of N. M., 201 Fed. 489, 119 C. C. A. 581; Central Imp. Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121; Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205; Savage v. United States, 213 Fed. 31, 130 C. C. A. 1. It is a very unsafe practice to rely upon this court to consider a question not passed upon by the trial court. It is only in a clear case and to prevent a failure of justice that this court will interfere.

[3] We have carefully considered the evidence in the record, and

we are unwilling to affirm the judgment. Gillette's presence in Moorhead is fully accounted for upon other grounds than that of meeting the girl. The matter of dining had been mentioned in the morning; Gillette as the dinner hour approached, finding himself in Moorhead, telephoned the girl to come to the Comstock Hotel and stated for what purpose he desired her presence. When the girl arrived in Moorhead, the offense with which Gillette was charged was complete, providing the requisite intent and purpose was behind the journey. There was no locus pœnitentiæ for him after that. Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728. His intent and purpose, of course, must be found from his acts, declarations, and conduct. There is no evidence to show that Gillette, at the time he asked the girl to come to Moorhead, had the intent and purpose that the girl should engage in the *practice* of debauchery and illicit sexual relations, and hence the charge made by the indictment was not proven.

Taking these facts into consideration, we are of the opinion that there is not substantial evidence to sustain the conviction.

Judgment reversed, and a new trial ordered.

HOOK, Circuit Judge (concurring). After giving the statute the very broadest construction, and after according to the verdict all the presumptions and advantages of rules of practice to which it is entitled, I am still unable to bring myself to assent to the conviction. In the opinion of the court the case is very properly stated in the aspect most unfavorable to the accused; but it is not improper to say further that, so to state it, it was necessary to sift it out of a mass of evasions and contradictions by a woman of confessed immoral character possessed of a motive of revenge.

BRAND v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 21, 1916.)

No. 4678.

1. CRIMINAL LAW ⟸878(2)—GENERAL VERDICT ON TWO COUNTS—EVIDENCE.
Where there was evidence to support a conviction under one count of the indictment, and there was a single sentence upon the two counts, the conviction will not be reversed as without support in evidence, though one of the counts was not established.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. ⟸878(2).]

2. CRIMINAL LAW ⟸829(1)—INSTRUCTIONS—REFUSAL.
The refusal of a requested charge covered by one given is no ground for complaint, the court not being bound to follow the language of the request.
[Ed Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829(1).]

In Error to the District Court of the United States for the Eastern District of Missouri; J. C. Pollock, Judge.

Charles Brand was convicted of devising a scheme to defraud by use of the United States mails, and he brings error. Affirmed.

Roy A. Fish, of St. Louis, Mo., for plaintiff in error.

Arthur L. Oliver, U. S. Atty., and Vance J. Higgs, Asst. U. S. Atty., both of St. Louis, Mo.

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

SANBORN, Circuit Judge. The plaintiff in error was indicted in three counts for devising a scheme to defraud which he intended to effect by means of correspondence through the mails of the United States by intentionally inducing persons to pay him for his treatment and medicines by representing that by his treatment and remedies he could and would cure diseases that he knew he could not cure, and by representing to persons that they were suffering from diseases or ailments which he could and would cure, when he knew that they were suffering from no such diseases or ailments, and that he caused certain letters, copies of which were set forth in the indictment, to be sent through the post office establishment of the United States postpaid, addressed to such persons who were specified in the indictment, with the intention thereby to execute his scheme. At the close of the trial he was acquitted on the first count, convicted on the second and third counts, and sentenced on the latter counts to confinement in the jail for six months, to the payment of a fine of $500, and costs, and to stand committed until the fine and costs were paid. Two errors have been assigned, that the court should have granted the request of the defendant at the close of the evidence to instruct the jury to return a verdict in his favor, and that it should have given his request for an instruction to the effect that if in offering his remedies for sale the defendant did so honestly believing his remedies to have curative values for the diseases for which he offered them, then the fact that in order to procure the sale of them he deposited letters in the post office to induce parties to whom the letters were addressed to buy them, would not constitute an offense against the United States as charged in the indictment.

[1, 2] A careful reading, however, more than once, of the evidence in this case, has convinced that there was substantial evidence in support of the charge in the third count of the indictment, and as there was a single sentence upon the second and third counts the judgment was not without evidence to sustain it, and it may not be reversed upon that ground. Moreover, a comparison of the request for the instruction regarding the belief and intention of the defendant and its effect with the general charge given by the court conclusively demonstrates the fact that the entire substance of the request was clearly and forcibly given to the jury by the court as the law of the case. They were told, in the words of the trial judge, that:

"The question in this case is: What did the defendant believe? Did he believe in the work he was doing and in his medicines? If so, your verdict will be acquittal."

The refusal of a court to charge in the words of counsel a principle or rule of law which is fairly and clearly given to the jury for their guidance in the words of the court is not error, and the judgment below must be, and it is, affirmed.

TOMPKINS v. ST. REGIS PAPER CO.

(Circuit Court of Appeals, Second Circuit. July 1, 1916.)

No. 279.

1. PATENTS ⟸280—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.
Where suit for infringement is brought upon a patent which has expired, a court of equity ordinarily has no jurisdiction; but there may be special circumstances which give it jurisdiction, as where the facts alleged show that complainant has sustained no damages which could be recovered at law and his only remedy is by a suit to obtain an accounting for profits.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. ⟸280.]

2. PATENTS ⟸289—SUIT FOR INFRINGEMENT—LACHES.
A suit for infringement by an assignee of a patent may be barred by the laches of his assignor, which has the same effect as his own.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⟸289.]

3. PATENTS ⟸289—SUIT FOR INFRINGEMENT—LACHES.
Acquiescence and laches, however long, on the part of a patentee, may be excused by satisfactory proof that he had no knowledge or means of knowledge that his patent was being infringed, but poverty alone is not a sufficient excuse for delay in asserting his rights.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⟸289.]

4. PATENTS ⟸289—SUIT FOR INFRINGEMENT—LACHES.
Delay in prosecuting other infringers while the validity of a patent is in active litigation does not constitute laches.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⟸289.]

5. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING PAPER STOCK.
The Tompkins patent, No. 458,135, for a process of making paper pulp, in view of the prior art, and especially of patent No. 340,640 to the same patentee, is void for lack of patentable novelty; also, *held* not infringed.

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

Suit in equity by John D. Tompkins against the St. Regis Paper Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 226 Fed. 744.

The defendant is a corporation organized and existing under the laws of the state of New York, and it has its principal office and regular place of business at Watertown, in the county of Jefferson and state of New York.

The complainant is a citizen of the United States and a resident of the state of New York. He alleges that he was the first and sole inventor of cer-

tain new and useful improvements in the process of making paper pulp, and that United States patent No. 458,135 was issued to him therefor, dated August 18, 1891.

The complainant alleges that the defendant has infringed the patent above referred to, and he asks an injunction and that defendant may be decreed to account for and pay over the gains and profits realized by the defendant, and in addition the damages or treble the amount of the damages as the court may determine.

The court below, in a carefully prepared and exhaustive opinion of 28 printed pages, dismissed the bill on the ground that the patent sued upon was anticipated in the prior art, and particularly by letters patent No. 340,640 granted to the complainant on April 27, 1886, and also upon the ground that even if letters patent No. 458,135 had been valid the complainant had not infringed. From that decree this appeal was taken.

A. Page Smith, of Albany, N. Y. (Edwin J. Prindle, of New York City, of counsel), for appellant.

W. K. Richardson, of New York City (W. B. Van Allen, of New York City, on the brief), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The art to which the invention of the patent in suit relates is that of so treating fibrous vegetable substances as to prepare them to be made into paper. The raw materials used in the manufacture of paper comprise wood pulp, rags, straw, hemp, flax, jute, and so forth. From these materials come the cellulose fibers, matted or felted into a sheet, of which paper consists. It is necessary to free the cellulose fibers from all incrusting matter from which they must be isolated and set free. This is accomplished by cooking the raw materials with chemicals. The patent in suit relates to the art or process of treating fibrous and other kindred materials for their conversion into paper stock.

The patentee has been a manufacturer of a wrapping paper made from straw. There is testimony in the record showing that at one time he stood at the head of the manufacturers of straw wrapping paper. His paper was sold from New York to San Francisco, and he was esteemed "a sort of peer in the business."

Wrapping paper made from straw was of coarse texture and inferior in strength as compared with manila and wood pulp papers which began to displace it and prices commenced to decline. The patentee's mill was so situated that he could not advantageously get wood pulp, and he began to experiment to see if he could not improve the quality of his straw product.

There appear to have been three principal ways of cooking paper stock. One way has been by the soda process, used for soft woods. By that process wood is run through a chipping machine reducing it to chips three-eighths of an inch thick; the chips are put into a boiler-iron digester and boiled with caustic soda liquor. This leaves the fiber free, the noncellulose matters of the wood being decomposed by or combined with the soda.

Another way has been by the sulphite process. Under this process wood chips are boiled in a steel digester containing a solution of bisulphite of lime or bisulphite of calcium. The bisulphite solution is

made by passing sulphurous acid gas up through towers filled with limestone and at the same time water is trickled through the limestone.

Another way has been by the sulphate process. This consists in boiling wood chips in a digester under pressure in a solution of sodium sulphate containing some caustic soda and carbonate of soda.

In the patent in suit the paper stock is cooked by the sulphite process.

This patent is only one of a group of patents taken out by Tompkins for processes and apparatus for treating pulp in a digester. None of them, Tompkins testified, ever got beyond use at his own mill. There are five of the Tompkins patents. The first of his patents is No. 340,640, which was applied for on July 2, 1885, and was granted on April 27, 1886. The patent in suit was the last of the five he took out and was granted on August 18, 1891.

[1] Before considering the merits of this patent, it will be necessary to dispose of some preliminary questions. It appears that this suit was commenced on August 7, 1912, when the bill was filed. As patents can only be extended by a special act of Congress and no such act is shown to have been passed respecting this patent, it is assumed the patent expired on August 18, 1908. This suit was therefore brought four years after the patent expired. Where suit is brought upon a patent which has expired, a court of equity ordinarily has no jurisdiction. An injunction does not issue in such cases. Huntington Dry Pulverized Co. v. Virginia-Carolina Chemical Co. (C. C. 1902) 121 Fed. 136. And if the suit is one to compel an infringer to account for the profits realized during the period of infringement and to pay damages there is ordinarily a complete remedy at law. See Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975 (1881), where this question was elaborately considered.

But in Tompkins v. International Paper Co., 183 Fed. 773, 106 C. C. A. 529 (1910), we held a bill was not demurrable which was filed three days before the patent expired, and which alleged that during the six years next prior to the filing of the bill complainant had not made, used, nor sold his process nor any part thereof, nor had he sustained any actual damage during such period by the enjoyment of the invention by others. It seemed to us in that case that the patentee's remedy at law was inadequate under the circumstances, because at law the patentee could not recover more than nominal damages while in equity he could recover the actual profits; and because at law he could not prove loss of license fees and he had no established license fees; and because he could not show that he lost sales as he was not in fact selling at all; and because he could not show reduction in prices through competition as there was no competition; and because he could not show that his market was destroyed by the infringer, as he was not undertaking to establish a market. The fact that in that case the bill was filed three days prior to the expiration, and in the case at bar was brought four years after the expiration of the patent, is immaterial, provided the other facts alleged in the bill show a similar condition to that disclosed in Tompkins v. International Paper Company and which led this court to the conclusion that it reached in that case.

The bill in this case avers that during the six years preceding the filing of the bill the plaintiff did not use the patented process nor sustain any damage from infringement, and we think this brings the case within the doctrine of Tompkins v. International Paper Company.

[2] The defendant also urges that the present suit cannot be maintained because of the complainant's gross laches, inasmuch as the process he claims under his patent—the quick cook process—had been used for many years before he brought his first suit, being in notorious and unconcealed use by many paper manufacturers in this country, and that it was used as early as 1895. The claim is that as these various sulphite mills were permitted, all these years, to keep on "infringing," the complainant has no right now by a suit begun in August, 1912, to come in and ask for profits and damages from the "infringement." The fact that the complainant did not have the title during the whole period of delay does not excuse laches, if laches there has been, as the courts hold that the negligence or acquiescence of a former owner has the same effect upon the assignee's rights as his own neglect or acquiescence. Woodmanse, etc., Mfg. Co. v. Williams, 68 Fed. 489, 15 C. C. A. 520; New York Grape Sugar Co. v. Buffalo Grape Sugar Co. (C. C.) 24 Fed. 604.

[3] Acquiescence and laches, however long, on the part of a patentee, may be excused by satisfactory proof that he had no knowledge or means of knowledge that his patent was being infringed. Wortendyke v. White, 30 Fed. Cas. No. 18,050. It has been held that laches is not to be imputed to the owner of a patent because of his failure to prosecute to judgment a suit against an infringer when it appears that the complainant was disabled from carrying on litigation by lack of financial means. Bradford v. Belknap Motor Co. (C. C.) 105 Fed. 63, affirmed in 115 Fed. 711, 53 C. C. A. 293; Davis v. A. H. Reid Creamery & Dairy Supply Co. (C. C.) 187 Fed. 157, affirmed 195 Fed. 80, 115 C. C. A. 112. But in Hayward v. National Bank, 96 U. S. 611, 618, 24 L. Ed. 855 (1888) the Supreme Court said:

"No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

That was not a patent case. But the statement was quoted approvingly in Leggett v. Standard Oil Co., 149 U. S. 287, 294, 13 Sup. Ct. 902, 37 L. Ed. 737 (1893), which involved the infringement of a patent, and which is understood as laying down the rule that the poverty or pecuniary embarrassment of a patentee is not a sufficient excuse for postponing the assertion of his rights or preventing the application of the doctrine of laches.

[4] In view of the conclusion which we have reached respecting the validity of the patent, it is not necessary to consider the subject of laches as fully as under other circumstances might be incumbent. We shall therefore not consider in much detail the evidence introduced by the complainant to justify his failure earlier to institute this suit. It may be remarked, however, that in addition to his poverty, his fortune having been lost, the complainant denies that he had positive knowledge of this alleged infringement until 1908, not 1891, as defendant

mistakenly asserts. And it appears that without delay thereafter he instituted a test suit against a different infringer, the International Paper Company, which was settled in 1911. Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 945, 52 C. C. A. 559. Negotiations were then commenced to obtain a settlement with the present defendant. The negotiations being unsuccessful, this suit was instituted in 1912. The complainant insists that prior to 1908 he had continually and persistently but without success endeavored to ascertain whether his patent was being infringed. The court below seems to have been satisfied with the evidence on this branch of the case, for the whole subject was passed over without remark in the opinion which the court rendered. The delay in instituting the present suit between 1908 and 1912 is satisfactorily accounted for by the pendency of the litigation involving the validity of the patent; and, if complainant's testimony is true that he had no actual knowledge of the infringement of his patent prior to 1908, he has satisfactorily explained the delay which unexplained might debar him on the ground of laches from the right to maintain this action. As the Supreme Court has pointed out, the defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by the person's own oath, and hard to disprove. There has been and is therefore a tendency to insist that a party, thus alleging a want of knowledge, should have used reasonable diligence to have informed himself of the facts. Foster v. Mansfield, etc., R. Co., 146 U. S. 88, 99, 13 Sup. Ct. 28, 36 L. Ed. 899 (1892). During the period involved the complainant appears to have been inquiring of everybody he met who was connected with the art as to what process was being employed in the mills. It was very difficult to ascertain whether his patent was or was not being infringed, as it was not possible to ascertain it from the form of the apparatus used, or from the raw materials used, or from the nature of the product put out. We therefore are of the opinion that, all things considered, the complainant has not lost his right to maintain this suit on the ground of laches in bringing it.

[5] This brings us to a consideration of the patent. The complainant in his specification for patent No. 458,135, the patent in suit, stated that heretofore it had been the practice to subject vegetable and other kindred material from which paper stock was made to the successive action of various treating-liquids within a closed vessel or digester, and while thus inclosed to bring the treating-liquids into intimate contact with the material by spraying the liquids in a downward direction thereon, or by agitating the mass of material and liquids together, as by rotation of the digester. He added that both methods had been found in practice to be open to objection, the first, by reason of the fact that the downwardly directed streams of liquid served to pack the paper stock material upon the bottom diaphragm of the digester, the effect of which was to transform the material into a strainer or filtering mass, gather the lignine and other material picked up by the treating-liquors upon the top of the mass, and to unevenly affect the material by the treating-liquids.

He also said that it would be readily understood that, when the mass was packed upon the bottom of the digester, the upper portion of the mass would be much more affected than the lower portion, and hence the material would be fully acted upon in one portion, partially acted upon in another, and, to a great extent, unacted upon at the lowermost part of the mass. He added that agitation of the material and liquids by rotation or other movement of the digester tended in a measure to break up and destroy the fibrous character of the paper stock material thus acted on. He then went on to say:

"The object of my invention is to treat the material in a closed digester and in such a manner that no packing of the material will occur, the fiber not be injuriously affected, the adventitious materials separated therefrom, and all of the material brought into the best possible position to be evenly and effectively acted upon, and this I accomplish in a manner which I will now proceed to describe.

"It may be generally stated that the majority of the various vegetable or kindred substances from which paper stock may be made are of a lower specific gravity than water, and hence tend to float in water or in any of the treating-liquids commonly employed. It is also true that such materials will absorb the liquids within which they are immersed and when thoroughly soaked will sink or gravitate to the bottom of the vessel within which they are placed. In practice it has been found that, if the materials can be kept in a suspended condition in the treating liquid, they will be most thoroughly and effectively acted on, and also that the strength of the treating liquid may be materially reduced, as also the time required to effect the treatment.

"My improved method of treatment is based upon the theory that the material from which the paper stock is to be made should be suspended in the treating-liquid while in the digester, and while thus suspended subjected to the heating, cleansing, or chemical action of the suspending liquid."

He made but one claim, and that he stated as follows:

"The herein described art of treating fibrous and other kindred materials for their conversion into paper stock, which consists in effecting the suspension of such materials in a constantly-rising current of the treating-liquid, and while thus suspended subjecting the material to the heating, cleansing, or chemical action of the suspending-liquid."

It appears therefore that what Mr. Tompkins claims in this patent as his improved method of treatment is a suspension, in a constantly rising current of the treating-liquid in the digester, of the materials to be converted into paper stock, and while thus suspended subjecting them to "the heating, cleansing, or chemical action of the suspending-liquid."

At the time his first patent was obtained, Tompkins knew that wood was being cooked in closed digesters, rotary and upright. For instance, he knew of the Wheelright & Marshall patent, dated November 4, 1884, and that in the process there employed the circulation of the cooking liquor was taken from the bottom of the digester and by a pump or injector, returned to the upper part of the vessel to percolate downward through the mass being cooked. And he understood that straw could not be cooked in the same way that wood might be, it being a much softer and more delicate fiber than wood, and that it would pack in the bottom of the digester, thus causing the circulation to cease before the cooking was completed. So that finally he conceived the idea that if the straw or material could be held in suspension in the

cooking liquor during the entire cooking period each particle could be perfectly cooked. This he sought to accomplish in his first patent, No. 340,640. The idea was to try to effect the necessary suspension by circulating the cooking liquor upward two-thirds of the time and downward one-third of the time. When it is said that no person before Mr. Tompkins ever even hinted a suspension of the material being cooked, the fact, if it be a fact, cannot help out the validity of the patent in suit, inasmuch as Tompkins had advanced that idea in his first patent.

Then it is said that the essential feature of the patent in suit is that the suspension of the material is effected and maintained by "the constantly rising current" of the treating-liquid within the digester. How much there is in this claim is disclosed in the testimony of the defendant's expert. He testified:

"The Tompkins patent aims to effect the suspension of the materials undergoing treatment in a constantly rising current of the treating-liquid, and in order to maintain this current over the whole sectional area of the digester, as indicated by the arrows in the drawing, provides external channels for the descending return current, which is out of contact with the material. In the absence of such return channels, the currents could not possibly maintain the direction indicated by the arrows in the Tompkins drawing, and instead the descending currents would equal in volume the ascending currents, thus defeating the object of the patentee."

The court below thought that the constantly upward current of the treating-liquid was not new. The court said it was fully described and claimed prior to the Tompkins patent in patent No. 54,510, granted by the United States Patent Office on May 8, 1866, to John W. Dixon and George Harding. That patent called for a circulating tube which passed from below the diaphragm to the upper part of the digester. In this tube a reciprocating pump was placed, which was driven by machinery and produced a constant circulation of the digesting liquid from the lower chamber below the diaphragm through the tube into the upper part of the digester, or vice versa from the upper part of the chamber down through the tube and the pump into the bottom of the digester, and thence upwardly, by virtue of the pump, through the mass to be pulped.

The court in its opinion in referring to the Dixon-Harding patent speaks of its "constantly upward current." That patent indicates an upward circulation and also indicates a downward circulation. The one is no more continuous than the other, but either may be used and used continuously, to the exclusion of the other, if we correctly apprehend the matter. This no doubt was what the court meant when it referred to the "constantly upward current" of that patent.

In the first Tompkins patent, Mr. Tompkins in his specifications refers to "the old processes where the cooking liquor is circulated continuously downward" and "the material becomes compacted in the lower portion of the digester." And again he says:

"In the old processes, where the cooking liquors are circulated in one direction and downwardly continuously, the liquor is gradually weakened in its strength as it passes downward through the compacted mass."

Then he points out that one of the distinguishing features of his invention is:

The cooking of the material "in hot (about boiling) water while the latter is circulated through the former at alternate times in opposite or reversed directions, preferably downward and upward, so that all packing of the material will be prevented, and the cooking water will be made to move in such an active contact with all the particles of the material treated that they will be made to move against each other in a loosened manner in all portions of the digester and cause all the particles to be simultaneously and uniformly cooked and the soluble portions of the lignine (dissolvable in water) to be uniformly dissolved," and so forth.

Again he says:

"Another distinguishing feature is the cooking of the material with the boiling alkaline liquor under pressure while the latter is circulated through the body of the former continuously and in alternating reversed directions, preferably downward and upward at alternate times, whereby a packing of the particles of the treated material in the lower portion of the digesting-chamber, as heretofore had, is effectually prevented," and so forth.

Again he says:

"Another distinguishing feature of this invention is the treating of the disintegrated pure fiber to the action of a bleaching liquor (preferably chlorine liquor) with or without pressure, while it (the liquor) is being continuously circulated through the mass of fiber in alternating reversed directions, whereby all the particles of the fiber will be in a state of constant movement in the liquor, and be simultaneously and uniformly acted on by the chlorine or other bleaching agent held in the water, which saturates and penetrates these constantly moving fibers so that each fiber will be as effectually acted on both externally and internally by the bleaching agent as the others. The advantageous result had from this part of my invention is that the bleaching of the fiber can be effected without any handling whatever in a few hours, where in the old process it required treatment for two or more days and employment of labor to handle and stir the mass being treated, so as to expose all portions to the action of the bleaching agent, which is wholly done in the practice of my invention by the reversed circulations of the bleaching liquor."

Again he says:

"I have described my new process when a single digesting chamber is used; but, if preferred, this process can be practiced in an apparatus employing two digesters properly connected with each other by suitable pipes so that when the circulations of the treating waters and liquors are upwardly through the mass in one digesting chamber they will be downwardly through that in the other, and the reverse alternately, when the same advantageous results will be had as when the successive treatments are had in a single chamber."

The alleged novelty of his first patent is that he circulates the liquid alternately upward and downward by means of the piping and pumps described, and he states that by his process "the material is made to be constantly suspended in the treating liquor in the best condition for the active circulation of the treating liquor between the suspended particles" by the reversed currents.

In his testimony in this case he testified repeatedly that in actual operation under this first patent he circulated the liquor upward two-thirds of the time and downward one-third of the time.

The difference between the process of Tompkins' first patent and his last, the patent in suit, is in this: In his first patent he circulated

the liquid upward for two-thirds of the time, and downward one-third of the time, while in the patent in suit the circulation from below is said to be "always from below upward." Nevertheless provision is made for a reversed direction of the circulation in treating certain classes of the material. In his specification he says:

"When treating classes of paper-stock material, it is occasionally found that the light feathery portions tend to be carried upward and to lodge against the digester surface of the diaphragm *B*. As the diaphragm becomes covered with this material, the circulation is of course impeded, and in order to overcome this difficulty I have arranged the pump *G* and the various communicating pipes so that the direction of circulation of the liquid within the digester may be reversed and the liquid drawn from the lower chamber C^1 and delivered into the upper chamber *C*, and from thence through the diaphragm *B* in a downward direction upon the material within the digesting chamber."

Under both patents the result stated is the same, the prevention of the packing of the materials at the bottom of the digesting chamber. Moreover, in practicing the invention of the patent in suit Mr. Tompkins used precisely the same apparatus he used in practicing the invention of his first patent. Mr. Tompkins was asked: "When you conceived the principle of suspension as set forth in the patent in suit herein, what method of cooking were you then using?" He replied: "We were using an upright digester equipped with pipes and pumps for reversing the cooking liquor by circulating it up two-thirds of the time through the mass and downward one-third of the time." He was asked: "In other words, you were using an apparatus designed to handle circulating liquor, is this correct?" He replied: "It is." He was asked: "What steps did you take to utilize the principle of suspension disclosed in the patent in suit?" He replied: "We took the apparatus we were then using and ran the pump slowly so as to produce a continuous upward current of the treating liquid sufficient to overcome specific gravity of the cooking material." He was asked: "That is, I understand that you applied your new method as disclosed in the patent in suit to the apparatus which you then were using and which was designed to circulate liquor, is this correct?" He replied: "It is."

In view of the first Tompkins' patent, this court is unable to find in the patent in suit any patentable novelty. The official chemist of the American Paper & Pulp Association testified on behalf of the defendant. His testimony shows him to be thoroughly informed as to the processes of paper manufacture in this country and abroad. His testimony is absolutely convincing that the theory of the patent in suit is, to use his language, "fully disclosed" in the first Tompkins' patent, and that "the apparatus and method for carrying the theory into effect are also fully described" therein.

This expert was asked "whether or not the cooking of pulp, by the sulphite process, in a digester provided with a steam inlet pipe at the bottom, and a relief pipe and valve set therein, and connected to the top of the digester, was carried on continuously in practically every pulp mill in the United States ever since the starting of the digesters of the Richmond Paper Company at Providence in 1884, and whether or not the carrying on of the sulphite pulp process, by means of di-

gesters similarly equipped, was generally known and publicly discussed in trade papers and at meetings of trade and scientific societies." His answer to the question follows in part:

"With the exception of a very few Mitscherlich digesters, a few Globe rotaries, and three or four Salmon-Brungger digesters, which were heated by a jacket, for the purpose of forming a protective lining, through deposition of lime salts upon the inner wall of the digester, it is true that the cooking of pulp by the sulphite process in digesters provided with a steam inlet pipe, at the bottom, and a relief pipe and valve set therein connected to the top of the digester, was carried on continuously and universally, and to a constantly increasing extent, in sulphite pulp mills of this country to the exclusion of any other means of cooking until to-day probably not less than 5,000 tons of sulphite pulp is daily so produced in this country and great additional quantities in Europe. Precisely similar methods were employed in Japan as early as 1885, as the result of the visit of Mr. H. Okawa, to which I have previously referred.

"The method described, and the apparatus itself, have been well known in the trade, and among pulp and paper chemists and engineers and to all those skilled in the art for many years, beginning with 1883 in this country, at Richmond Paper Company, among those there employed and rapidly extending generally throughout the classes indicated."

The court below was right in its conclusion that the patent in suit was not valid and was not infringed.

Decree affirmed.

JUDSON L. THOMSON MFG. CO. v. CLARK et al.

(Circuit Court of Appeals, First Circuit. September 12, 1916.)

No. 1178.

PATENTS ⊂=328—INFRINGEMENT—RIVET SETTING MACHINE.

The Maenche patent, No. 753,281, for a rivet setting machine, construed with respect to the device for preventing the tipping of short and top-heavy rivets when they descend from the raceway, *held* not infringed by the device of the Coombs patent, No. 1,128,852, which accomplishes the same result, but by a different and not equivalent mechanism.

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

Suit in equity by the Judson L. Thomson Manufacturing Company against Willet M. Clark and others. Decree for defendants, and complainant appeals. Affirmed.

Daniel A. Rollins, of Boston, Mass., for appellant.

Henry N. Paul, Jr., of Philadelphia, Pa. (Emery, Booth, Janney & Varney, of New York City, on the brief), for appellees.

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

BROWN, District Judge. This appeal presents a question of infringement of claims 1, 2, and 5 of letters patent No. 753,281, March 1, 1904, to A. T. Maenche, for improvements in rivet setting machine.

Rivets with large heads and short shanks are topheavy, and likely

to tip over when they descend from the raceway, and then are not properly seated to be driven by the plunger. The patentee says:

"The invention consists in a machine of the character described, of a raceway, a reciprocatory plunger, an anvil, a rivet carrier, * * *"

—and, finally, the element to which this case particularly relates:

"a stop and holder so constructed as to stop the rivet in line with the center of the anvil and plunger, and also projecting above the top of said rivet to prevent the same from tipping out of a vertical position."

The claims are as follows:

"1. In a rivet setting machine, a reciprocatory driver, an anvil, a raceway, a rivet carrier, and a rivet stop and holder located on the opposite side of said carrier from that upon which the rivets approach said carrier.

"2. In a rivet setting machine, a reciprocatory driver, an anvil, a raceway, a rivet carrier and a rivet stop and holder located on the opposite side of said carrier from that upon which the rivets approach said carrier, and constructed to project over the top of a rivet resting upon said carrier."

"5. In a rivet setting machine, a reciprocatory driver, an anvil, a raceway, a rivet carrier, and a rivet stop and holder located on the opposite side of said carrier from that upon which the rivets approach said carrier and constructed to project across the path of motion of said driver, and above the head of a rivet resting upon said rivet carrier."

What is described in the claims as a "rivet stop and holder" is referred to in the specification as an "improved stop" and as "rivet stop *40*." It serves to stop, not only the lateral motion of the rivet from the raceway, but, because it projects over a portion of the top of the rivet, it stops upward vertical motion of the rivet and prevents the same from tipping at an angle. It fairly may be said that it stops both horizontal and upward vertical movement of the head of the rivet.

In the defendants' device the horizontal movement of the rivet is checked, as in devices of the prior art, by the wall of the rivet seat. The provision against upward movement of the rivet head and consequent tipping is a pin or finger freely mounted within the axis of the plunger, and hanging by its own weight to a short distance above the top of the rivet. Passing from the raceway the rivet will be clear of contact with the pin if seated in a proper position.

The defendants' device is shown in the patent No. 1,128,852, February 16, 1915, to J. W. Coombs. The specification of this patent says:

"The rivet, before coming to rest upon the seat, is subjected to jars or tremors, which tend to cause a topheavy rivet to sometimes invert, unless means are provided to prevent this. The position of the pin *11*, directly over the top of the rivet, is such that the top of the rivet will come into contact with the end of this pin, before it can turn over, and the pin has sufficient weight and is so situated as to prevent such inversion of the rivet."

It is the contention of the appellant that although in the patent in suit the rivet stop consists of a single piece of metal which stops both lateral and upward vertical movement of the rivet, and although the defendants' lateral stop is that of the prior art, and although the pin is a projection in line with the center of the plunger and is attached solely to the plunger, these two parts are mechanically equiv-

alent in functions to the single part or "stop and holder" of the appellant.

It is, of course, possible that the functions of a curved stop, which stops both horizontal and vertical movement, might be performed by using a broken line, instead of a regular curve. Ives et al. v. Hamilton, Ex., 92 U. S. 426, 23 L. Ed. 494. It is, nevertheless, true that the defendants borrow nothing from the complainant, but only from the prior art, in respect to the means for stopping lateral motion. Complainant's combination as a whole, however, is characterized by the novel feature of a stop against vertical displacement which extends above the head of the rivet. It does not appear that in rivet setting machines such a stop was previously used.

But the difficulty in the present case is that if we should find the addition to the old machine of a stop overhanging the head of the rivet, and which stops tipping just as the plunger itself, if close to the seat of the rivet, might prevent tipping, to be an infringement of the claims in suit, this would be to ignore other structural features and to try the case as if the patentee had secured a broad claim for the use of a stop projecting over the top of the rivet for the purpose of preventing tipping. We have no means of knowing whether a claim of such breadth would have been allowed by the Patent Office, and certainly the question of invention would be different from that presented by a claim for a restricted combination. The claims of this patent must be construed rather as for the specific structure whereby the rivet is fed and maintained in a position for the plunger than as an embodiment of a broad inventive idea of preventing the tipping over of the rivet by interposing a stop against upward vertical movement.

We appreciate the force of the complainant's suggestion that the conception of the patentee was not only to put a stop over the head of the rivet and in the path of the driver, but to allow the driver to operate either by slotting it so that it could straddle the stop, or by providing a stop or holding device with an aperture through which the driver could descend. It is quite true that the extension of the stop over the head of the rivet required a modification of the driver or plunger, and that the defendants adopted not only the idea of a stop over the top of the rivet, but also the idea, which was incidental to it, of so modifying the plunger of the prior art as to make it avoid striking the stop in its descent. Structurally, however, the defendants' means for doing this is quite different from complainant's; and in view of such difference, and of the fact that a patent has issued to the defendants, we agree with the opinion of the District Court that the two devices are too different in function and in mode of operation to permit calling either an equivalent for the other.

The comparison of devices is stated in the complainant's brief, as follows:

"1. The patented machine stops the rivet in the rivet holder by the vertical portion of the 'stop and holder'; defendants' machine stops it by the high back wall of the rivet carrier (of the old art).

"2. The patented machine 'holds' the rivet by the horizontal part of the

'stop and holder' situated over the rivet head; defendants' machine 'holds' the rivet by the guard finger over the rivet head.

"3. In the patented machine the plunger straddles the holder portion of the 'stop and holder' in order to descend and drive a rivet; in defendants' machine the plunger, in effect, straddles the guard finger in order to descend and drive the rivet—that is, the guard pin retreats up into the plunger, which is the same thing.

"4. In both constructions the 'throat' of the rivet carrier is left clear and unobstructed for the passage of the rivet on to the rivet carrier from the raceway."

Conceding that infringement may not be avoided by substituting for a single part, which performs two functions, two parts, each of which performs one of the two functions in the same way, it yet may be said that in respect to the means for performing the function of stopping lateral motion the defendants borrow nothing from the complainant, but follow the prior art, and that they add to the old combination a new element which structurally is not an equivalent for, though it performs one of the two functions of, the complainant's stop and holder.

It may also be conceded that in the adoption of a stop partly overhanging the head of the rivet, and in the corresponding provision of means to enable the plunger to avoid contact with the stop, the defendant's device resembles in a general way the complainant's. This feature, however, is not specifically referred to in any of the claims in suit; and the projecting pin, freely mounted in the axis of the plunger, though performing a stopping function, is a mechanical solution of the idea of preventing an overhanging stop from interfering with the action of the plunger, which is substantially different from the complainant's means of combining vertical stop and plunger.

The defendants' combination of the two elements, the stop and plunger, is not shown to be a mere mechanical equivalent for the complainant's combination of these two elements, but, on the contrary, seems to involve an original solution of this problem, or at least a solution not suggested by the patent in suit.

We are therefore of the opinion that the claims of the patent in suit, and the claims of the patent to Coombs, No. 1,128,852 covering defendants' structure, are for distinct combinations, and that the defendants' device does not infringe the first, second, and fifth claims of the Maenche patent, No. 753,281, now in suit.

The decree of the District Court is affirmed, and the appellee recovers costs in both courts.

PEERLESS MACHINERY CO. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, First Circuit. September 12, 1916.)

No. 1150.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—FOLDING MACHINE.

The Drake and Folsom patent, No. 727,313, for a folding machine, used for folding shoe uppers, claim 4, relating especially to the feature that the mechanism for operating the trimming knife is "normally inoperative and adapted to be made operative by the operator," as limited by the prior art, *held* not infringed.

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

Suit in equity by the United Shoe Machinery Company against the Peerless Machinery Company. Decree for complainant, and defendant appeals. Reversed.

Richard P. Elliott and Francis J. V. Dakin, both of Boston, Mass., for appellant.

Frederick P. Fish and Alexander D. Salinger, both of Boston, Mass., for appellee.

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

BROWN, District Judge. This appeal involves the question of infringement of letters patent No. 727,313, May 5, 1903, to Drake and Folsom, for folding machine. Claim 4 is as follows:

"4. A folding machine comprising a work support, an edge-bender, work-feeding means co-operating with said bender in turning the edge portion of the work progressively over the body portion, a presser for progressively compressing the turned portion, a movable snipping-knife having a shearing edge projecting over the edge portion of the work, a fixed shear-blade arranged to support the said edge portion, and means for operating the movable knife, said means being normally inoperative and adapted to be made operative by the operator."

The question before us relates to means for operating the movable knife, and particularly to the following expression:

"* * * Said means being normally inoperative and adapted to be made operative by the operator."

The specification states that when the edge to be folded is substantially straight the snipping mechanism (i. e., the knife and its actuating means) is allowed to remain inoperative.

When the edge portion of the work to be folded is curved, it is desirable that the material be slitted to enable the curved edges to be smoothly folded, without wrinkles or bunches. The specification states that the machine is adapted to fold the edge of a piece of material whether said edge be curved or straight.

The relative amount of time that the knives are in use or disuse while the folding operation continues will depend upon the character of the work. If the edge is all straight, the knife is not used; if all curved, the knife will be used throughout the folding operation.

If the edge is partly straight and partly curved, the knife will be brought into operation only at the curved portions.

If the length of straight edge exceeds the length of curved edge, the knife will be in operation during the smaller part of the folding operation. When the material has an edge which is first straight, then curved, and then straight, it is desirable to begin folding with the knife out of operation, to throw it into operation when the curve is reached, and again out of operation when the curve is passed.

The vamps of boots and shoes, referred to by the patentee as "parts of boot and shoe uppers," are material with an edge of this form. By claim 4 now in suit, and especially the words, "normally inoperative and adapted to be made operative by the operator," the complainant seeks to cover that adjustment of the cutting mechanism which is said to be most convenient for use in folding shoe uppers.

If this claim is to cover such adjustment it follows that any maker of a folding machine which may be designed for folding edges either straight or curved or both straight and curved is excluded from what may be the most convenient initial arrangement for a particular class of material in which the curved portion of the edge is comparatively short and is intermediate between two lengths of straight edge.

We are of the opinion that the prior art prevents such a limitation of the use of a combination of folding and cutting mechanism since it discloses means whereby the cutting operation may, at will, be suspended or brought into operation while the folding operation continues. Such machines are described in patent No. 285,823, October 2, 1884, to Lawton; patent No. 294,394, March 4, 1894, to Lufkin; patent No. 713,657, November 18, 1902, to Lufkin. These are so fully described in the opinion of the District Court that repetition is unnecessary. In each is disclosed means for suspending the cutting mechanism whenever it is desired to do so.

It is true that neither of these patents indicates an intention to use the knives only when the edge is curved, and to suspend their use at straight edges, but expressly indicates only the suspension of cutting to pass over seams; but they indicate the general purpose of suspending the cutting operation while the folding operation continues. As their mechanism is adapted to do this at any time desired, it is obvious that no subsequent inventor could patent such mechanism when used to suspend the operation of the cutters at straight portions, or when starting with the cutting suspended on work where the first edge to be folded is straight.

This patent cannot be enlarged in scope, nor the prior art narrowed, upon the assumption that it was an invention to use the cutter only on curves when the edge comprised both straight and curved portions.

As the cutting mechanism was introduced to assist in folding at curves, there could be no broad inventive conception in using it for that purpose only, though there might be room for invention in respect to the means whereby the cutting mechanism could be controlled independently of the folding mechanism.

We cannot make the adoption of the mode of operating so as to cut only on curves the test of infringement by the defendant.

We agree with the view of the District Court that the patentees' advance over Lawton or Lufkin is measurable by the extent to which their mechanism is better adapted to carry out the idea of cutting only on curves, and folding uncut on straight portions.

Before the patent in suit, the operator of a Lufkin machine, by depressing a lever or treadle, was able to discontinue the action of the cutting mechanism without interfering with the other operations. As was said in the opinion of the District Court:

"The important difference * * * lies in the fact that depression and holding down of the Lufkin lever renders and keeps the cutting mechanism of the machine inoperative, permitting it to become again operative only when the lever is released, while depression and holding down of the patentee's lever renders and keeps the cutting mechanism operative until release of the pressure lets it become again inoperative."

We are of the opinion, however, that this difference does not constitute a patentable invention.

As the Lufkin combination includes means whereby, at the will of the operator, the cutting mechanism operates or discontinues operation, it is merely a matter of reversal of order of operations to choose that which is most convenient for particular work. We agree with the expert testimony of the defendant upon this point. It is a mere difference of convenience between two adjustments, one of which is the substantial equivalent of the other.

This greater convenience, moreover, is not an essential feature but merely an accidental feature, in a folding machine designed to fold edges whether straight or curved, and in whatever order they may be presented.

If it be true, as was testified by one witness, that in certain work the knives are out of operation 90 per cent. of the time, and, therefore, that it is easier for the operator to hold down a treadle for 10 per cent. of the time to put the knives in operation than to hold it down for 90 per cent. of the time to hold them out of operation, and if this adjustment, by reason of its superior convenience, amounts to a patentable invention, it would seem to follow that for work which is mostly curved the normally operative position, because of its superior convenience for that kind of work, would, on like grounds, be patentable, and that after the invention of a machine like Lawton's, capable of either adjustment at will, he could be deprived of the right to use either, and thus of the use of his machine.

After the invention of mechanism whereby the operator may, at will, use his cutting mechanism at any time during the folding operation, no subsequent patentee can claim the superior convenience of starting his folding operation before starting his knives as an independent invention. The scope of mechanism capable of adjustment at will cannot be limited by one who merely is first to adjust it for the most convenient use upon particular material. Whether it is best to start with knives in operation or out of operation, whether it is better to throw them from the operative to the inoperative, or from the inoperative to the operative position, how long they are to be maintained in either, and the relative convenience of one over

the other, are all matters which relate to the operation of the mechanism and which will vary according to the work to be done.

The machines of the prior art as well as the machines of the patent in suit, must be regarded as folding machines adapted to various kinds of work, and subject to the most convenient adjustment for any particular variety of work.

The inventor of independently operated cutting mechanism combined with folding mechanism cannot be deprived of the right to adapt the order of operations to any material which is presented for folding. In effect, by claiming cutting means normally inoperative, the patentees seek to exclude other inventors of like combinations from that particular adjustment which the shape of a shoe upper makes appropriate.

The words "normally inoperative" are not sufficiently definite to be descriptive of mechanical elements. It is perhaps more usual to find examples of mechanism which is normally inoperative, and is brought into operation at the will of the operator, than to find examples of mechanism which is operative until thrown out of operation by the operator. In view of Lawton especially, who provides means for adjusting the knives in either position, whether at the outset of the work or during its continuance, there can be no patentability in a claim for these elements set in one adjustment or the other. The means under the control of the operator for either adjustment anticipate any ordinary adjustment by the machine builder in either as a fixed position.

The second distinction is based upon the fact that Lufkin, instead of controlling the knife, removes the shear block out of coaction with the knife, and that the defendant's control of the knife is an advance over Lufkin in this respect. This, however, has no relation to the question which is presented as to the relative convenience of means which are normally inoperative and means which are normally operative; nor is this distinction of any consequence in respect to the Lawton machine, in which the knife is moved, and not the shear block as in Lufkin. If there is any substantial defect in the Lufkin machine owing to the fact that the shear block is governed rather than the knife itself, this is not relevant to the question which is raised by the words, "normally inoperative and adapted to be made operative by the operator."

The substance of the case as to infringement is the contention that the normally inoperative position is better when only a comparatively small amount of slitting is to be done. No evidence has been offered to show the amount of time required for the whole operation of folding an upper, or to show that as a substantial practical matter the holding down of a treadle throughout the greater part of a whole operation rendered the Lufkin machine impractical for use by the ordinary operator, or more difficult than the operation of many treadle controlled machines. It is not enough to say that one machine requires the treadle to be held down longer than the other. From a practical point of view this may amount to nothing, especially if the whole time for the operation is short.

Upon the whole we are of the opinion that in view of the prior art the defendant is at liberty to make its initial adjustment of its cutting device "normally operative" or "normally inoperative," as it sees fit, according to the character of the work for which the folding machine is desired.

The decree of the District Court is reversed, and the case is remanded to the District Court, with instructions to dismiss the bill; and the appellant recovers costs in both courts.

SOUTHERN PLOW CO. v. BENTON MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1916.)

No. 2725.

PATENTS ⊂=328—VALIDITY—EVIDENCE.

The Rosenbaum patent, No. 807,967, and the Haiman patent, No. 815,698, for cultivators or harrows, *held* invalid in view of the prior art, not showing invention, but mere mechanical skill.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the Southern Plow Company against the Benton Manufacturing Company. From a judgment for defendant, complainant appeals. Affirmed.

John M. Coit, of Washington, D. C., for appellant.

J. E. Hall and Alexander Akerman, both of Macon, Ga., for appellee.

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

FOSTER, District Judge. In this case the Southern Plow Company, as owner of letters patent of the United States, Nos. 807,967, granted December 19, 1905, and 815,698, granted March 20, 1906, by virtue of transfer and assignment from the original patentees, Eugene Rosenbaum and Elias Haiman, respectively, brought its bill against the Benton Manufacturing Company, alleging infringement, and praying for an injunction and an accounting. The defendant answered, denying that Rosenbaum and Haiman were the original inventors of the devices patented to them, and setting up numerous instances of prior use and publication. On these issues the matter was referred to a master, who reported in favor of defendant. Exceptions to his report were overruled, and a decree entered by the District Court dismissing the bill. From that decree this appeal is prosecuted.

The patents in suit are for a cultivator or harrow, designed to be drawn by a horse and guided from the ground the same as an ordinary plow. Claim No. 1 of the Rosenbaum patent is as follows:

"A beam, pairs of parallel bars connected pivotally with and extending in opposite directions from the beam, earth-engaging members pivotally connecting the parallel bars and serving to keep them in parallel relation, a circular brace securely connected with the beam, and means for connecting one of each pair of parallel bars adjustably with the circular brace."

Claims 2 and 3 are substantially the same, except that the inventor allows latitude for the substitution of some other kind and shape of brace, instead of the circle above described.

The Haiman patent is substantially the same as the Rosenbaum, the main difference being that the brace is elliptical, instead of circular, and very much smaller in circumference. Defendant's implement is practically identical with the Rosenbaum machine, except that an elliptical brace, similar to the Haiman device, but approximately the same size as the Rosenbaum circle, is used, and this is strengthened by a bar across and on top of the beam at right angles, in the center of the brace. It may be assumed that defendant has infringed complainant's patents if they are valid, notwithstanding it has also obtained patents on its device.

The master found the parallel bars and earth-engaging members of plaintiff's device to be identical with the device patented to Blount and Guice, letters patent No. 633,563, dated September 26, 1899, some six years prior to the issue of plaintiff's patents, and the circular brace to be similar to a device used in the same manner and for the same purpose patented to Gilliard, letters patent No. 26,581, dated December 27, 1859. Considering these prior patents, the master concluded the combination as made by Rosenbaum and Haiman disclosed mere mechanical skill, not amounting to patentable invention.

There can be no doubt that the intention of each of the inventors above named was to design a harrow with adjustable plow points depending from bars that might be fixed at different angles to the beam, so as to throw the earth to either side, or the center, as occasion might require. That each of the said inventions may be so adjusted is beyond dispute. Gilliard, who is perhaps the man with the original idea, used a circular brace with a single bar, on each side of the beam carrying adjustable plowing points. Blount and Guice used parallel bars for carrying the plowing points and other straight bars connected to different points on the beam for holding the parallel bars at the desired angle. Rosenbaum used the circular brace, and Haiman an elliptical brace, for the same purpose.

Considering the object in view, the shape of the brace was unimportant, and possibly the patents in suit might be held to be anticipated by the Blount and Guice and other patents in the record. That particular question, however, is not material, as the claim relied on is for the combination including the circular brace. Beyond question the Rosenbaum and Haiman devices are combinations of the Blount and Guice and the Gilliard devices. This is not seriously disputed, but it is contended by plaintiff that this combination of old elements is new and useful, and in combination the said elements perform functions not possible in either of the other implements. To that end it is argued that the circle used by Gilliard does not act as a brace to hold down the ends of the bars and prevent their twisting when the plow points come in contact with the earth, while in the Rosenbaum and Haiman devices it does. Except for the theoretical speculation of plaintiff's expert, there is nothing to show that each of the four said implements, as well as defendant's, would not do

exactly the same work when practically operated. Incidentally it may be noted the preponderance of expert testimony is on the side of the defendant. Obviously the contention is untenable. Unless the various members of the cultivators were made strong enough to resist the strains to which they would be subjected in the ordinary operation of the implement, the machine would be useless. How a circular brace could perform certain functions on one machine, and not on another almost identical, is inconceivable. No particular dimensions of any member are attempted to be patented and the making of them large enough and strong enough is a mere detail of construction. No doubt the implement manufactured by plaintiff is useful; but, if the form of the means used to hold the teeth-carrying bars at the desired angle is material, it is certain the circular brace performs exactly the same functions, and no others, on the Rosenbaum and Haiman devices, as it does on the Gilliard device. Every feature of plaintiff's devices has been anticipated, and the combination discloses only mechanical skill, not amounting to invention.

The judgment of the district court was right, and it is affirmed.

WALKER, Circuit Judge (dissenting). It seems to me that the record in the case makes it plain that the joint effect of the two patents in suit was to disclose a new type of farming implement. But the view which has prevailed is that nothing more than mechanical skill was displayed in so bringing previously known devices into juxtaposition and co-operation, and that the result was what is known in patent law as a mere aggregation, as distinguished from a true combination.

The bringing together for coaction of previously known devices or mechanical elements is what is known as a mere aggregation, which is not patentable, if no new and useful result is thereby attained; but the old devices or elements as newly associated produce only the same results and in the same way, except possibly in a different order, as previously were produced by their action singly, or as some of them formerly were brought into co-operation. But, however old and familiar all the constituents of a newly devised association of elements or devices may be, if by means of it a new and useful result is produced, or an old result is attained in a new and materially better way, what is accomplished is a new combination, which is as much entitled to be protected by a patent as a new machine or composition of matter. Webster Loom Company v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Expanded Metal Company v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Proudfit Looseleaf Company v. Kalamazoo Looseleaf B. Co., 230 Fed. 120, 144 C. C. A. 418; New York Scaffolding Company v. Whitney, 224 Fed. 452, 140 C. C. A. 138. If there is the requisite new and useful result or the attainment of an old result in a materially better way, it does not matter that the combination, after it has once been suggested, seems so simple and obvious that one wonders how it happened to be overlooked by others mechanically skilled and engaged in the same field. The inquiry as to whether what is disclosed is a mere me-

chanical advance, or evidences the exercise of the creative faculty amounting to a meritorious invention, is not to be determined by conjectures of what readily might have been seen but was not. If the suggested change from the prior art is such that it meets the approval of the Patent Office, there arises the presumption of invention which attaches to the issue of the patent. And the adoption of the suggested change by those engaged in the art, who, it may be supposed, would have made the change before if it had occurred to them, is a further and persuasive evidence of invention. Diamond Rubber Company v. Consol. Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Expanded Metal Company v. Bradford, supra. The persistence of the appellee in using in its cultivators substantially the same combination which the patents in suit disclosed, and also in a patent embodying an additional feature or features which it subsequently obtained, is evidence, not only of the novelty and utility of the combination, but of its patentability.

But it is urged that the evidence of invention is rebutted by the disclosure that what was accomplished amounted merely to making the long-known device of a circle fastened to a plow beam over and attachable, in different positions with reference to the beam, to single bars carrying plow points, as disclosed in the Gilliard patent issued in 1859, serve the purpose of bracing parallel bars with pivotally attached spring teeth or plow points, the last-mentioned construction, but without the bracing feature of it, also being one which was previously known. The rulings above cited show that it does not necessarily follow from this disclosure that the new combination was not patentable. That depends upon the nature of the results attainable by the use of the new combination. The report of the master contains the following:

"The placing of the solid circular or elliptical brace over the parallel bars as shown in the Rosenbaum and Haiman patents is an improvement over the one bar as shown in the Gilliard patent for the reason that there is less tendency to twist and the resistance is more evenly distributed over the machine."

The District Judge, in the opinion accompanying the overruling of exceptions to the master's report, says:

"It is true that the principal claim of the plaintiff is for its combination and improvement of the effective features of the cultivator, as set forth in its patents, and clearly described in the master's report. Undoubtedly such combination is a fact. It is more; it is a valuable fact, and the combination must be highly useful, particularly in the shallow surface cultivation of the crops peculiar to the Southern States. But the conclusion of the master that this combination is the result of mechanical skill, and not invention, seems unanswerable."

In the opinion of the writer the last-stated conclusion is one which is not warranted, where the fact was, as in effect it was found to be, that the combination disclosed by the patents in suit called for a reassembling of old elements or devices in such a way as to get a new coaction in a complete workable farming implement capable of effecting a better cultivation of the soil than was attainable by the use of any previously known implement which otherwise embodied the agen-

cies which were brought into co-operation. The evidence in the case and the findings of fact supported by it are such that the decree appealed from involves the assumption that one who is the first to devise a farming implement which enables the user of it to cultivate the soil better or easier than could have been done before with the elements made use of as they previously were employed does not come within the description of the statute (R. S. § 4886 [Comp. St. 1913, § 9430]) which provides that:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof * * * may * * * obtain a patent therefor."

My conclusion is that that assumption is unwarranted, and that it follows that the decree was erroneous, and should be reversed.

BUMP'S PERFECTED PAPER FASTENER CO. et al. v. MAX GESSLER, Inc.

(Circuit Court of Appeals, Seventh Circuit. May 26, 1916.)

No. 2298.

PATENTS ⊂=328—INFRINGEMENTS—WHAT CONSTITUTES.

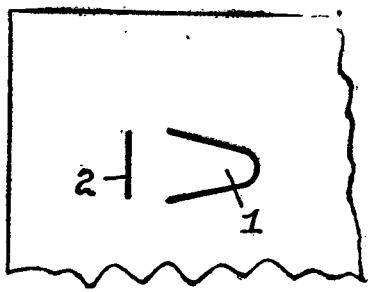
The Bump patents, Nos. 1,009,644 and 1,065,903, for devices for fastening together sheets of paper by means of incisions and flaps made in the sheets, *held* limited by the prior art, and, as limited, not infringed by defendant.

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

Suit by Bump's Perfected Paper Fastener Company and others against Max Gessler, Incorporated. From a decree for dismissing the bill, complainants appeal. Affirmed.

Appellee is charged with infringement of letters patent to G. P. Bump, No. 1,009,644, November 21, 1911, and No. 1,065,903, June 24, 1913. The last is for a device for fastening together sheets such as paper. Application was filed May 14, 1909, and upon division of this application, there was filed an application for a method patent for fastening together paper and other sheets, in pursuance of which the first-named patent was granted. Fig. 1 of the application for the method patent illustrates the incisions to be made in the sheets, and the one claim of this patent explains the incisions and the manner of making the fastening. They are as follows:

FIG. 1.



I claim as my invention:

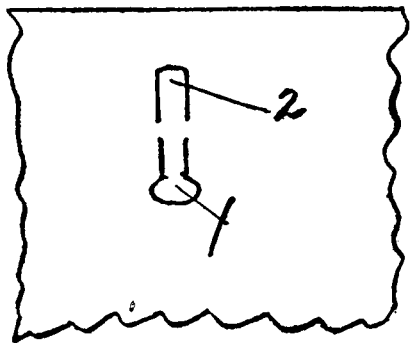
"The herein described method of fastening together paper sheets or the like consisting in superimposing said sheets, cutting a tongue therefrom and cutting a slit therein, folding the tongue back, then bending it toward the slit at a point intermediate of its length, and then drawing this bent portion of the tongue through the slit in advance of the end of said tongue, substantially as described."

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

The following illustrates appellee's alleged infringing method:

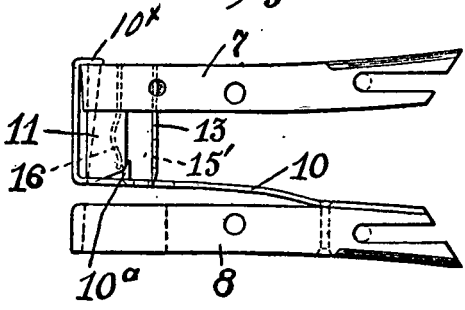
Two incisions *1* and *2* are made through the sheets, forming a tongue *1* having at the free end lateral shoulders or ears. It is bent down, back, and up through the opposite slot-like opening made by pressing forward the tongue 2, and the shoulders or ears being pushed through the narrower slot, and springing back to their original shape, rest across the slot on the adjacent surface of the sheets, preventing tongue *1* from going back, thus locking the sheets together.

FIG. A.



The device patent of which infringement is charged is in the form of a hand punch with handles, which, on pressure, bring together two parallel jaws, which jaws, with equipment thereof, are illustrated by

Fig. 2.



One of the jaws is equipped with a cutter *11* and back of this a blade or slitter *13*. The cutter is of shape to cut the tongue *1* of Fig. 1, and the slitter is a flat piece of metal with sharp end, to cut the slit *2*. The sheets to be fastened are inserted between the lower jaw *8* and the spring *10*, and as the jaws 7 and 8 are contracted the descending spring holds the sheets together while the cutter *11* cuts the tongue, and the slitter penetrates the sheets, cutting the slit. The cutter in passing through the sheets causes the tongue to be pressed downward into a die in the opposite jaw. A dog mechanism in the cutter, actuated by the cutter's descent, pushes the tongue into an eye or opening *15'* near the cutting edge of the slitter, very much as a needle is threaded. When the jaws are together the tongue is through the opening or eye of the slitter. Relaxing the grasp of the hand on the handles, a spring causes the jaws to expand, and as the upper jaw rises it draws the slitter upward, at the same time drawing the tongue through the slit, and, continuing to rise, the slitter and cutter are disengaged from the sheets, leaving them fastened together as first above described.

Of the 22 claims of this patent, infringement is charged of those following:

Claim 1: "A device for fastening sheets of paper, comprising cutting means constructed to form a tongue from the paper, which tongue is integrally united to the body of the paper at one end, means for penetrating the paper adjacent to the attached end of the tongue, and means for causing said penetrating means to draw the end of the tongue through the opening made thereby."

Claim 8: "In combination in a device of the class described, a tongue cutter, a slitter for passing through the paper, said slitter having a portion to engage the tongue, and a folder operating between the cutting edges of the cutter, and moving with the cutter, said folder having a movement to bend the paper tongue into engagement with the slitter, substantially as described."

Claim 12: "A device of the class described comprising a die member, a tongue cutter and slitter, a carrier member therefor, means for giving a relative movement to the said members, a folder on the carrier member to bend the tongue into connection with the slitter to be drawn back through the

paper thereby and a folder operating part with which the folder has sliding engagement to effect the movement of the folder toward and from the slitter as the members move toward and from each other, and a stripper plate between the members carrying said folder operating part, substantially as described."

Claim 15: "In combination in a machine of the character described, two members having relative movement, one carrying a tongue cutter, a slitter and a tongue folder, and the other having a die, means for giving relative movement to said members and a stripper plate having normal flexion toward the die member and means for lifting the stripper plate as the members separate, substantially as described."

Appellee's device is also in the form of a hand punch with parallel jaws, and, like the other, its penetrating members are in one jaw, and the sheets to be fastened are likewise held to the opposite jaw by a spring. The forward cutter, instead of being shaped to cut the tongue of the patent, is designed to cut a tongue with the lateral ears or shoulders *1* shown in Fig. A. Instead of a slitter shown in the patent, there is, back of the first cutter, another cutter designed to cut the slotted opening *2* of Fig. A. As the jaws contract, the shouldered or eared tongue made by the forward cutter is pressed down, and a dog, held in this cutter and actuated by the descent of the jaws, engages the tongue, and drives or pushes the shoulders or ears through the opening at 2 made by the rear cutter, at the same time pressing upward the piece so cut at *2*. The shoulders or ears, being thus pressed through the slotted opening at *2*, snap into approximately their original position; and, being wider than the width of the slot, are thus held on the upper surface of the sheets resting on the surface adjacent to the opening at *2*, whereby the sheets are fastened together. The entire operation is completed by compressing the punch handles, the relaxing of them simply withdrawing the dog and the cutters. The District Court found noninfringement and dismissed the bill.

L. C. Wheeler, of Milwaukee, Wis., for appellants.

E. H. Bottum and F. E. Dennett, both of Milwaukee, Wis., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The one claim of the method patent describes a fastening quite unlike that of appellee. The slit being, as its name implies, simply a cut, and no part of the substance of the sheets being removed, the tendency of the material is to resume its first form and close the slit, causing pressure against the tongue protruding through it, and by this frictional engagement holding it in place and effecting the lock. This result could not be accomplished if, instead of such a slit, this same tongue were passed through a slot of substantial width, as in the fastening complained of; for there would then be nothing to keep the tongue from slipping back to its former place.

The prior art shown discloses fastenings made at folded corners or edges of superposed sheets, but the claim of the patent is not broad enough to include any sort of fastening that might be made by cutting out and interlocking parts from the body of the sheets, leaving undisturbed the edges and corners; and, indeed, the bill does not allege that the patent has a scope so broad. Appellee's lock is in no wise effected by frictional engagement of the sides of a slit against a tongue drawn through it, but reveals a conception substantially different from that of the patent and not included in its claim.

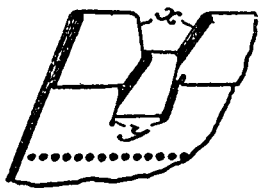
As to the devices, from the description given of them the resemblances and differences are quite apparent. Both are in the form of hand punches with handles actuating parallel jaws, with cutting members on one jaw and corresponding dies on the other. Means for holding the sheets and for cutting and bending down the tongue which is to form the lock, are substantially the same. But so far there is nothing novel in either combination, and here the resemblance ceases. The knifelike blade or slitter in the combination of the patented device is wholly absent in the other. The slitter with its eye, into which the tongue enters, is quite analogous in function to a needle having its eye near the point to receive the thread and draw it through the material. In defendant's device there is no slitter, and nothing which is the equivalent of the needle mechanism and sewing action of the slitter of the patent. The pushing action of the dog, whereby the ears of the tongue cut by the alleged infringing device are pushed through the slot cut therefor is very different from the drawing of the tongue through the slot by means of the needle and thread action of the patented device. The essential distinction between the drawing and the pushing action was explained and emphasized by the patentee himself in distinguishing, in the Patent Office, his method from that of the prior Ruth patents, upon which the examiner had rejected the Bump claim.

The Ruth patents show a triangular piece or wedge cut into the folded corner or edge of the sheets, remaining attached to the sheets at the inner side, and the opposite points of the wedge pushed into slits cut into the paper to receive them, the slits being nearer together than the distance between the points of the wedge, so that the wedge had to be bent between the points in order to insert or push the points into the slits, and, on being inserted, and the wedge-like piece straightened out, the locking was effected. Fig. B shows this fastening.

Under date of March 21, 1911, in a letter to the Commissioner of Patents the applicant, Bump, said:

"Applicant's method proceeds with a sequence of steps quite distinct from the steps necessary in the Ruth patent, and it will be observed that not only is applicant's tongue drawn through the slit instead of being pushed through as in the Ruth case, but the process is distinguished from Ruth also in that applicant's tongue is bent back from its free end, and is thus drawn through in advance of the extreme end."

FIG. B.



And in distinguishing the Ruth devices, which were cited in the Patent Office on Bump's application for the device patent, Bump wrote October 2, 1909:

"Applicant's invention appears to be clearly distinguished from the references cited in a number of respects. In applicant's case, the slitter passes into and is withdrawn from the paper, and, while its eye is exposed on the under side, the end of the tongue is tucked into the eye, and then, upon the withdrawal of the slitter, the tongue is drawn up through the slit. No such action is disclosed in any of the references. * * *"

The lack of this element and function, so necessary in Bump's combination, distinguishes appellee's device as well as Ruth's.

Claim 1 is the broadest of the claims of which infringement of the device patent is alleged, and while it does not mention the slitter, the designation "means for penetrating the paper adjacent to the attached end of the tongue, and means for causing said penetrating means to draw the end of the tongue through the opening made thereby," in view of the specifications and drawings and the file history of this patent, as well as of the method patent which is referred to in the specification of the device patent, must be held to be the knife-like slitter with its needle-like eye to "draw" the end of the tongue through the slit made by the slitter.

Claims 8, 12, and 15 mention the slitter, the function of which is particularly set forth in the application, which refers to the lock of the earlier granted method patent as the object to be accomplished by the device, by drawing through the slit the tongue threaded through the slitter's eye.

We find the alleged infringing method to be substantially different and distinct from that of the patent, and that the device for producing it does not incorporate the necessary element of the combination of the patent embodied in the slitter, and that the District Court correctly found that neither patent had been infringed by appellee.

The decree is affirmed.

UNION SPECIAL MACH. CO. v. QUAKER CITY FLOUR MILLS CO.

(District Court, E. D. Pennsylvania. October 9, 1916.)

No. 107.

1. PATENTS ⊜170—NOVELTY—USE OF PRIOR ART.

While novel combinations of known elements resulting in new functions are meritorious inventions, nevertheless the Bigelow patent, No. 875,314, for a machine for sewing the mouths of filled sacks, does not, in so far as it adopted old methods known to the trade and forming no novel combination, though by reason of other additions it was a new and valuable addition to the art, deprive others of the right to use such knowledge; and so the Burghardt patent, No. 768,111, for a similar machine, is no infringement, though using such knowledge.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. ⊜170.]

2. PATENTS ⊜170, 176—INVENTIONS PATENTABLE—NOVELTY.

One inventing a special kind of machine to accomplish a limited purpose is entitled to be protected in its exclusive use if the means employed be novel, but if the means be old is entitled only to be protected in the exclusive use of the combination of which he was the inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 245, 250½–252; Dec. Dig. ⊜170, 176.]

3. PATENTS ⊜62—PRIORITIES—INFERENCE.

Every inference of priority may be drawn against a patent, where the patentee fails to answer the charge of another, who showed that he had,

before the issuance of the patent, made disclosures to the patentee which it was claimed were taken advantage of by him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. ⊂⊃62.]

4. PATENTS ⊂⊃328—INFRINGEMENT—WHAT CONSTITUTES.

The Foster patent, No. 875,339, relating to machines for sewing filled sacks, *held* limited by the prior art and proceedings in the Patent Office, and, as so limited, not to be infringed by the Burghardt machine.

In Equity. Bill by the Union Special Machine Company against the Quaker City Flour Mills Company. Sur trial upon bill, answer, and proofs. Bill dismissed.

Charles L. Sturtevant, of Washington, D. C., and Joseph C. Fraley, of Philadephia, Pa., for plaintiff.

Charles C. Linthicum, of Chicago, Ill., for defendant.

DICKINSON, District Judge. The purpose of this proceeding is to have determined the question of the validity of letters patent No. 875,314 (known as the Bigelow) and No. 875,339 (known as the Foster) relating to machines for closing by a sewing seam the mouths of filled bags. The title of plaintiff is that of an assignee. The machine alleged to infringe is that described (with some modifications) in letters patent No. 768,111, known as the Burghardt patent. The grant of none of these letters patent admittedly has more than formal significance in the present inquiry.

The bearing points of the controversy can be best disclosed by a few excluding general observations. Had the field of invention upon which Bigelow entered been a virgin field, or if the defendant had used the special constructions designed by him, neither validity nor infringement would have been contested. The defendant comes, however, with this complaint. Bigelow entered upon a field already occupied, and taking, as he had the right to take, the ideas there found, which were common property, by the application of ordinary mechanical skill and adding certain features, he produced a machine differing only from those before known in the merit of its mechanical construction and in the addition of these supplementary features. When the machines of the plaintiff and defendant are compared, they are alike only in the features which each constructor borrowed from the prior art, and it is found that the defendant has not followed those features of plaintiff's machine in which invention might justly be claimed.

[1] The complaint that defendant has taken the idea of the construction of its machine from that of the plaintiff is met by the statement that the plaintiff had itself taken these ideas from the prior art. The claim of inventive merit in the supplementary features of plaintiff's machine is met by the statement that these are not found in the machine of the defendant. The defense, therefore, is that where infringement might otherwise be found plaintiff's claim to invention has no validity, and where invention might be found there is no infringement. The counter complaint is thereby provoked that the plaintiff,

through a construction which may be an improvement upon the prior art, is seeking to appropriate to itself an exclusive property in that which is the common property of all. There is this further complaint made: Bigelow was invited to collaborate with defendant in the construction of an improved machine. The ideas of construction which had become known to defendant were communicated to Bigelow and embodied in plaintiff's machine, and are now embraced in plaintiff's claim to an exclusive proprietary right.

A review of the prior art and the conditions affecting the needs of the business in which these machines are used will throw light upon the controversy. The real and nominal defendant is in the milling business, and the recital will be confined to this. Flour and other mill products were at first handled in barrels. Later, bags came into use. The closing of the mouths of the bags was done by sewing them by hand.

It is a well-known American characteristic that no American mechanic can see anything done without at once having his thoughts turned to the construction of a machine which will perform the work. As was to be expected, such machines soon appeared. The practical problem presented certain difficulties. As was to be expected, the already known sewing mechanism was brought into requisition. A change was found necessary, in that the tops of the bags could not be folded or lapped over as in the ordinary sewing operation, but must be sewed while in an upright position. The thrust of the needle must in consequence be horizontal, instead of vertical. Again, the feeding mechanism in a sewing operation must bring the material to the needle and permit it to remain until the thrust is made and the needle withdrawn. The motion is, because of this necessity, an intermittent one. The inertia and momentum of filled bags compels a continuous movement of the bag carrier, and this in turn requires the feeding movement of the top of the bag to synchronize with the carrying movement of the body of the bag, so that neither will interfere with the operation of the other. The bags, moreover, are of different lengths or heights. This calls for some means of adjusting, through a raising and lowering operation, the position of the top of the bag with the position of the needle. The sewing head must also overhang the bag carrier, and the side toward the operator be open, so as to afford ready access to the bags. The commercial value of any such device consists in the reduction of the unit cost of the operation. It must, therefore, have a capacity for rapid and economical operation, and portability adds thus to its value. The weight of the filled bags compels the presence of some support to any carrier belt which may be employed.

It is not denied that the Bigelow and Foster machine of the plaintiff answers to these requirements. Nor is merit denied to certain additional and auxiliary or adjunctive features, as they have been called. The defense presented, as before observed, eliminates these latter features, because not infringed, and meets the former by the averment that every element of invention disclosed in plaintiff's machine was borrowed from the prior art.

The fallacy of the argument (characterized as the purely Mosaic)

which denies merit to novel combinations of known elements resulting in new functions is admitted, but the presence here of any such combination is denied. The broad combinations set forth in the claims are asserted to be old. There is a denial of any novel function resulting from the use of certain elements with their limitations, because, if present, they have exactly the same action in the combinations known to the prior art, and, if omitted, it is at the expense of a lost function, so that no economy results from the omission. In other words, the plaintiff did precisely what Burghardt did. They each took the contributions of the prior art, from which, with the application of mechanical skill, they constructed a machine to do this work, adding to its operation the performance of certain auxiliary functions. They differ only in this: Burghardt admitted his debt to the prior art and claimed as his invention only the adjunctive features. The plaintiff boldly claims to take the whole of the prior art as its own exclusive property.

The real controversy between the parties is very fairly presented by plaintiff's expert in his summary of the real claims which may be made on behalf of the Bigelow patent. Whatever merit it possesses resides in the judgment required to decide what of the elements of the prior art should be accepted and what should be discarded. That judgment and skill are called for cannot be denied. This limits the discussion to an application of the distinction between the exercise of the inventive faculty and the application of the judgment and skill which the well-equipped mechanic is frequently called upon to employ. It is admittedly difficult to determine just how and where to draw this line. Perhaps the best guide to be found is that supplied by counsel for the plaintiff. In the very nature of things such aid can only be general. Certain broad facts, however, thrust themselves to the front in the consideration of the facts of this case. A clarifying summary of what they are is supplied in the analysis of any of these claims. One is that a machine for the sewing of filled bags was not a novel idea. Given the thought and purpose to build one, certain features were of obvious necessity. With respect to these the faculty of invention could be employed only in the special form of construction. It might be present in the conception of the idea of supplying the conveying force through the operation of gravity or of a positively driven carrier. If each of these means, however, had been previously employed, there would be no novelty in that conception. As in the ordinary sewing operation the movement of the needle is vertical, invention might be involved in the thought of changing the thrust to a horizontal one, in order that the tops of the bags might be sewed without the necessity of turning or bending them down, so as to be moved into a position under a vertical needle; but if this thought had been previously put into practice there would be in it no novelty. The thought of a conveying chain or belt might be said to involve invention; but, if these devices had been already in use, there would again be no novelty in their employment. The necessity, when heavy bags were conveyed, of having some support under the belt would in itself be so obvious, and a supporting table, over which the belt might be

drawn, such an obvious expedient, as that its adoption, in view of the prior art, could not be said to involve patentable invention. It seems to be a conceded fact that whatever invention is involved consists in a combination of known devices happily chosen to accomplish the desired results.

It is clear that one who takes up the problem of producing a machine to serve a useful purpose, and who accomplishes only the result of a simple and inexpensively constructed machine, to supply the place of a complicated and costly one, has earned the right to own the thing which he has thus invented, because he who saves all the functional value of a machine, after eliminating many of its features, has made a contribution to the art no less valuable than he who, through another combination, has given added functions. The test of such value, however, lies in the preservation of all the functions of the machine. Skill and judgment may call for the elimination of certain features of an existing machine. If the elimination results in a loss of function, a new combination cannot be said to be a patentable invention, because the man who does this has invented nothing; he has merely borrowed part of the prior art. The merit of the Bigelow machine would seem to consist in this: The prior art was rich in all the elements which enter into the construction of a machine for sewing filled bags. There was room for mechanical improvement in some of its parts. There was room for the elimination of some of its features at the cost of the loss of certain functions. There was room for the incorporation of other elements in order to give new functions to the machine through these adjunctive features. Bigelow accomplished this, and, because of what he did, secured the exclusive right to the machine which he had thus constructed; but he did not thereby acquire an exclusive right to what others had contributed to the art before he constructed his improved machine. When, therefore, the defendant made the same use of the prior art of which Bigelow himself had made use, and abstained from any trespass upon the rights which Bigelow had acquired in his improvements, the defendant was doing only that which it had the right to do, and the bill against it in this respect and to this extent should be dismissed.

This finding is made without regard to the charge that Bigelow was indebted to Harding for the idea incorporated in his machine. The evidence to support this charge does not come up to the measure of proof required in such cases. There is no doubt, however, that the services of Bigelow were called in to collaborate in the construction of a machine, and the dates which he himself fixes as the commencement and close of his work emphasize the view with which we have been impressed, for it carries conviction of the truth of the observation that Bigelow himself did not at the time regard himself as the inventor of a machine for sewing filled bags, but did regard himself as an improver, in that he had produced such a machine with the adjunctive features, his right to which has not been infringed by the defendant.

[2-4] This brings us to a consideration of the claims of the Foster patent. The proceedings in the Patent Office have foreclosed any

possible claim under the Foster patent to anything more than a claim to certain special forms of construction of certain parts of the machine referred to. These are embodied in claims 3, 5, 6, 8, and 9.

The experience of the Foster patent in its journey through the Patent Office was this: The original Foster application described a machine which in all its general characteristics was the equivalent of the described Bigelow and Burghardt machines. It describes also particular and alleged novel means to assure connection between the belt conveyor and its driving mechanism at any height at which, during its vertical adjustment, it may be placed. The result achieved is that the operation of the movement of the belt conveyor goes on unimpeded as it is brought nearer to or removed from the sewing mechanism. This is accomplished through the special means described. The claims at first embraced, not only this special construction, but these general features as well.

The Bigelow and Foster applications were pending in the Patent Office at the same time. There was thus a conflict of claims, and an interference was declared. Before any decision was reached on the merits of the two applications, they both passed into the ownership of the plaintiff. Following this, Foster defaulted, and a formal judgment was entered in favor of Bigelow. The broad claims were then withdrawn, and the patent issued with claims allowed which included these special features. The Bigelow application, however, covers claim 67 for a combination, including means for operating the conveying mechanism together with an adjusting mechanism for bringing the bags into any desired relation to the sewing mechanism.

As the Bigelow patent secured an award of priority over the Foster patent, the latter can only be valid as protecting the special form of gearing described. Foster, as the record stands, clearly did not invent a bag-sewing machine. All he did was to introduce a special kind of mechanism to accomplish the limited purpose indicated. The use of some means for this purpose having been employed before he described the means of which he makes use, the only query remains of whether the substitution of one such means for another constitutes patentable invention. If the means employed be novel, he would clearly have the right to be protected in its exclusive use. If the means be old, he clearly could not forbid its use by others, except as part of a novel combination of which he was the inventor.

It is to be observed that the Foster application does not make claim in terms to a combination. It is for an apparatus which embraces a special form of gearing. The general apparatus described is substantially that described in the Bigelow application. The only difference is that the one does and the other does not describe a specific form of gearing. The merit of the Foster device is claimed to lie in the speed of the conveyor keeping pace with the operation of the sewing mechanism and the former being adjustable vertically. To accomplish this the application calls for a means and then defines the special means designed. It is true the applicant declares his claim is not confined to the means he describes in all minor details, but he does limit it to these means. Bigelow and Foster intended his feeding movement to keep

pace with the sewing operation, and each meant to have the adjustable feature. Bigelow makes a broad claim to any means of doing this, and Foster claims his specifically described means, with protection against the use of modifications of it in minor details. There are several different means known to the mechanical trade by which the intended result could be reached, a mechanic being once given the thought of the result to be accomplished. A constructor who could make no claim to the idea of employing means for the purpose can surely not be permitted to lay claim to any one of these well-known means as his exclusive property. More than this, we find Foster to have been anticipated in the use of means to accomplish this purpose, which, to paraphrase his own language, while showing various minor modifications and changes, may be truly said to be of the very spirit of his claimed invention. These anticipations are so clearly shown by the record that we do not deem it necessary to restate them.

Finally, a perusal of this record brings the strong conviction that Foster has at least not made out his title to any proprietary right to such a machine as that in use by the defendant. Such machines were in use before his attention was drawn to them. He was brought in for the sole purpose of supplying a sewing head. The machines were shown him for this purpose. He made sketches of their other component parts, including the parts to which his claim of invention relates. In a conflict of merit claims between that which was thus shown him and that which he claims to have invented, it is not too much to ask of him that he answer the charge that he was shown what he subsequently averred he had originated, and that he give his version of the disclosures made to him. This has not been done, and in the absence of some answer every inference of priority may properly be drawn against him.

Plaintiff's bill of complaint is dismissed for want of equity, and a formal decree to this effect, with an allowance of costs to defendant, may be submitted.

TURNER v. LAUTER PIANO CO. et al.

(District Court, D. New Jersey. October 11, 1916.)

1. PATENTS ⟸118—ISSUANCE—PRESUMPTIONS.

As there can be no presumption that the Patent Office examiners have knowledge of construction methods throughout the country according to engineering opinion, patents which on their face give monopolies in the ordinary use of materials for structural purposes, in the combination of such materials and in the engineering or mathematical problems relating to such construction, do not carry the same prima facie presumption of validity as in the case of ordinary mechanical patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 170, 170½; Dec. Dig. ⟸118.]

2. PATENTS ⟸328—INVENTION—REINFORCED CONCRETE CONSTRUCTION.

The Turner patent, No. 985,119, for steel-skeleton concrete construction, *held* void for lack of invention in view of the prior art.

8. PATENTS ⟸328—VALIDITY—CONCRETE CONSTRUCTION—INFRINGEMENT.
The Turner patent, No. 1,003,384, for steel-skeleton concrete construction, *held* invalid for anticipation and infringement of the Norcross patent, No. 698,542.

In Equity. Suit by Claude A. P. Turner against the Lauter Piano Company and another. Bill dismissed.

Chas. J. Williamson, of Washington, D. C., for complainant.
A. C. Paul, of Minneapolis, Minn., for defendants.

ORR, District Judge. This is an ordinary patent suit. The plaintiff is the owner of United States patent No. 1,003,384, for "steel-skeleton concrete construction," issued to him September 12, 1911, and the owner also of United States patent No. 985,119, for "steel-skeleton concrete construction," issued to him February 21, 1911. The former may be called the parent patent and the latter a divisional patent. The plaintiff charges the defendants with the infringement of his patents in the construction and use of a large building in the city of Newark in said district. The building was erected by the American Concrete Steel Company for the Lauter Piano Company and has been and is now used by the latter. The defenses set up are that the patent is invalid and that the defendants have not infringed.

Both patents relate to the reinforcement of concrete in the construction of buildings. The reinforcement of concrete is necessary, of course, to give the material the strength to resist the strains to which it may be put. It is not ordinarily reinforced to enable it to resist ordinary compression strains, because the vast remains of Roman civilization disclose an extensive use of concrete in construction where the effect of compression strains have been apparently negligible. Where, however, the horizontal section of the concrete mass is short, and the vertical section is long, and compression is vertical (as in a column) there must be reinforcement. Tensile strains and shearing strains, if they are differentiated, must be taken care of by reinforcing the concrete in the places where such strains are to be found. The character and location of such strains are determined empirically by many, but can be, and more often are, with reasonable accuracy determined by engineering methods.

[1] The ordinary material used in reinforcing concrete is iron or steel, because of its great tensile strength. It is used in the form of wire netting, in the form of bars, and in other forms. Sometimes the reinforcing rods are unattached to each other, and sometimes they are attached in order to preserve the framework of the reinforcing material until it may be imbedded in the concrete. The rods are sometimes twisted, but often bent at proper angles, in proper places, in order that they may be better held in place by the compression of the concrete. We therefore have in this case patents which upon their faces give monopolies in the use of ordinary materials for structural purposes, in the combination of such materials, and in the engineering or mathematical problems relating to such construction. Where such conditions exist, the weight to be given to the patents as prima

facie evidence of their validity is considerably weakened. If there could be a presumption that the Patent Office examiners had knowledge of what was going on throughout the country in the uses of ordinary materials for structural work, according to diversified engineering opinion, the weight to be given to the patent should be as great as in the case of a machine or other form of mechanical apparatus.

[2] It is unnecessary to refer to the specifications of the several patents at great length. It is significant that the patentee places emphasis upon the necessity of placing his reinforcement where the stresses are to be found. He states in one place that in warehouses and similar buildings the load is naturally concentrated around the columns; otherwise, the aisles or passageways would be obstructed. That he therefore should have placed most of his reinforcing material around and connected with the columns which support the flooring is what any other thoughtful engineer might do.

From the foregoing observations, it seems plain that neither of the patents are of a broad fundamental character. The claims of patent No. 985,119, which are in suit, are as follows:

4. "In flat slab and column construction of concrete the combination of a concrete slab, concrete columns in vertical alignment above and below the slab, column reinforcement extending continuously through a vertical line of columns, cantilever heads separate from the column reinforcement, comprising, each, crossed rods imbedded in the slab and extending laterally outward from the column in different directions, rods extending from the said head downward into the column, and groups of rods extending crosswise of the head through the slab from column to column in direct and diagonal lines, said rods being toward the bottom of the slab between columns."

8. "In flat slab and column construction of concrete, the combination of a plurality of concrete columns and vertical reinforcements therein, of a separate and distinct set of reinforcing elements imbedded in the column and principally supported thereby, the ends of said separate set of reinforcing elements being separated so as to radiate from the column into the floor slabs toward substantially all parts thereof, and a concrete floor slab imbedding and supported by said radiating means."

This patent was the subject of litigation in the Eighth Circuit. Turner v. Moore, 211 Fed. 466, 128 C. C. A. 138. The Circuit Court of Appeals held that claims 1, 4, and 6 of the patent were invalid. The decision of that court was proper, notwithstanding the earnest efforts of counsel for the plaintiff in the present case to diminish the effect thereof.

Claim 8 of that patent, which is now involved in the present litigation, is not so different from claim 4 as to lead this court to think that it should be sustained. We therefore conclude that the claims of Turner patent No. 985,119, which are involved in this litigation, are invalid.

[3] The claims of Turner patent, No. 1,003,384, which are involved, are as follows:

1. "An arrangement of reinforcement for a column-supported flat plate floor of concrete, comprising a plurality of circumferential cantilever members, respectively situated in the upper part of the slab at the columns and projecting therefrom, and reinforcing means extending from member to member in multiple directions through the space between said members, and filling, or substantially filling, such space."

5. "An arrangement of reinforcement for a column-supported flat plate floor of concrete, comprising multiple belts or rods that extend from column to column in two directions directly, and in two directions diagonally, portions of said belts being beyond the columns on opposite sides and forming cantilevers, the rods running in intersecting directions crossing at the columns in the upper part of the floor, and the cantilever-forming portions of rods of one belt supporting rods of another belt, the area between the columns being covered, or substantially covered, by reinforcements."

10. "In a structure of reinforced concrete comprising columns, and a flat plate floor slab, the combination of an open frame consisting of crossed rods at the top of a column extending partially into the slab contiguous to the column and belts of rods extending crosswise of said open frame and passing through the slab directly and diagonally in straight lines from column to column.

11. "The combination of concrete columns, and a flat plate floor slab of concrete supported directly thereon, horizontally arranged bars in the slab at the top of the columns, and supported thereby with their free ends extending outward into the slab from the columns forming cantilevers, and belts of reinforcement extending in mutiple directions through the slab from support to support, and supported by said cantilevers."

16. "The combination of concrete columns, and a flat plate floor slab of concrete supported directly thereon, horizontally arranged upon frames imbedded in the concrete at the top of the columns extending transversely of the column axis, belts of reinforcement extending in multiple directions through the slab from column to column and supported by said frame, the belts being of a width to substantially cover the area between the columns.

17. "In a reinforced concrete structure, the combination of supports, consisting of columns of concrete, and a flat plate floor slab of concrete supported directly thereon, belts of reinforcement extending through the slab to the supports in four directions, said reinforcements having a thickness of four belts over the support in the upper part of the slab, a thickness of two belts in a diagonal direction midway between the supports in the bottom part of the slab, a thickness of one belt midway between the supports directly from one support to the other in the lower part of the slab, and a set of reinforcements extending transversely of the column axis and projecting beyond the tops of the columns."

This patent has been the subject of litigation also in the Eighth Circuit. Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74. It is there held that a construction substantially after the manner pointed out in the specifications of letters patent No. 985,119 and No. 1,003,384, issued to Claude A. P. Turner, February 21, 1911, and September 12, 1911, respectively, was an infringement of claims 1, 3, and 4 of patent No. 698,542, issued to O. W. Norcross, April, 29, 1902.

This court is satisfied that the conclusions reached by the Court of Appeals in the Eighth Circuit in the case last cited should be adopted. Strenuous efforts on the part of the plaintiff to diminish the effect of that decision must fail. The Norcross patent is set up in the present case as an anticipation of the patents in suit. It seems clear that, if a construction in accordance with the patents in suit would infringe the Norcross patent, the Norcross patent must be an anticipation of the patents in suit. The effect of this decision is not weakened by the decision of the Court of Appeals of the First Circuit in the case of Turner v. Quincy Market Cold Storage & Warehouse Co., 225 Fed. 41, 140 C. C. A. 367. That case principally decided that a tenant, occupying under lease a building the construction of which embodies a patented feature, is not necessarily a "user" of the invention in such a sense as to be an infringer. Further consideration of the

prior art, either as found in structures, patents, or publications offered in evidence on the part of the defendant, would but unnecessarily lengthen this opinion.

The claims of both patents which are relied upon by the plaintiff in this suit are invalid. The bill must be dismissed, at the cost of the plaintiff. Let a decree be drawn.

PERFECTION SPRING SERVICE CO. v. AMERICAN AUTO HEATER CO., Inc., et al.

(District Court, W. D. New York. May 1, 1916.)

No. 167B.

1. PATENTS ⟸136—OMISSIONS—MODE OF RECTIFICATION.
The remedy for mistakes and omissions in description or claim of a patent is to surrender the original patent and apply for a reissue.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. ⟸136.]

2. PATENTS ⟸141—REISSUE—SCOPE.
Where the original patent is surrendered and a reissue sought, the patentee cannot enlarge the scope of his claim, so as to include other inventions and devices made since the grant and in public use.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206-213; Dec. Dig. ⟸141.]

3. PATENTS ⟸328—CLAIMS—INFRINGEMENT.
The Kempshall patent, No. 670,080, for a device for using the engine exhaust for heating motor carriages, particularly with reference to internal combustion engines, *held* limited, by the prior art, the wording of the claims, and the acquiescence of the patentee in the proceedings in the Patent Office to the exact combination shown, which consisted of two mufflers with an arrangement between the exhaust and the mufflers for using either by shutting off the connection independently of the other, and, as so limited, not to be infringed.

In Equity. Bill by the Perfection Spring Service Company against the American Auto Heater Company, Incorporated, and another. Bill dismissed.

Hull, Smith, Brock & West and Harold E. Smith, all of Cleveland, Ohio, and J. Wm. Ellis, of Buffalo, N. Y. (Melville Church, of Washington, D. C., of counsel), for plaintiff.

William Macomber, of Buffalo, N. Y. (Wilber E. Houpt, of Buffalo, N. Y., of counsel), for defendant company.

HAZEL, District Judge. We are herein concerned with the scope, validity, and infringement of the single claim of patent No. 670,080, granted to Eleazer Kempshall on March 19, 1901, relating to improvements in devices for utilizing engine exhaust for heating motor carriages, with special reference to engines of the internally explosive type. The object of the inventor was to use the products of combustion for warming the interior of the car by means of a heater or foot warmer placed therein.

At the date of the invention it was old to adapt to explosive engines a muffling device to reduce or silence the noise of discharging vapor into the atmosphere without increasing the back pressure on the engine. The patentee intended his adaptation, consisting of two mufflers, for use in connection with steam engines, as well as with engines of the explosive or gasoline type. Indeed, as bearing upon such dual use, the specification states:

"The form of engine shown is an internally explosive double cylinder gasoline engine, but my invention is equally applicable to engines in which steam is employed as the motive force, and also to engines in which only one cylinder is used."

There is nothing to indicate any limitation to a particular type of muffler or heating device. The invention in suit is for an additional muffler, in the form of a heat regulator, made to operate independently of the other, though both are connected by piping and valves adapted to shut off one muffler when the other is in use. Two engine cylinders, two primary mufflers, and two heating mufflers are described in the specification and drawings. The mufflers (*9* and *14*) are preferably divided in the middle of their length, each containing two valves, one for each exhaust; and in Fig. 2 are illustrated the two mufflers to which are attached a series of tubes arranged concentrically, each being perforated to permit the confined gases to escape through successive tubes into the open air. Each pair of mufflers is shown to be connected by independent connections with the upper cylinder, and may be cut off separately by valves, mufflers *9* and *14* being cut off from the upper cylinder *6* by valves *13* and *18* located between the exhaust *8* of said cylinder and the primary muffler *9* and the secondary muffler *14*. When the interior of the car is being warmed, the valves of the primary muffler are cut off, and valves *17* and *18* of the secondary muffler are open. The single claim reads as follows:

"1. The combination, with an engine, of two mufflers adapted to receive the exhaust therefrom, one thereof situated to serve for heating purposes, independent connections between said mufflers and the exhaust of the engine, and valves for controlling each of said independent connections, whereby either one of said mufflers may be employed according as heating is desired, substantially as described."

The defenses are anticipation, and, mainly, a narrowness of the patent resulting from self-imposed limitations and from amendment in the Patent Office to secure the claim, in consequence of which defendants' device is no infringement thereof.

Upon consideration of the evidence, together with the file wrapper and contents, it has been determined that in the ascertainment of the scope of the claims we are not confined to muffling devices of the explosive engine type, but may consider mufflers generally as described in prior patents to Kilbourn, Fink, Schwarm, Freese, Michaels, Healy, and Pennington. See Jones v. Cyphers [C. C.] 115 Fed. 324, affirmed 126 Fed. 735, 62 C. C. A. 21. It is true there is no muffling device specified in the patent for use in connection with a steam engine; but, as heretofore pointed out, the reference in the specification to steam engines, as well as the title of the patent, would seem to indicate an intention to include such constructions in the scope of the invention.

Furthermore, the patentee emphasizes the manner in which the primary and secondary mufflers are to be used in order to heat the interior of the car, and the wording of the claim indicates its allowance because of restrictions and limitations assented to by the patentee.

[1, 2] The original application for the patent had two claims, which, however, were rejected as involving nothing more than a duplication of the muffler device shown in the patent to Fink, No. 238,773, while the patent to Healy stated that it was customary to flow the exhaust gases from a motor either through a heating coil or through a separate muffler. The patentee by counsel insisted that his invention was different from the prior art as cited by the examiner, in that he described two mufflers and independent valves connected between the muffler and the exhaust of the engine, whereby either muffler could be brought into use as desired. Thus limited, the patent was allowed, and it would seem that patentable novelty resided simply in the means employed for using the valves and connections, so as to permit shutting off the primary muffler when using the heater. It must be admitted that such a limitation may not accord full justice to the patentee, who appears to have been the first to adapt for use a combination of two mufflers, one for silencing the noise from the exhaust, and the other for warming the interior of motor cars; but the equities are not on his side. He delayed 16 years before attempting to levy tribute on other devices for warming the interior of automobiles which have come into use since his invention; and the rule of law, that when a claim is clear and explicit the courts cannot alter it by enlargement, is, under the circumstances, properly invoked. The remedy for omissions and mistakes in description or claim is to be found in the Patent Office, through surrender and reissue. Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235. In such circumstances the patent law does not permit enlargement of the scope of the claims to include other inventions and devices, made since the grant and in public use. Railroad Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053.

[3] In such circumstances defendants contend that the very language of the claim qualifies the functions of the combined elements to achieve the result, in that its wording is, "whereby either one of said mufflers may be employed according as heat is desired." I think that to ignore the functional limitation, in view of the prior state of the art, would not be to interpret the claim, but to substitute a new one. E. & H. T. Anthony Co. v. Gennert, 108 Fed. 396, 47 C. C. A. 426; Thacher v. Transit Const. Co. (D. C.) 228 Fed. 905. But the complainant urges that the reason for the amendment in the Patent Office is not controlling; that the single muffler of the Fink patent was connected to the safety valve of a locomotive and not adapted to receive the exhaust from an engine cylinder, and that the words "according as heating is desired," in claim 1 as allowed, operated to broaden it to a use which required no separate use of the muffling device, but I do not agree with this contention. The patentee designed to adapt old elements in his combination to perform a new function, though similar functions were performed by such elements, somewhat differently arranged, in connection with locomotives and cars. Indeed,

prior thereto, in the patent to Merrill in 1864 is shown an arrangement of dampers and flues to permit waste heat to pass in connection with steam engines, locomotives, and cars. In the patent to Kilbourn (1877) is shown a system for heating cars from the locomotives, with the main pipe extending to the main exhaust, and the heater is provided with valves.

The Fink patent, cited in the Patent Office, was for a combined heater and muffler, and the noise of the steam was suppressed by passing it into the tender, where it was condensed and used for heating the feed water. Thus is shown a heater using the exhaust while the muffler silences the noise, functions performed by the combination claim in suit, and perhaps suggesting it to the patentee herein. In the Freese patent, No. 325,796, for a car heater, the exhaust steam passes into an exhaust pipe extending from the engine to the car, and having a muffler at its end; and a branch pipe leading from the exhaust heats the car, the steam then passing down and discharging into the muffler. There are two valves in such device, one in the exhaust, and the other in the heater pipe, and various of the elements of the Kempshall patent are present. It does not, however, anticipate the patent in suit, which, as shown, was for a new combination, including in an old combination two mufflers, instead of one, and connecting them by independent connections.

In the Michaels patent, No. 135,239, there is a valve for closing one passage and opening another, and vice versa, the pipes, couplings, and cylinder operating as a muffler; but such device does not have two mufflers, nor is the exhaust pipe from the engine connected at a point intermediate of the engine on the main muffler as in the claim in suit, and therefore it is not anticipatory. In the Scott patent, No. 381,647, there are devices into which the exhaust passes to pipe *Z* and discharges into the smokestack, where it is muffled and then passes back into the steam heater pipe, and thence to the cars. A valve is used to enable the engineer to shut off or turn on the exhaust. Complainant denies that pipe *Z* and the manner of discharging the exhaust operate as a muffler, but there is evidence that the arrangement causes an expansion of the steam, with the result that the noise of the steam is deadened or silenced.

The Healy patent, No. 491,482, is perhaps closer to the patent under consideration than any of the others mentioned. The combination shows several mufflers for receiving the exhaust from the engine and utilizing it for heating. Pipes *b* and *k* seem to correspond to the independent connections between the mufflers and the exhaust of the engine of the Kempshall patent, and there is one valve for controlling the connection. Complainant contends that the muffler of the Healy device is a condenser, and that the deadening of the noise is due to the liquefaction of the steam; but this is a negligible difference, and I think the disclosure of such patent and other prior patents clearly indicates that the improvement or modification described in complainant's patent was not of sufficient importance in the art to warrant granting to the claim such breadth as to cover defendants' device.

It follows that the claim in controversy is limited, by its wording

and by the acquiescence of the patentee in the proceedings in the Patent Office, to the exact combination shown, including the arrangement located between the exhaust and the muffler for using either muffler by shutting off either connection independently of the other.

Both the external and internal construction of defendants' heater is different from that of the heater in suit. The exhaust gases, when not used as a heating element, in defendants' apparatus flow directly to the primary muffler, the valve at such time being closed; but when heating is desired the valve is opened, thus enabling part of the gases to flow through the branch pipe to a heating coil extending to the casing in the car body, and thence to the open air. While it is true that the heating coil used by defendants in place of a secondary muffler somewhat decreases the noise, it does so only incidentally, being designed to function as a heater, and not as a muffler, or silencer of the exhaust. As defendants employ a different kind of valve, one that does not entirely close the main exhaust, it is unable to perform the function of the two valves of Kempshall, whereby the latter may at option use either one of the mufflers described in the patent according as heating is desired, and it does not infringe the patent in suit.

A decree dismissing the bill may be entered, with costs.

In re KAPLAN & MYERS.

(District Court, M. D. Pennsylvania. October 3, 1916.)

No. 3068.

BANKRUPTCY ⊂=363—RECLAMATION OF PROPERTY—ELECTION.

One who has filed and proved a claim as a creditor for goods sold to the bankrupt cannot thereafter reclaim the goods without withdrawing his claim, and without proof that it was filed in ignorance of the essential facts. He is required to elect whether to affirm or disaffirm the sale, and the election, once made with knowledge of the facts, is conclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550–554; Dec. Dig. ⊂=363.]

In Bankruptcy. In the matter of Kaplan & Myers, bankrupts. On exceptions to report of special master in reclamation proceedings. Exceptions sustained, and petition for reclamation dismissed.

William Jenkins Wilcox, of Scranton, Pa., for claimant.

A. V. Bower and E. C. Amerman, both of Scranton, Pa., for trustee.

WITMER, District Judge. Kaplan & Myers, who were engaged in business at Scranton, Pa., manufacturing garments, and selling to jobbers and retail merchants, were on December 31, 1915, adjudicated involuntary bankrupts on a petition filed October 30, 1915. Frederick Vietor & Achilles, the petitioners in this proceeding, on February 3, 1916, filed and proved their claim as general creditors against the bank-

rupt for goods sold to them at different times between January 29, 1915, and the filing of the petition, aggregating $1,249.63. The proof of claim bears on its face the following indorsement:

"That the filing of this claim is not to be construed as a waiver of the right of said claimant to follow any of this merchandise, in whatsoever hands it may be, including the trustee in bankruptcy, providing the same was delivered through misrepresentation."

Thereafter, on February 21st, the claimant filed an intervening petition, setting forth that the goods, being of the same goods to the amount of $886, on account of which they had filed and proved their claim as a creditor, had been purchased from them by the bankrupt upon false representation concerning their financial condition, on which they relied in making the sale; wherefore the petitioners averred that they were entitled to the possession of the goods, praying that the trustee be directed to return the same to them. The petition contained no allegation as to the time discovery of the fraud was ascertained, nor was there an offer to withdraw the claim already proven and filed.

The referee found from the testimony taken that the claimants, Frederick Vietor & Achilles, sold the goods on credit to the bankrupts, having been so induced by the false and fraudulent representations suggested, and that therefore, upon their election, they might repudiate the sale and recover the goods. For revision of an order accordingly entered the trustee had the matter certified.

Without interfering with the findings of fact of the referee, it remains to be determined whether as a matter of law, under the circumstances of the case, the petitioners ought to be permitted to reclaim the goods, having proven and filed their claim for the same, without withdrawing such claim, and without proof that such was filed in ignorance of their rights, or of facts which were not in their possession when their claim was filed, and of which they were then conscious when they presented their petition for reclamation. Their petition did not only fail to claim that the petitioners had through ignorance and inadvertence proven their claim, but the reservation appearing in their proof of claim, and the allusion to the alleged misrepresentations are a sufficient indication, in the absence of such allegation, prima facie, to support the conclusion that the petitioners had as much information of the essential facts upon which they relied when they made their proof of claim as when they filed their petition.

This case must be judged by what was done when the proof of claim was filed, or when the petition to reclaim was presented. The parties must be held to an affirmance of their contract, or a repudiation of the same, though such does not appear to have been their intention, if their purpose may be gathered from the course pursued. Apparently it is their intention to hold fast to both—to their proof of claim and to their proceeding to reclaim the goods. This they cannot do. They cannot have the proceeds of the sale, and likewise the goods that passed as a consideration. The remedies to accomplish this are in opposition, and required prompt election by the parties. Standard Varnish Works v. Haydock, Trustee, etc., 143 Fed. 318, 74 C. C. A. 456, 16 Am. Bankr. Rep. 286; In re Douglas C. Kenyon (D. C.) 19

Am. Bankr. Rep. 194, 156 Fed. 863. Upon this principle it was held, in Re Hildebrant (D. C.) 10 Am. Bankr. Rep. 184, 120 Fed. 992:

"That a vendor could not affirm the contract of sale as to part of the goods, and claim the price and disaffirm as to another part, and recover the goods in specie."

And, having made his election under such circumstances, the vendor makes it once for all. This, of course, implies knowledge of his rights and full possession of the required facts. If, after reserving their right, as indicated in their proof of claim, to follow the goods on discovery of certain facts, it would have been afterwards made to appear that such particular facts had been ascertained, and having indicated a desire to change about from an affirmance of the contract to a rescission of the same, the case might be held in line with what was decided in Thomas v. Taggart, 209 U. S. 392, 28 Sup. Ct. 519, 52 L. Ed. 845, where it was held that proof of claim of a customer against a broker, including value of securities deposited as collateral, does not amount to a waiver of his right to recover possession of the specific stocks, after discovery that the shares had been returned to the assignee in bankruptcy, where his claim specifically states that he does not waive such right of possession.

The situation before us is not of a change of remedies founded upon after-discovered facts as made to appear when the petition to reclaim was filed, but to the fact that the petitioners deliberately had elected a remedy inconsistent with the claim they now make without assigning any reason therefor, notwithstanding the statement of the learned referee that "the claimants, within a period of two weeks after their claim had been filed, giving knowledge of the fraud perpetrated upon them, they instituted these reclamation proceedings." There is nothing in the petition or the proof adduced supporting this finding, but the bare fact that a petition to reclaim was presented based on allegations of fraud, which in my opinion, under the circumstances, is not sufficient to warrant the conclusion.

In view of what has been indicated, it will not be necessary to discuss the original title of claimants to the goods sought to be reclaimed, which, to the greater portion, by a cursory examination is revealed as very doubtful.

The order of the referee is reversed, and the petition is dismissed.

In re WIX.

(District Court, W. D. South Carolina. July 3, 1916.)

1. BANKRUPTCY ⇐409(1)—DISCHARGE—CONCEALMENT OF TRUE FINANCIAL CONDITION.

Where a bankrupt, during the ten years he had been in business, and during part of which he had been prosperous, kept his books in the same slipshod manner, he will not, on bankruptcy, be denied discharge on the ground that his method of keeping books prevented the ascertainment of his true financial condition; for it cannot be assumed that he in-

tended to keep his books in such a manner as to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752–757; Dec. Dig. ⊂⊃409(1).]

2. BANKRUPTCY ⊂⊃414(1)—DISCHARGE—RIGHT TO.

As the discharge in bankruptcy is a very great privilege and right, the burden rests on a creditor, objecting to a discharge, to show that the bankrupt is not entitled thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⊂⊃414(1).]

3. BANKRUPTCY ⊂⊃409(1)—DISCHARGE—KEEPING BOOKS.

Under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, one is not required to keep any books at all in order to obtain a discharge, and a bankrupt, no matter how irregularly or poorly kept his books may be, will not be denied discharge, unless his intent was to conceal his true financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752–757; Dec. Dig. ⊂⊃409(1).]

In Bankruptcy. In the matter of bankruptcy of John W. Wix. On exception to the report of the special master, recommending that the bankrupt be denied discharge. Report of master overruled, and bankrupt ordered discharged.

Marion & Marion, of Chester, S. C., for trustee in bankruptcy.
Gaston & Hamilton, of Chester, S. C., for bankrupt.

JOHNSON, District Judge. This cause came on to be heard upon exceptions to the report of the special master, C. W. F. Spencer, Esq., recommending that the bankrupt be not allowed his discharge. This is a very interesting case, and I should like to go into it at length, but the pressure of work makes that impossible. An expert accountant testified that he could not ascertain the bankrupt's financial condition from an examination of his books. The special master, in a very able and interesting report, concluded that a man was presumed to intend the natural consequences of his act, and that, inasmuch as the bankrupt had not kept such books as would enable an accountant to ascertain his real financial condition, he must be presumed to have intended the natural consequences of his act, to wit, to deceive his creditors as to his financial condition.

[1-3] Ordinarily the special master, having had the witnesses before him, has a very great advantage in determining facts. In this case, however, I do not think there is any dispute about the facts, and the only question is, What is the proper inference to be drawn from undisputed facts? I think that the fact that Wix had been in business for about ten years, and that during all of that time he had the same method or lack of method of keeping books, refutes the presumption that he adopted that method for the purpose of deceiving his creditors as to his real financial condition. I cannot believe that when he first went into business and during all the years of his prosperity he had any purpose in his mind to deceive and conceal his true financial condition. If that purpose and intent did not exist when he adopted that method of keeping books ten years ago, there

is nothing in the record to show that he subsequently formed that intent.

The discharge is a very great privilege and right. The theory of the bankruptcy law is that a citizen who has become overburdened shall not try to go through life bearing burdens that will crush him, but he may come into the bankruptcy court and surrender all, and when that all is distributed among the creditors, he is free, the slate is wiped out, and he can start life over again. Like the Hebrews of old, it is to him a day and a year of Jubilee.

I think, therefore, that the burden rests upon the creditor objecting to his discharge to show that he is not entitled to it; and, as I have already said, I do not think the evidence in this case justifies the conviction that during his entire business career John W. Wix intended to conceal his true financial condition. The inference I draw from the evidence is that he was careless; he had a very poor method of keeping books. The bankruptcy law does not require any particular method of bookkeeping; in fact, it does not require a man to keep books at all. The only provision of the law is that he must not adopt a method of keeping books for the purpose of concealing his true financial condition. No matter how irregularly or poorly kept his books may be, if the evidence does not show that his intent was to conceal his true financial condition, he is entitled to his discharge.

I feel constrained to overrule the report of the special master; and it is so ordered. Let the clerk of this court issue to the bankrupt, John W. Wix, his discharge in bankruptcy.

RICHMOND CEDAR WORKS v. STRINGFELLOW et al.

(District Court, E. D. North Carolina. September 20, 1916.)

1. EVIDENCE ⟸343(3)—CERTIFIED COPIES—ADMISSIBILITY.

Under Revisal N. C. 1905, § 988, declaring that a duly certified copy of any deed or writing required or allowed to be registered may be registered in any county, a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to probate and registration, though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1317, 1318; Dec. Dig. ⟸343(3).]

2. EVIDENCE ⟸343(3)—DOCUMENTARY EVIDENCE—ANCIENT INSTRUMENTS.

In an action to recover land, plaintiff introduced a certified copy of a deed about 100 years old reciting that Elisha Hassell had sold and conveyed the property. In the attestation clause the name of the grantor was written Elijah, and the signature, which was by mark, was Elijah. On the certified copy was an indorsement that the grantor Elijah did therefor warrant and defend, etc., and this purported to be signed Elisha. The same witnesses attested both signatures and the deed was duly proven by one of the attesting witnesses shortly after execution. *Held*, that it was manifest that the name of the grantor was either incorrectly spelled by the conveyancer or incorrectly copied by the register in recording, and it

was admissible in evidence to establish a conveyance by the said Elisha Hassell.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1317, 1318; Dec. Dig. ⊂⊃343(3).]

3. DESCENT AND DISTRIBUTION ⊂⊃19—PRESUMPTION—INTESTACY.

Where there is no evidence showing that a deceased grantor left a will, it will be presumed that he died intestate and that the property descended to his heirs who conveyed the land.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 11–13; Dec. Dig. ⊂⊃19.]

4. NAMES ⊂⊃18—PRESUMPTIONS—IDENTITY OF GRANTOR.

In an action to recover land, plaintiff showed in his chain of title a conveyance to William C. duly recorded and a subsequent conveyance six years later by William R. C. There was no evidence that the grantee and grantor were the same person, but there was no showing of the death of the grantee, or that any other person named William C. ever owned the land. *Held*, that in view of the antiquity of the deed, which was over 50 years old, it will be presumed that William C. and William R. C. are the same.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 1, 4, 17; Dec. Dig. ⊂⊃18.]

5. ACKNOWLEDGMENT ⊂⊃29—REGISTRATION OF DEEDS—CERTIFICATE OF PROBATE.

Code N. C. 1883, § 1246, subd. 8, provides that, when the subscribing witness to a deed is a nonresident or dead and the maker shall also be a nonresident or dead, proof of the handwriting of the witness or the maker before the clerk of the superior court of the county where the deed is to be registered shall be sufficient evidence of execution to admit the deed to registration. A deed in which the spaces in the attestation clause left blank for the date were never filled in was admitted to probate and registration on affidavit that the affiant was familiar with the handwriting of the grantor and verily believed that the signature on the conveyance was that of the grantor. The certificate of probate did not certify that the grantor and subscribing witness were dead at the time of the probate, but the evidence clearly showed that fact, and that the deed was probably then over 35 years old. *Held*, that failure of the certificate to recite that the maker and attesting witness were dead did not render the registration of the deed improper, for those jurisdictional facts will be presumed.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 151–159; Dec. Dig. ⊂⊃29.]

6. INFANTS ⊂⊃112—JUDGMENT—COLLATERAL ATTACK—SERVICE OF PROCESS.

At the time a judgment was rendered, which was before the adoption of the North Carolina Code of Civil Procedure, the courts had jurisdiction in actions against infants, without service of process on them, to appoint a guardian ad litem for them and proceed to judgment. The record of the suit which was one against infants recited that their general guardian accepted service. *Held* that, in view of the power of the court, the judgment could not be collaterally attacked many years later on the ground that the court was without jurisdiction because there was no valid service on the infants.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 320; Dec. Dig. ⊂⊃112; Judgment, Cent. Dig. §§ 941, 961, 962.]

7. EVIDENCE ⊂⊃82—PRESUMPTIONS—REGULARITY.

Where the records of a county were in such confusion that it was practically impossible to find many of them, the courts will of necessity for the protection of titles of purchases dependent on deeds made on judicial sale, indulge presumptions of regularity in procedure, where it appears

that the court making the order of sale or rendering the judgment had jurisdiction of the person and subject-matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⊂⊃82.]

8. EXECUTORS AND ADMINISTRATORS ⊂⊃349(2)—SALES TO PAY DEBTS—JUDGMENT—"VENDITIONI EXPONAS."

Act 1784 (Rev. St. N. C. c. 63, § 1) gave creditors of deceased debtors whose personalty had been exhausted the right to sue out scire facias summoning the heirs to show cause why execution should not issue against lands descending, while Act 1789 (Rev. St. c. 63, § 8) provides that, if the estate of a deceased person be indebted to the administrator and there shall not be personal assets sufficient to pay such debts, it shall be lawful for such administrator to file a petition against the heir at law setting forth the nature of the debt and praying that the heir be made defendant, on which petition execution may issue against the lands of a deceased debtor. Laws 1846–47, c. 1, repealed Rev. St., c. 63, allowing creditors of deceased persons to subject by scire facias, to payment of their debts lands descending. After this act went into effect, the administrator of the estate of a deceased person filed a petition setting up that decedent was indebted to him, that the personalty was exhausted, and praying that the heirs be made parties and execution issue against lands descending to the heirs. The court, pursuant to the prayer, found the amount of the debt and directed that the same be paid from the lands descending to the heirs. The record recited, "Issue venditioni exponas. Issd.," and further showed an account of a sale by the administrator agreeably to the petition filed. *Held*, that the deed of the administrator is not subject to attack on the theory that the judgment did not authorize the sale, for the expression "venditioni exponas" may be translated, "You expose to sale," and therefore, as the title of a purchaser at judicial sale will be protected without regard to the regularity of the procedure where the court had jurisdiction, the use of the Latin phrase which was common in olden times will not defeat the deed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1449–1455; Dec. Dig. ⊂⊃349(2).

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

9. EJECTMENT ⊂⊃86(3)—RIGHT TO RECOVER—PROOF.

Where plaintiff established a paper title under grant from the state showing himself to be seised of one-half of a parcel of lands, plaintiff cannot recover the whole without deraigning a superior title or showing an ouster followed by adverse possession ripening into title, while defendant to recover must deraign superior title or establish an adverse title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 239, 244; Dec. Dig. ⊂⊃86(3).]

10. ADVERSE POSSESSION ⊂⊃95—EVIDENCE—WEIGHT.

The listing of lands for taxation and payment of taxes, while a circumstance to be considered in determining ouster and adverse possession, is of little if any weight to establish ouster and adverse possession until there is a showing of actual ouster and possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530–532; Dec. Dig. ⊂⊃95.]

11. ADVERSE POSSESSION ⊂⊃13—TEST.

The test of adverse possession is the exposure of the occupant to an action of ejectment.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67–76; Dec. Dig. ⊂⊃13.]

12. ADVERSE POSSESSION ⟸13—NATURE OF POSSESSION—ESSENTIALS.
To establish adverse possession, there must be actual occupancy, clear, definite, positive, and exclusive, during the whole statutory period with an intent to claim title to the land occupied.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67–76; Dec. Dig. ⟸13.]

13. ADVERSE POSSESSION ⟸14—RUNNING OF STATUTE—OUSTER.
Defendant claimed title to a portion of a timber swamp, but the boundaries given in his conveyance were so vague that the limits could hardly be ascertained. He listed the land for taxation and paid taxes thereon. Thereafter through his agent he placed notices on trees upon the land warning trespassers and asserting his ownership, and similar notices were posted on the courthouse door and at the post office. Subsequently through an agent defendant took possession of the land. *Held*, in view of the nature of the land which was not susceptible of cultivation and of no use but for timber, defendant did not enter into adverse possession until he took actual possession through his agent.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77–81; Dec. Dig. ⟸14.]

14. EJECTMENT ⟸115—RECOVERY OF UNDIVIDED INTEREST.
In ejectment for land, plaintiff is entitled to possession of the whole upon establishing title to an undivided one-half interest, where defendant is shown to have no title whatsoever; for one tenant in common may sue and recover the entire property against one claiming adversely to himself and his cotenant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 373–407; Dec. Dig. ⟸115.]

At Law. Action by the Richmond Cedar Works against R. S. Stringfellow and another. Judgment for plaintiff.

Ward & Thompson, of Elizabeth City, N. C., and Winston & Biggs, of Raleigh, N. C., for plaintiff.

Aydlett & Simpson, of Elizabeth City, N. C., and Mark Majette, of Columbia, N. C., for defendants.

CONNOR, District Judge. [1] Plaintiff shows title out of the state by grant No. 687 to Josiah Collins, July 9, 1796. It then introduced certified copy of a deed from Collins to Richard Davis, March 11, 1789. The certified copy contains the following words:

"Be it known that I, Josiah Collins, Allen and Dickinson, of Edenton, county of Chowan, and state of North Carolina, for and in consideration (seven lines belonging to this deed cannot be copied, it is torn so badly) Josiah Collins Allen Dickinson line." (A description by metes and bounds covering 2½ pages, and concluding:) "Containing sixty thousand acres be the same, more or less, being the land granted by his excellency, Samual Ashe, to the aforesaid Josiah Collins by patent No. 587, being dated 9th day of July, 1796. To have and to hold the said piece or parcel of land with all ways, woods, waters and every other appurtenance thereunto belonging or appertaining to the said Richard Davis, his heirs and assigns forever."

Then follows the usual covenant of warranty to the said Richard Davis. The probate, September term, 1809, Tyrrell county court, is in the following words:

"This deed of sale for land from Josiah Collins, Sr., to Richard Davis, Esq., was proved in open court by the oath of Thos. Trotter ordered to be registered."

Thos. Trotter and James Haskins were the attesting witnesses. It was registered December 29, 1809. This copy was certified March 27, 1914. Plaintiff also introduced a copy of the same deed certified by W. H. Cooper, P. R., September 26, 1887, in which the lines referred to as being torn, in the other certified copy, are found. They are:

"Of the sum of two hundred and fifty dollars current money to me in hand paid by Richard Davis of the county of Tyrrell, state of North Carolina, at and before the sealing and delivery of these presents, the receipt and payment whereof is hereby acknowledged, have bargained, sold, aliened, enfeoffed and confirmed and I do hereby bargain, sell, alien, enfeoff and confirm unto the said Richard Davis, his heirs and assigns, a certain piece or parcel of land lying and being in the county of Tyrrell on the east side of Lake Phelps, south side of Scuppernong river, on the west side of Great Alligator river. Beginning at a pine in Allen Collins and Dickerson's line, etc."

This certified copy was admitted to probate and registration September 27, 1910, upon the affidavit of J. L. Cooper, who testified that he was the brother of W. H. H. Cooper, who was then dead, and was, at the date of the certificate, register of deeds of Tyrrell county. Plaintiff insists that section 988, Rev. 1905, authorized the registration of the certified copy. I am of the opinion that enough appears on the certified copy to show that the original was a perfect deed of conveyance from Josiah Collins to Davis. The habendum, which is complete, read in connection with that portion of the record which was not torn, shows that it was, before being torn, the registration of a deed from Collins to Davis. The certificate of probate made in open court expressly states that it was a perfect deed. To reject the overwhelming evidence in respect to this deed, 107 years after its registration, would be to make a precedent which, if followed, would endanger the title to innumerable tracts of land in this state. Whether or not the certified copy of September 26, 1887, was entitled to registration, the evidence is plenary and uncontradicted that it was a true and correct copy of the record in its then condition. The mutilation of the record evidently took place since 1887.

On March 27, 1809, Richard Davis conveyed a portion of the same land, covering the locus in quo, to Elisha Hassell.

[2] Plaintiff introduced certified copy of a deed, bearing date June 12, 1809, reciting that Elisha Hassell had sold to Joseph Hassell the land described in the deed. In the attestation clause the name of the grantor is written "Elijah Hassell," and the signature "Elijah Hassell" —he makes his mark. On the certified copy is the following indorsement: "And further by these present I, the said Elijah Hassell, do hereby forever warrant and defend," etc. This purports to be signed "Elisha Hassell." The same witnesses attest both signatures. The deed was proven in open court, June term, 1809, upon the oath of James Hassell, one of the attesting witnesses. It will be noted that in a deed from Joseph Hassell to Solomon Hassell, dated August 22, 1809, in which he conveys a tract of land, of which, after giving a specific description, he says:

"Which I have sold this day out of the deed, which I bought of Elisha Hassell, which is out of the Josiah Collins patent, No. 687."

On the certified copy of the deed from Richard Davis to Elisha Hassell is indorsed the following:

"Know all men by these present, that I, Elisha Hassell, for and in consideration of the sum of one hundred dollars to me in hand paid by Joseph Hassell, have given and granted unto said Joseph Hassell all of my right of the within deed. Signed and delivered in the present June 12, 1809.

"Elisha Hassell. [Seal.]"

This indorsement is attested by James Hassell, who also attested the signature to the deed of the same day, June 12, 1809. In view of the similarity in the two names, it is manifest that either the person who wrote the name of the grantor incorrectly spelled it, or the register incorrectly copied it in recording the deed. I find no difficulty in reaching the conclusion that the deed was, in truth, executed by Elisha Hassell. The next deed introduced by plaintiff is from Joseph Hassell to Solomon Hassell, bearing date August 22, 1809, recorded September 22, 1816. It is not denied that this deed covers a portion, which is located by the surveyor, of the Josiah Collins patent, No. 687, including the land in controversy.

It appears from the next deed introduced that Solomon Hassell on November 4, 1813, sold to Jesse Alexander a portion of the land conveyed to him by Joseph Hassell. The deed, after setting out the boundaries, concludes:

"Containing six hundred acres, more or less, which I have sold out of a deed I bought of Joseph Hassell, which was out of the Josiah Collins patent, No. 687."

This deed is recorded October 5, 1819, and covers the land in controversy.

[3] Plaintiff introduced Mrs. Ellen Davenport, the granddaughter of Jesse Alexander, who testified that he died leaving surviving five children, Joseph, George, Thomas, Abner, and Martha. Plaintiff shows certified copy of deed from George Alexander to Thomas Alexander bearing date January 7, 1832, conveying "one-fifth part of a swamp lying in Gum Neck and the swamp my father bought of Solomon Hassell," recorded March 17, 1832. There is no evidence tending to show that Jesse Alexander left a will—and is, therefore, presumed to have died intestate. The land conveyed to him, by Solomon Hassell, therefore, descended to his children, and, by the deed from George to Thomas, the latter became the owner of two-fifths undivided interest, leaving outstanding in his other children three-fifths.

[4] Thomas Alexander conveyed, September 21, 1832, the land by same description contained in the deed from Solomon Hassell to Jesse Alexander, to William Cahoon. This deed is recorded September 7, 1833. Plaintiff introduces deed from William R. Cahoon to James S. Cahoon, bearing date October 20, 1839, conveying the land as described in the deed from Joseph Hassell to Solomon Hassell. This deed is recorded September 6, 1845. Defendants insist that, in the absence of any evidence that William Cahoon and William R. Cahoon are the same person, the court cannot find the fact. It will be noted that there was an interval of seven years between the two deeds.

There is no evidence tending to show the death of William Cahoon, nor was there any evidence that any other person known as William Cahoon owned the land described in the deed. I think that it is a reasonable conclusion that William R. Cahoon is the same person to whom Thomas Alexander conveyed the land.

[5] Plaintiff introduced a certified copy of a deed from Jordan L. Jones, administrator of J. S. Cahoon, to Charles M. McClees, conveying the land by the same description contained in the deed from Solomon Hassell to Jesse Alexander, containing 600 acres more or less. Defendants attack this deed for a number of reasons. In the attestation clause the spaces left by the draftsman for the date are blank. Charles A. Truitt is the attesting witness. It was admitted to probate on December 22, 1885, on the affidavit of B. Jones, in which he states that he was personally acquainted with J. L. Jones, "the party whose name appears to be the same, and was acquainted with his writing, having often seen him write and having seen a great deal of his writing, and verily believes that the signature of the maker thereof is in the proper handwriting of the said J. L. Jones." The deed was ordered to registration, upon this affidavit by T. L. Jones, clerk superior court of Tyrrell county. Defendants insist that the certificate of probate is insufficient because it does not comply with the provisions of the statute then in force in this state.

Section 1246, subd. 8, Code 1883, provides that, when the subscribing witness is a nonresident or dead and the maker shall also be a nonresident or dead, proof of the handwriting of the witness, or that of the maker, before the clerk of the superior court of the county where the deed is to be registered, shall be sufficient evidence of the execution thereof to admit the deed to registration. The defendants insist that the clerk should have found, as a fact, and so certified, that the maker and subscribing witness were dead at the time he took the probate. The statute does not require that the certificate of the clerk shall contain a finding that the maker, or witness, are dead. In Cochran v. Improvement Co., 127 N. C. 386, 37 S. E. 496, Judge Furches reviewed the decisions of the Supreme Court of this state bearing upon the sufficiency of certificates of probate of deeds, reaching the conclusion that the court would presume that the jurisdictional facts existed. This case has been repeatedly affirmed and may be regarded as the settled law of this state. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302; Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164. While the deed does not show the date upon which it was executed, it contains recitals, to which specific reference will be made, which clearly show that it was executed as early as 1850. It was probably 35 years of age when admitted to probate. It was shown in evidence that the maker died during the year 1854, and the witness Truitt died 1879 or 1880. There can be no doubt that, at the time the probate was taken, the jurisdictional conditions existed. It would be trifling with the property rights to reject the certified copy of the deed. The certified copy from the office of the register of deeds of Tyrrell county is admitted.

[6] The other objections to the validity of deed invite a careful

consideration of its recitals and the record evidence relied upon to sustain it. It appears that at the January term, 1849, of the court of pleas and quarter sessions of Tyrrell county, Jordan L. Jones, by his attorney, Hon. R. R. Heath, exhibited a petition setting forth that he was administrator of the estate of J. S. Cahoon, deceased. The record of the court, April term, 1848, shows his appointment and qualification. He alleges: That the estate of his intestate is indebted to him in the sum of $110.75. That the personal property, and rights and credits, of his intestate have been exhausted in the payment of debt; that he died seised and possessed of real estate, which descended to his two children, who were his heirs at law, "Sarah Ann and Elizabeth Cahoon, both of whom are infants in ward to one Jesse Sikes duly appointed by Tyrrell court, the county of their domicile. That he is advised he is entitled to satisfaction of his claim against his intestate's estate out of the realty descended, and he therefore prays his debt may be ascertained and decreed, that execution may issue against the lands descended, therefor, and to that end that process may issue to said heirs compelling them to appear and answer," etc. At the January term, 1849, of the court, the following entries appear on:

The "Appearance Docket, No. 42, Heath—Jordan L. Jones, Admr. v. Cahoon Heirs. Service accepted. It appearing to the court that the estate of James S. Cahoon is indebted to petitioner in the sum of $110.75, judgment for said sum and interest from this date is granted to be raised from the lands with costs, descended to defendants from James L. Cahoon. Issue Venditioni Exponas. Issd."

At the April term, 1849, the case is found on the execution docket. No entry appears showing what, if anything, was done. The record shows:

An "account sales of J. L. Jordan the lands of Jas. S. Cahoon deed—sold on a credit of six months on the 21st day of April, 1849, agreeable to a petition filed at January term, 1849, by administrator."

Among other tracts, the account sale shows: "The Alexander tract on east of Armstrong bridge. Charles McClees $75.00." The deed recites that:

The land was sold "at Ashbee's store in Gum Neck, after advertising the same at the court house door and several other places in said county when and where Charles McClees came and bid the sum of seventy-five dollars and no one bidding a higher price, the following tract of land was struck off to him, the said Chas. McClees," etc.

Defendants insist that it appears from the record that no process was issued or served upon the heirs at law of James L. Cahoon, or their guardian, that therefore the court did not acquire jurisdiction of their persons, and that the judgment rendered in the cause is void.

Upon the back of the petition the following entry is found:

"Jordan L. Johnson, Administrator of Cahoon, v. Cahoon Heirs.
"Service accepted. Jesse Sikes, Guardian."

The entry on the docket was evidently taken from this indorsement and constituted a judicial recognition of its validity.

In Matthews v. Joyce, 85 N. C. 258, it was held that in a petition in the county court, prior to the adoption of the Code of Civil Procedure, against infants, the court had the authority, without service of process upon them, to appoint a guardian ad litem for them, and proceed to judgment. In that case it appears that Judge Dillard and Judge Settle were referees. Judge Ruffin was of counsel. The concurrence of these lawyers, all whom, besides long and distinguished careers at the bar, served on the Supreme Court bench, with the opinion of Chief Justice Smith, writing for a unanimous court, of which Judge Ashe was the associate, gives to the decision more than ordinary weight. Judge Smith, after stating that the practice followed in that case "has long and almost universally prevailed in this state, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defense of this Special Guardian." Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975; Insurance Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580. If the court, under the practice prior to the Code of Civil Procedure, had the power to appoint a guardian ad litem, for the infant defendants, without process being served, it would seem clear that it could proceed to judgment when the infant appears by a general guardian who comes in and "accepts service"—voluntarily submits to the jurisdiction of the court. As said by Judge Smith, to declare judgments, under such conditions, void, "would be to establish a rule subversive of much judicial action, unsettling titles dependent thereon, and introducing distrust and confusion in regard to the tenure of estates, the injurious consequences of which can hardly be foreseen or estimated, and we do not feel at liberty, after so long delay, to disturb the decree on this ground." In that case, a direct attack was made on the decree by those who were affected by it; here, the attack is collateral and by a stranger to the title. There, the decree attacked was rendered during the year 1867 and the action was tried in 1879; here, the judgment was rendered 67 years ago. The court acquired jurisdiction, and its judgment cannot be called into question at this time.

[7, 8] It is, however, insisted that, if it be conceded that the court acquired jurisdiction, it did not render a judgment authorizing the administrator to sell the land. If the judgment is erroneous, it is conceded that it cannot be attacked collaterally; but if, as insisted by defendants, the judgment did not authorize the sale of the land by the administrator, his action in that respect is, of course, absolutely void. There is some apparent confusion in the language used by the counsel who conducted the proceeding. The judgment subjects "the lands descended" to sale for the payment of the amount found due the administrator, but, instead of directing the sale by the administrator, orders the issuance of a writ of venditioni exponas; and the docket entry shows that it was issued. It appears that J. L. Jordan, the administrator, was at that time sheriff of Tyrrell county. The Act of 1784, R. S. c. 63, § 1, gave to the creditor of a deceased debtor, whose personalty had been, upon a plea of fully administered, by the personal

representative, found to have been exhausted, the right to have a writ of scire facias summoning the heir to show cause why execution should not issue against the lands descended in his hands, etc. The Act of 1789, section 8 of the same chapter, Rev. Stat., provides that, if the estate of a deceased person is indebted to the administrator, and there shall not be personal assets sufficient to pay such debt, that it should be lawful for such administrator to prefer a petition in the county court, against the heir at law, setting forth the nature of the debt and praying that the heir be made defendant, and if, upon the hearing, "a decree be made against such heir or heirs and devisee or devisees, or any of them, execution shall and may issue against the real estate of the deceased debtor, in the possession of such heir, etc." At the session of the Legislature 1847 (Laws 1846–47, c. 1), this chapter of the Revised Statutes was repealed and a new method of subjecting the lands of deceased debtors, in the hands of heirs or devisees, prescribed. The last section of the act expressly repeals all laws and clauses of laws which allow creditors of deceased persons to subject the lands descended by scire facias, etc. The provisions of the act applied to all administrations granted subsequent to February 1, 1847. It is manifest that neither counsel nor clerk were very familiar with the new statute.

It will be observed that, in the method of procedure prescribed by this statute, no difference is made between debts due the general creditors and the administrator; but, in all cases where the goods and chattels were insufficient to pay all his debts, with the charges of administering the estate, the administrator was required to file a petition, setting forth the amount of the debts and the charges of administration. He was also to set forth a description of the lands, the heirs were to be made parties and served with notice "as in other petitions," and thereupon if the facts were found to be true, as alleged, the court was directed to make an order directing the sale, etc. The facts set forth in the petition filed by Jordan L. Jones, administrator, while not so full as required by the statute, complied substantially with its provisions—certainly containing those allegations which were essential to confer jurisdiction upon the court. The heirs were parties and, as we have seen, came into court by their guardian. The court found the amount of the debt and directed that the "sum be raised from the land descended to defendants from James S. Cahoon." The criticism of the judgment is in that it directed that a venditioni exponas issue. By a literal translation, these words mean, "You expose to sale." The writ known by that name is one which directs the sheriff to expose to sale lands or goods upon which he has theretofore levied a writ of fieri facias, and returned it into the court. As we know, formerly, in noting pleadings and docket entries, Latin terms, abbreviated, were in general use by lawyers and clerks. Doubtless, in proceedings under the statute in force prior to 1847, the attorney, or the clerk, noted the action and orders of the court, by using the words "Sci Fi" and, upon its return, "Ven Ex," all of which was well understood by them. It is no strained construction of the term used to give to it the meaning which it is manifest was given by the administrator, as shown by

the recitals in the deed—an order to sell the lands of his intestate for the purpose of making assets, etc. He did not refer to it as a "writ," but as an order "upon a petition filed." Acting in his capacity as administrator, and in accordance with the prayer of his petition, he exposed the land to sale—what he asked the court to permit him to do, and what the court manifestly gave him license or permission to do, as the statute authorized and directed. This is further shown by the account of sale made and returned to the court in which he says that he sold the land "on a credit of six months agreeable to a petition filed."

Defendants insist that the deed cannot be sustained because no order of sale, nor report, nor order confirming the sale, is shown. It is undoubtedly true that, upon both the reason of the thing, and decided cases, the law requires that one claiming under a deed, made pursuant to a judicial proceeding, show the record of the proceeding or account for the failure to do so. There is evidence tending to show that search was made in the clerk's office for the papers, orders, etc., and that the only paper found was the petition which was put in evidence. There is abundant evidence that the records of the court of Tyrrell county, prior to the Civil War, and the change in the system of courts and procedure, are in much confusion, and that it is practically impossible to find many of them. The courts, of necessity, for the protection of the title of purchases dependent upon deeds made by sheriffs, administrators, or commissioners, indulge presumptions of regularity in procedure, when it is shown that the court making the order of sale or rendering the judgment had and entertained jurisdiction of the person and the subject-matter. Grignon's Lessees v. Astor, 2 How. 319, 11 L. Ed. 283. It is also uniformly held by the courts of this state and the Supreme Court of the United States that, when it appears that the court in which the order of sale was made had jurisdiction, the title of the purchaser at such sales will be protected, without regard to the regularity of the procedure. In Brown v. Coble, 76 N. C. 391, it is held that, after the payment of the purchase money for land sold under a decree of the court, an order of such court is not necessary to enable the master to make a valid deed to the purchaser. In Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975, Walker, J., says:

> It is "the general doctrine, settled by this court, * * * that, when there is a purchaser under an order or judgment, the purchaser need only to inquire if upon the face of the record the court apparently has jurisdiction of the parties and the subject-matter, in order to be protected, provided he buys in good faith and without notice of any actual defect"—citing a large number of decisions of the court.

In that case no process was served on the infant defendant before the appointment of the guardian ad litem; the court held that the title of the purchaser was protected by the judgment. Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763, wherein Judge Walker again reviews the authorities. In Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34, Judge Field says:

> "The proceeding for the sale of the real property of an intestate, though had in the general course of administration, is a distinct and independent pro-

ceeding authorized by statute only in certain specially designated cases; but, when by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some * * * mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed."

Reference to the records of this court, and the state courts, discloses an amount, and character, of litigation involving the validity of title to the timber or swamp lands in this state, together with the unsatisfactory and incomplete records, which illustrate the wisdom, if not necessity, of resorting to presumption of regularity of judicial procedure in the courts, conducted frequently a century ago. The lands were usually of small value and incapable of other than constructive possession. The manner in which the judicial records were made and preserved render it necessary, for the protection of titles, that the courts indulge in presumptions that, however imperfect in form and state of preservation, they import verity. This record is a striking illustration of this necessity. I am of the opinion that the deeds and records introduced by the plaintiffs show a connected paper title to the interest which Thomas Alexander conveyed to Jas. S. Cahoon in the land in controversy.

Plaintiff introduced record of special proceedings in the superior court of Tyrrell county, instituted August 26, 1893, by the heirs of Chas. McClees for sale for partition, in which, pursuant to decrees made therein, the land in controversy, together with several other tracts, were sold and conveyed by M. Majette, commissioner, to C. R. Johnson, November 10, 1893. Johnson conveyed to Richmond Cedar Works, October, 1905. One of Jesse Alexander's children died intestate and without issue.

[9] Unless the title thus acquired by plaintiff has been divested by some superior paper title, or by an ouster followed by adverse possession of sufficient length of time to bar plaintiff's action, it is entitled to one-half undivided interest in the 600 acres described in the complaint. Plaintiff introduced evidence which, it is argued, entitles it to recover the entire tract upon a different chain of title. Having shown title out of the state and in itself, it can only recover, in this action, by showing either a grant prior in date to the Josiah Collins grant, No. 687, or an ouster, followed by adverse possession, ripening into title, and showing that it owns such title. This, it has failed to do. Its right to recover is dependent upon the paper title which it has shown.

Defendants can resist the plaintiff's recovery by showing a superior legal or paper title, or by showing color of title in themselves or those under whom they claim, followed by an ouster and seven years' adverse possession. Defendant Armstrong does not claim to have title. He was in possession of the land in controversy as the tenant of his codefendant, R. S. Stringfellow.

Defendant Stringfellow claims under the following paper title:

(1) Deed from Cahoon and others, children of Gilbert Cahoon, to Z. F. Owens, January 9, 1885.

(2) Z. F. Owens to G. W. Rowland, March 6, 1885.

(3) G. W. Rowland to H. C. Walker, July 18, 1888.

(4) G. W. Rowland to Mrs. S. Stringfellow, 1889.

(5) Mrs. Mary S. Stringfellow to defendant R. S. Stringfellow, April 27, 1896.

(6) Defendant also introduces a deed from Roughton to himself, December 14, 1909.

An action was brought by plaintiff against defendant for the recovery of the land in controversy, December, 1911, in which plaintiff at ——— term, 191—, submitted to a judgment of nonsuit, and on November 25, 1914, being within one year thereafter, brought this action. Defendant does not connect himself with the title, originating with Josiah Collins, nor any of those persons claiming under, or through, him, or a grant prior to that to Josiah Collins. His claim to ownership is based upon an ouster and an alleged adverse possession of seven years. While the description contained in the deeds under which defendant claims is very indefinite, it may be taken that it is sufficient to enable the location of the land, as surveyed by Mr. Basnight, 1910, and covers the land in controversy.

[10] We are thus brought to a consideration of the determinative question, upon the decision of which the conflicting contention of the parties to this action depends. It is conceded that the land is low, swampy soil, covered by a growth of pine, juniper, and cypress, not capable of cultivation, and valuable only for the timber on it. It is a part of a large swamp of several thousand acres. Prior to the survey made by Basnight, for defendant, it had not been surveyed, and there were no marked lines or boundaries upon, or around, it. There is no sufficient evidence of an ouster and possession by those under whom defendant claims.

For the purpose of showing adverse possession, defendant introduced evidence in regard to: (1) Listing and payment of tax on the land. (2) Posting notices warning trespassers to keep off. (3) Building and occupying a small cabin on the land. (4) Cutting trees.

I have given the evidence a careful examination and consideration. The payment of taxes by the agent of Mrs. Stringfellow, prior to 1896, the date upon which she conveyed to defendant, is of but little probative value as evidence of an ouster or possession. The latest expression of opinion as to the effect of payment of tax on land, as evidence of adverse possession, is found in Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949, where Judge Walker says:

"The listing of the land and payment of taxes is a relevant fact, in connection with other circumstances, tending to show a claim of title and an adverse or hostile possession, though not sufficient by itself for the purpose."

In this case, listing and paying taxes on the land prior to the time that notices were posted and the cabin built thereon should be given but little, if any, weight, for the purpose of showing an ouster and possession. The land in controversy is a small portion of a large timber swamp. There was nothing on or around the land to show the metes and bounds of defendant's claim; and, until 1910, it does not appear that any survey had been made or any act directing attention to the extent of the claim to the land. Nothing appeared on the tax book indicating the location or extent of defendant's claim. Mr.

Stringfellow paid taxes on the land after the execution of the deed to him in 1896.

[11-13] The test of adverse possession is the exposure of the occupant to an action of ejectment. Christman v. Hilliard, supra. The standard, by which the claim of the defendant Stringfellow that he has acquired title by adverse possession is to be measured, has been frequently fixed by the court. In one of the latest decisions, it is said:

"To establish adverse possession, there must be actual occupancy, clear, definite, positive, and exclusive during the whole statutory period and with an intention to claim title to the land occupied." Bland v. Beasley, 145 N. C. 168, 58 S. E. 993.

"Possession necessary to give title to land by limitations is a possession under color, taken by a grantee in person or by his agents, and held and claimed continuously to the boundaries of the deed, without interruption or relinquishment, for seven years." Haddock v. Leary, 148 N. C. 378, 62 S. E. 426.

There can be no doubt that Mr. Stringfellow in good faith claimed to own the land in controversy; he honestly believed that his title was valid. He paid taxes on it, and during the year 1907 had his agent, Mr. Armstrong, to build a small house or cabin on it, built of logs cut from the land. Armstrong occupied it at night, with more or less regularity, kept the door locked, and left his cooking utensils and furniture in it. This was done for the purpose of claiming and asserting ownership and was notice to the holder of the legal title of his claim. At some time (the exact date is uncertain, but, so far as it can be fixed, during the year 1905), Mr. Stringfellow, who resides in Alabama, caused to be printed on pieces of cloth warning to trespassers, and had Mr. Armstrong, his agent, to post, or tack, them upon trees on different parts of the land. The words were printed on "a thin piece of duck"—cloth. One was posted or tacked upon the courthouse door in Columbia. During the year 1909, the first notices having become worn or defaced by the weather, Mr. Stringfellow had the notice printed upon thicker or heavier cloth and posted on the trees and at the post office. The notices forbade people from "trespassing or hunting" on the land.

Assuming that the several assertions of possession by Mr. Stringfellow, combined or connected, constituted an ouster and were the exercise of such dominion or use of the land of which it was capable, and that they began with the posting of the first notices, 1905, and continued up to the time the first action was instituted, December, 1911, the period of time is not sufficient to ripen such possession into title. I think it doubtful, however, whether there was any ouster or adverse possession until the cabin or house was built in 1907. It is doubtful whether simply posting notices warning trespassers and hunters from going upon swamp land, with no suggestion of its boundaries, constitutes possession. There was no actual occupancy of any portion of the land, nor were there any metes and bounds marked or indicated by which the extent of the defendant's claim could be ascertained. An examination of the deeds, under which he claimed, would have afforded but little information in respect to the

boundaries. It is painfully indefinite and uncertain. It was only by a most latitudinous construction that it was possible to make a survey. A large mass of evidence in regard to the location of the several divisions of Thicket Swamp, itself sufficiently indefinite, only tended to confusion and uncertainty. The confusion of boundaries, together with the almost numberless conveyances and the absence of well-defined marked lines, or water courses with distinctly marked banks or "runs," renders any conclusion which may be reached unsatisfactory.

It is reasonably certain that, for some reason, not very apparent, August 22, 1809, a tract of swamp land was conveyed by Joseph Hassell, "out of the deed which I bought of Elisha Hassell, which is out of the Josiah Collins patent, No. 687," containing 600 acres. This tract is located with reasonable certainty and is conveyed by the several deeds in plaintiff's chain of title. It is not very clear that defendant's deed covers this land, but there is sufficient evidence to indicate that it probably does. Assuming that it does, I am unable to find, nor is it seriously contended, that those under whom defendant claims acquired the Collins title. The claim therefore of the defendant must, of necessity, begin with an ouster and depend upon adverse possession. Giving to the principle that, in respect to lands of that character, possession may be acquired and continued by subjecting the land to the use of which it is capable, a most liberal interpretation and application, I am unable to find that such possession began prior to 1907, when the house or cabin was built, and thus continued for only four years before the first action was brought. A nonsuit having been taken and this action brought within one year thereafter, the paintiff is not barred of its entry and action.

[14] The plaintiff, having shown title to one-half undivided interest, is entitled to be put into possession as against the defendant who shows no title to any interest. The rule is stated by Mr. Justice Avery in Gilchrist v. Middleton, 107 N. C. 663, 684, 12 S. E. 85, 92:

"One tenant in common of land may sue alone and recover the entire interest in the common property, against another claiming adversely to his cotenants as well as to himself, though he actually prove title to only an undivided interest. This he is allowed to do, in order to protect the rights of his cotenants against trespassers and disseisors." Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924.

This action was instituted on the law side of the docket; but upon hearing the evidence it was manifest that, by reason of the complication of the boundaries and the large number of deeds introduced, it was impracticable to have the questions involved decided by the jury. The court found the facts.

A judgment will be drawn declaring that the plaintiff is the owner of a one-half undivided interest in the land described in the complaint. So far as appears from this record, the other one-half interest is outstanding in the heirs of Jesse Alexander, deceased. The cost will be divided between the parties, each party paying its and his witnesses, subpœnas, cost of service, and attendance; the remaining cost, including stenographer's allowance and court cost, to be divided equally.

THE LOUIS DOLIVE.

(District Court, E. D. Louisiana. July 19, 1916.)

No. 14569.

1. MARITIME LIENS ⊂=66—RIGHT TO LIEN—DILIGENCE.
Due diligence in ascertaining the authority of one ordering supplies for a vessel, which is necessary before a maritime lien can be secured on the vessel, is largely a question of fact depending on the particular circumstances of each case.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 104; Dec. Dig. ⊂=66.]

2. MARITIME LIENS ⊂=30—RIGHT TO LIEN—DILIGENCE.
One furnishing supplies on the order of the person in charge of a vessel and seeking a maritime lien therefor is not absolved from all inquiry in every case by want of notice as to the authority of such person.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. ⊂=30.]

3. MARITIME LIENS ⊂=30—RIGHT TO LIEN—DILIGENCE.
The owner of a vessel before charter had dealings with claimant, supplies being charged directly to the vessel, and bills being paid by the owner. After the charterer took possession of the vessel, supplies were ordered by the captain of the vessel, who was known to claimant, and for some time they were paid for promptly. The owner did not notify claimant that the vessel had been chartered. *Held*, that the claimant in furnishing necessary supplies and charging them to the vessel was not guilty of lack of due diligence, and so was entitled to a maritime lien against the vessel, for the owner might reasonably have informed claimant of the charter party.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. ⊂=30.]

4. MARITIME LIENS ⊂=30—RIGHT TO LIEN—DILIGENCE.
Before the chartering of a vessel, the manager of the corporate owner had occasionally ordered coal for her from claimant; but claimant knew the boat burned wood as well as coal and usually obtained her fuel at another place. After the vessel was chartered, the president of the corporate charterer made arrangements with claimant to furnish coal to the vessel, the coal being delivered in an entirely different manner. Claimant made no inquiry as to the authority of the president of the charterer to impose liens on the vessel, and the coal was used for the purpose of enabling the vessel to make round trips across the lake in which it plied. *Held*, that claimant did not use sufficient diligence, particularly in view of the fact that the coal was not ordered by the master, and so was not entitled to a maritime lien.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. ⊂=30.]

5. MARITIME LIENS ⊂=65—RIGHT TO—EVIDENCE.
Where no evidence was offered in support of a claim for maritime lien, the libel will be denied.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. ⊂=65.]

6. MARITIME LIENS ⊂=62—ENFORCEMENT—PARTIES—PETITION.
In a proceeding to enforce maritime liens on a vessel which had been chartered, where the owner intervened claiming the vessel, the court might

in its discretion allow the owner to file a petition against the charterer to obtain reimbursement for any lien perfected against the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 100; Dec. Dig. ⊂⊃62.]

7. SHIPPING ⊂⊃50—CHARTER PARTIES—RIGHT OF CHARTERER.

The charterer did not pay for necessary supplies furnished a vessel and a lien was obtained against it. The charter party provided that the charterer should make repairs on the vessel and should be reimbursed out of the money due on the charter party. The charterer retained sufficient to reimburse itself for the repairs contemplated. *Held*, that the owner was in such case entitled to reimbursement to the amount of the liens.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 150–155; Dec. Dig. ⊂⊃50.]

8. MARITIME LIENS ⊂⊃56—ENFORCEMENT—PARTIES.

Where, in a proceeding to enforce maritime liens on a vessel, the owner intervened claiming the vessel and then filed a petition against the corporate charterer, the owner cannot in that proceeding set up the defective incorporation of the charterer and try out the question of the liability of stockholders of the charterer.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 95; Dec. Dig. ⊂⊃56.]

In Admiralty. Libel by the Kittredge-Waters Supply Company against the steamer Louis Dolive, in which the Robert P. Hyams Coal Company, Limited, and others, intervened; the vessel being claimed by the St. Tammany Steamship Company as owner, which filed a petition against the charterer. Decrees sustaining the lien of libelant and the petition of the claimant owner.

John D. Grace, of New Orleans, La., for libelant.

Rice & Montgomery, of New Orleans, La., for claimants.

Jas. E. Zunts, of New Orleans, La., for intervener Robt. P. Hyams Coal Co. and others.

Buck, Walshe & Buck, of New Orleans, La., for intervener Tennessee Coal, Iron & Ry. Co.

John Dymond, Jr., and A. Giffen Levy, both of New Orleans, La., for intervener Pineland Realty Co.

Grant & Grant and Eraste Vidrine, all of New Orleans, La., for Lancaster and others.

FOSTER, District Judge. In this case the Kittredge-Waters Supply Company filed a libel against the steamer Louis Dolive to recover for supplies furnished, and other materialmen intervened, to wit, Robert P. Hyams Coal Company, Limited, Tennessee Coal, Iron & Railroad Company, Carpenter & Hillman, and Pine Lands Realty Company. The vessel was seized, but was claimed by the St. Tammany Steamship Company as owner. The owner answered the libel and intervening libels and denied that any maritime liens existed on the vessel, on the ground that, at the time the supplies were furnished, the vessel was being operated under a charter by the Mandeville Steamboat Company, Limited, and the charterer was not authorized to create liens on the boat. The owner also filed a petition against the charterer and several of its officers and stockholders, to wit, William B. Lancaster, John E. John-

son, and Earnest J. Bagur, calling them in warranty and praying for judgment over against them for any amounts adjudged to be liens on the vessel. The charterer and the individuals named excepted to the regularity of the proceeding on the ground that a suit in personam could not be cumulated with an action in rem. These exceptions were overruled. 211 Fed. 783. Answers to the petitions were filed setting up the unseaworthiness of the vessel when delivered to the charterer, the expenditure of an amount for her repair exceeding the total of the claims against the vessel as an offset, and other defenses personal to the individuals. These various and somewhat complicated issues were referred to a commissioner to take the proof; but he submitted no report, and the matter was finally argued in open court on the pleadings and the evidence taken before the commissioner. The facts will appear in the course of the opinion.

The Louis Dolive, a side-wheel steamer, was owned by the St. Tammany Steamship Company, a Louisiana corporation, and was operated by it for some time on Lake Pontchartrain and its tributaries between New Orleans and other points in Louisiana. On November 1, 1911, it chartered the boat to the Mandeville Steamboat Company, another Louisiana corporation; her use being restricted to the same waters. The transfer of the vessel was complete. The charterer appointed a master and crew and agreed to return the boat in good order, free from all liens and incumbrances. The charter was for two months with the right to extend for ten months, and this was availed of by the charterer. Whether any liens were acquired on the boat depends on the Act of June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, §§ 7783–7787). The act creates a lien on foreign and domestic ships for necessaries furnished upon the order of the owner or of any person lawfully in possession, including a charterer or an owner pro hac vice, but with the proviso that no lien will arise if the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party the person ordering the necessaries was without authority to bind the vessel. In this case, by the terms of the charter party the charterer was without authority to bind the vessel, but was lawfully in possession as owner pro hac vice. Therefore the question as to whether the materialmen used due diligence is of paramount importance.

Claim of Kittredge-Waters Supply Company.

[1-3] With regard to this claim, it appears that the Louis Dolive had been dealing with the claimant prior to the charter. Supplies were charged directly to the vessel, and the bills were usually promptly paid by the owner. When the charterer took charge of the vessel, she continued to deal with the claimant, charges were made as before, and the bills were paid promptly for a while. When the supplies forming the basis of the claim were delivered, Capt. Badeau, who had formerly commanded the Dolive on the appointment of the owner, was in command. All of the supplies were ordered by him, or by the chief engineer or other members of the crew with his express authorization. When the account was not paid with the usual prompt-

ness, the secretary and credit man of the claimant looked in the newspaper for the advertisement of the vessel and discovered that the agent was Earnest J. Bagur, who was secretary of the charterer. The advertisement is not in evidence, and it does not appear that it conveyed notice that the Dolive was being operated by virtue of a charter, and furthermore, all, or nearly all, of the supplies had been furnished at that time. When Capt. Badeau ordered the supplies, the claimant made no inquiry of him as to whom he was employed by, and he said nothing at all on the subject. The supplies were necessary and were used on the boat. They consisted mainly of articles for the engine room, with the exception of a considerable number of bolts and stirrups that were used to permanently repair one of the paddle wheels. One or two other captains had preceded Capt. Badeau, but it is shown captains on Lake Pontchartrain frequently change vessels, and all of them were well known to the claimant, and no questions ever arose as to the payment of bills contracted by them for the vessel. It would be impracticable for the owner of a vessel chartering her to another to give special notice to every one from whom the charterer might be expected to buy supplies, but it would be an easy matter for him to give notice in some form to those that he formerly had regularly dealt with. Due diligence is mainly a question of fact depending on the particular circumstances of each case. A materialman is not absolved from all inquiry in every case by want of notice as to the authority of the person in charge of the vessel. For instance, he is always put upon inquiry as to the necessity for the supplies. The Grapeshot, 9 Wall. 129, 19 L. Ed. 651. But in this case the boat had been dealing with this claimant before her charter and the supplies were ordered by the captain, who had formerly been employed by the owner. The boat was running in the same trade, there was nothing to put claimant on notice of the changed condition of her operation, and the vessel's dealings might well have been considered a continuance of the old account. Except as to the necessity for the supplies, claimant was not required to make inquiry as to the authority of the captain to order them. As the supplies were in fact necessary, the failure to inquire as to this feature is immaterial. Under all the circumstances, claimant has not been guilty of a lack of due diligence. The supplies were necessary, were ordered by the captain, and were of benefit to the owner. The vessel was impliedly hypothecated, and the lien will be allowed. The George Dumois, 68 Fed. 926, 15 C. C. A. 675; The Malola (D. C.) 214 Fed. 308; The City of Milford (D. C.) 199 Fed. 956; The Iola (D. C.) 189 Fed. 972.

Claim of Robert P. Hyams Coal Company.

[4] With regard to this claim, it appears that, prior to the chartering of the Dolive, Thomas Ellis, manager of the St. Tammany Steamship Company, the owner of the boat, had occasionally ordered coal for her from claimant; but claimant knew the boat burned wood as well as coal and that she usually got her fuel at Mandeville, La. All of the coal ordered by Ellis was delivered in wagons directly to the boat. About a year after the last order from the owner, W. B.

Lancaster, president of the Mandeville Steamboat Company, made arrangements with the claimant to supply the Dolive with coal. W. P. Hyams, president of the claimant, testifies that he sold the coal to Lancaster and looked to him for payment; that he made no inquiries as to who was running the boat, or by what authority Lancaster ordered coal on her faith and credit; that he never makes any investigation in any case before delivering coal to a vessel, but always looks to the vessel. Claimant sold and delivered quite a considerable amount of coal, charging it in each instance to the boat, and, except for the last five carloads, it was all paid for; the bills being presented and paid at Lancaster's office. Lancaster was principally engaged in the real estate business, and claimant knew this. The coal was delivered to the railroad company and transported to Spanish Fort, a suburb of New Orleans on Lake Pontchartrain, and there dumped into a bin, and the vessel coaled from this bin. Occasionally the captain of the vessel would telephone to the claimant for the delivery of the coal, but it cannot be considered the captain ordered any of the coal, and it is not shown that the captain had anything whatever to do with the coal in controversy here. It is shown that the Dolive during the term of the charter got coal nowhere but at Spanish Fort, but it is not shown that all the coal dumped in the bin was in fact used on the Dolive. The Dolive was making short daily trips from her home port to Mandeville directly across Lake Pontchartrain. She required five or six tons of coal for the round trip, worth not over $20; but the claim was allowed to accumulate until it reached over $630. Such an amount of coal was not needed to preserve the vessel or to enable her to complete a voyage and was of no benefit to the owner of the boat. In my opinion any one opening a new running account with a steamboat, especially in her home port and when her supplies are not ordered by her captain, is charged with the duty of at least inquiring as to the authority of the person ordering the supplies to bind the vessel, if he intends to rely upon the credit of the vessel for payment. This claimant could not have considered, and in fact did not consider, that the account was a continuing one with the owner. Had it made the least inquiry, it would have discovered the terms of the charter party. Mere belief, in good faith, that one has a lien on a vessel for supplies furnished, does not create a lien.

Under the circumstances, I do not consider claimant has used due diligence. The lien will be denied and the intervening libel will be dismissed without prejudice. The Eureka (D. C.) 209 Fed. 373; The Iola (D. C.) 189 Fed. 972; The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Valencia, 166 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

Claims of the Tennessee Coal, Iron & Railroad Company, and Carpenter & Hillman.

These claims are in exactly the same condition as the Hyams claim with regard to the delivery of the coal and the failure to make the least inquiries. Furthermore, neither of these claimants came in con-

tact even with the charterer, as the coal was ordered from them by Hughes, a broker, and no attempt has been made to show his authority.

Liens will therefore be denied, and the intervening libels will be dismissed without prejudice.

Claim of the Pine Lands Realty Company.

[5] No evidence whatever has been offered to support this claim. It will therefore be denied, and the intervening libel dismissed without prejudice.

[6] With regard to the issues as between the St. Tammany Steamship Company and the Mandeville Steamboat Company, my attention has been called to the recent case of the Wilhelmina, 232 Fed. 430, — C. C. A. —, on the question of the propriety of rendering judgment over against the charterer in these proceedings on the petition calling it in warranty. To that case might be added The Ruth, 186 Fed. 87, 108 C. C. A. 199. Both cases uphold the discretion of the court in allowing a petition calling a charterer in warranty and are not in conflict with other cases on the same subject. I see no occasion to change the views expressed when overruling the exception to the petition. The Louis Dolive (D. C.) 211 Fed. 783. And in this regard see The Planet Venus (D. C.) 113 Fed. 388; Evans v. New York & P. S. S. Co. (D. C.) 163 Fed. 407; and O'Keefe v. Staples Coal Company (D. C.) 201 Fed. 133.

[7] As to the offset claimed, it appears that the charterer made considerable repairs to the Dolive. It is clear, however, that these were agreed to be made by the charterer, except as to a small proportion of same. As to this proportion to be paid for by the owner, it was agreed that the cost should be deducted from the charter money, and it appears that the charterer has retained more than sufficient to reimburse itself. The charter also sets up a partnership agreement with the owner, but the proof is that the agreement was with a Mr. Clay Riggs personally, and not with the owner. Furthermore, Riggs was not authorized to bind the owner.

[8] The owner has endeavored to inject into the case questions concerning the legality vel non of the incorporation of the Mandeville Steamboat Company and is seeking personal judgment against Lancaster and the other stockholders named, on the theory that the concern is a partnership and not a corporation. To go into these questions would complicate the case to an extent not contemplated by the permission to call the charterer in warranty. If there is any personal liability on the stockholders of the charterer to the owner, it arises from the law of Louisiana, and not from the contract between the parties. I considered it proper to permit the cumulation of an action in personam by the owner against the charterer with the action in rem by the materialmen against the vessel, as the liability was primarily that of the charterer; but the line must be drawn somewhere.

The St. Tammany Steamship Company will have judgment over against the Mandeville Steamboat Company for the amount allowed

the Kittredge-Waters Supply Company. As against the individuals named, the petition will be dismissed without prejudice.

Decrees may be drawn in accordance with the above, costs to follow the decrees, and, unless apportioned by agreement, may be taxed on motion.

UNITED STATES v. GRIMINGER.

(District Court, N. D. Ohio, W. D. October 12, 1916.)

No. 2524.

1. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CONSTRUCTION OF STATUTE.

As the laws of the United States afford very reasonable terms of admission to citizenship, doubts as to whether an alien has performed the conditions precedent required by statute should be resolved in favor of the government.

2. ALIENS ⟸62—CITIZENSHIP—RESIDENCE—"RESIDED CONTINUOUSLY."

An alien who, after 8 years' residence in the United States and declaration of his intention to become a citizen, returned to the country of his nativity, remaining there over 2½ years, during which time he married. After his return to the United States, and 5 years after making declaration of intention, the alien applied for naturalization, having spent about one-half of the 5-year period in the country of his nativity. *Held*, that under Act June 29, 1906, c. 3592, § 4(4), 34 Stat. 596 (Comp. St. 1913, § 4352[4]), requiring an alien to have resided continuously within the United States for 5 years immediately preceding his petition for final papers, the alien was not entitled to admission to citizenship, although the term "resided continuously" does not necessarily preclude any departure from the United States; the purpose of the residence requirement being to enable the alien to acquaint himself with the language and customs of the country of his adoption.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.

For other definitions, see Words and Phrases, Second Series, Resided Continuously.]

3. ALIENS ⟸62—CITIZENSHIP—"RESIDED."

Under Act June 29, 1906, c. 3592, § 4 (4), 34 Stat. 596 (Comp. St. 1913, § 4352 [4]) requiring an alien to have resided within the United States for five years immediately preceding his petition for final papers, the term "resided" means "lived."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.

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

4. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—ATTACK ON CERTIFICATE.

Under Act June 29, 1906, § 15 (Comp. St. 1913, § 4374), providing for cancellation of certificate fraudulently or illegally procured, the naturalization certificate of an alien may be attacked where he had not complied with the requirement of 5 years' continuous residence in the United States before petition for final papers, even though he made a candid disclosure of the facts to the court granting the certificate.

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5. ALIENS ⊂⊃71½, New, vol. 7 Key-No. Series—NATURALIZATION—ATTACK ON CERTIFICATE.

As the state court issuing a certificate of naturalization received its authority from act of 1906, a certificate issued by such state court may be attacked in the federal District Court on the ground that the requirements of residence had not been met, and the attack cannot be defeated on the ground that the state court had exclusive jurisdiction, and that its judgment was not reviewable.

Proceedings by the United States against Joseph Max Griminger, to cancel a certificate of naturalization. Demurrer to petition overruled.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and John S. Pratt, Asst. U. S. Atty., of Toledo, Ohio.

A. H. Miller, of Toledo, Ohio, for defendant.

KILLITS, District Judge. [1, 2] Joseph Max Griminger came to the United States in 1902, as an emigrant from Austria-Hungary. In September, 1910, he declared his intention to become a citizen of the United States. In July, 1911, he went back to Austria on a visit, expressing his intention of returning to the United States as his place of residence. In Austria he married, and a child was there born to him, which facts are his explanation for his detention in that country for at least 2 years and 5 months, or until some time in December, 1913. In October, 1915, he appeared before the common pleas court of Lucas county, Ohio, as an applicant for naturalization, and was admitted to citizenship, although the fact transpired that during the 5 years immediately preceding the filing of his petition for admission he had spent these 2 years and 5 months continuously in Austria. By the familiar terms of the statute (Comp. St. 1913, § 4352[4]) he could be legally admitted to citizenship in this country only when it appeared as a jurisdictional fact to the court admitting him that he had "resided continuously" within the United States for a period of 5 years immediately preceding the filing of his petition for final papers. By the act of June, 1906, this court is given jurisdiction, on the application of the District Attorney, to inquire into the naturalization proceedings of any court having jurisdiction of the subject-matter in any specific instance, with a view of canceling the certificate if it should appear to this court that such certificate had "been fraudulently or illegally procured." Such an inquiry is the one now entertained by the court, and the concrete question is whether one who has, of his own choice, been continuously without the United States for nearly half of the 5-year period may be said to have "resided continuously" within the United States during that period. In our judgment the question practically answers itself, and we feel that if there were any doubt upon the matter, that doubt should be resolved in favor of the government, both on principle and because of the authority of United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445. The laws of the United States offer very fair and reasonable terms of admission to citizenship. No one ought to be heard to say that Congress imposed too long

a time for an apprenticeship by fixing a 5-year period of continuous residence in which the applicant might get into the atmosphere of our institutions and acquire or absorb characteristics valuable to our community. Fixing a period of probation is undoubtedly to secure some measure of preparation for the duties incumbent on a citizen. That is clearly the spirit of the requirement as gathered from other provisions of the naturalization statute, which require a showing of certain proficiency in the use of our language and in the knowledge of our institutions. Of course, we agree with other courts that the words "resided continuously" must not be taken with exact literalness. There should be no interpretation that would cause any temporary interruption of a social or business character to be fatal to the applicant's right to a certificate. But the line must be drawn somewhere. If the applicant chooses to leave the United States during the 5-year period, it is for him to see that that breaking of the exact continuity of his residence here is not carried to such an extreme as to substantially interrupt the influences of American residence in the formation of his character as an American citizen. As was said in the Cantini Case, whether he continuously resided in this country or not is a question of fact which is not determinable altogether by the applicant's insistence as to what his intention was during his absence. Both the character and extent of that absence are factors which may have greater potency than any evidence of the applicant's mental attitude occupied at the time he departed from this country or during his absence, whether testified to by himself or any one else. We are clear that a line must be drawn against any continuous absence abroad which substantially interrupts the continuity of residence in this country. If it may be said that one may depart from this country on a visit, after leaving assurances with his friends and employers that he intends to come back, and remain continuously absent of his own choice for a period of 2 years and 5 months and still be considered to have been continuously a resident of the United States for a period of 5 years covering that absence, we see no legitimate reason why he could not have stayed away 3 years or 4 years under the same circumstances without losing his right to naturalization.

[3] The terms "domicile" and "residence" have sometimes the same meaning and often distinctive significations. Often neither is considered to involve the matter of bodily presence. It is unprofitable to discuss the numerous authorities from which but one clear rule is to be deduced, namely, that the particular meaning of either is to be broadened or narrowed to give reasonable effect to the purpose and spirit of the act in which it is used. In the statute under consideration here, looking to the evident function of the requirement of a definite period of residence, we feel that the word "resided" has the meaning of "lived"; that the applicant must be seen to have been a "resident" in the sense of "inhabitant" of, and bodily present in the United States continuously for 5 years immediately preceding application for final papers. Such an interpretation affords opportunity for departures and limited absences from the country for social or business reasons, while at the same time leaving none for a substantial interruption of

that continuity of inhabitancy necessary to secure the effect of the provision. If, on the other hand, we allow the expression to have a constructive signification; if we may say that an applicant has, constructively, "resided continuously" within the United States for the defined period, when, in fact, a substantial portion of that time has been continuously spent abroad, although the absence is accompanied by a continued and fixed intention to return at an indefinite period for permanent residence in the United States, the court so interpreting the meaning of the expression is clearly thwarting the only purpose in providing a probationary period which we are able to see was in the mind of Congress.

Cantini's Case was under circumstances almost parallel with those of the case at bar. Like Griminger, he went back to the old country to visit, fell in love with a girl there, married her, and had a child born to him. The only substantial difference between the two sets of circumstances is that Cantini got back to the United States in less than 2 years or about 6 months sooner than did Griminger. The Third Circuit Court of Appeals held, as a question of fact, applying these circumstances, that Cantini had not resided continuously in the United States for 5 years prior to his application. We feel that this decision should be followed. If that decision is right, of course Griminger's Case is less entitled to a different conclusion.

[4] It is urged that it is only in cases where a certificate was fraudulently or illegally procured that this court has power to cancel it, and that neither element obtained in this case, because the state court possessed all the facts. Griminger's certificate was not fraudulently procured, because he frankly told the court the circumstances. Was it illegally procured? The requisite of 5 years' continuous residence is jurisdictional. If it were not proven, the certificate could not be said to have been legally procured.

[5] It is also urged that the court of common pleas had exclusive jurisdiction of this case, that its judgment is not reviewable, and that that judgment is entitled to full faith and credit. The act of 1906 under which this application for cancellation is brought has been held by the Supreme Court of the United States to be constitutional. Its purpose and its terms are broad enough to give this court jurisdiction to review, in a proper case, the circumstances attending naturalization in any court having jurisdiction of the subject-matter. The jurisdiction of the court of common pleas to hear the application at all is by favor of the legislation which gave this court the right to inquire into its action through cancellation proceedings. In Cantini's Case, as heard by the District Court, 199 Fed. 857, on page 858, Judge Orr discusses the relationship which the court entered for cancellation purposes sustains to the court whose certificate is under question, and finds that the doctrine of finality which ordinarily would protect the judgment of the court of common pleas does not apply in face of the act of 1906. It is not necessary for us to determine whether we sit as a reviewing court, a court of error or appeal. It is sufficient to note that Congress, which conferred jurisdiction upon the state court, lim-

ited the finality of that jurisdiction by a provision which authorizes this court to entertain cancellation proceedings.

Our conclusion is that the demurrer to the petition should be overruled.

THOM v. CITY OF SOUTH AMBOY, N. J.

(District Court, D. New Jersey. September 27, 1916.)

1. NAVIGABLE WATERS ⟸26(3)—HARBORS—OBSTRUCTIONS—BURDEN OF PROOF.
On a libel against a municipality, which had laid a large sewer pipe on the bed of a bay, which, it was claimed, caused the destruction of libelant's vessel, the municipality has the burden of justifying the laying of the pipe in the harbor, and of showing that the pipe was within the then established harbor lines.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 152–166; Dec. Dig. ⟸26(3).]

2. NAVIGABLE WATERS ⟸19—HARBORS—OBSTRUCTIONS.
A municipality, without authority, laid a sewer pipe on the bed of a bay about 3½ feet distant from a pier or dock. It was customary for boats to anchor in the bay, and during an unusual storm libelant's power boat was driven from its moorings toward the dock, and wedged between the pipe and the dock. As so wedged, the boat was destroyed by the pounding of the sea, although, had it not been caught, it might have been saved. *Held*, that the municipality was liable for the loss of the boat, having improperly obstructed navigable waters.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–72; Dec. Dig. ⟸19.]

In Admiralty. Libel by John C. Thom against the City of South Amboy, N. J. On final hearing. Decree for libelant.

Hyland & Zabriskie, of New York City, for libelant.

Francis P. Coan, of South Amboy, N. J., for respondent.

HAIGHT, District Judge. During the year 1910, or thereabouts, the city of South Amboy laid a sewer pipe, about two feet in diameter, from the foot of Henry street in that city out into the Raritan Bay, one of the navigable waters of the United States. For almost its entire length the pipe was laid parallel to and about 3½ feet distant from a pier or dock, which had been theretofore erected by the city. The pipe was not buried in the bed of the bay, but merely rested on the bottom, and consequently protruded up into the water a distance practically equal to its diameter. At high tide nearly all of the pipe was submerged, but the amount under water at low tide depended, very largely, upon the direction of the wind and the condition of the weather. It had been the custom for many years for owners of small boats and vessels to anchor them in and about the bay near where the pier and pipe were located. The libelant owned a small power boat, and had for some time so moored it to a buoy, which was fastened to an anchor imbedded in the bay, at a point distant about 500 feet southeasterly from the pipe and dock. There is no question but that the boat was properly and securely anchored,

and in a manner to resist any usual storm and stress of weather. However, on the 2d day of August, 1915, a violent storm arose, which caused the libelant's vessel to break from her moorings and to drift on and over the sewer pipe. She became wedged between the pipe and the pilings on which the dock was built, so that one side of the hull rested upon the pipe, at a point where there was a protruding joint made by the connection of two of the pipe sections. In a very short time, owing to the roughness of the water and the consequent pounding of the boat on the joint, a hole was stove in her bottom. She thereupon quickly filled with water, and all efforts to extricate her from the dangerous position in which she had become lodged were unavailing. During the night she broke up and became a total wreck. The evidence leaves no doubt that, if she had not become so wedged between the pipe and the pilings of the dock, she could have readily been saved with very little, if any, damage.

[1] Admittedly, if authority from the Secretary of War, was necessary, under section 10 of the Act of March 3, 1899 (30 Stat. 1151, c. 425 [Comp. St. 1913, § 9910]), to lay the pipe either in the place or in the manner in which it was laid, none was ever procured, if, indeed, it could have been, as likewise there is no evidence that any such authority was given by the state of New Jersey. Also, if it is of any materiality, which I do not think it is, I must hold that there is no evidence that the pipe was located within the then established harbor lines; the evidence attempted to be offered on that point being clearly hearsay and inadmissible. The burden of establishing these facts was, I think, on the respondent. Penn. Ry. Co. v. Baltimore & N. Y. Ry. Co. (C. C.) 37 Fed. 129. I do not decide, because it is unnecessary to do so in this case, that, even if the pipe had been located pursuant to either or both of the before-mentioned authorities, respondent would thereby be relieved from liability to answer for an injury to a vessel of a private individual lawfully using the waters of the bay, due to the location of the pipe. It was not necessary that the pipe be laid as it was; in fact, it could readily have been sunk in the bed of the bay, or placed under the pier, so as to in no way interfere with the unobstructed use of the bay for navigation.

The pipe, therefore, by reason of its location in navigable waters constituted an unlawful obstruction to navigation, and undoubtedly the respondent would have been liable for any damages sustained by one whose boat, while being properly navigated, came in contact with it, provided that due and proper warning had not been given of its existence and location. The Steam Dredge No. 6 (D. C.) 222 Fed. 576, 579; North American Dredging Co. v. Pacific Mail S. S. Co., 185 Fed. 698, 107 C. C. A. 620 (C. C. A. 9th Cir.); Omslaer v. Philadelphia Co. (D. C.) 31 Fed. 354; Blanchard v. Western Union Telegraph Co., 60 N. Y. 510.

[2] The above cases are not cited to support the general proposition regarding liability for injuries sustained by reason of obstructions in navigable waters (although they do), because it is so well settled as to need no citation of authorities; but they are cited as merely

illustrative of instances where obstructions of a similar nature have been held or considered to impose liability upon those responsible for their existence. Under the circumstances of this case, no warning would have prevented the injury which the boat sustained, so that this feature may be eliminated from consideration. The question then to be decided is whether one who has placed a pipe in navigable waters, which constitutes an unlawful obstruction to navigation, is liable to another whose vessel, when adrift without fault of the owner, is injured by reason of the obstruction. The case, so far as industrious and learned counsel have been able to enlighten me, is in that aspect one of novel impression, and although its decision is not altogether free from difficulty, I think it is governed by the general principle before stated. If in this case the location of the pipe can be said to be the proximate cause, within the meaning of the law, of the injury to the vessel, I can see no difference in principle between this and a case where a vessel, being properly navigated, is injured by collision with a pipe. In either case it is the placing of the obstruction in navigable waters which causes the injury, and the unlawfulness of the obstruction is the basis of liability. If it could be said that the obstruction was for any reason lawful, and that failure to give warning of its existence would be the real cause of liability in the supposed case, it may, with equal force, be said that the failure to properly guard the obstruction in the present case would be the ground of liability.

It is necessary, therefore, to determine whether the proximate cause of the injury was the respondent's act in laying the pipe as it did. It was certainly the efficient cause, because without it the injury would not have happened; and I think the injury was one which, in the light of attending circumstances, ought reasonably to have been foreseen as likely to occur. The respondent was charged with knowledge that it was the custom to moor boats roundabout where libelant moored his, and that it was entirely lawful to do so; that storms frequently occur of such violence as to tear any boat, situated as they were and had been for years, from its moorings; that certain winds and tides would necessarily cause a boat, so torn loose, to drift towards the pipe and the pier; that, if the water were of the proper depth to carry the boat over the pipe, its progress would be arrested and the boat held, as by a vise, between the dock and the pipe; and that in a storm of sufficient violence a boat thus caught would be injured, by pounding against a protruding joint of an iron pipe, to such an extent that in all likelihood she would sink. The injury was, therefore, the proximate cause of the respondent's act, and one which ought reasonably to have been foreseen as likely to occur.

As respondent, under the decision of the Supreme Court in Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, is unable in admiralty to avail itself of the immunity granted by the laws of New Jersey to municipal corporations from responding for injuries caused to others in the performance of governmental duties (if the act of building this sewer comes within such exemption, which I do not attempt to decide), it follows that the respondent

is liable for the damage which the libelant suffered. The vessel was a total loss, and, under the evidence, I must find that her value was not less than $500, the amount claimed in the libel.

The libelant is therefore entitled to a decree for $500, with costs.

In re HAMIL.

(District Court, W. D. New York. June 14, 1916.)

1. SALES ⟸474(2)—CONDITIONAL SALES—VALIDITY.

Unrecorded contracts for conditional sale of goods and chattels where title is reserved in the seller are not void in New York as against creditors, Personal Property Law N. Y. (Consol. Laws, c. 41) § 62, making such contracts, unless filed as required, void only as against subsequent purchasers, pledgees, or mortgagees in good faith.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. ⟸474(2).]

2. BANKRUPTCY ⟸140(1)—TRUSTEE—RIGHT OF.

A trustee in bankruptcy, though representing general creditors, occupies no different position with respect to a conditional sale than the bankrupt would have occupied had not bankruptcy intervened, and he cannot disturb the effect of a conditional sale to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

3. BANKRUPTCY ⟸140(1)—CONDITIONAL SALES—VALIDITY.

Claimant sold plows to the bankrupt under an agreement that they should be paid for by notes, but that title and ownership should remain in claimant until the whole purchase price was fully paid. The contract also provided that in case of death, failure, insolvency, loss by fire, or the bankrupt's disposal of his business, all obligations arising under the contract should become due and payable at once. *Held*, that as the contract prevented resale of the plows by the bankrupt until payment, the reservation of title was not fraudulent, and on bankruptcy, the plows not having been paid for, claimant was entitled to them as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

In Bankruptcy. In the matter of the bankruptcy of William W. Hamil. Claim by the John Deere Plow Company of Syracuse. On review of decision of special master, denying the claim. Decision reversed.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for petitioner.

Louis B. Shay, of Brockport, N. Y., for trustee.

HAZEL, District Judge. The stipulation of facts filed herein, in so far as material, shows that on November 13, 1913, the bankrupt agreed in writing that certain plows and other articles purchased by him from the petitioning creditor, the John Deere Plow Company of Syracuse, should be paid for by promissory notes, but that title and ownership of said articles should continue and remain in the vendor

until the whole purchase price was fully paid in cash. The bankrupt defaulted in payment in the amount of $698.25, with interest from December 1, 1914. At the time of his adjudication he had in his possession several of the plows and other articles specified in the agreement, which the petitioning creditor now seeks to reclaim from the trustee.

[1-3] The two questions principally considered by the special master were: First, whether the agreement constituted a contract of conditional sale, reserving title in the vendor until full payment of the purchase price; or, second, whether the contract constituted a sale, transferring title to the buyer with a lien over upon the articles to the vendor. He held that the contract was void under the doctrine of In re Garcewich, 8 Am. Bank. R. 149, 115 Fed. 87, 53 C. C. A. 510, and was a fraud upon the creditors of the bankrupt, and, assuming the contract to have been given as a lien for the debt, he concluded that it was void pursuant to section 230 of the Lien Law of the state of New York (Consol. Laws, c. 33), and that accordingly the rights of the trustee herein were superior to those of the petitioning creditor.

In the Garcewich Case, supra, the agreement considered by the court substantially stated that the goods were sold with the understanding that title and ownership of such portion of the goods as remained unsold should continue in the vendor until the payment of the purchase price. Judge Wallace, who wrote the opinion for the Circuit Court of Appeals, thus stated the law:

"It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors."

The facts of the present case are clearly distinguishable from those of the Garcewich Case. Here, the phrasing of the agreement does not indicate a right of resale. At first I was of the opinion that the contract permitted resale of the goods before payment of the promissory notes given to secure the purchase price, but I now think the contract is, with greater reason, open to the inference that the parties contemplated full payment for the plows and other articles purchased before their resale, and the reservation of title in the vendor until such payment. If this construction of the contract is correct, there obviously is no inconsistency therein by reason of the provision relating to the continued ownership by the vendor until full payment of the purchase price. Contracts for the conditional sale of goods and chattels, where title is reserved in the vendor, are not void in this state as against creditors (Cole v. Mann, 62 N. Y. 1); and Personal Property Law, art. 4, § 62, in terms makes such con-

tracts, unless filed in accordance with the recording provision of the act, void only as against subsequent purchasers, pledgees, or mortgagees in good faith. It is silent as to the invalidity of unrecorded contracts of conditional sale as against creditors.

The trustee in bankruptcy occupies no different position than the bankrupt would have occupied if bankruptcy had not intervened; he is not vested with any greater right in the plows or other articles in question in the possession of the bankrupt at the time of the adjudication than the bankrupt had, and he cannot disturb or alter the force and effect of the existing conditional contract. In re Kellogg, 112 Fed. 52, affirmed sub nom. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

Nor was the transaction open to the attack that the parties contemplated a resale of the articles, with a lien reserved to the vendors. The case of John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539, is not controlling, for there the contract was of necessity determined by the law of Michigan, and, besides, it appears that in that case the parties clearly understood that the goods were to be resold by the vendee, with a lien attaching to the proceeds of the sale. In the present case there is nothing in the stipulation of facts to indicate that the business relations of the petitioning creditor and the bankrupt were such as to justify the inference that the articles were to be resold without the purchase price first being paid, or that the petitioning creditor knew that the contract was inconsistent in that respect with the dominant provision thereof, namely, that title should not pass until the goods were fully paid for. It is true, one of the provisions of the conditional sales contract under discussion states that in the event of death, failure, insolvency, loss by fire, or disposal of the business, all obligations arising under the contract shall become due and payable at once, but no inference of an intention to resell with the consent of the vendor regardless of payment follows from this. The contract makes no specific reference to the purchase price, and, standing alone, it does not indicate, to my mind, that the express reservation of title amounted to a chattel mortgage, or other instrument requiring recording as a condition of validity as against creditors.

Importance was attached to a somewhat similar agreement in the Mowry Case, supra, including a provision that in case of death the full purchase price should mature, but in that case the dominant feature was the permission to resell the goods, which was regarded by the court as inconsistent with the provision reserving title. However this may be, the case of Cole v. Mann, supra, apparently holds that in the state of New York conditional contracts reserving title are good, even though there is an intention to resell the property purchased, although such reservation may, no doubt, not infrequently bear on the bona fides of the transaction. But it is unnecessary further to discuss the question, as I think the contract of conditional sale with which we are herein concerned was valid as against creditors, and was unaffected by actual or implied fraud or dishonesty of purpose.

The decision of the special master is reversed.

Ex parte PLASTINO.

(District Court, W. D. Washington, N. D. September 20, 1916.)

No. 3393.

1. ALIENS ⟸54—HABEAS CORPUS—FUNCTION OF COURT.
The function of the court, in habeas corpus by one ordered deported by the Department of Commerce and Labor under a charge of being an alien unlawfully in the country because of deriving benefits from the earnings of a prostitute, is to ascertain whether he was accorded a fair hearing and whether there was any evidence on which to predicate the charge.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

2. ALIENS ⟸54—DEPORTATIONS—PROCEEDINGS.
Under the rule of the Department of Commerce and Labor, and the law, one accused as an alien unlawfully in the country, because of deriving benefits from the earnings of a prostitute, must be notified of the charge against him, and have opportunity to inspect the warrant or arrest and the evidence on which it is issued, and to be advised, before he is examined, of his right to have counsel, to the end that his interests may be properly safeguarded in the hearing.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

3. ALIENS ⟸54—DEPORTATION—EVIDENCE.
The order of deportation of an alien, under a charge of being an alien unlawfully in the country because of deriving benefits from the earnings of a prostitute, must be supported by the evidence at the hearing, and the charge must be established by legal evidence.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

4. ALIENS ⟸54—DEPORTATION—EVIDENCE.
Under the record in proceedings for deportation of one as an alien unlawfully in the country because of receiving the earnings of prostitutes, *held*, on habeas corpus, that there was no evidence to support the charge; the statement of the inspector being his conclusion as to testimony in another case.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

Petition of Sam Plastino for writ of habeas corpus. Petitioner ordered discharged.

Beeler & Sullivan and Joseph M. Glasgow, all of Seattle, Wash., and Tolman & King, of Spokane, Wash., for petitioner.

Clay Allen, U. S. Dist. Atty., and Albert Moodie, Asst. U. S. Dist. Atty., both of Seattle, Wash., for government.

NETERER, District Judge. The petitioner, aged 30 years, whose father declared his intention to become a citizen of the United States in 1900, came to the United States in 1897, and has since been a resident therein. On the 12th of January, 1912, he was arrested under a warrant issued by the Acting Secretary of Labor, charging "that the said alien is unlawfully within the United States, in that he

has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes," and thereafter ordered deported. An appeal taken to the Secretary of Commerce and Labor confirmed this order, and warrant of deportation was thereupon issued, execution of which was suspended pending discharge of the prisoner from the federal prison, where he had been committed on conviction on an indictment under the Mann Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]). Petitioner files this petition for writ of habeas corpus, alleging that he is in custody and about to be deported, and that he did not have a fair trial, in that he was not permitted to inspect the warrant of arrest or any of the evidence upon which it was issued, nor advised of his right to have counsel, and that there is no evidence upon which to base a warrant of deportation.

[1-3] The function of the court in a proceeding of this kind is to ascertain whether petitioner has been accorded a fair hearing, and also whether there is any evidence upon which to predicate the charge made. Under the rule of the Department of Commerce and Labor, and the law, the accused must be notified of the charge against him, and have opportunity to inspect the warrant of arrest and the evidence upon which it is issued, and be advised of his right to have counsel, to the end that his interests may be properly safeguarded in the hearing by one specially concerned therewith, and in accordance with established, recognized rules of procedure. The order of deportation must be supported by the evidence at the hearing, and the charge must be established by legal testimony.

[4] Upon this hearing the petitioner testified that he was not advised of the charge against him, that he requested permission to consult counsel, that at the time he had been convicted of a felony and had counsel engaged, and that his counsel was in the city within a day or so. His testimony is supported by the brother of the accused, who stated that counsel had been employed, and also stated that he did not decline to employ counsel for the accused, and that he was abundantly able to do so. Much appears in this testimony which has no place there. The petitioner may be a moral degenerate, and from this record as it stands is unfit to be a citizen of the United States; but the charge in the warrant is *receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes,* and the testimony upon that is as follows:

"Q. You were convicted December 7, 1911, on the charge of having transported Goldie Cardiff from Seattle to San Francisco for the purpose of prostitution? A. Yes. * * * Q. How long did you live with Goldie Cardiff? A. Never. She used to come around me and my place and show money. Q. Did you ever receive earnings from her? A. No. Q. Did she ever give you money? A. No. Q. Do you know Ethel Richards? A. Yes; she never lived with me. Q. Did she pose as your wife in Seattle and Spokane? A. No. Q. Was she a prostitute? A. No. Q. Did you ever receive any of her earnings? A. No; I threw away money. I didn't care for their earnings. Q. Do you know Grace Howard? A. Yes; that is the same party. Q. You were living with another prostitute at Seattle, were you not? A. No; I had them in my rooms when I went out for a good time. Q. What is your business? A. A merchant in Seattle. In Spokane, at 322 Main street, I had a

pool room for about one year, me and my brother. Q. You heard the testimony of Goldie Cardiff in the court in the trial of your case, in which she testified she turned money over to you? A. Yes; it wasn't true."

Statement by Inspector Fisher:

"I examined the naturalization records in the United States District Court for the Eastern District of Washington, and find that the records show that Sam Plastino claimed he was born in Alteria, Italy, Sept. 7, 1886, and came from Naples, Italy, on the steamship Abrumvra to the port of New York about the 10th day of June, 1897, and declared his intention to become a citizen of the United States before W. H. Hare, clerk of the United States District Court, at Spokane, Wash., March 22, 1911. Sam Plastino was convicted, after a hearing in the United States District Court at Tacoma, Wash., for violating the White Slave Traffic Act, in that he assisted in the transportation of one Goldie Cardiff, from Seattle, Wash., to San Francisco, Cal., for purposes of prostitution. The evidence adduced at the hearing showed that Sam Plastino had received the earnings of Goldie Cardiff, prostitute, for several years; that he had also received the earnings of two other prostitutes prior and subsequent to his meeting Goldie Cardiff."

At the conclusion of the examination of the petitioner by the inspector appears the following:

"Q. You have a right to be represented by counsel, if you desire. A. If my brother in Spokane will get a lawyer for me, I want a lawyer. If he will not, I don't care for any. Q. Then, if your brother in Spokane does not see fit to retain a lawyer for you, do you waive your right to be represented by counsel? A. Yes, sir. Q. By your brother, you mean Joe Plastino? A. Yes, sir."

This appears in different colored ribbon and prior to the certificate of the party taking the testimony. This was, in my judgment, inserted after the testimony was completed, for if the ribbon had been changed just at the time that this statement commenced, it would not have been changed back to the old ribbon for the certificate, but the record would have been in the same colored ribbon from the time the first change was made. The statement may have been made, and not inserted at the time; but the fact that it is in different colored ribbon indicates that it was not inserted at the time, and raises a doubt as to whether the statement was made. It was the right of the accused to be advised of the privilege of counsel before he was examined, and it is admitted that this information, if given, was not given until the examination was concluded. The statement of the inspector in this record, unsupported by oath, is not testimony. Even though it had been given under oath, it is not testimony which would be admitted in any court, as it is the inspector's conclusion as to certain testimony in another case. Eliminating this from the testimony, there is no evidence which supports the charge. All of the inquiries propounded to the petitioner bearing upon the receipt of earnings of prostitutes were answered in the negative, excepting the one with relation to the transportation, and the court, I think, must recognize that there are many convictions under the Mann Act where the earnings are not the motive for the transportation.

I am fully persuaded that the accused did not have a fair trial, and that the petitioner's conviction was not predicated upon testimony produced with relation to the charge made, but rather upon many other

charges against the accused, and which show him to be a very undesirable person. But such fact does not take from him the rights which are guaranteed, and all of the facts with relation to this, or any other offense, should be presented in the manner which the law and justice requires. Justice never hesitates in according a fair hearing; on the contrary, guarantees it to the worst criminal. I think, under the record in this case, the petitioner should be discharged.

The petitioner will be discharged, unless the government appeals within 20 days, and, if appeal is taken, may be released on $1,000 recognizance, pending the review by the appellate court.

In re COOPER et al.

(District Court, D. New Jersey. September 20, 1916.)

1. BANKRUPTCY ⟸404(2)—DISCHARGE—DEBTS DISCHARGED—EFFECT OF PRIOR PROCEEDINGS.

The failure of a bankrupt to apply for a discharge in a previous proceeding precludes him in a subsequent proceeding from procuring a discharge from the debts which were scheduled and provable in the former.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. ⟸404(2).]

2. BANKRUPTCY ⟸404(2)—DISCHARGE—QUALIFIED DISCHARGE.

In such case, where debts have been incurred since the former proceeding from which the bankrupt is entitled to a discharge, he may be granted a qualified discharge, excepting the old debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. ⟸404(2).]

In Bankruptcy. In the matter of Stephen A. Cooper and others, bankrupts. On exceptions to special master's report recommending that a qualified discharge be granted the bankrupts, excluding certain debts scheduled in prior bankruptcy proceedings in which bankrupts failed to procure a discharge. Report confirmed, and discharge granted.

Merritt Lane, of Jersey City, N. J., for bankrupts.
Henry C. Moses, of New York City, for objecting creditors.

HAIGHT, District Judge. [1] This matter presents two questions for decision, viz.: (1) Whether the failure of a bankrupt to apply for a discharge in a previous proceeding precludes him, in a subsequent proceeding, from procuring a discharge from the scheduled and provable debts in the former; and (2) if so, whether in such subsequent proceeding, when it appears that there are debts which have been incurred since the first proceeding, and from which he is entitled to a discharge, he may be granted a qualified discharge, excepting the old debts. The first question has been conclusively settled in this circuit in the affirmative by the decision of the Circuit Court of Appeals in Loughran v. Hazleton Mercantile Co., 218 Fed. 619, 134

C. C. A. 377. To the same effect is the decision of Judge Lanning in this district. In re Weintraub (D. C.) 133 Fed. 1000.

[2] I unhesitatingly conclude, both upon reason and authority, that the second question must likewise receive an affirmative answer. Although it does not seem to have been directly passed upon in any reported decision in this district, or by the Circuit Court of Appeals of this circuit, it has been decided, in the way above stated, by such an overwhelming weight of authority that it should be considered, in the absence of an authoritative decision to the contrary, as settled. In re Kuffler, 151 Fed. 12, 80 C. C. A. 508 (C. C. A. 2d Cir.); Id., 155 Fed. 1018 (D. C.), affirmed 168 Fed. 1021, 93 C. C. A. 671 (C. C. A. 2d Cir.); Pollet v. Cosel, 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164 (C. C. A. 1st Cir.); Bacon v. Buffalo Cold Storage Co., 193 Fed. 34, 113 C. C. A. 358 (C. C. A. 5th Cir.); Siebert v. Dahlberg, 218 Fed. 793, 134 C. C. A. 460 (C. C. A. 8th Cir.); In re Von Borries, 168 Fed. 718 (D. C. Wis.); In re Pullian, 171 Fed. 595 (D. C. Tenn.); In re Westbrook, 186 Fed. 414 (D. C. Ala.). In both the Kuffler Case and Bacon v. Buffalo Cold Storage Co., supra, writs of certiorari were denied by the Supreme Court. Kuffler v. Hinsdale Smith & Co., 214 U. S. 520, 129 Sup. Ct. 701, 53 L. Ed. 1066; Bacon v. Buffalo Cold Storage Co., 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264. If the decision of the District Court of Massachusetts, in the case of In re Claff, 111 Fed. 506, may be considered as not in harmony with the decisions above cited, it is clearly overruled by the Circuit Court of Appeals in that circuit in Pollet v. Cosel, supra. In addition, it can be accorded no weight, since the premise upon which the procedure there followed is based—that a discharge in a second proceeding, if obtained, would be no bar to a suit upon a debt scheduled under the first and not proved under the second—is incorrect, in view of the subsequent decision of the Supreme Court in Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390.

As a denial of a discharge, or the failure to apply for the same within the time limited by the statute, bars one from thereafter procuring, in that or any other bankruptcy proceeding, a discharge from debts existing at the time of the first proceeding, and as the failure to interpose such denial or failure as an objection to the granting of a discharge in a subsequent proceeding prevents a creditor from availing himself thereof, when the discharge thus granted is pleaded as a bar to recovery on the creditors' claim (Bluthenthal v. Jones, supra), and as a bankrupt is undoubtedly entitled to a discharge from such debts as have accrued since the first bankruptcy proceeding, it must follow that the courts may except from a discharge any debts from which the bankrupt is not entitled to be discharged because of previous denial of or failure to apply for a discharge within the time limited by law. Otherwise they would be left in the position of either denying the bankrupt a discharge from debts to which he is entitled to be discharged, or of discharging him from debts from which he is not so entitled. Surely such a condition was never intended by Congress. The refusal to grant a discharge as to certain

debts, which are not within the express exceptions of the statute, is to not read into the statute an additional exception, but merely to give effect, under circumstances such as in this case, to a limitation which Congress has imposed, namely, that the application for a discharge must be made within a certain specified time, and thus to prevent a bankrupt from procuring indirectly what the law denies him the right to procure directly. This, I think, is the logical result of the reasoning upon which the decision in Loughran v. Hazleton Mercantile Co., supra, is based.

The bankrupts in this case had been adjudged such in the Southern district of New York in 1906, but, for the purposes of this case, may be considered as having failed to apply for a discharge within time. They then filed a voluntary petition in this court and were adjudged bankrupts; but, upon the New York proceedings being brought to the attention of the court, all proceedings in this court were stayed. The latter order has never been vacated. In 1912 they filed another voluntary petition in this court, were duly adjudged bankrupts, and thereafter presented their petition for discharge. As a number of claims are scheduled in the present proceeding which were also scheduled in the proceedings in the Southern district of New York, and as the schedules in this proceeding include debts incurred since the New York proceedings were instituted, the bankrupts are entitled to a discharge, in the usual form, from all of their provable debts, except those which were scheduled and provable in the bankruptcy proceedings in the Southern district of New York.

The master's report will accordingly be confirmed, and an order for discharge entered in conformity with these conclusions.

In re ANDREWS.

(District Court, D. Vermont. September 8, 1916.)

HABEAS CORPUS ⟸45(2)—FEDERAL PRISONER—SURRENDER TO STATE AUTHORITIES—DISCHARGE BY FEDERAL COURT.

Relator being in the custody of the federal inspector of immigration awaiting deportation under the immigration law, and the state desiring to take proceedings to secure her appearance as a witness, the inspector, at direction of his superiors in the Department of Labor that he postpone her deportation pending such proceedings, and allow the state to take her out of his custody for that purpose, did so, and she was brought by officers of the state before a city court, and ordered to enter into recognizance for her appearance as such witness, and, failing to do so, was committed to jail. *Held*, that her imprisonment is lawful, so far as the jurisdiction of the federal court is concerned, so that it will deny her petition for habeas corpus; the question of jurisdiction and custody of her being one of comity between the governments, and she not having a right to immediate deportation, notwithstanding the proceeding of the state.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⟸45(2); Courts, Cent. Dig. §§ 804, 805, 1376–1381.]

Habeas Corpus. Petition of Violet M. Andrews for release from custody of the sheriff of Franklin County, Vt. Denied.

C. G. Austin & Sons, of St. Albans, Vt., for petitioner.
V. A. Bullard, U. S. Atty., of Burlington, Vt., for respondent Robie.
S. S. Cushing, State's Atty., of St. Albans, Vt., and W. R. McFeeters, of Enosburgh Falls, Vt., for respondents Post and Holmes.

HOWE, District Judge. While the relator was in the custody of the United States Inspector of Immigration, confined in jail at St. Albans, Vt., awaiting her deportation to the Dominion of Canada in accordance with the acts of Congress relating to immigration, she was brought before the city court at St. Albans and ordered to enter into a recognizance to the state of Vermont with sureties in the sum of $300 for her appearance as a witness for the state before the county court to be held at St. Albans on the second Tuesday of September, and, having failed to enter into such recognizance, she was committed to the county jail by the respondent Holmes as sheriff of Franklin county on a mittimus issued by the respondent Post as judge of the city court.

Before the proceedings in the city court were commenced, the United States Department of Labor was informed by the state's attorney of Franklin county that the state desired to take such action, and Inspector Robie was directed by his superiors in that department to postpone her deportation pending such proceedings, and that he allow the officers of the state to take her out of his custody for that purpose. The United States attorney for the district of Vermont appears for the respondent Robie in this case and objects to the relator being released from her imprisonment by the state and approves of the course adopted by the Department of Labor as carried out by Inspector Robie.

The relator does not claim that the process or its execution was unlawful in either case, except that the Department of Labor and the Inspector of Immigration had no right to allow her to be taken out of his custody by the state without her consent; that she has a right to be deported forthwith, notwithstanding the proceedings against her in the city court; and that consequently her imprisonment in the county jail by the state is illegal.

It is well settled that a state would have no right to take the relator out of the custody of the officers of the United States in these circumstances without the approval of the United States. Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597. And it is equally well settled as a matter of comity between the federal and the state governments that either may surrender its custody of a prisoner to the other without the prisoner's consent. In such a case, the question of the jurisdiction and custody of the prisoner is one of comity between the governments, and not a personal right of the prisoner. United States v. Marrin (D. C.) 227 Fed. 314; Ex parte Marrin (D. C.) 164 Fed. 631.

Therefore, as the relator's imprisonment is lawful so far as the jurisdiction of this court is concerned, her petition is denied, and she is remanded to her former custody.

THE GARDEN CITY.

(District Court, N. D. California, First Division. September 18, 1916.)

No. 15418.

COLLISION ⊜154—SUIT FOR DAMAGES—COSTS.

Where, in a suit for collision in which there is no cross-libel, the court finds both vessels in fault and enters a decree for libelant for half damages, the costs also should be divided.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308; Dec. Dig. ⊜154.]

In Admiralty. Suit for collision by the Klamath Steamship Company against the steamer Garden City; South Pacific Coast Railway Company, claimant. On taxation of costs.

Ira S. Lillick, of San Francisco, Cal., for libelant.

Andros & Hengstler, E. J. Foulds, and G. W. Bell, all of San Francisco, Cal., for claimant.

DOOLING, District Judge. The Garden City collided with the Klamath in a dense fog, inflicting substantial injury; herself being uninjured. The owner of the Klamath filed a libel in this court alleging that the collision was due solely to the fault of the Garden City. The latter answered averring that the collision was due solely to the fault of the Klamath. There was no cross-libel. The court found that both vessels were at fault and ordered that a decree be entered for divided damages. A decree has now been presented assessing against the Garden City one-half of the damage sustained by the Klamath. Libelant now claims full costs. Respondent contends that the costs, like the damages, should be divided. This contention seems to be in accord with the settled rule in such cases. The Edward Luckenback (D. C.) 94 Fed. 544; The Bermuda (D. C.) 128 Fed. 816; The Gladiator (D. C.) 223 Fed. 381.

The costs will therefore be divided.

CABONI v. UNION CARBIDE CO. et al.

(District Court, W. D. New York. July 7, 1916.)

NAVIGABLE WATERS ⊜30—RIPARIAN OWNERS—RIGHTS OF.

A riparian owner, who lawfully dug a ditch in the bed of a river, is not liable for the death of one drowned therein, who came upon his land and went into the river to bathe, particularly where there were sheathings protruding from the water, which should have warned the bather of the ditch, and no public highway at that point led to the river, for no one has an absolute right to bathe or swim in a public stream, and the owner of the upland is under no duty of protecting persons coming uninvited on his land for the purpose of bathing.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. ⊜30.]

At Law. Action by Michele Caboni, as administrator of the goods, chattels, and credits of Cosimo Quagliano, deceased, against the Union Carbide Company and another. Complaint dismissed.

Horace O. Lanza, of Buffalo, N. Y. (John K. White, of Buffalo, N. Y., of counsel), for complainant.

Dudley & Gray, of Niagara Falls, N. Y., for defendants.

HAZEL, District Judge. This is an action for damages arising from the accidental drowning in Niagara river of Cosimo Quagliano on the 18th day of July, 1912. The drowning occurred about 150 feet from shore, in consequence of decedent's stepping into a trench or depression in the bed of the river. The plaintiff has failed to establish a cause of action.

It will be unnecessary to discuss the various matters contained in the briefs relating generally to the rights of the public or of riparian owners to the bed of Niagara river, or specifically to the rights of the Niagara Falls Power Company thereto through legislative enactments, especially with regard to its power to lease or license the stream to the codefendant, the Union Carbide Company, which is alleged to have negligently left the trench open, save to state that in my judgment the defendants had the lawful right to excavate in Niagara river near the shore at the point where the drowning occurred, and that nuisance does not lie.

The question of whether the decedent was drowned in the trench of the Union Carbide Company is left in some uncertainty, as in the map in evidence (Defendants' Exhibit 4) the water is shown to be 8.4 feet deep over the Hooker trench, adjoining the trench of the Union Carbide Company, while out farther, and near the carbide pipe line, it was only 3.4 feet in depth. But, assuming the drowning to have occurred in farther toward the shore, where excavating by means of a dredge and scow was done by the Union Carbide Company in June, 1911, I nevertheless believe that there can be no recovery by the plaintiff. The deceased, who was employed in a neighboring factory, did not have the right to bathe or swim in the river at the point where he was drowned. The land adjacent to the river, as well as the river bed at this point, was in the possession of the defendants and under their control; there was no public highway at this point leading to the river, or directly to the land along the shore. It has long since been established law in this state that the riparian owner has the right of access to a public stream from his property to the exclusion of other persons. Wetmore v. Atlantic Lead Co., 37 Barb. (N. Y.) 70.

Actions to recover for drowning while bathing or swimming are rare; but the case of Hunt v. Graham, 15 Pa. Super. Ct. 42, is a close approach to the case at bar. There the learned court held that a person has no absolute right to bathe or swim in a public lake, river, or stream, the right being limited to fishing, boating, cutting ice, etc., and that a person is not permitted to enter upon the premises of another for the purpose of bathing or swimming; the owner of the uplands owing no duty of protection to persons coming uninvited upon

his lands and entering a stream to bathe without the consent of the owner, and as said by the court:

"Defendants were not bound in the exercise of ordinary care to anticipate and provide against the act of a boy of this age, who, knowing that he could not swim, and that such holes were in the near neighborhood, would walk over a river bottom, which he could not see, and enter this hole."

While it is no doubt true that the decedent in this case, who also could not swim, did not know that a trench had been previously dug by the Union Carbide Company, there is evidence that the banks were used as a sort of dumping ground for factories; that sheathings had been left in the surface excavation, which protruded above the water for quite a distance from the shore, and should have warned him to be on his guard. Upon inquiry he could easily have ascertained that there were holes or depressions at this point in the bottom of the river. Sickles v. New Jersey Ice Co., 153 N. Y. 83, 46 N. E. 1042; Murphy v. City of Brooklyn, 98 N. Y. 642. Aside from this, there was no evidence that the defendants had any knowledge that persons were accustomed to bathe in the river at this point, and accordingly they were not required to post prohibitive or warning notices.

The complaint is dismissed, with costs.

SHERIDAN v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. October 16, 1916.)

No. 2705.

1. BANKS AND BANKING ⟸257(1)—NATIONAL BANKS—CONVERSION OF DEPOSITS—"SPECIAL DEPOSIT"—"GENERAL DEPOSIT."

An indictment, alleging that defendant, the president of a national banking association, abstracted and converted its funds in violation of Rev. St. § 5209 (Comp. St. 1913, § 9772) averred the abstraction and conversion of a deposit made for the sole use and benefit of the depositor, charging that the property consisted of moneys, funds, and credits of the national banking association, that the depositor was a depositor and creditor of the association, and that defendant intended to injure and defraud such association and the depositor. *Held*, that as, where money or its equivalent is deposited in a bank without special agreement, the law implies that it is to be mingled with other funds, and the relation of creditor and debtor is created, the deposit being general, while a special deposit is a delivery of property, securities, or money for the purpose of having the identical thing safely kept and returned to the depositor the indictment is not bad, as charging the conversion and abstraction of a special deposit instead of the conversion of funds of a national banking association, which is the offense denounced; the allegation that the deposit was for the depositor's sole use and benefit evidently being intended to indicate that only the depositor was authorized to withdraw the funds.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⟸257(1).

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

2. BANKS AND BANKING ⟸234—NATIONAL BANKS—OFFENSES—STATUTE.

Rev. St. § 5209 (Comp. St. 1913, § 9772), denouncing the offense of conversion or abstraction of the moneys or property of a national banking association by an officer or agent, declares that one violating the section shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five nor more than ten years. Pen. Code, § 335 (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1913, § 10509]), provides that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies, and all other offenses shall be deemed misdemeanors. *Held* that as the offense denounced by section 5209 is an infamous crime, the provision for punishment was not repealed by the Penal Code, defining misdemeanors as punishable by a term not exceeding one year; the fact that the offense was classed as a misdemeanor not changing its nature.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 879–967, 970–1127; Dec. Dig. ⟸234.]

3. CRIMINAL LAW ⟸1032(3)—INDICTMENT—OBJECTIONS.

Unless objections to the form of an indictment are pointed out by demurrer or otherwise taken advantage of on trial, such objections cannot be urged after verdict, unless they affect the substantial rights of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627; Dec. Dig. ⟸1032(3).]

4. BANKS AND BANKING ⟸257(1)—NATIONAL BANKS—OFFENSES—INDICTMENT.

An indictment charged that defendant was the president of a national banking association; that he did willfully and unlawfully abstract and convert to his own use, benefit, and advantage certain moneys, funds, and

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

*Rehearing denied January 8, 1917.

credits of the bank of the amount and value of $5,000, a more particular description of which was to the grand jury unknown, from and out of the moneys, funds, and credits of the association, and held by the same as a deposit for the sole use and benefit of a depositor and creditor of the bank, by means of an instrument designated a memorandum check, without the knowledge and consent of the banking association, and with the intent to injure and defraud the association, the depositor, and the creditor. Rev. St. § 5209 (Comp. St. 1913, § 9772), declares that any officer or agent of a national banking association who shall convert or appropriate any money of the association with intent to defraud shall be guilty of an offense. *Held*, that the indictment was not open to attack because the property was described as certain moneys, funds, and credits of the association of specified amount in dollars; a more particular description to the grand jury being unknown.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⊂⊃257(1).]

5. BANKS AND BANKING ⊂⊃257(1)—NATIONAL BANKS—OFFENSES—INDICTMENT.

Such indictment sufficiently charged the manner of the alleged abstraction and conversion, and, having alleged that the money was abstracted without the knowledge and consent of the association, it was unnecessary to allege that it was done without the knowledge or authority of the directors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⊂⊃257(1).]

6. BANKS AND BANKING ⊂⊃257(1)—NATIONAL BANKS—OFFENSES—INDICTMENT.

The indictment was sufficient, though charging that the abstraction was done by means of a memorandum check; for the means of abstraction are immaterial.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⊂⊃257(1).]

7. BANKS AND BANKING ⊂⊃257(1)—NATIONAL BANKS—OFFENSES—INDICTMENT.

In such case, the indictment, which alleged that the money taken by defendant was converted to his own use and benefit, and to the use and benefit of another, is not open to attack on the ground that it was ambiguous and uncertain as not showing what part was received by either of the parties; for if the money was willfully and unlawfully abstracted, without authority and with intent to defraud, it was immaterial that defendant used any portion thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⊂⊃257(1).]

8. BANKS AND BANKING ⊂⊃257(1)—NATIONAL BANKS—OFFENSES—INDICTMENT.

In such case, the indictment need not allege that the money was abstracted without the knowledge or consent of the depositors; that being a matter of defense to be shown by defendant.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 970–973; Dec. Dig. ⊂⊃257(1).]

9. INDICTMENT AND INFORMATION ⊂⊃121(1)—SUFFICIENCY—BILL OF PARTICULARS.

Where an indictment sufficiently charged all of the essential facts to constitute the offense, defendant, if desirous of other details must demand a bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 316; Dec. Dig. ⊂⊃121(1).]

10. CRIMINAL LAW ⟸814(8, 9)—TRIAL—INSTRUCTIONS.
The evidence showed that defendant, the president of a national banking association, who had charge of loans, abstracted funds from the account of a depositor and converted the same to his own use, although it appeared that he executed in favor of the depositor a promissory note, which was never delivered, but was retained in the possession of the bank. An instruction that an officer of a national bank, who has full charge of making loans, has the right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts, without first obtaining permission of the directors, was refused. *Held*, that the instruction was properly refused, not being applicable to the facts of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ⟸814(8, 9).]

11. BANKS AND BANKING ⟸257(2)—INDICTMENT—VARIANCE.
An indictment, charging conversion and abstraction of the funds of a national banking association, with intent to defraud the association and the depositor whose account was charged with the defalcation, alleged that the abstraction was made by means of a memorandum check. The evidence showed that defendant, the president of the bank, who made the abstractions which were charged to the accounts of several depositors, in each case made memorandum checks, charging the depositors with the amount of their deposits, that in one case the memorandum check was deposited to the account of a third person, while in another it was deposited to the account of defendant, and that notes for the amount of the unauthorized loans were executed. *Held*, that there was no variance between the indictment and proof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 971-973; Dec. Dig. ⟸257(2).]

12. BANKS AND BANKING ⟸257(3)—NATIONAL BANKS—OFFENSES.
Where the president of a national banking association converted and abstracted funds of the association by charging the depositors' accounts with amounts of purported loans which were unauthorized by the depositors, and then crediting the amounts of the loans to his own account, or that of other persons, the president must be deemed guilty of the offense of abstraction or conversion of the moneys or property of a national banking association denounced by Rev. St. § 5209 (Comp. St. 1913, § 9772); every man being presumed to intend the legitimate consequences of his acts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 974-976; Dec. Dig. ⟸257(3).]

13. BANKS AND BANKING ⟸256(3)—OFFENSES—EMBEZZLEMENT.
In such case, as the deposits were made with the bank and not with the president, the fact that the president had control of the bank and dictated its policy did not render the offense embezzlement, instead of unlawful conversion and abstraction of the funds of the association, as charged.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 964; Dec. Dig. ⟸256(3).]

14. CRIMINAL LAW ⟸1169(1)—REVIEW—HARMLESS ERROR—EVIDENCE.
In such case, evidence that the account of the one to whom the president lent the money charged to have been abstracted was in overdraft at the time of the loan, while possibly immaterial, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. ⟸1169(1).]

15. CRIMINAL LAW ⟸371(1)—EVIDENCE—OTHER OFFENSES.
In a prosecution against the president of a national banking association for unlawfully converting and abstracting funds of the association, where

his method of procedure was to charge depositors' accounts with the amounts of his conversions, evidence of similar offenses or transactions other than those charged in the indictment was admissible to show the intent with which the abstractions were made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊂⊃371(1).]

16. BANKS AND BANKING ⊂⊃257(4)—NATIONAL BANKS—OFFENSES.

In a prosecution for unlawfully converting and abstracting the funds of national banking association with intent to defraud, where the defendant charged the amounts of his appropriations against the accounts of depositors, *held* that the question whether the depositors authorized the procedure, intending to make loans, was, under the evidence, for the jury.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 965; Dec. Dig. ⊂⊃257(4).]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Oregon; Frank H. Rudkin, Judge.

Thomas R. Sheridan was convicted of violating Rev. St. § 5209 (Comp. St. 1913, § 9772), by abstracting and converting to his own use money and funds of a national banking association, with intent to defraud, and he brings error. Affirmed.

John L. McNab, of San Francisco, Cal. (James W. Ryan, of San Francisco, Cal., of counsel), for plaintiff in error.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted on two counts of an indictment which charged him with the violation of section 5209, Revised Statutes (section 9772, Comp. St. 1913), by abstracting and converting to his own use the moneys and funds of a national banking association, with intent to defraud the association and the depositor of the money.

[1] It is contended that the demurrer to the indictment should have been sustained on the ground that the plaintiff in error is therein charged with the unlawful abstraction and conversion of a special deposit. The contention that the deposits were special is based on the allegation contained in each count that the deposit which was alleged to have been abstracted and converted was a deposit made for the "sole use and benefit" of the depositor; and it is argued that to abstract and convert a special deposit is not an offense against the United States. But the allegation so referred to is not all that the indictment charges as to the nature of the deposits. It is also alleged in each count that the property abstracted and converted consisted of "certain moneys, funds and credits of the national banking association," and that the depositor in each case "was a depositor and creditor" of the bank, and that the intent of the plaintiff in error was "to injure and defraud said national banking association and said depositor and creditor." All the allegations, when taken together, can only mean

that the deposit referred to in each count was a general deposit, creating the relation of debtor and creditor between the depositor and the bank. In a sense the primary purpose of a general depositor in a bank is to deposit his money for his own "sole use and benefit," and not for the use and benefit of another. It is evidently in that sense that the words are used in the indictment. The purpose of them is to show that the money deposited was the property of the depositor, and that it created a fund in the bank which he, and no other, had the right to draw out by check. It is not alleged in the indictment that there was any agreement as to the character of the deposit, or that the deposit was accompanied with a request that the money be kept apart.

"Where money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with other funds of the bank, and the relation of creditor and debtor is created, and the deposit is general; the bank becoming the owner of the fund." Michie on Banks and Banking, p. 1290.

"A special deposit is a delivery of property, securities, or even money to the bank for the purpose of having the same safely kept and the identical thing deposited returned to the depositor." 7 Corpus Juris, 630.

"Where money, not in a sealed packet, or closed box, bag or chest, is deposited with a bank or banking corporation, the law presumes it to be a general deposit, until the contrary appears; because such deposit is esteemed to be the most advantageous to the depositary, and most consistent with the general objects, usages, and course of business of such companies or corporations." 7 Corpus Juris, p. 631, note (a).

Tested by these rules, we entertain no doubt that the deposit referred to in each count is therein alleged to have been a general deposit to the credit of the depositor.

[2] It is contended that the demurrer to the indictment should have been sustained on the ground that section 5209 defines an offense for which no punishment is provided. It is said that, since the offense described in that section is therein specifically designated a misdemeanor, and section 335 of the federal Penal Code of 1910 provides that all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies, and all other offenses shall be deemed misdemeanors, it follows as a corollary of the statute that no misdemeanor shall be punished by a term exceeding one year, and it is urged that the provision for the milder punishment should be held to repeal the older and severer punishment. The contention cannot be sustained. Long prior to the enactment of the federal Penal Code of 1910 the Supreme Court had held, in substance, that while the offense is in the statute designated a misdemeanor, it is in fact an infamous crime. In United States v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485, it was held that the offense denounced in section 5209 is an infamous crime, for which the defendant could not be held to answer on information, but only on presentment or indictment. In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409, is to the same effect. The court there said of the crime denounced in section 5209:

"In determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment."

In Folsom v. United States, 160 U. S. 121, 16 Sup. Ct. 222, 40 L. Ed. 363, the court said:

"The offense denounced by section 5209 of the Revised Statutes is punishable by imprisonment not less than five nor more than ten years, and is therefore an infamous crime."

Section 335 of the Penal Code has no effect upon section 5209 except to define as a felony the offense therein described.

[3-6] It is urged that the indictment is defective, in that it merely charges the offense in the language of the statute; that it contains no sufficient description of the property charged to have been abstracted; that the acts constituting the fraud, or intention to defraud, are not stated; that there is failure to charge the violation of a right of either the bank or a depositor; that the allegation that the abstraction was accomplished by means of a memorandum check is unintelligible and repugnant to the other charges; and that there is failure to charge that the abstraction was made without the knowledge or consent of the directors of the bank. We find that the indictment goes further than to charge the offense in the language of the statute. Count 4, for example, charges that the plaintiff in error was the president of the bank; that on April 15, 1911, he, being such president, did willfully and unlawfully abstract and convert to his "own use, benefit, and advantage, certain moneys, funds, and credits" of said bank of the amount and value of $5,000, "a more particular description of which is to this grand jury unknown, from and out of the moneys, funds, and credits of said national banking association," held by the same as a deposit for the sole use and benefit of one Laura M. Verrill, a depositor and creditor of the bank, by means of a certain instrument, designated a memorandum check, without the knowledge and consent of said national banking association, and with the intent then and there on the part of him to injure and defraud the said national banking association and said depositor and creditor. No specific objection to the form of the indictment was made by demurrer or otherwise. The sole ground of demurrer was that the matters stated "are not sufficient in law." Unless objections to the form of an indictment are specifically pointed out by demurrer or are otherwise taken advantage of on the trial, it is too late, after verdict, to urge such objections, unless it is apparent to the court that they affect the substantial rights of the accused. Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Armour Packing Co. v. United States, 209 U. S. 56, 84, 28 Sup. Ct. 428, 52 L. Ed. 681; Connors v. United States, 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033.

It is not ground of demurrer to an indictment under section 5209 that the property is described as certain moneys, funds and credits of the bank of a specified amount in dollars, as it was described in this case, where, as here, it is followed by the averment that a more particular description is to the grand jury unknown. Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Breese v. United States, 106 Fed. 680, 45 C. C. A. 535; United States v. Voorhees (C. C.) 9 Fed. 143.

The indictment sufficiently charges the manner of the alleged abstraction and conversion. United States v. Eastman (C. C.) 132 Fed. 551; Dickinson v. United States, 159 Fed. 801, 86 C. C. A. 625. It alleges that the money was abstracted without the knowledge and consent of the national banking association. It was not necessary to allege in addition that it was done without the knowledge or authority of the directors. Flickenger v. United States, 150 Fed. 1, 79 C. C. A. 515; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; United States v. Morse (C. C.) 161 Fed. 429. And it was sufficient to charge that the abstraction was done by means of a memorandum check, for the means of abstraction are immaterial. United States v. Harper (C. C.) 33 Fed. 471; United States v. Breese (D. C.) 131 Fed. 915.

[7] In the first count it was charged that the money so taken by plaintiff in error was converted to his own use and benefit, and to the use and benefit of one B. C. Agee. It is said that this allegation is ambiguous and uncertain because it does not show what part was received by either of the parties. But if the money was willfully and unlawfully abstracted without the authority of the bank, and with the intent to defraud the bank and its depositors, it is immaterial whether the plaintiff in error used the money, or any portion thereof. Breese v. United States, 106 Fed. 680, 45 C. C. A. 535; United States v. Lee (C. C.) 12 Fed. 819.

[8] Nor was it necessary to allege that the money was abstracted without the consent or knowledge of the depositors. If in fact it was abstracted with such consent and knowledge, it was a matter of defense to be shown by the plaintiff in error.

[9] Our conclusion is that the indictment sufficiently stated all of the essential facts to constitute the offense with which the plaintiff in error was charged. If there were other details of which he desired to be informed, his remedy was to demand a bill of particulars. In Cochran v. United States, 157 U. S. 287, 15 Sup. Ct. 628, 39 L. Ed. 704, Mr. Justice Brown said:

> "Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

[10] It is contended that the trial court erred in denying a requested instruction, to the effect that an officer of a national bank, who has full charge of making loans on behalf of the bank, has a right to lend any portion or all of the money deposited in the bank by depositors on general checking accounts, without first obtaining permission from the depositors. This requested instruction was properly denied, not for the reason that it was incorrect as a general principle of banking law, but for the reason that it was inapplicable to the case. The evidence under each count under which he was convicted was that the

plaintiff in error took the money from the account of the depositor and converted it to his own use. That evidence is not negatived by the fact that in each case he executed in favor of the depositor a promissory note, which was never delivered, but was retained in the possession of the bank.

[11] Under the assignment that the court erred in denying the motion of the plaintiff in error for an instructed verdict in his favor, it is contended that the evidence demonstrates that no money was ever abstracted by the means of "a certain instrument designated as a memorandum check," as was charged in the indictment. The evidence is that the plaintiff in error in each case made a memorandum check, charging the depositor with the amount of his deposit; and the evidence under the first count is that thereupon, on the date of the memorandum check, he made out a deposit slip, showing that the amount covered by the memorandum check was deposited to the credit of one B. C. Agee, and that the note bore the same date. Under the fourth count the memorandum check shows that on April 15, 1911, the depositor's money was loaned by the plaintiff in error, but the books show that the money was transferred to the account of the plaintiff in error on the books of the bank, and that he, on that date, executed to her a promissory note for the amount. As we have already shown, it was not necessary that the indictment should show the means by which the money was abstracted. But in view of the evidence, there is no ground for saying that it was not done in each case by means of a memorandum check.

[12] It is said that there was no proof of the intent of the plaintiff in error to defraud. The case comes within the general rule that the law presumes every man intends the legitimate consequence of his own acts. The acts were deliberately committed, and they resulted in loss to the depositors. Agnew v. United States, 165 U. S. 53, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664.

[13] It is urged that the evidence discloses a case of embezzlement rather than abstraction, and that therefore the precise charge made in the indictment was not met by the proof. It is said that the plaintiff in error himself had possession of the funds of the bank, and reference is made to the testimony of the cashier, who said that the plaintiff in error had the full and exclusive power of lending the money of the bank, and that "Tom Sheridan and I ran this bank," and it is argued that the cashier's part consisted merely of clerical duties, while the plaintiff in error, as president, had possession of the money at the time when he is charged with the unlawful abstraction. But it does not follow, and the court would not be justified in holding, that because the plaintiff in error was the manager of the bank the possession of moneys in the bank was his possession and not that of the bank. Clearly, all funds deposited were deposited with the bank, and not with the president and manager thereof, and the possession of the deposits was the bank's possession.

We find no ground to sustain the contentions that the offense shown by the evidence was maladministration, and not unlawful abstraction,

or that it consisted wholly in making a false entry or obtaining money under false pretenses.

[14] It is contended that the trial court erred in admitting in evidence under the first count testimony that the account of the person to whom the plaintiff in error lent the money charged to have been abstracted was in overdraft at the time of the loan. This evidence may have been immaterial to the issues, but it is not perceived that it could have been prejudicial to the plaintiff in error.

[15] It is contended that it was error to admit evidence of similar offenses or transactions other than those charged in the indictment. We think the case comes clearly within the rule that evidence of similar transactions may be admitted to show the intent with which the specific act under investigation was done. Wood v. United States, 16 Pet. 342, 10 L. Ed. 987. The rule has been applied to cases of indictment under section 5209. Breese v. United States, 106 Fed. 680, 45 C. C. A. 535; Brown v. United States, 142 Fed. 1, 73 C. C. A. 187; Prettyman v. United States, 180 Fed. 30, 103 C. C. A. 384; Breese v. United States, 203 Fed. 824, 122 C. C. A. 142.

[16] It is contended that the motion for an instructed verdict should have been granted, for the reason that the evidence is that the depositors named in the first and fourth counts assented to the acts of the plaintiff in error and authorized him to draw their funds and invest them. The depositor named in the first count denied that he ever gave authority to the plaintiff in error to loan the $230 so taken from his account. As to the fourth count, the testimony of the depositor was that the plaintiff in error asked her if she wanted to loan the money, that he said that he would get a good loan for her, and that she supposed that the bank was to loan the money. She testified that she never authorized the making of the memorandum check by which the money was drawn from her account, and that when the check was shown her later she had supposed that it was for the purpose of showing that the bank had loaned the money, and that the plaintiff in error then told her that her money was safely invested. The letters signed on June 20, 1911, by both of these depositors, at the instance of the National Bank Examiner, were clearly ineffectual to legalize the abstraction of the depositors' moneys by the plaintiff in error. Concerning the defense that the plaintiff in error was authorized to take these moneys, the court instructed the jury that if they found from the testimony that the plaintiff in error was authorized by the depositors to draw those moneys, or if they found from the course of dealing between the plaintiff in error and the depositors that the former had reasonable cause to believe, and in good faith did believe, that he was authorized, then he was not guilty of the crime here charged. The jury have found that the plaintiff in error was not so authorized, and we would not be justified in holding that there is not evidence to sustain that conclusion.

We find no error. The judgment is affirmed.

ROSS, Circuit Judge (dissenting). The gist of the charge contained in count 1 of the indictment is that on the 7th day of March, 1911, the

defendant was president of the First National Bank of Roseburg, Or., a theretofore duly organized and established national banking association under the laws of the United States, doing business at the city of Roseburg, and that, being such president, the defendant on that day and at that place willfully and unlawfully abstracted and converted to his own use, and to the use of one B. C. Agee, $230 from and out of the moneys of the bank "held by said national banking association as a deposit for the sole use and benefit of one David Hull, a depositor and creditor of said the First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said national banking association," and with the intent to injure and defraud both the said bank and the said depositor.

The gist of the fourth count is that the defendant was, on the 15th day of April, 1911, president of the First National Bank of Roseburg, Or., theretofore duly organized and established under the laws of the United States and doing business at Roseburg, and that the defendant, then being such president, on the day and at the place alleged, willfully and unlawfully abstracted and converted to his own use $5,000 from and out of the moneys of the said bank "held by said national banking association as a deposit for the sole use and benefit of one Laura M. Verrill, a depositor and creditor of said the First National Bank of Roseburg, by means of a certain instrument designated as a memorandum check, without the knowledge and consent of said national banking association," and with the intent to injure and defraud both the said bank and the said depositor.

To each of the foregoing counts the defendant demurred on the ground that no offense against the United States was therein charged, which demurrer was overruled.

"All deposits made with bankers," said the Supreme Court in Marine Bank v. Fulton Bank, 2 Wall. 252, 256, 17 L. Ed. 785, "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 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."

The same thing has been many times held by the same court, and by subordinate courts.

It necessarily follows, I think, that money deposited with a bank "for the sole use and benefit of" the depositor cannot be held to be a loan to the bank, nor that the depositor thereby parts with the title to his money. Manifestly, it cannot be received and held for the sole use and benefit of the depositor and at the same time become the property of the bank and subject to such use as the bank should see fit to put it. In the latter case, the relation of debtor and creditor would exist between the parties; in the former, that of trustee and cestui que trust. Titlow v. Sundquist, 234 Fed. 613, — C. C. A. — (decided at the present term). It necessarily results, in my opinion, that the $230 alleged by the first count of the indictment to have been

willfully and unlawfully abstracted and converted by the defendant to his own use and to the use of one B. C. Agee, with the intent to injure and defraud both the bank and the depositor David Hull, was not the money of the bank, but of Hull, and that the $5,000, alleged by the fourth count to have been willfully and unlawfully abstracted by the defendant and converted to his own use with the intent to injure and defraud both the bank and the depositor Laura M. Verrill, was not the money of the bank, but of Laura M. Verrill. And such, evidently, was the view of the learned judge of the court below, for among his instructions to the jury are the following:

"It is likewise conceded that the defendant Thomas R. Sheridan was the president of that association during all the times mentioned in the indictment and for many years prior thereto; it is likewise conceded that the defendant Thomas R. Sheridan withdrew from the bank the several sums of money belonging to the several depositors as set forth in the indictment by means of certain memorandum checks received in evidence. The principal question for your consideration will be—or at least the first question for your consideration will be: Was the defendant authorized by the depositors to withdraw these moneys? If you find from the testimony in this case that he was so authorized, or if you find from the course of dealing between the defendant and the depositor that the defendant had reasonable cause to believe, and in good faith did believe, that he was so authorized, then he is not guilty of the crime here charged. But if you are satisfied beyond a reasonable doubt that he had no authority from the depositor to withdraw the funds, and if you further find that he had no reasonable cause to believe and did not in good faith believe, that he had such authority, then his abstraction of the funds was wrongful, and the crime is complete if you find that the abstraction was made with the intent to injure or defraud either the banking association or the depositor. * * *

"Applying this rule to the case at bar, if you should find from the evidence beyond a reasonable doubt that the defendant without authority took from the accounts of his depositors named in the indictment, without previous authorization from them, their money and converted the same to his own use and benefit, and thereby placed the same beyond the control of said depositors, you would be justified then in presuming that he did these acts with intent to injure and defraud said depositors."

If the language of a penal statute be plain—

"it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial." Bolles v. Outing Co., 175 U. S. 262, 265, 20 Sup. Ct. 94, 44 L. Ed. 156.

The defense of the defendant was that the depositors Hull and Laura M. Verrill authorized him to draw their money from the bank and loan it for them, which defense the jury by its verdict rejected; but the difficulty is that the unlawful withdrawal of their money from the bank by the defendant and its unlawful conversion by him with the intent to injure and defraud both the bank and the depositor is not, by the statute in question, made an offense against the United States. Section 5209 of the Revised Statutes (Comp. St. 1913, § 9772), as amended by section 335 and the concluding clause of section 341 of the act of March 4, 1909 (Comp. St. 1913, §§ 10509, 10515), makes it a felony to so withdraw and convert, with intent to defraud, money of the bank, but not of a depositor. And such is here conceded to be the meaning of the statute by the attorney for the government, he,

however, insisting that the counts of the indictment under consideration do allege that the money deposited by the respective depositors mentioned belonged to the bank, with which contention, for the reasons stated, I am unable to agree.

It results that, in my opinion, the judgment should be reversed, and the cause remanded to the court below, with directions to sustain the demurrer to counts 1 and 4 of the indictment.

LEONARD v. STATE EXCHANGE BANK OF ELK CITY, OKL.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1916.)

No. 4628.

1. BILLS AND NOTES ⟸262—ACCOMMODATION MAKERS—RIGHTS OF.
One signing a note for the accommodation of another, if compelled to pay it, may ordinarily recover the amount paid from the one for whose accommodation the note was made.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 611; Dec. Dig. ⟸262.]

2. BANKS AND BANKING ⟸109(1)—ACTS OF OFFICERS—LIABILITY ON NOTE.
Notes signed by the officers to obtain a loan for a bank constitute legal obligations of the bank, where the money was received by it, and all parties understood the nature of the transaction.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 257, 258; Dec. Dig. ⟸109(1).]

3. SUBROGATION ⟸7(7)—PRINCIPAL AND SURETY—RIGHTS OF.
Where officers of a bank executed notes for the accommodation of the bank and were compelled to pay them, the officers, being only sureties and the bank the real party in interest, are subrogated to the rights of the holders.
[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 26, 77, 92; Dec. Dig. ⟸7(7).]

4. BILLS AND NOTES ⟸106—VALIDITY—LEGALITY OF OBJECTION—RELIEF OF PARTIES.
Officers of the defendant bank, to obtain a loan for it without impairing its credit, executed their own notes. On maturity the notes were paid by plaintiff, one of the officers. The parties to the transaction intended to conceal it from the state bank commissioner. Rev. Laws Okl. 1910, § 269, provides that every officer or agent of any bank doing business under the laws of the state, who shall unlawfully and knowingly subscribe to or make any false report or false entries in the books of the bank, or knowingly subscribe or exhibit any false writing or paper, with intent to deceive any person as to the bank's condition, shall be deemed guilty of a felony and punished by a fine or imprisonment or both. *Held* that, as the act prescribes a specific penalty and does not declare void notes made with intent to deceive as to the condition of the bank, the notes executed by the officers were valid and enforceable against the bank in the hands of the holder, and having been paid by plaintiff, who was subrogated to the holder's rights, he could enforce them against the bank.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 219, 225–232; Dec. Dig. ⟸106.]

5. BANKS AND BANKING ⟸109(1)—ACTS OF OFFICERS—NOTES.
In such case, before payment of the notes, the officers, who were the sole stockholders, transferred their stock, and the transferees in turn

disposed of the stock. *Held* that, though the last purchasers did not know of the nature of the transaction and the bank's liability, the bank was liable for repayment of the loan, having received the full consideration and being considered a separate entity for such purposes; this being particularly true where the last purchasers had received a written guaranty protecting them against all loss and damage by reason of any transactions or acts of the bank or its officers prior to the date of purchase.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 257, 258; Dec. Dig. ⟸109(1).]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by William D. Leonard against the State Exchange Bank of Elk City. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Frederick B. Owen, of Oklahoma City, Okl., and W. H. Hills, of Enid, Okl. (George L. Edwards and Walter J. G. Neun, both of St. Louis, Mo., Guy S. Manatt, of Enid, Okl., and Henry E. Asp, Henry G. Snyder, and Walter A. Lybrand, all of Oklahoma City, Okl., on the brief), for plaintiff in error.

Frank Wells, of Oklahoma City, Okl. (James R. Keaton and David I. Johnston, both of Oklahoma City, Okl., F. L. Williams, of Clay Center, Kan., and Frank Winters, of Elk City, Okl., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law brought by Leonard, plaintiff in error, to recover from the State Exchange Bank of Elk City, Okl., a sum of money paid by him to the National Bank of Commerce in St. Louis because of certain notes alleged to have been signed by him and two others for the accommodation of the defendant bank. The parties waived a jury in writing, and agreed that the case should be tried to the court. The court made a finding of facts and rendered judgment thereon for defendant bank. This writ of error, sued out by plaintiff Leonard, challenges that judgment, and the only question presented by the assignment of errors is whether the finding supports the judgment.

The court made the finding in words and figures as follows:

"The court finds that the plaintiff in this action, together with Charles E. Davis and J. A. Moon, were the only officers and directors and sole stockholders of the defendant bank herein, at the date of the transactions herein litigated.

"The court further finds that during the time the said plaintiff herein, together with Charles E. Davis and J. A. Moon, were such officers, stockholders, and directors, they made, executed, and delivered to the National Bank of Commerce in St. Louis, in their individual capacity, their three certain promissory notes in writing, obligating themselves to pay the said National Bank of Commerce in St. Louis, the aggregate sum of twelve thousand five hundred ($12,500) dollars; that at the time of the execution and delivery of said notes to the National Bank of Commerce in St. Louis, the plaintiff herein, and Charles E. Davis and J. A. Moon, took from the note case of the State Exchange Bank, defendant herein, bills receivable, aggregating approximately

the amount of the loans that they were securing from the St. Louis bank, and forwarded the same to the said St. Louis bank to secure said loans, and that when said notes therefor and the said securities were forwarded to the St. Louis bank, it was instructed to place the proceeds of said loans to the credit of the defendant herein, on the books of the National Bank of Commerce in St. Louis, and the said loans were obtained *solely for the use and benefit* of the defendant herein.

"The court further finds that the said National Bank of Commerce in St. Louis pursuant to said request, placed to the credit of the defendant herein, the sum of twelve thousand five hundred ($12,500) dollars, less the discount, on the books of the St. Louis bank, and that said sum was checked out of the St. Louis bank by the State Exchange Bank, defendant herein, and used in the usual course of business for its sole and entire benefit, and that the plaintiff herein received nothing as a result of the signing of said notes, but that the defendant herein received all the benefits and proceeds thereof.

"The court further finds that at the time the bills receivable were taken out of the note case of the State Exchange Bank, defendant herein, an entry was made on the bills receivable record of said bank, crediting the same with the amounts of the notes so taken out and forwarded to St. Louis; that at the same time and on the same date, the National Bank of Commerce in St. Louis, was debited on the journal of the State Exchange Bank of Elk City, with the amount of said notes signed by the plaintiff herein, and his associates, and that the said National Bank of Commerce in St. Louis, at the same time and place was debited on the general ledger of the State Exchange Bank of Elk City with the amount of the notes signed by the plaintiff herein and his associates.

"The court further finds that the plaintiff and his associates had the object in the making of said loans in their individual names and of the said entries in the books of the defendant bank that no such indebtedness of said bank would appear on its books or in the reports of its financial condition to the Oklahoma state bank commissioner, and that the same was accordingly withheld therefrom.

"The court further finds that the plaintiff herein sold his stock in said bank to Charles E. Davis, one of his associates and one of the signers of the said notes, and that the said Charles E. Davis sold said stock, and that the stock of said bank is now owned and controlled by G. T. Patterson, P. E. Wheeler, M. Scannell, G. H. Crumley, O. H. Cafky, Frank Winters, J. D. Davault, J. S. Pettus, W. E. Allen, A. P. Harris, W. E. Clark, T. J. Clark, and F. L. Clark.

"The court further finds that the said William D. Leonard was compelled to pay to the National Bank of Commerce in St. Louis, on said indebtedness, the sum of $9,457.92 by giving his note and securing the same by a first mortgage on certain real estate, said note bearing interest at the rate of 7 per centum per annum, and that the said National Bank of Commerce in St. Louis accepted the same from the plaintiff herein as a final settlement of all amounts due it on the three notes of $12,500 above referred to.

"The court further finds that at the time the loans of $12,500 were made from the National Bank of Commerce in St. Louis, the plaintiff in this action, and Charles E. Davis and J. A. Moon, were the sole and only stockholders in said defendant bank, and that the stockholders who now own the stock purchased their stock from parties, other than the plaintiff herein, long after the said loans had been consummated, and the proceeds thereof used by the defendant bank herein, and without knowledge or notice of the liability of the defendant to the said National Bank of Commerce in St. Louis.

"The court further finds that at the time the said stockholders who now own said stock purchased the same, their vendors in writing guaranteed them and the defendant bank against all loss and damage by reason of any transactions or acts of the bank, or its officers, prior to the date of said purchase, namely, March 31, 1913.

"The court further finds that the plaintiff herein was one of the active managing officers of the State Exchange Bank, defendant herein, at the time of the loans mentioned above and the entries in the books of said bank, and

that said plaintiff had actual knowledge of said entries, and that the present stockholders of said bank when purchasing their stock relied upon the books of the bank appearing as aforesaid and as showing the true condition of said bank, and that said books did not disclose said loans.

"The court holds that by reason of the facts found as aforesaid, the plaintiff is not entitled to any recovery or relief in this action, * * *" and then rendered judgment in favor of the defendant.

Was that judgment right? Certain comparatively unimportant questions, much debated by counsel, will first be rather summarily disposed of.

[1] (a) If one who signs a note for the accommodation of another is compelled to pay it, he, as a general rule, may recover from him thus accommodated the amount so paid by him.

[2] (b) The fact that the notes negotiated with the Bank of Commerce were actually signed in the individual names of the officers of the Exchange Bank, instead of in the name of the bank itself, is, in itself, of no legal consequence. The money, as understood by all the parties interested, was borrowed for the bank, placed to the credit of the bank, and checked out and used exclusively by the bank for its own purposes. The notes, therefore, created legal obligations of the bank, notwithstanding the fact that they were not executed in the name of the bank. Cherry v. City National Bank, 75 C. C. A. 343, 144 Fed. 587; Flower, Trustee, v. Commercial Trust Co., 138 C. C. A. 580, 223 Fed. 318, and cases cited.

[3, 4] Defendant's counsel contend that as the transaction with the Bank of Commerce, including the book entries concerning it, was made by plaintiff and his associates with intent to deceive the state bank commissioner as to the condition of their bank, in violation of the provisions of section 269, Revised Statutes of Oklahoma 1910, there can be no recovery by plaintiff in the action. This section enacts that:

"Every officer, director, agent or clerk of any bank, doing business under the laws of the state of Oklahoma, who shall unlawfully and knowingly subscribe to or make any false report or any false statement or entries in the books of such bank, or knowingly subscribe to or exhibit any false writing or paper, with the intent to deceive any person as to the condition of such bank, shall be deemed guilty of a felony, and shall be punished by a fine not to exceed one thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment."

It is worthy of note that this act prescribes a definite penalty for its violation, and does not in terms avoid a contract made in its attempted or intended violation. In these respects it is like the acts of Congress (sections 5209–5213, R. S. 1878 [Comp. St. 1913, §§ 9772–9777]), relating to false reports and false entries by officers and agents of national banks. In the case of Hanover National Bank v. First National Bank, 48 C. C. A. 482, 109 Fed. 421, this court had occasion to consider a question quite similar to that now being considered, on a state of facts in essential respects like those involved here. The question there presented, and decided, was whether a New York bank, which had rediscounted promissory notes for a Kansas bank without the indorsement of the bank itself (accepting in lieu thereof the personal

indorsement of its president and certain other assurances for their payment), could recover against the Kansas bank, notwithstanding the facts, pleaded as a defense by the Kansas bank, that the arrangement was made by the officers of the two banks for the purpose of enabling the Kansas bank to conceal the fact of its contingent liability on those notes from the Comptroller of the Currency in making reports of its condition to him, as required by law. This defense received the careful consideration of the three sitting judges, who expressed themselves in separate opinions, and rendered a judgment overruling that defense.

After a careful consideration of the present case, in the light of the able arguments of counsel, we are unanimously of the opinion that we should adhere to the conclusion reached in that case. The reasons for doing so are so cogently stated by Judges Sanborn and Thayer in the former case that it would be idle and useless for us to now restate them.

A distinction is sought to be drawn by counsel for defendant, because of the fact that in the former case the action was brought by the New York bank against the Kansas bank directly, on some of the rediscounted notes, whereas in this case the action is brought by the accommodation maker of the notes against the bank accommodated, for money paid by him in satisfaction of the notes. We think this is a distinction without a difference. The Bank of Commerce stands in its relation to the Exchange Bank as the New York bank stood in its relation to the Kansas bank.

Plaintiff and his comakers, while principal debtors to the Bank of Commerce, were sureties so far as the Exchange Bank, the primary debtor, was concerned, and plaintiff, having paid the debt of the latter, may, on familiar principles of subrogation, stand in the shoes of the creditor and whatever rights the creditor had against the primary debtor ought to be and are available to the sureties. We discover no reason, notwithstanding the distinction pointed out, why the doctrine of the Hanover Bank Case is not fully applicable to this, and on the authority of that case we hold that the fact that the notes were executed in the name of plaintiff and his cosureties with the intent to conceal the true condition of the bank from the state bank examiner constitutes no defense to this action.

[5] Defendant pleaded, for another defense, that at the time of the transaction with the National Bank of Commerce the plaintiff and his two associate makers of the notes in question were the sole and only stockholders of the Exchange Bank, but that since then and prior to the beginning of this suit they had sold and transferred all their stock to other persons who subsequently transferred the same, in varying amounts, to 13 other persons, naming them, who, at the time of purchasing their stock in 1913, had no actual knowledge of the indebtedness of the Exchange Bank to the Bank of Commerce, but relied on the books of the bank as showing the true financial condition of the bank, and that those books showed no such indebtedness to the Bank of Commerce. Defendant's counsel contend that by reason of these facts plaintiff is estopped, as against the bank, and especially as against

the 13 present stockholders, from asserting any claim against the bank.

The finding of facts made by the court discloses that the facts set forth in this defense are substantially truly stated, but the court finds another important fact to be true also, namely:

"That at the time the said stockholders who now own said stock purchased the same, their vendors in writing guaranteed them and the defendant bank against all loss and damage by reason of any transactions or acts of the bank, or its officers, prior to the date of said purchase, namely, March 31, 1913."

No injury was done to the Exchange Bank itself or to any of its then existing stockholders by the transaction with the Bank of Commerce. The Exchange Bank, by the voluntary action of plaintiff and his associates in 1911 signing their individual names to the notes, obtained for its sole use and benefit $12,500 from the Bank of Commerce, which it employed in the usual course of its business; the plaintiff or his associates receiving nothing whatever for their accommodating service. The Exchange Bank needed money, and, for reasons satisfactory to its officers, decided to secure it without injuring its credit, if possible, and resorted to the not uncommon practice, as judicial history discloses, of borrowing it in such a way as not to disclose the fact of an increase in the present indebtedness of the bank. No graft or individual advantage to the accommodating signers appears in this record. The record discloses nothing to impeach the essential honesty of the transaction, so far as the parties directly interested were concerned. When defendant repays to plaintiff the amount paid by him for its account, it will pay out only what it had actually received from the Bank of Commerce as a result of plaintiff's voluntary accommodating act. In other words, it will have lost nothing by the transaction, except possibly the loss incidental to the forced sale of its collateral, about which, if any such loss was made, no point is now made by defendant's counsel.

The stockholders of a corporation, as illustrated in this case, are a changing body—stockholders of to-day may not be to-morrow, or next week, or next year. To hold that a transaction of to-day, approved by the corporation itself and by its entire body of stockholders, intended to serve the best interests of the corporation, as now understood by its governing board, can be assailed a year or more later by a board of directors chosen by stockholders who may then have acquired a controlling interest in the stock, not for dishonesty or fraud in the transaction, but for some of the incidental consequences of the transaction, would introduce unending confusion and disorder. As the Exchange Bank received the full benefit of a transaction conducted with its full approval and that of all its stockholders, as they existed at the time of the transaction, the plaintiff would clearly not now be estopped from asserting his legal rights against the bank itself.

While it is true, as argued by defendant's counsel, that the separate entity doctrine of corporations in their relation to their stockholders should not always be enforced, certainly not in cases where its enforcement would work injustice and wrong, we are unable to find in this case any reason for not applying it here. Plaintiff, not being

estopped from asserting his legal rights against the corporation as constituted in 1911 when the notes were negotiated with the Bank of Commerce, is not estopped as against that corporation, or its stockholders, as constituted in 1913 when the present stockholders purchased their stock.

For another reason, also, we think there is no estoppel even as against the 13 present stockholders. They apparently did not much rely, in purchasing their stock, upon the showing made by the books of the bank at the time. They required, and secured, a written guaranty from their vendors against all loss or damage by reason of any transaction or acts of the bank or its officers prior to the date of that purchase, which was March 31, 1913.

Perceiving no reason why the Exchange Bank should not repay to plaintiff the amount of money paid by him for its accommodation, the judgment of the District Court is reversed, and cause remanded to that court, with instructions to grant a new trial.

LASSWELL LAND & LUMBER CO. v. LEE WILSON & CO. *

(Circuit Court of Appeals, Eighth Circuit. August 24, 1916.)

No. 4621.

1. APPEAL AND ERROR ⊜878(6)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Where defendant did not appeal from a decree awarding it affirmative relief, the propriety of the denial of some of the relief sought by defendant cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3576, 3577; Dec. Dig. ⊜878(6).]

2. SALES ⊜77(1)—CONSTRUCTION OF CONTRACT—PRICE.
A contract for the sale of lumber provided that the buyer should, on the seller's manufacturing the lumber, advance 50 per cent. of the purchase price; that the lumber should be stacked for six months when delivery should be made, and the balance of the contract price paid, less 2 per cent., the same to be in full payment. *Held*, that as the parties in previous dealings treated the 2 per cent. clause as providing for a deduction of 2 per cent. of the entire contract price, that construction will, the provision being ambiguous, be followed, and the buyer is justified in deducting from the last installment 2 per cent. of the entire purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 208, 209, 211; Dec. Dig. ⊜77(1).]

3. SALES ⊜43(1)—RESCISSION BY BUYER—RIGHT TO RESCIND.
Defendant, the buyer of lumber which was to be stored in the seller's yards and shipped out within six months, in making sales to its customers billed out the lumber shipped at amounts in excess of those reported to the seller. The overbilling and overcharging of invoices to defendant's customers was for the purpose of preventing them from raising unreasonable and captious objections concerning the quality and quantity of lumber invoiced to them. There was no showing that defendant, whose duty it was to scale and measure the lumber, did not report to the seller the true amounts shipped. *Held*, that there was no such misconduct on the part of defendant as would justify the seller in rescinding the contract

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

*Rehearing denied December 4, 1916.

and defendant was entitled to relief on account of the seller's rescission, despite its misconduct as to others.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 86, 89, 92, 97–99; Dec. Dig. ⊂⊃43(1).]

4. APPEAL AND ERROR ⊂⊃1022(1)—REVIEW—REPORT OF MASTER.

A report of the master approved by the trial judge is presumptively correct, and will not be disturbed by the appellate court, unless some obvious error of law or serious mistake in considering the evidence has occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015, 4017, 4018; Dec. Dig. ⊂⊃1022(1).]

5. CORPORATIONS ⊂⊃661(2)—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN THE STATE.

Where a foreign corporation, doing business in the state without compliance with Rev. St. Mo. §§ 3039, 3040, so as to entitle it to sue on its contracts, made advances under a contract of sale, it may, on the seller's wrongfully rescinding the contract, recover back the advances, such action not depending on, or being an assertion of, the validity of the contract, but being one in assumpsit for money had and received.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539; Dec. Dig. ⊂⊃661(2).]

6. EQUITY ⊂⊃66—MAXIMS.

A seller of lumber, which received advances from a foreign corporation doing business in the state, cannot, having sought equitable relief against a replevin suit by the corporation, defeat the corporation's cross-bill to recover the advances, on the ground that the corporation had not complied with the laws of the state as to doing business, and could not sue on the contract, for he who seeks equity must do equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. ⊂⊃66.]

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

Suit by the Lasswell Land & Lumber Company against Lee Wilson & Co., which filed a cross-bill. From a decree for defendant, complainant appeals. Affirmed.

R. P. Williams, of St. Louis, Mo., and J. P. Tribble, of Kennett, Mo. (C. B. Williams, of St. Louis, Mo., on the brief), for appellant.

Frank H. Sullivan, of St. Louis, Mo. (Allen Hughes, of Memphis, Tenn., on the brief), for appellee.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. This was a suit in equity, brought in the district court by the Lasswell Land & Lumber Company, appellant, against Lee Wilson & Co., appellee, to enjoin the prosecution of a replevin suit before then instituted by the Wilson Company against the Lumber Company to recover possession of certain lumber in the possession of the latter company, for an accounting concerning the matters involved in the replevin suit, for a decree in its favor for the amount to be found due, and general relief.

Plaintiff, in its bill, alleged: (1) That the Wilson Company was a

foreign corporation organized under the laws of the state of Arkansas, and engaged in the transaction of business in the state of Missouri without having filed with the secretary of state a certified copy of its charter and given the other information required by section 3039 of the Revised Statutes of Missouri requisite to secure a license to do business in Missouri, and for that reason the defendant was, by the provisions of section 3040 of the Revised Statutes, barred from maintaining any action against it; (2) that the replevin suit arose out of a contract, dated March 14, 1910, by the provisions of which the Wilson Company had agreed to purchase from the Lumber Company a large quantity of lumber, to be manufactured within the period of one year thereafter to ensue by the latter company, and stacked in its yards at its sawmill located in Missouri, for the Wilson Company, and had agreed to make monthly advances to the Lumber Company of about 50 per cent. of the value of such lumber as had been manufactured and stacked during the previous month, such advances to be evidenced by promissory notes of the Lumber Company given to the Wilson Company for the several advances as and when made, and had agreed to ship out the lumber within six months after it should be manufactured and stacked, at which time it was agreed that each stack should be accurately inspected and measured and full payment made of any sums due over and above the advances made.

Plaintiff further alleged in its bill that the Wilson Company had breached the contract by failing to take possession and ship out the lumber within six months from the date it was manufactured, as result of which the Lumber Company was required to execute its notes from time to time for the amounts of such advances and obligate itself to pay interest thereon to the Wilson Company at the rate of 6 per cent. per annum from the time the advances were made until the lumber should be shipped and final settlement made, and had further breached the contract and committed fraud upon the plaintiff's rights, in that it had made inaccurate and false inspections of the lumber when shipped out to its customers or vendees, and had rendered false reports and invoices to plaintiff as to the quantity of lumber shipped, reporting to plaintiff a less amount than was in fact shipped, and in some other respects had failed to comply with its provisions.

Plaintiff further alleged in its bill that defendant had not fully paid for the lumber replevied and was therefore not entitled to its possession, and that it had been greaty damaged by the foregoing breaches of the contract and frauds perpetrated by the defendant, and could not secure redress for the same in the replevin suit.

Plaintiff prayed for an injunction restraining the prosecution of the replevin suit until this suit should be heard, for cancellation of the promissory notes executed by it to the Wilson Company for advances made, and for an accounting "between this plaintiff and the defendant of all their actions and dealings in connection with the purchase and sale of the lumber aforesaid; that such account be taken under the direction of the court and the condition thereof ascertained and stated"; and that plaintiff have judgment for such sum as may

be found due to it from defendant growing out of the transactions hereinbefore set forth, and for general relief.

A temporary restraining order was issued by the court, as prayed, and a receiver appointed to take possession of the lumber in question and sell the same.

Defendant, for answer to the bill, admitted that it was a foreign corporation, and had not secured a license to do business in Missouri, but denied that it was carrying on business in Missouri within the meaning of the Missouri statute, averring that the transaction out of which the suit arose was one in interstate commerce. It denied each and every wrongful act imputed to it by the plaintiff, and alleged that an accounting between the parties would show a balance due it of some $7,000, for which it prayed judgment against plaintiff. It also filed a cross-bill, asking that its answer be taken as part thereof, in which it set forth the terms and provisions of the contract of March 14, 1910, substantially as stated in the bill, and alleged that it had at all times kept and performed the stipulations obligatory upon it, and had made advances of money to the Lumber Company on estimates of lumber stacked for it in excess of the price agreed to be paid therefor, as shown by an itemized account filed with the cross-bill. This account, it was averred, shows certain lumber received from and advances made to a firm by the name of Lasswell & Crider, plaintiff's predecessor in business, on contracts similar to that of March 14, 1910, between plaintiff and defendant; that these contracts had been partly performed by Lasswell & Crider and partly by their successor (the plaintiff), the vendor's obligation in which, it is alleged, had been assumed by the plaintiff.

Defendant further alleged that on February 24, 1911, plaintiff not then having manufactured, stacked for, and delivered to it the full amount of lumber it had agreed to do, then well knowing that the value of the lumber in the yard was not sufficient to repay the defendant the advances then before made by it, breached the contract by refusing to make further delivery of lumber to it or permit it to take possession of and ship out the lumber that was there stacked for it, and seized and converted to its own use the lumber then stacked in its yards belonging to the defendant, according to the terms of the contract, falsely pretending that the defendant had been at fault and had defrauded it in the matter of certain prior shipments and their inspection, and later notified defendant that it renounced its obligation under the contract of March 14, 1910, and proposed to sell the lumber then stacked in its yards for the defendant to other parties. Defendant then set forth its damage for breaches of the contract, alleging the same to have been $7,000, and prayed for a decree accordingly, and for general relief.

Plaintiff filed a plea to this cross-bill, again alleging that the defendant was a foreign corporation and had not complied with the laws of Missouri in the matter of domestication, and was not, for that reason, entitled to invoke the aid of the court for any purpose. The court heard this plea and overruled it. Plaintiff then filed an answer to the

cross-bill, among other things, admitting its refusal to perform the contract after February 24, 1911, alleging as reason therefor that the defendant had made false statements and rendered false accounts to plaintiff, as stated in its bill, and in other respects denied the allegations of the cross-bill.

The cause was then referred to Hon. Hugo Muench, as special master, to hear the proof, make findings of fact and conclusions of law for the advice of the court. The master, after a full hearing, stated an account between the parties, as prayed for by them. He disallowed to plaintiff any damages arising from the alleged failure of defendant to ship out the lumber promptly after it had remained in plaintiff's yards six months, disallowed to the defendant any damages alleged to have accrued to it by reason of the increase in market value of lumber after plaintiff's refusal to deliver lumber over and above the price agreed to be paid to it by defendant, then, crediting plaintiff with the purchase price of all lumber delivered to defendant in the execution of the contract so far as deliveries were made, and charging plaintiff with all moneys paid to it by defendant as advance payment for lumber afterwards to be delivered, and disposing of some minor and additional items of controversy, found a balance in favor of the defendant of $7,263.79, and, finding the other issues joined in favor of defendant, recommended a decree in its favor for the amount so found. Exceptions filed to the master's report were heard and overruled by the court, the report confirmed and final decree rendered dismissing plaintiff's bill for want of equity, and rendering judgment for defendant on its cross-bill, as recommended by the master. From this decree plaintiff alone appeals.

The errors assigned are numerous, but the ones relied on in the briefs of counsel, as required by our rule 24 (188 Fed. xvi, 109 C. C. A. xvi), and urged in argument, are comprehended within the following questions:

(1) Was the transaction between plaintiff and defendant, out of which the controversy between them arose, a transaction in interstate commerce?

(2) If not, do the facts of the case permit the defendant to invoke the aid of the court as it did in its cross-bill?

(3) Did the conduct of the defendant in the matter of making inspections of lumber and reporting the same to the plaintiff damage the plaintiff or justify it in renouncing the contract of March 14, 1910, before its full performance, and refusing further performance thereof?

(4) Was it of such character as precluded the defendant from invoking the aid of a court of equity in its cross-bill for redress, because not approached with clean hands?

(5) If these issues are found for the defendant, was the account, as stated by the master in his report and the judgment as rendered thereon, for the correct amount?

There are some other incidental issues affecting the accounting which will be disposed of in the course of the opinion.

The facts bearing on the first question, for our consideration, are substantially these: Plaintiff was a Missouri and defendant an Arkansas corporation. Plaintiff was a manufacturer of lumber at its sawmill, located in Arbyrd, Mo.; defendant was a buyer of and dealer in lumber, doing business in Memphis, Tenn. These parties negotiated a contract in Missouri, and defendant executed it in Memphis, Tenn. By it plaintiff agreed to manufacture, in Missouri, about 2,000,000 feet of lumber for defendant, stack the same in its millyard in Arbyrd for defendant, which act, it was agreed, should constitute a delivery of the lumber to defendant, there to remain for a period of about six months to dry, and then be shipped by defendant to its customers to whom it might have sold the same. Defendant kept an inspector in Arbyrd, Mo., where the sawmill was operated, to inspect the lumber as and when stacked by plaintiff, for the purpose of estimating the amount of advance to be made by defendant on the contract price when the lumber should be stacked, and for the purpose of measuring and superintending the shipping of lumber when dried and sold by defendant to its customers. Defendant sent soliciting agents into Missouri and other states to solicit orders for the lumber, and in this way intended to sell, and did sell, its lumber. When the contract was made defendant had no particular intention of selling lumber at St. Louis, Mo., or at any other one place, but did intend to dispose of it wheresoever it could do so most advantageously. Defendant had not, before making or executing this contract, secured a license to do business in Missouri as required by section 3039 of the Revised Statutes.

Did the transaction in question, conducted in the way, under the circumstances and for the purposes just stated, constitute interstate commerce? The majority of the court is of opinion that the transaction constituted interstate commerce, and, as such, was exempt from the operation of the Missouri statute. The minority thinks it was in no inconsiderable degree a local or intrastate transaction, constituting "doing business" in Missouri within the true meaning of its statute, and, as such, was not exempt from its requirements. But as we are of one opinion on the second question, and as this is controlling of the judgment in the case, we shall not rest our decision on any definite answer to the first question. Answers to some of the other questions, affecting the accounting, will first be disposed of.

[1] On February 24, 1911, the plaintiff repudiated the contract of March 14, 1910, and refused to make further deliveries of lumber to defendant. (This is admitted in the pleadings.) At that time less than one-half of the lumber called for by the contract had been delivered to defendant, and 700,000 feet were stacked for defendant in plaintiff's yard. On this last-mentioned amount of lumber the provisional estimates had been made, and about 50 per cent. of its value advanced by defendant to plaintiff, as agreed. These facts are not disputed. For the amount of these advances and the further sum of $5 per thousand feet, as damages occasioned by the increase in market value of the lumber over and above the price agreed to be paid, defendant sought recovery in its cross-bill. This claim for damages was

denied by the master, and defendant not appealing relieves us from further consideration of it.

Plaintiff claims to have sustained damage in the sum of $300 by reason of defendant's delay in shipping out some cottonwood lumber within the period of six months fixed in the contract for such shipment. The master found that the proof fails to sustain this claim. In this we think he was right, and the same was properly disallowed to plaintiff in the accounting.

[2] Plaintiff claims that defendant, in making settlements for lumber delivered to it, unlawfully deducted 2 per cent. from the gross price of all lumber so delivered, instead of from the balance due to plaintiff over and above that which had been theretofore paid on preliminary estimates. This dispute calls for the construction of one of the provisions of the contract of March 14, 1910. After providing for the stacking of the lumber as and when sawed by plaintiff, for the estimation of its value by inspectors chosen by each party (afterwards by supplemental agreement by inspector chosen by Wilson & Co. alone), for the payment of about 50 per cent. of the purchase price by the Wilson Company as an advancement, for the remaining of the lumber in the stacks for about six months, for loading it on railroad cars by plaintiff and the payment of the balance of the contract price due plaintiff, the contract, in paragraph 5, uses this language: "* * * Less 2% (two per cent.), the same to be in full payment thereof." This provision is ambiguous and vague, and, taken by itself, might be unenforceable, but, read in connection with other provisions of the contract, discloses, in our opinion, that the parties undertook to finally conclude the question of price, by making at the close of the deal a uniform deduction of 2 per cent. upon the contract price of the entire amount of lumber sold and delivered. This conclusion is reinforced by the conduct of the parties. In their previous dealings they had made similar contracts containing this same 2 per cent. clause, and had treated it as requiring a deduction upon final settlement of 2 per cent. from the whole contract price. A familiar rule, governing the construction of a contract, and one frequently applied by us, in cases of doubt requires us to adopt a construction which the parties themselves, in their regular course of dealing, may have placed upon it. This is a reasonable rule, and cannot work injustice. We think there was no error in allowing the additional 2 per cent. as done.

[3] Plaintiff contends that defendant, upon whom, by supplemental agreement of the parties, the duty was imposed to be solely responsible for correct inspections and measurements of the lumber as it was shipped out, made inaccurate and false inspections and measurements, to the injury of plaintiff, and that this misconduct not only misrepresented the actual amount of lumber received by defendant, for which plaintiff should have credit, but justified it in refusing further performance of the contract, and was of such deliberate, intentional, and fraudulent character as should close the portals of a court of equity against defendant on the equitable ground that it does not approach them with clean hands. There is little, if any, evidence tend-

ing to show that the inspector of defendant fraudulently underestimated the amount of lumber actually received by his company from plaintiff, or failed to report to plaintiff the true amount of lumber so received. If any unintentional errors were made, the master, as he says, corrected them in stating his account. There is evidence tending to show that the amount of lumber billed and charged to defendant's customers as carloads, shipped out by the inspector of defendant from the yards of plaintiff, exceeded the amount reported to plaintiff as contained in those cars and for which it received credit in its account with defendant. Counsel for the latter earnestly contend that there is no proof that any false or fraudulent inspection or any false report thereof was made to plaintiff, but, conceding that there is proof of overbilling carload shipments and of overcharging invoices to defendant's customers, seek to explain that conduct on the ground that there was a common practice by wholesale dealers in lumber to overbill shipments to their customers because of the latter's disposition to raise unreasonable and captious objections concerning the quantity and quality of lumber invoiced to them, and claim that whatever dishonesty may have been practiced by defendant in its dealings with its vendee customers ought not, in any manner, to redound to the credit of the plaintiff, and, also, that such dishonesty is not so related to or connected with the transaction between the plaintiff and defendant as to bring it within the clean-hands doctrine so as to affect defendant's right to seek, through a court of equity, reparation for wrong and injury done to it by plaintiff.

These were the views taken by the master and the court below. They held that there was no such misconduct by defendant as justified plaintiff in rescinding the contract. They also held that any such errors made in the invoices to customers only, however fraudulent they might have been, cannot, of themselves, close the doors of a court of equity to the defendant for such redress as its case warrants. There was, in our opinion, no error in these holdings. The improper conduct, which repels a court of equity, must inhere in the transaction itself concerning which the parties are litigating, and cannot be predicated of general obliquity or misconduct or inequitable or wrongful treatment of others than the parties litigating.

[4] After reaching the foregoing conclusions and in accordance with them, the master proceeded to state an account, resulting in a credit balance due defendant for money advanced on preliminary estimates and for some other incidental expenses and charges, not questioned by plaintiff, over and above the contract price for all the lumber received from the plaintiff, of $7,263.79. This result was reached by the master after a long hearing of the proof bearing on the several issues already disposed of by us, most of which were essential to the statement of the account between the parties. The conclusions so reached by him were afterwards approved by the district judge on exceptions taken, and are presumptively correct. The rule is well settled, and of frequent application in this court, that the findings of a master, concurred in by the court on exceptions taken, are presumptively correct, and will not be disturbed by an appellate court unless

some obvious error of law or serious mistake in considering the evidence has occurred. After a careful review of the legal questions involved, as already made, we have found no error in their determination, and, after giving as patient and thorough consideration to the proof as we are able to give, we have been unable to discover any serious mistake in the consideration of it by the master or court. A case like this, involving the taking of a long account and the consideration of great detail of facts necessary to do so correctly, is peculiarly appropriate for reference to a master, and in view of the manifestly careful and exhaustive work done by the master in this case, and its approval thereof by the court, we are constrained to apply the general rule just stated, and sustain the accounting as made.

[5] Assuming, but not deciding, that the transaction between the plaintiff and defendant amounted to "doing business" in the state of Missouri and subjected defendant, a foreign corporation, to the necessity of securing a license therefor, and that its failure to do so rendered the contract of March 14, 1910, void (Tri-State Amusement Co. v. Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808), do these facts prevent recovery by defendant of the sum of money found due it by the court below? We think not. Defendant, as disclosed in the pleadings and indisputable facts found by the master and court below, advanced a large sum of money to plaintiff in partial payment for lumber purchased from plaintiff pursuant to the terms of the void contract. Plaintiff, with this money in its possession, repudiated the contract, refusing to deliver the lumber to defendant, and converted the money to its own use. Every principle of justice and fair dealing requires that it should pay back this money to defendant; and this the law demands, notwithstanding the fact that the contract was void. One cannot make a shield of a void contract to rob an associate. Defendant's right of action, as asserted in its cross-bill, does not spring from or rest upon the void contract. It does not invoke the contract for the assertion of its rights. It seeks recovery notwithstanding the contract. Its action is properly classified as one in assumpsit for money had and received by plaintiff to defendant's use. Plaintiff's counsel argue that defendant's cross-bill is based on the contract, because, as they say, defendant does not concede that the contract was void, and for that reason that it does not state a cause of action. We think this is a mistake. The cross-bill states the facts of the case, among other things, that defendant was a foreign corporation, and had not secured a license to do business in Missouri. (These facts, according to plaintiff's contention, render the contract void, and constitute a sufficient averment of that fact for the purposes of this case.) Our conclusion is that the defendant may recover the money advanced to plaintiff in execution of the contract, even if it was void. This conclusion is supported by abundant authority. See United Shoe Machinery Co. v. Ramlose, 231 Mo. 508, 132 S. W. 1133, and cases therein cited.

[6] For another reason also defendant may recover notwithstanding its failure to secure a license to do business in Missouri. Plaintiff instituted this suit in equity. At the outset it secured an order

restraining defendant from prosecuting its replevin suit, and a further order appointing a receiver to take possession of and sell the property replevied. Thereby the entire controversy became merged in the equitable suit. Plaintiff first appealed to the court of equity to take cognizance of and grant the relief to which it might be entitled in view of all the facts of the case. The court responded to the appeal by enjoining an effort defendant had made at law to that end, and took full possession of the corpus of the controversy upon which defendant claimed a lien for money advanced, and sold the same. By this proceeding plaintiff voluntarily subjected itself to the jurisdiction of the court and to such orders and decrees as it might make in the case. The court, if it had known the true facts of the case as ultimately disclosed, doubtless would not have entertained plaintiff's bill and made the orders it entered in the case without at least an offer of plaintiff to pay to defendant any sums of money ultimately found due to it. The rule is universal that he who seeks equity must do equity. Much more, in our opinion, is it true that an applicant for equitable relief must submit himself to the requirement to do equity.

In view of these last-mentioned conclusions, it is quite unimportant to decide the first-mentioned question, whether the transaction between plaintiff and defendant was one in interstate commerce or not.

The decree of the District Court is affirmed.

ALVERSON v. OREGON-WASHINGTON R. & NAV. CO.*

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2703.

1. APPEAL AND ERROR ⟸272(2), 501(4)—EXCEPTIONS TO INSTRUCTIONS—TIME FOR TAKING—RECORD.

In the federal courts, exceptions to instructions given, or to the refusal to give instructions requested, to be considered by an appellate court, must be taken at the trial, and while the jury is at the bar, and such fact must affirmatively appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2304; Dec. Dig. ⟸272(2), 501(4); Trial, Cent. Dig. §§ 254, 680.]

2. APPEAL AND ERROR ⟸216(1), 263(1)—REVIEW—INSTRUCTIONS—EXCEPTIONS.

The construction placed upon a contract by a trial court in its instructions cannot be reviewed, where no different instructions on the point were requested, and no exceptions taken to those given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516, 1518; Dec. Dig. ⟸216(1), 263(1); Trial, Cent. Dig. § 627.]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action at law by J. L. Alverson against the Oregon-Washington Railroad & Navigation Company and others. Judgment for defendant named, and plaintiff brings error. Affirmed.

Alverson, plaintiff below (and plaintiff in error here), sued the Oregon-Washington Railroad & Navigation Company and J. A. Caughren, Carlos N.

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

*Rehearing denied October 9, 1916.

Boynton, H. W. Church, S. A. McCoy, and Martin Woldson, partners under the name of Caughren, Boynton & Co., to recover damages for lost profits resulting from an alleged breach by defendant in error railroad company of a contract for the performance of certain railroad construction work. In the course of the litigation all parties defendant were dismissed, and the action was carried on as against the railroad company, sole defendant and defendant in error herein. Defendant company answered, denying any liability. The case was tried before a jury, verdict was rendered in favor of the defendant railroad company, and after judgment was entered on verdict, writ of error to this court was sued out by plaintiff. The case is as follows:

At some time in 1911 the Oregon-Washington Railroad & Navigation Company entered into a contract with the partnership firm of Caughren, Boynton & Co. involving the construction by that firm of certain concrete structures required in the building of a railroad line into the city of Spokane, Wash. Caughren, Boynton & Co. sublet that portion of their construction work involving the concrete structures in question to a partnership firm of Alverson & Koeper by a subcontract dated May 11, 1911. While the subcontract was in existence, Alverson & Koeper dissolved, and Alverson became the subcontractor, as the successor of the firm of Alverson & Koeper. Caughren, Boynton & Co. went ahead with the work called for in their contract with the railroad company. During the progress of the work controversies arose, however, between them and the railroad company, which were submitted to arbitration in accordance with an arbitration agreement entered into on April 25, 1912, between the railroad company and the Caughren firm. This arbitration agreement referred to the contract of June, 1911, between the firm and the railroad company, and after provisions that matters of difference should be settled between them by arbitrators, there appears the following provision: "In event that the railroad company does not elect, within 30 days from the date hereof, to have the contractor complete the structures, the construction of which has not at this date been commenced, then and in that event the railroad company shall assume all obligations of the contractor to the party or parties holding subcontracts for the construction thereof, and said arbitrators shall determine the amount of profit which the contractor might reasonably have made upon said portions of said work, and make an award thereof, which shall be paid by the railroad company in consideration of the cancellation of said contract as to said work." In a letter dated February 1, 1912, Caughren, Boynton & Co. wrote to Alverson, referring to the original contract dated May 15, 1911, between themselves and Alverson & Koeper, and further referring to the release or assignment of that contract dated January 23, 1912, and expressing the wish that Alverson proceed with the work in accordance with the prices set forth in the contract between Caughren, Boynton & Co. and Alverson & Koeper, dated May 15, 1911, with the understanding that the work was to be dependent upon the action of the railroad company as to the time they would desire it to be done. The railroad company did not elect to have the contractors (the Caughren firm) complete the structures yet to be constructed, and it is to be accepted that the company was bound to recognize Alverson with respect to his subcontract.

The plaintiff charges that the railroad company, after its failure to elect to proceed with the work, entered into a contract with other contractors to perform the work and furnish the material called for in the contract theretofore entered into between the railroad company and Caughren, Boynton & Co. and between Caughren, Boynton & Co. and plaintiff, and refused to allow plaintiff to go ahead with the work and complete the same. The defendant answers that it tendered the performance of the work to the plaintiff and that he refused to perform in accordance with the terms of his subcontract, but that he imposed upon the defendant as a condition of performance that the defendant finance him and furnish him sand and gravel required for the construction work under consideration.

At the conclusion of the evidence the court charged the jury, in effect, that the plaintiff was limited to the terms and provisions of the contract between Caughren, Boynton & Co. and Alverson & Koeper, and that the terms of that contract could not be modified by reference to any other contract introduced in the case, and that the contract between the railroad company and Caughren,

Boynton & Co., called the "arbitration agreement," was admitted to assist in determining the subject-matter and limits of the work contemplated in the Alverson & Koeper contract. The court then charged that the main contract between Caughren, Boynton & Co. and Alverson & Koeper, under which plaintiff claimed, did not require the railroad company to furnish sand without cost to the plaintiff, and that, if the jury found from the evidence that the plaintiff imposed that condition upon the defendant, then the plaintiff, in effect, broke and abandoned the contract, and that under such circumstances the defendant should recover. And again the court said, in effect, that if the plaintiff imposed upon the defendant as a condition for the doing of the work that the defendant furnish sand or gravel without cost upon the work, or imposed the condition of financing him, then and in either of said contingencies the plaintiff, in making such demand and imposing such conditions, thereby abandoned and broke the contract, and that the defendant would be excused from the performance of the contract by it.

At the conclusion of the charge the court, in the presence of the jury, and before the jury retired, inquired of counsel for both parties as follows: "Anything further, gentlemen?" Counsel for the plaintiff then and there answered: "I don't think of anything, your honor." The record continues: "Whereupon counsel for the defendant then and there in the presence of the jury, and before the jury retired, reserved and took exceptions to certain instructions given by the court, and to the refusal of the court to submit to the jury certain instructions requested by defendant. But no exceptions to the charge of the court were taken by plaintiff before the jury retired, or at any other time, excepting those taken after the return of the verdict, pursuant to the stipulation hereinafter set forth." It appears that the jury retired April 22, 1915, and returned a verdict in favor of the defendant on April 23, 1915. Thereafter, on May 1, 1915, the parties entered into and filed with the clerk of the court the following stipulation: "It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that plaintiff may have 30 days in which to take and file exceptions to the court's instructions, and for the preparation and service of a bill of exceptions in the above-entitled case." It further appears that thereafter, pursuant to the stipulation, on the 20th of May, 1915, plaintiff, by his attorney, took exceptions to and filed with the clerk of the court exceptions to the instructions of the court and assigned the following errors: That the court erred in instructing the jury that, should it find from the evidence that plaintiff demanded that the defendant furnish sand and gravel without cost, or that plaintiff required as a condition for the prosecution and performance of its contract that the railroad company finance the plaintiff, then plaintiff, in effect, broke and abandoned his contract.

Plummer & Lavin and O. C. Moore, all of Spokane, Wash., for plaintiff in error.

W. W. Cotton and A. C. Spencer, both of Portland, Or., and Hamblen & Gilbert, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The points urged by counsel for the plaintiff in error relating to the giving of certain instructions to the jury are not for consideration by this court. The record affirmatively shows that after the court had delivered the charge to the jury the judge inquired of counsel for both parties whether there was anything further to present, and that counsel for the plaintiff replied that he did not think of anything further. Counsel for the defendant, in accord with the proper practice, in the presence of the jury, and before the jury retired, took exceptions to certain instructions given by the court and to the refusal of the court to submit to the jury certain instructions requested by defendant.

Plaintiff is not aided by the stipulation of May 1st, because not only did he fail to take exceptions to the instructions which the court gave before the jury retired, but his express statement to the court was to the effect that he had none to present. Under such circumstances the subsequent stipulation is to be construed as having been made with the purpose of giving to the parties, not a right to take exceptions as of the time when the jury was at the bar, but as affording the plaintiff such rights as might attach under the law and the practice of the federal courts, namely, drawing out the exceptions in form and presenting them for signature.

The question involved was squarely decided by this court before the present case was tried. Beatson Copper Company v. Pedrin, 217 Fed. 43, 133 C. C. A. 29. In that case there was a stipulation made in the presence of the jury, and before it retired, that plaintiff and defendant have until a certain time "to make and take exceptions to instructions given and refused"; but this court, citing the earlier cases of Arizona & New Mexico Railway Company v. Clark, 207 Fed. 817, 125 C. C. A. 305, and Western Union Telegraph Company v. Baker, 85 Fed. 690, 29 C. C. A. 392, declined to consider the assignments of error in respect to giving and refusing to give certain instructions, because exceptions were not taken in open court while the jury were at bar. In Star Company v. Madden, 188 Fed. 910, 110 C. C. A. 652, the Court of Appeals of the Second Circuit quoted the language of the Supreme Court in Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643, holding that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. In Johnson v. Garber et al., 73 Fed. 523, 19 C. C. A. 556, Judge Taft, speaking for the Circuit Court of Appeals of the Sixth Circuit, held to the same effect and cited many decisions, going back to Walton v. United States, 9 Wheat. 651, 6 L. Ed. 182, ruling that an exception to be of any avail must be taken at the trial, and that, although it may be reduced to form and signed afterwards, the fact that it was seasonably taken must appear affirmatively in the record or bill of exceptions duly allowed, or otherwise. The matter was regarded as one of law, notwithstanding the fact that a practice at variance with the rule had obtained and was recognized and acquiesced in by the trial judge. Greene et al. v. United States, 154 Fed. 401, 85 C. C. A. 251; Montana Mining Company v. St. Louis Mining & Milling Company, 147 Fed. 897, 78 C. C. A. 33; Merchants' Exchange Bank v. McGraw, 76 Fed. 930, 22 C. C. A. 622; St. Louis, I. M. & S. Railway Company v. Spencer, 71 Fed. 93, 18 C. C. A. 114; Price v. Pankhurst et al., 53 Fed. 312, 3 C. C. A. 551.

[2] Paragraph 4 of the agreement made between Caughren, Boynton & Co., designated in the agreement as the "railroad company," and Alverson & Koeper, which may be called Alverson's contract, provided that if the contractor, in the opinion of the engineer, communicated in writing by the engineer to the contractor, should fail to comply with the provisions of the contract to be performed by the contractor, or should neglect to prosecute the work with a sufficient force to insure

completion within the time specified, the railroad company, at its option, could, "after the expiration of 10 days from the mailing of such notice to the contractor at his post office address, cancel this contract and declare the same void, and a notice in writing mailed to the contractor at his post office address, signed by the railroad company, shall be sufficient for that purpose." It was further provided that in the event the contract was canceled, as therein provided, the contractor should have no claim against the railroad company for damages, and the compensation or percentage unpaid should be retained, etc., "and the railroad company may, at its option, employ other parties to complete said work, or any part thereof, and any loss occasioned by reason of such default to be chargeable against the contractor, the amount of such loss to be estimated by the engineer, whose decision shall be final and binding on the parties hereto."

The argument of plaintiff is that a full compliance by the railroad company with the requirements of this provision of the contract was necessary as a condition precedent to a rescission by the railroad company, even had Alverson given sufficient cause for a declaration of forfeiture, and it is urged that, inasmuch as the railroad company did not give the required notice nor pretend to, its failure in that regard shows that its officers fully understood that no sufficient grounds for forfeiture existed, and that letting the work to other contractors was done with full knowledge and a deliberate violation of the rights of Alverson. But as the bill of exceptions nowhere shows that plaintiff requested the District Court to charge the jury in respect to the effect of paragraph 4 of Alverson's contract, or that plaintiff asked the attention of the trial court to the point now urged, and as no error was assigned in respect to the matter, there is no ground for complaint. Phœnix Railway Company v. Landis, 231 U. S. 578, 34 Sup. Ct. 179, 58 L. Ed. 377; Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011; Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343; Isaacs v. United States, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Texas & Pacific Railway Company v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420. We do not look upon the point as presenting an instance of "plain error" which, under rule 11 of the court (150 Fed. xxvii, 79 C. C. A. xxvii), may be noticed at the option of the court.

Finding no reason to disturb the action of the District Court, its judgment is affirmed.

CISCO et al. v. LOOPER.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1916.)

No. 4632.

1. APPEAL AND ERROR ⟸728(1)—REVIEW—QUESTIONS PRESENTED.
Assignments of error complaining of the admission or exclusion of evidence, but not quoting the evidence as required by rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii), and unsupported by argument or reasons in the brief, will not be considered.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3010; Dec. Dig. ⟸728(1).]

2. ASSAULT AND BATTERY ⟸18—CIVIL ACTION—PERSONS LIABLE.
Where defendants participated in a scheme to terrorize the laborers of a mine into joining the union, and defendants were present when plaintiff, an employé of the mine, was assaulted, defendants are, where they encouraged the assault by words, gestures, or signs, liable as principals, though they did not actually commit it.
[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸18.]

3. APPEAL AND ERROR ⟸273(6)—EXCEPTIONS—SUFFICIENCY.
An exception to a charge, which is general, and fails to specify the particular part claimed to be erroneous, is insufficient, though where the excerpt quoted showed the contention made, and it was raised by motions for an instructed verdict, it will be considered.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1621; Dec. Dig. ⟸273(6); Trial, Cent. Dig. § 256.]

4. LIMITATION OF ACTIONS ⟸118(2)—RUNNING OF STATUTE—INSTITUTION OF SUIT.
Where within the year allowed by Kirby's Dig. Ark. § 5065, for commencement of actions for assault and battery, plaintiff filed his first amended petition, on which day summons was issued to the marshal for service on defendant, but was subsequently returned, because no deposit for costs had been made, the action, though because of plaintiff's inability to find security for costs, service of summons was delayed, was commenced within time; the filing of the petition and delivery of the summons for service marking the commencement of an action.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 528; Dec. Dig. ⟸118(2).]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by O. T. Looper against Mike Cisco and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

John Goolsby, of Hartford, Ark., and George W. Dodd, Holland & Holland, Thomas B. Pryor, and Covington & Grant, all of Ft. Smith, Ark., for plaintiffs in error.

Daniel Hon, of Ft. Smith, Ark. (John P. Woods, of Ft. Smith, Ark., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law, brought by Looper against Cisco and 17 other named defendants, in which plain-

tiff sought recovery of damages alleged to have been sustained by him by an assault and battery committed on him by the defendants. At the close of all the evidence, the court instructed a verdict for some of the defendants, and submitted the case to the jury as to the others. The trial resulted in a verdict and judgment against Cisco and the others for $1,250. To reverse this judgment they prosecute this writ of error.

The amended complaint, on which the case went to trial, is substantially this: That defendants on the 6th day of April, 1914, while plaintiff was at work in the employ of the Bache-Denman Coal Company, as foreman at one of its coal mines located in Sebastian county, Ark., known as mine No. 4, with other persons unknown to plaintiff, marched in a large body to the mine, fell upon and beat the plaintiff, and compelled him to draw the fire from the furnace under the boilers of the mine, and while he was so doing continued to beat and ill-treat him, so that he was seriously hurt and suffered great bodily pain and injury.

Defendants, in due course, appeared and filed their answer, denying the allegations of the complaint, pleading specially that the suit was not brought within one year after the cause of action accrued, and was therefore barred by the statute of limitations of the state of Arkansas.

At the trial evidence was produced showing that on the 6th day of April, 1914, a body of several hundred men, including the defendants, by prearrangement, assembled at a schoolhouse not far distant from the mine, for the purpose of devising a scheme for unionizing that mine, which before then had been operated by nonunion men; that after some speech-making they proceeded, with band playing, flag flying, and with much noisy demonstration, to the mine; that on arriving there they kept up their noise, and in the midst of much confusion created thereby some person or persons among them ordered plaintiff to draw the fire from the furnace under the boilers, by which the mine was operated, and thus stop its working, and simultaneously fell upon and beat the plaintiff and other employés of the coal company there at work.

The plaintiff was compelled to rely largely upon the testimony of the defendants, and others associated with them, for evidence to sustain his complaint. These witnesses testified with manifest indisposition to make any full, frank, or fair statement, but admitted, in effect, that an assault was made upon the plaintiff, that a large crowd was present at the time of the assault, that they did their work with much shouting, noise, and confusion, and that the defendants were present. But each and every one of them denied any participation in the assault, and testified that they could not identify any one who actually committed it. There was, however, abundant testimony to the effect that the crowd present, which consisted of hundreds of men and women, generally joined in abusing the plaintiff and his coworkers, and in encouragement of the assault made upon them, and there was evidence tending to show a state of facts, including language, conduct, and behavior of the defendants, which, by themselves or by fair

and reasonable inferences deducible from them, tended to show that defendants themselves encouraged and abetted the assault.

During the progress of the trial plaintiff dismissed his suit as against defendants Jim Lee, A. Y. Reed, Will Johnston, George Struth, and Andy Zaccanti, and the case proceeded to final hearing against the defendants Mike Cisco, John Kiger, Tom Kiger, Chas. McCowen, Louis Fioretti, James Slankard, Vergil Stroud, Pete Clements, John Bumpass, W. P. Fitzgerald, W. C. Chambers, Clint Burris, and Joe Overman. At the close of the evidence the court declined to instruct a verdict in favor of any of the remaining defendants, as requested by them, and charged the jury fully as to the law governing the case—amongst other things, as follows:

"There is no direct testimony, I may say there is no testimony at all, tending to show that any one of these defendants struck the plaintiff, or threw any missile at him. You are then to determine whether they were connected in any way with the assault, in conformity with the rules that I now give you.

"A person who is present at the commission of an assault and battery, and encourages and incites by words, gestures, looks, or signs, or by any other means, is 'aiding and abetting' the same, and is liable as a principal. You are then to determine, from all the facts and circumstances in the testimony, whether these defendants, or any of them, encouraged and incited by words, gestures, looks, or signs, or by any other means, the assault upon this plaintiff. The fact that a person is present at the commission of an assault and battery, or within a reasonable distance, so that he knows what is going on, without disapproving or opposing it, is evidence on which, in connection with other circumstances, it is competent for the jury to infer that he aided and abetted the same. * * *

"Mere presence without participation will not suffice, if no act whatever is done in concert, and no confidence intentionally imparted by such presence to the perpetrators. In other words, if these defendants were present through idle curiosity, with no intention that their presence should inspire confidence in those who made the assault upon Looper, then such defendants are not liable in this action. They must have been there with a conscious purpose that their presence would inspire confidence in those who perpetrated the assault. If they were there for that purpose, and you are to take all the facts and circumstances in this case to determine that question, then they are liable in this action."

Defendants assign for error that the court erred (1) in ruling on the admission and exclusion of evidence; (2) in denying their several motions for an instructed verdict in their favor; (3) in giving to the jury the charge above quoted; and (4) in ruling that plaintiff's cause of action was not barred by the statute of limitations.

[1] Counsel for plaintiffs in error have failed to quote the evidence alleged to have been improperly admitted or excluded, as required by our rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii), or to present any argument or reasons in support of their first assignment of error concerning admission and rejection of evidence. We therefore refrain from any special consideration of it.

[2] In support of their second assignment, they contend that there was no evidence tending to show that defendants, or either of them, committed the assault upon plaintiff, or aided or abetted any other person in so doing. We have carefully read the evidence of every witness produced, either for plaintiff or defendant, and agree with counsel for defendants that there is no direct evidence to the effect

that either of the defendants actually assaulted the plaintiff. But we find beyond any reasonable doubt that the defendants were with the body of men and women who accompanied the persons who did commit the assault to the mine, and remained with them while the assault was being made. In addition to this, we are advised by the necessary intendment of the verdict of the jury, in the light of the charge of the court, that the defendants themselves "encouraged and incited the assault upon the plaintiff," by whomsoever made.

But counsel say that the finding of the jury in this particular was brought about by an erroneous charge of the court to the effect, as already appears in the part of the charge quoted, that a person present at the commitment of an assault and battery, encouraging its commission by words, gestures, looks, or signs, is an aider and abettor, and liable as a principal. Was this charge erroneous?

We cannot read the record of this case without feeling a deep indignation at the method adopted by those who proposed to unionize the mine in question. No one now doubts the right of any organized or unorganized body of men to seek to persuade in a peaceful and orderly way their fellow men to join their ranks; but violence and lawlessness, as arguments to that end or as means of coercing others, cannot be tolerated. Any persons who resort to violence to accomplish their purposes fall under the condemnation of the law, and cannot escape responsibility therefor by any subterfuge adopted to conceal or mystify their identity. To make the law effectual as against any such practices, it must, in our opinion, be held that any one who consciously participates in the creation of a state of confusion, intended to prevent identification of the wrongdoer, or to safeguard him from detection or screen him from the consequences of his act, is an aider and abettor in the accomplishment of the wrong, and should be held as a principal in its perpetration. Such, we think, is the substance of the charge complained of. A careful reading of it, with its modifications and limitations, shows that it is fully as favorable to the defendants as they were entitled to.

[3] The exception to the charge was general, and failed to properly specify the particular part of it claimed to be erroneous; but in view of the fact that the excerpt quoted presents the question of law involved in the case, and of the further fact that the same question is presented by the motions for an instructed verdict, we have considered the question as if properly raised by the exception to the charge.

[4] Was the action barred by the statute of limitations? By section 5065, Kirby's Digest of the Statutes of Arkansas, it is provided that actions for assault and battery must be commenced within one year after the cause of action accrues. The cause of action in this case accrued April 6, 1914. The first amended petition, which brought in as defendants all the persons now plaintiffs in error here, was filed May 25, 1914, and on that day summons was issued to the marshal for service on them. The summons was received by the marshal prior to June 22, 1914, for on that day he made a return that the summons was not served because no deposit for costs had been made. Afterwards some amendments to the petition were made and

some other proceedings had, from which defendants' counsel argue that the summons was not delivered to the marshal with any intention that it should be served by him. They claim that the law of Arkansas governing this matter is declared by the Supreme Court of that state in the case of Wilkins v. Worthen, 62 Ark. 406, 36 S. W. 22, wherein the court said:

"The statute provides that 'a civil action is commenced by filing in the office of the proper court a complaint and causing a summons to be issued thereon.' * * * But the mere signing and sealing a summons by the clerk is not sufficient. It must be delivered to the sheriff, or to some one for him, and with the intention and purpose of placing it in the hands of the sheriff to be served."

Claiming this to be a correct exposition of the law, which, for the purposes of this case, we may concede, counsel argue that the proof discloses that no bona fide intent or purpose was made by the plaintiff or his counsel to have the summons served on the defendants, and as a result that the action was not commenced when it purports to have been.

After a careful reading of the proof, we are unable to agree with this contention of counsel. We think it clearly appears from several indisputable facts disclosed in the record that, although plaintiff had some difficulty in finding security for costs, he made an honest effort to have his summons served by the marshal within due time, and that it was ultimately so served.

Finding no error in the proceedings below, the judgment is affirmed.

BABCOCK & WILCOX et al. v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4477.

1. APPEAL AND ERROR ⟸184—WAIVER OF ERRORS—OBJECTIONS.
Where a case was tried by the court as one in equity without objection, the point that the case was an action at law cannot be raised on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1150, 1179–1183; Dec. Dig. ⟸184.]

2. UNITED STATES ⟸67(2)—CONTRACTORS' BONDS—LIABILITY OF SURETY—CONSTRUCTION OF LIABILITY.
An agreement for the erection of a building for an Indian school provided that the contractor should comply with Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), for the protection of persons furnishing materials and labor. The act referred to declares that any person entering into a formal contract with the United States for the construction of any public building shall execute the usual penal bond, with the obligation that such contractor shall promptly make payments to all persons supplying him with labor and materials, and that, if no suit be brought by the United States within six months from the completion of the contract then those supplying the contractor with labor and materials may sue. The bond furnished by the contractor was conditioned that he should keep, observe, and perform all covenants, conditions, and agreements mentioned in the articles of agreement for the erection of the building. *Held*

that, though the contract required the contractor to furnish labor and materials for the erection of the building and to give bond for the protection of laborers and materialmen, yet as payment of their claims was not made a condition of the bond, the liability of the surety cannot by construction be extended, so as to include them, on the theory that the agreement to furnish the labor and materials was equivalent to an agreement to pay therefor.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂=67(2).]

Appeal from the District Court of the United States for the District of South Dakota; Jas. D. Elliott, Judge.

Action by Babcock & Wilcox against Silas N. Opdahl and the American Surety Company of New York. From a judgment for defendant Surety Company, plaintiffs appeal. Affirmed.

Karl Goldsmith, of Pierre, S. D. (A. E. Boyesen and H. H. Flor, both of St. Paul, Minn., and Henry R. Horner and Glenn W. Martens, both of Pierre, S. D., on the brief), for appellants.

C. O. Bailey, of Sioux Falls, S. D., and Charles R. Fowler, of Minneapolis, Minn., for appellee.

Before CARLAND, Circuit Judge, and MUNGER, District Judge.

CARLAND, Circuit Judge. The appellants brought this action as an action in equity against Opdahl and the surety company, to recover the value of materials sold by appellants to Opdahl and used in the construction of the dormitory hereinafter mentioned. The complaint contained two causes of action. The first cause of action was an action at law upon a bond given by Opdahl and the surety company to secure the faithful performance of a contract which Opdahl had entered into with the United States for the construction and completion of a brick dormitory at the Pierre Indian School, Pierre, S. D., dated July 26, 1911. The second cause of action after pleading the facts substantially as in the first cause of action, with the added allegation that Opdahl and the surety company had not executed such a bond as the law required prayed for damages. The case was heard by the court and it was ruled that the appellants and other intervening claimants should elect upon which cause of action they would proceed. They elected to proceed on the first.

[1] We do not think there was any error in the ruling of the court compelling an election. Whether the case ought to have been tried as a case in equity or at law is not now important, as it was tried by the court as an equity action, and no objection was made as to the form of trial. At the close of the trial the court ruled that there could be no recovery upon the bond, as it nowhere contained a condition that Opdahl would pay the claims of the appellants and other interveners.

[2] A decree having been entered for the appellee, the appellants appeal. Article 8 of the contract between Opdahl and the United States reads as follows:

"It is further covenanted and agreed that in the execution of the said work the party of the second part will comply strictly with the provisions of the act of Congress approved August 1, 1892, relating to the limitation of the

hours of daily service of laborers and mechanics employed upon the public works of the United States and the District of Columbia, and the act of Congress approved February 24, 1905, for the protection of persons furnishing materials and labor in the construction of public works."

The condition of the bond signed by the surety company is as follows:

"The nature of this obligation is such that, if the said Silas N. Opdahl, his heirs, executors, administrators, and assigns, or any of them, shall well and truly observe, perform, and keep all the covenants, conditions, and agreements mentioned in certain articles of agreement, bearing date the 26th day of July, 1911, between the Commissioner of Indian Affairs and Silas N. Opdahl, contractor, for erection and completion of a brick dormitory building at the Pierre Indian School, Pierre, South Dakota, according to the true intent and meaning of said agreement, then the above obligation to be void; otherwise, to remain in full force and virtue."

The act of Congress of February 24, 1905, amending the act of August 13, 1894 (28 Stat. 278, c. 280), contains the following language:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract. * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

The bond, as will be seen, did not contain the additional obligation required by the statute; but it is argued for appellants that, as the contract required Opdahl to *furnish* all the materials, this was equivalent to an agreement on Opdahl's part to pay for the same, and that the bond having been given to secure the faithful performance of the contract the surety company can be held liable for the amount due for materials furnished to Opdahl by appellants.

The word "furnish" in the contract would in a settlement between the United States and Opdahl, of course, be given its full significance, but we cannot hold that as against the Surety Company, the word "furnish" shall be given the broad meaning contended for by counsel for appellants. No case has been cited by counsel for the appellants parallel in all its facts to the case at bar. When all is said the case is simply this: That Opdahl by his contract agreed to give a bond obligating himself to pay the claims of materialmen, but he failed to give any such bond. The surety company signed the bond which was ex-

ecuted, and no other. The bond itself did not provide for the payment of materialmen, nor did the contract contain any such provision.

The case is not difficult, unless we try to make it different from what it really is. We have examined the cases cited by appellants, especially Peake v. United States, 16 App. D. C. 415, and Speir v. United States, 31 App. D. C. 476, and find that in those cases, while the bonds were defective, the contracts did provide that the contractor should pay for the material that went into the work. The cases which give the word "furnish" the broad signification contended for were cases brought by the obligee of the bond, such as the United States in the present action. Such cases as Scott-Graff Lumber Co. v. Independent School District, No. 1, 112 Minn. 474, 128 N. W. 672, Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756, Greenfield Lumber & Ice Co. v. Parker, 159 Ind. 571, 65 N. E. 747, and Electric Appliance Co. v. United States Fidelity & Guaranty Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609, illustrate the true rule. It is unfortunate for the materialmen that the case stands as it does, but we may not by construction make other and different contracts than those made by the parties. The conclusion which we have reached on this branch of the case renders it unnecessary to consider whether or not the suit was premature.

Judgment affirmed.

SHEINBERG et al. v. HOFFMAN.

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

No. 2162.

1. BANKRUPTCY ⟸414(1)—DISCHARGE—RIGHT TO—FAILURE TO KEEP BOOKS.
Where a bankrupt's discharge is opposed under Bankruptcy Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. 1913, § 9598), on the ground of his failure to keep books and his destruction of memoranda, a creditor has the burden, not only of showing the bankrupt's failure, or his destruction of memoranda, but of showing that the bankrupt intended thereby to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⟸414(1).]

2. BANKRUPTCY ⟸467—DISCHARGE—REVIEW.
Findings of fact by a master approved by the court are presumptively correct, and will be upheld on appeal, if supported by substantial evidence, unless a clear mistake is shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸467.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the bankruptcy of Abraham Hoffman. Benjamin Sheinberg and Jacob Weisberg, trading as Sheinberg & Weisberg, creditors, objected to the bankrupt's petition for a discharge, and from an order of discharge they appeal. Affirmed.

Lowrie C. Barton and Harry M. Stein, both of Pittsburgh, Pa., for appellants.
W. C. Pentz and John J. Pentz, both of Du Bois, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The bankrupt petitioned for a discharge. The appellant creditors, having demanded of the bankrupt the payment of their claim in full and being refused, opposed the discharge upon specifications under section 14b (2) (4) of the Bankruptcy Act (30 Stat. at Large, 544), as follows:

That the bankrupt, with intent to conceal his financial condition, (1) failed to keep certain books of account, and (2) destroyed certain records, from which such condition might be ascertained; and (3) concealed a part of his property with intent to hinder, delay and defraud his creditors.

The master found (1) that the bankrupt failed to keep certain books but not with intent to conceal his financial condition, and that from the records kept, his financial condition could be ascertained; and (2) that the bankrupt destroyed certain loose slips on which he had entered memoranda of personal and business expenses, which after bankruptcy he classified and copied into a book; that the book was produced with full explanation of the entries, and that the slips were not destroyed with intent to conceal his financial condition. And finally the master found, (3) in the entire absence of evidence upon the subject, that the bankrupt had concealed no part of his property with intent to hinder, delay and defraud his creditors; and, therefore, recommended his discharge.

The District Court affirmed the report of the master and ordered the discharge of the bankrupt. This is an appeal from that order.

[1] In determining whether the bankrupt had offended against the provisions of the Bankruptcy Act in failing to keep certain books and in destroying certain slips, the master found that the objecting creditors had failed to prove the essential element of the offense that the acts done and omitted by the bankrupt were with intent to conceal his financial condition, and accordingly recommended the discharge of the bankrupt under authority of the cases which hold that:

"Where a creditor seeks to prevent a discharge, on such ground (failing to keep books), the burden is on him, not only to show that the bankrupt failed to keep books of accounts, but that his omission was with intent to conceal his financial condition." In re Garrison, 149 Fed. 178, 79 C. C. A. 126; In re Marcus (D. C.) 192 Fed. 743; In re Miller, 212 Fed. 920, 129 C. C. A. 440; In re Brockman (D. C) 168 Fed. 1015; In re Burstein (D. C.) 160 Fed. 765; In re Haskell (D. C.) 164 Fed. 301.

The District Court cannot be charged with error of law in affirming the finding of the master based upon this rule.

[2] The findings of fact by the master and affirmed by the court are presumptively correct and will be upheld on appeal, if supported by substantial evidence, or unless a clear mistake is shown. Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; Ohio Valley Bank v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; Wilson v. Continental B. & L. Asso., 232 Fed. 824, — C. C. A. —. We discern no mistake in the findings of fact. As they are substantially supported by the evidence, we are not inclined to disturb them.

The decree below is affirmed.

REED v. ANDERSON et al.

(Circuit Court of Appeals, Eighth Circuit. October 5, 1916.)

No. 4607.

APPEAL AND ERROR ⊂⊃744—PERFECTION OF APPEAL—FILING ASSIGNMENT OF ERROR.

Where an appeal was granted on August 17th, and the supersedeas bond approved and filed August 27th, but no assignment of error was filed until September 25th, the appeal will be dismissed for noncompliance with rule 11 of the Circuit Court of Appeals, Eighth Circuit (91 Fed. vi, 32 C. C. A. lxxxviii), declaring that plaintiff in error or appellant shall file with the clerk of the court below, with his petition for a writ of error or appeal, an assignment of errors; the assignment of errors not being filed with or before the supersedeas bond, so as to come in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3043–3048; Dec. Dig. ⊂⊃744.]

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

Action between Mary A. Reed and Lucy M. Anderson and others. From a judgment for the latter, the former appeals. Appeal dismissed.

Homer S. Hurst, of Oklahoma City, Okl., E. P. Davies, of Santa Fé, N. M., and Victor A. Sniggs, of Oklahoma City, Okl., for appellant.

Reed Holloman, of Santa Fé, N. M., for appellees.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

TRIEBER, District Judge. The appeal in this case was granted and filed in the office of the clerk of the District Court on August 17, 1915. The supersedeas bond was approved and filed August 27, 1915, but no assignment of errors was filed until September 25, 1915. On that day counsel for appellant filed a motion to have the assignment of errors filed nunc pro tunc as of August 17, 1915, the day the appeal was granted. A hearing was had on this motion, and by the court denied.

In view of the settled rule of this court the merits of this case are not before us. In Webber v. Mihills, 124 Fed. 64, 59 C. C. A. 578, this court held:

"Attention has been sharply called to this rule (Rule 11, C. C. A., Eighth Circuit [91 Fed. vi, 32 C. C. A. lxxxviii]) and the announcement has been plainly made that it would be enforced, although in the earlier cases the errors assigned were carefully examined, that no injustice might result from an unexpected application of the rule [citing cases]. But in the later cases the rule has been steadily and uniformly enforced [citing cases]. * * * The assignment of errors in this case was not filed until seven days after the allowance of the appeal, and the appeal must be dismissed under rule 11."

This rule has been steadily enforced by this court ever since. Lockman v. Lang, 128 Fed. 279, 62 C. C. A. 550; Simpson v. First National Bank, 129 Fed. 257, 68 C. C. A. 371. The same practice prevails in other circuits. Mutual Life Ins. Co. v. Conoley, 63 Fed. 180,

11 C. C. A. 116 (Fourth Circuit); Mast & Co. v. Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157 (Sixth Circuit).

Had the assignment of errors been filed on or before the filing of the supersedeas bond, it would have been sufficient. Simpson v. First National Bank, supra. But it was not filed until 29 days after the bond had been approved and filed.

The appeal must be dismissed; and it is so ordered.

WATSON FIREPROOF WINDOW CO. v. BIERSACH & NIEDERMEYER CO.

(Circuit Court of Appeals, Seventh Circuit. June 7, 1916.)

No. 2299.

PATENTS ⟸328—VALIDITY—ANTICIPATION.

The Watson patent, No. 702,754, for improvements in windows, the distinctive feature of which was that the fixed part of the bar or muntin against which rest adjacent panes of glass is a flat surface, so that in glazing either pane can be slid across the same, and when both are in place are held apart by a rib along the middle of the movable part of the bar or muntin which, when in position, holds the panes in their relative and proper places, *held* not to show invention, being anticipated by disclosures of other patents shown in the prior art.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Bill by the Watson Fireproof Window Company against the Biersach & Niedermeyer Company. From a decree for defendant, complainant appeals. Affirmed.

The following is the opinion of Geiger, District Judge, in the trial court:

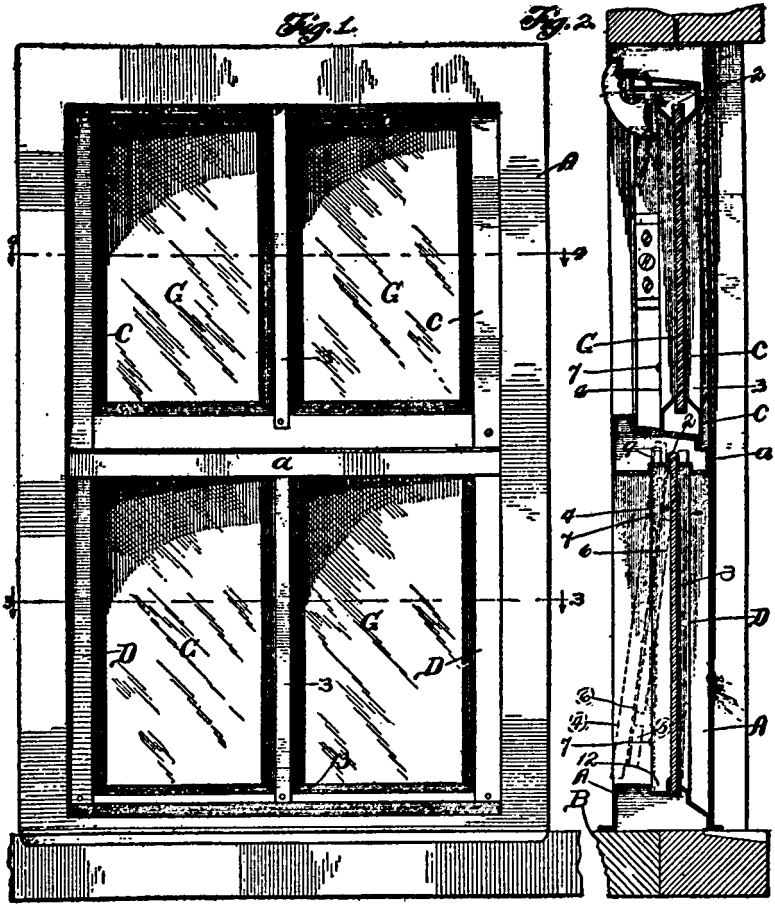
Complainant filed its bill, charging defendant with infringement of letters patent No. 702,754, granted June 17, 1902, to Watson, and assigned to it. The invention relates to "improvements in windows," and "more particularly to fireproof windows of that class which have their frames and casings made of sheet metal," and its object is "to provide an improved construction for securing the glass in place in the windows of this character." The invention is thus described in the drawings and specifications, omitting therefrom matters of detail:

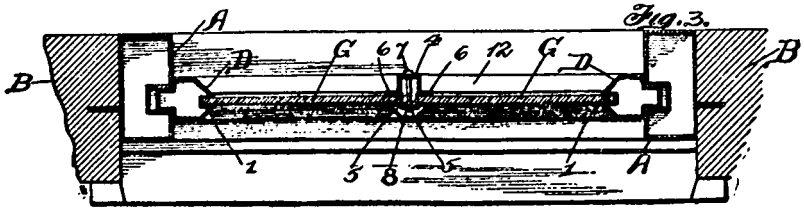
"In the drawings, Figure 1 is a front elevation of a metal window constructed in accordance with my invention and comprising a lower stationary and an upper pivoted or swinging sash, to both of which my improvements are applied. Fig. 2 is a sectional side elevation thereof. Fig. 3 is a top plan section taken through the stationary sash on line *3 3* of Fig. 1. Fig. 4 is a top plan section taken through the swinging sash on line *4 4* of Fig. 1. Fig. 5 is a fragmentary perspective view, indicating the manner of inserting the glass in the sash. Figs. 6, 7, 8, and 9 are top plan sections further showing the manner of inserting the glass in the sash.

"In said drawings, *A* designates the rectangular outer casing of the window which is designed to be built into the wall of the building *B* in the usual manner. This casing is herein shown as divided by a transverse bar *a* into upper and lower sections, of which the upper section is in this instance provided with a swinging sash *C*, while the sash *D* of the lower section is made fixed or stationary. It will, however, be understood that in so far as the present invention is concerned it is immaterial whether the window casing comprises one or more sections, or whether the sash of any section is fixed or is arranged to slide or swing, my improvements being equally applicable in either case.

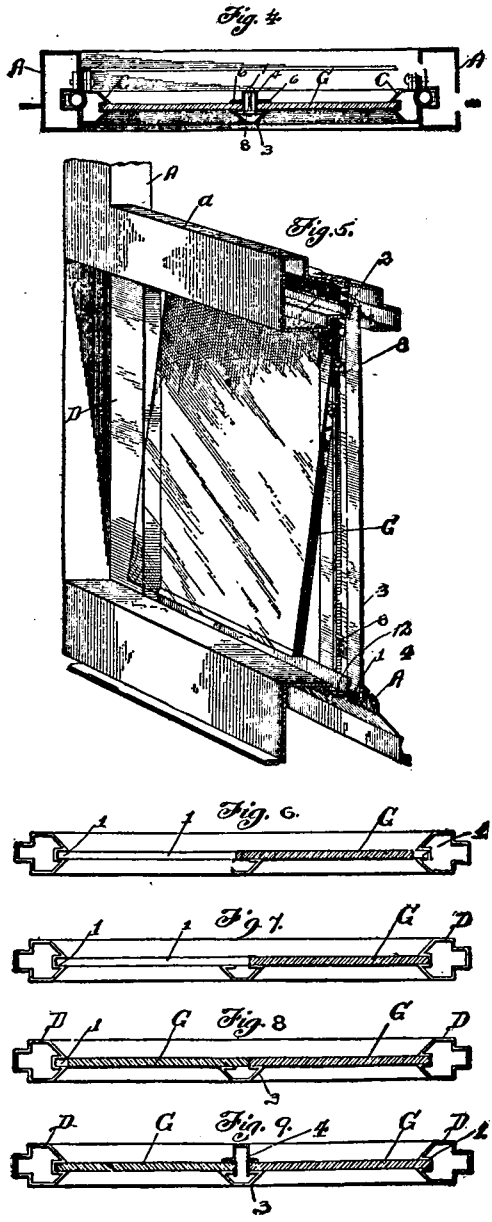
"Extending around the inner margin of each sash is a groove *1*, made of suitable width to receive the edges of the panes of glass *G* and of a depth desirably about equal to its width, except along the upper edge of the sash, where the groove takes the form of an open slot *2*, into which the glass may be thrust considerably farther than the distance which it normally occupies when in place, Figs. 2 and 5.

"The glass *G* for each sash is provided in a plurality of panes—in this instance two—the aggregate width of which is made somewhat less than the extreme inner width of the sash from the bottom of the groove *1* on one





side to the bottom of the same groove on the other. This permits the glass to be inserted by proceeding in the manner indicated in Figs. 5 to 9, inclusive. The upper edge of the first pane is slipped angularly up through the slot 2, as shown in Fig. 5, and the whole pane is then swung into a vertical position and slipped down until its lower edge enters the groove *1* at the bottom of the sash. The pane then occupies a position such as is indicated in Fig. 6 and



can be slipped sidewise until one of its lateral edges enters the groove *1* at the side of the sash, as shown in Fig. 7. This leaves a space between its other lateral edge and the other side of the sash wide enough to receive the second pane, which is then inserted in the same manner as the first pane until it occupies the position shown in Fig. 8, whereupon it is moved sidewise away from the first pane until its lateral edge enters the groove *1* on the other side of the sash, as shown in Fig. 9. The glass is then secured in this position, as follows: Midway between its sides the sash is provided with a vertical bar *3*, located in front of the groove *1*, with its rear face in the same plane as the front edge of said groove or in line with the front surface of the inserted glass. This bar covers the adjacent edges of the two panes of glass on their front sides and affords a ledge against which these inner edges of the glass rest. Operating in conjunction with this middle sash bar *3* is a clamping bar *4*, having forwardly projecting flanges *5*, which enter between the panes, so as to prevent their lateral movement, and lateral flanges *6*, which project back to the glass and hold it firmly against the front bar *3*. This clamping bar is herein shown as secured in place by screws *7*, which extend through the bar into screw plates *8* in the front bar *3* and by turning up which the glass may be held between the clamping bar and front plate as tightly as desired. This clamping bar is put in place after the panes have been inserted and moved laterally into their final positions, as shown in Fig. 9, and the tightening of its screws *7* completes the glazing operation.

"One great advantage of the construction described is that it enables the window to be glazed from the inside of the building and does not require any attention or manipulation from without, as is commonly necessary in fireproof windows of this character. Windows so constructed may, furthermore, be made of any desired width and arranged to contain as many panes of glass as may be necessary to glaze the desired width of the sash, without regard to the width of the panes, since it is only necessary to provide as many additional bars *3* and *4* as are needed in clamping the adjacent edges of each pair of panes. Obviously many changes may be made in the details of the construction shown without departure from the broad spirit of the invention claimed."

There has been much discussion of the question whether Watson invented a "fireproof" window—complainant asserting that he did; defendant that he did not. Of course the problem of defining a fireproof window, the inclusion of features necessary, and the exclusion of those unnecessary, to constitute such a structure, is not before the court for solution. Common observation teaches us that, after all, structures are "fireproof" as a matter of degree only. The term expresses the quality of one structure to withstand the stress of fire relatively to, or by comparison with, those which are deemed flammable or not so capable to withstand it. Therefore, in the present case, it may be conceded that a metal sash window with wire glass is, acceptably, a "fireproof window," simply because the materials are noninflammable. But upon the issues here the question is of importance, because upon its answer may depend the scope of the art to which reference may be had in determining the quality of Watson's endeavors—whether he invented anything, or merely selected and adapted to his structure well-known features. Upon the specifications and drawings Watson's invention is thus embodied in the first of the four claims of the patent:

"In a window, the combination of a plurality of panes of glass, of a sash grooved to inclose said panes of glass, a bar fixed to and extending across the sash in front of the plane of the groove and past which the panes may be slid lateral portions of the groove, a clamping bar interposed between the panes when slid into the side grooves and bearing against their adjacent edges opposite to the fixed bar, and means for detachably securing the clamping bar in place, substantially as described."

The second claim differs only in narrowing the "means for detachably securing the clamping bar" to "clamping *screws*," while the third and fourth claims differ substantially from the first and second, in respectively incorporating a "metal" sash. The five elements of the combination are therefore: (1) The plurality of the panes of glass; (2) the grooved sash for their inclosure; (3) the bar fixed to and extending across the sash in front of the plane of groove,

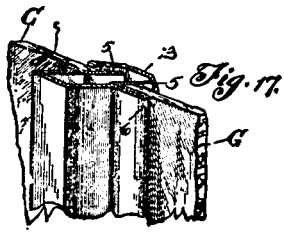
past which the panes may be slid laterally to introduce or withdraw them; (4) the clamping bar interposed between the panes; (5) the means for securing the clamping bar.

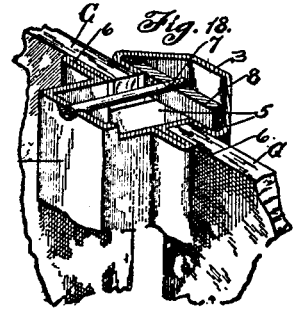
In determining the scope of the art to which Watson must be held, there are several considerations which are, I believe, controlling, in support of the conclusion that the invention, as claimed, is not a "fireproof window": First, his statement that his invention relates "to improvements in windows," and "more particularly to fireproof windows of that class which have their frames made of sheet metal," with the object of providing "improved construction for securing the glass in place in windows of this character"; secondly, the fact that a "metal" sash appears as an element in claims 3 and 4 and not in claims 1 and 2, taken in connection with the substantial identity of the claims as to other elements, as already indicated, shows, no matter what may be said of their validity, that the claimed improvement relates to an extended art; third, the rejection by the Patent Office of a claim for a fireproof window, for which no substitute claim now appears in the patent.

It may be, as contended by plaintiff, that Watson had in view the adaptability of his structure to the use of wire glass through which the fireproof quality would be greatly strengthened and more nearly approach perfection; that any expectation of its utility in such combined use has been realized through the advent and extensive use of that kind of glass. But his real invention is neither more nor less than he has declared—an improvement in windows—and there is open for consideration the entire art relating to sash for windows or window structure. Therefore the references cited by defendant, hereafter referred to, are deemed relevant.

Now in taking this view, defendant refers us to numerous structures of the prior art, ranging from simple forms of wooden sash structures of doors and windows to rather complex forms of fireproof windows and of sash in use in sky windows. No reason is perceived why these references are not pertinent, or why the more fundamental art of *glazing joinery* should not be consulted to determine the fund of information presumably possessed by mechanics in that art, in order to answer the question respecting Watson's alleged invention. Therefore the Sheldon patent, though for a screen door disclosing the form and arrangement of grooves for panels, and Short's disclosure, in a wooden window sash, of a removable muntin, are not to be discarded, in considering Watson's structure as one not necessarily fireproof. But an examination of the Hayes, the Bickelhoupt, the Rendle, and the Coulson patents shows, in my judgment, that Watson really does no more than to select from them, respectively, elements now found in his claims. Certainly the muntin of Watson differs from Short only in the fact that in the one the rib is upon the fixed, in the other upon the removable, part. The grooves are alike, both in arrangement and shape, in Watson, Sheldon, and Hayes. Watson's feature of deepening one groove to receive the pane and to enable its being lifted, then lowered, into the opposite groove, is disclosed and expressly claimed by Hayes.

With respect to the clamping bar and the means for securing it, and which is claimed "substantially as described," I am unable to find any difference in the disclosure shown by Watson in Figure 3, supra, and Figures 17 and 18, viz.:

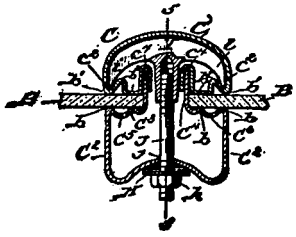




and those made by Coulson, patent 429,375, and Rendle, No. 1,372 (British), viz.:

(1) Figure 8, Coulson Patent, No. 429,375.

Fig. 8.



(2) Figures 1, 6, and 7 of the Rendle Patent, No. 1,372 (British).

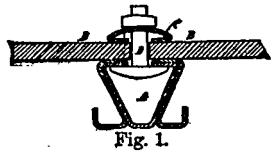


Fig. 1.

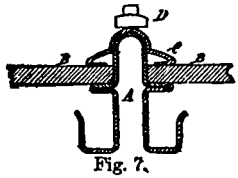


Fig. 7.

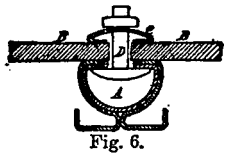


Fig. 6.

Every element found in Watson's structure appears in one or more of these references; and while Rendle's adaptation is limited to a "structure for horticultural purposes," and Coulson describes his as a "glazed structure," their pertinency, as already indicated, must be accepted if we regard Watson's efforts to have been exerted in the glazing art, rather than limited to such windows as are found on the sides of ordinary dwellings or buildings. To my mind, one seeking to perfect a structure wherein the mullion or the panes are easily removable would at once be referred to that branch of the art wherein that kind of structure was in greater demand, irrespective of the fireproof quality, and skylight and horticultural structures are in that branch. The contention of defendant, that the patent in suit is void for want of invention, must be upheld. It may be that Short and Sheldon, upon reproduction of their respective structures, are far from Watson in physical appearance; but, when the numerous later structures are added thereto, there is a sum total of mechanical elements in the art which forbids Watson's claims upon any theory except that of aggregation or selection. Every feature is not only suggested, but worked out; and even if Watson's precise combination is not disclosed in any one alone of the many references, its production is, in my judgment, attained through the exercise of mechanical skill, and has not the quality of inventive novelty.

The third and fourth claims, in adding the element of a "metal" sash, must fall with the first two.

The conclusion is that the patent is void, and that a decree in favor of the defendant be entered accordingly.

W. Clyde Jones and Albert H. Graves, both of Chicago, Ill., for appellant.

John G. Elliott, of Chicago, Ill., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge. This is an appeal from a decree of the District Court holding void letters patent No. 702,754 to Watson, granted June 17, 1902, for certain "improvements in windows," and

dismissing bill of appellant charging infringement thereof. A description of the patent, with cuts showing its illustrative drawings, appears in the opinion of the District Court, which is found on pages 211–221 inclusive of the printed transcript of record herein [see above]. That opinion considers the disclosures of various patents shown in the prior art, notably the Short, Sheldon, Hayes, Rendle, and Coulson patents, and from careful examination of these and of all the evidence we are satisfied that the District Court properly reached its stated conclusion that the patent in issue "has not the quality of inventive novelty."

One of the distinctive features of the Watson patent is that the fixed part of the bar or muntin, against which rest adjacent panes of glass, is a flat surface, so that, in glazing, either pane can be slid across the same, and, when both are in place, are held apart by a rib along the middle of the movable part of the bar or muntin, which, when in position, holds the panes in their relative and proper places. Distinguishing the Watson from the Short structure in this regard, it is said in the opinion:

"Certainly the muntin of Watson differs from Short in the fact that in the one the rib is upon the fixed, and in the other upon the movable, part."

In this respect the opinion fails to point out the full disclosure of the Short patent, which was granted for improvements in setting glass, and in the sash therefor; for, while it might possibly be concluded from its drawings that the rib is on the fixed part, the specification of that patent discloses it may be upon either—the language there employed being:

"The inner face of the binding pieces has a rib down through the center to separate the glass, or instead thereof there may be a rib on the stationary part."

Barring only the raised center rib on the fixed part of the muntin shown in the Sheldon patent, it shows the entire novelty claimed by Watson. It has the slots or grooves in the three sides, that on the upper side being abnormally deepened for projecting the panel therein and dropping it into the lower slot. It shows, also, some play or sliding space on the fixed part of the muntin, on either side of the rib thereon, so that the panel, being inserted in the upper and lower grooves, may then be slid into the groove on the side opposite the muntin.

It is claimed that the Sheldon patent, being for a combined screen and storm door, is not in an analogous art. It would be entirely feasible to have glass panes for the solid or storm panels of such doors; but whether of glass or of any other weather resisting material, transparent or opaque, means for conveniently inserting and holding in place the panels of such doors cannot be said to be irrelevant to the art of inserting and holding in place the glass panes of windows.

For the reasons set forth in the opinion of the District Court, supplemented by what is here said, the decree is affirmed.

WILLIAMSON v. ELECTRIC SERVICE SUPPLIES CO.

(District Court, E. D. Pennsylvania. October 9, 1916.)

No. 1171.

1. PATENTS ⟸112(1)—ISSUANCE—PRESUMPTION.
The issuance of a patent carries with it a presumption of validity.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 162; Dec. Dig. ⟸112(1).]

2. PATENTS ⟸69—ANTICIPATION—PRIOR USE AND PUBLICATION.
For prior publication to invalidate a patent, the invention described in the publication must be identical in all respects with that whose novelty it contradicts, and the same idea of means in the same stage of development as that which the patent has later embodied must be communicated to the public.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. ⟸69.]

3. PATENTS ⟸81—VALIDITY—PRIOR USE.
In determining whether a patent is void because of prior use for more than two years before application, where it is claimed that the use was not public, but was for the purpose of perfecting an incomplete invention by tests and experiments, the patentee's proof of that fact, the period for the use having been established, should be clear and unequivocal.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. ⟸81.]

4. PATENTS ⟸328—VALIDITY—PRIOR PUBLIC USE AND PUBLICATION.
The Ramsey patent, No. 575,733, for an electric signal system for electric railroads, which by means of lights indicated the presence of cars between the several blocks established, *held*, in view of the patentee's long delay in asserting his rights, invalid, because of publication two years before application, as well as public use for more than two years before application.

In Equity. Bill by James E. Williamson against the Electric Service Supplies Company. Bill dismissed.

J. F. Shrader, of Philadelphia, Pa., and John H. Roney, of Pittsburgh, Pa., for plaintiff.

Charles N. Butler, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The bill charges infringement of the Ramsey patent, No. 575,733, issued January 26, 1897, upon an application filed August 9, 1894. The patent contains a single claim, to wit:

"In a signal system for railways, a trolley or feed wire having a branch at each station, a line wire having a signal and a terminal switch at each station, and a return circuit; the switches co-operating with the return and branch circuits alternately, substantially as and for the purpose specified."

The answer denies the validity of the patent because the device was described in a printed publication more than two years prior to filing the application and was in public use and on sale in this country more than two years prior to the application. Infringement is denied.

[1] The defendant offered in evidence three prior patents under the defense of the prior art, the dates of issue of which, respectively, are

Hadden, March 6, 1883; Cheney, February 16, 1892; Jaggard, April 5, 1892. None of them, standing alone, anticipates the claim of the patent in suit, and no explanatory testimony was offered to overcome the presumption afforded by the issuing of the Ramsey patent. Bell v. McKinnon, 149 Fed. 205, 79 C. C. A. 163.

[2] In support of the defense of prior publication, the evidence of the description of the plaintiff's invention published in the Street Railway Journal in October, 1891, 2 years and 10 months prior to Ramsey's application, is sufficient to invalidate the patent if it comes within the rule cited by Judge Acheson in Hanifen v. Godshalk Co., 84 Fed. 649, 28 C. C. A. 507, as laid down in Robinson on Patents, vol. 1, § 329:

"The invention described in the publication must be identical in all respects with that whose novelty it contradicts. The same idea of means in the same stage of development as that which the inventor of the later has embodied must be thereby communicated to the public."

The facts will be considered in their bearing upon the defense of publication and of prior use and prior sale. Ramsey conceived of the invention of the patent in suit during the early part of 1890. At that time he was chief electrician of the Pleasant Valley Street Railway Company and later became superintendent of the road. During the early part of 1890 he began the construction of boxes and the installation of his system on a branch of the Pleasant Valley Street Railway, and, during June or July, 1892, more than two years prior to the application for the patent, the system was installed on the Beaver Valley Railway in the same locality as the Pleasant Valley line. It is claimed by the plaintiff that this use was merely experimental, and that the perfected system, as set out in the patent, was not in use on either of these roads until September, 1892.

[3, 4] In the specification the patentee states:

"My invention relates to systems for throwing or showing signals at two or more points to indicate that a certain block or section of track is occupied by a train or car and that the train or car so signaled must wait until the signaling train or car passes such point."

In the patented device the main conductor of the electric circuit is the trolley wire. From the trolley wire at each end of the section of single track for which the signals are to be provided a branch conductor leads to a binding post. Each of the signal boxes at the respective ends of the single track is provided with lamps in series. A conductor, which is referred to as a line wire, not directly connected with the trolley wire or its branches, connects the series of lamps in the two boxes. A ground wire is provided at each signal box, connecting with the ground line of the main circuit. Points of contact are provided for each branch wire and each ground wire, which may be connected with the line wire by means of a switch arm. When both switches are in contact with the branch wires, or when both are in contact with the ground wires, no current will pass through the line wire, and the lamps are then unlighted. When, however, one switch arm is in contact with the branch wire and the other with the ground wire, the circuit is closed, and the consequent current causes the lighting of the lamps in both boxes. The purpose of the device is to enable

the conductor of a trolley car, by turning the switch at either end, to light the lamps at both ends of the single track upon entering it, thereby warning the conductors of other cars that the single track is occupied, and, upon leaving it, by turning the switch at the other end of the single track to extinguish the lights, so that the conductor of another car entering the section of single track knows that there is no other car upon that track.

The invention described in the specification is for a new and useful improvement in systems for electrical signaling. The essential feature of the improved system is the arrangement of the construction whereby a single line wire conducting through the lamps is, by means of switches, made a part of a circuit connecting through the ground wire at one end and the branch wire at the other end alternately, and whereby, by means of one switch at either station, the current may be turned on or off, lighting the lamps or extinguishing them simultaneously at both ends of the circuit.

It is to be determined, then, whether the invention, as described in the Street Railway Journal and in use prior to August, 1892, was identical with the device set out in the claim of the patent. The plaintiff claims that the system described in the Street Railway Journal and in use upon the Pleasant Valley and Beaver Valley Street Railway lines differed from that described in the patent, in that resistance coils were supplied in the signal boxes used prior to September, 1892, and shown in the illustration published in the Street Railway Journal, and that the lamps in use were arranged in multiple series and so shown in the Street Railway Journal publication; that the resistance coils caused excessive heat in the boxes and destroyed the efficiency of the lamps, and, while the general result was a practical operation of the system, it required further experiment to bring it to a degree of perfection which would make it reliable as a signaling device. In September, 1892, the resistance coils were removed, and the inventor changed the circuits through the lamps from multiple series to series, with the result that the system became reliable and efficient, and later came into general use as the standard system for street railway signals.

If the system in prior use and described in the Railway Journal of 1891 lacks identity with the system described in the patent, it does so only by reason of these differences: First, the presence of resistance coils in the system first described and used, and the omission of resistance coils in the claim and specification and drawings of the patent; and, second, the arrangement of the lamps in prior use and described in the Railway Journal in multiple series and their arrangement in the drawings in the patent in series.

It is undisputed that the system in use upon the Pleasant Valley Railway and the Beaver Valley Railway more than two years prior to filing the application for the patent could be constructed from the publication in the Street Railway Journal by others skilled in the art to which it pertains. The determination of the identity of the description in the Railway Journal and of the system used by the two railway companies with the system described in the claim of the plaintiff's patents must therefore be based upon the determination of the

questions whether the removal of the resistance coils, assuming that the patent is limited to a system without such resistance, or the change from multiple series to series, assuming that the patent is limited to a series arrangement of lamps, embodied invention. The advantage of the absence of the resistance coils, as explained by the plaintiff's witnesses, is that the coils caused excessive heat within the signal boxes, causing short-circuiting, and in some cases resulting in burning up the boxes. The effect of the coil upon the lamps is not clear. It is stated by the witnesses that, when there was an exceptionally heavy load upon the current, the lights would become so dim as to render it difficult to determine whether they were lighted or not. This condition is not by any clear evidence traceable to the presence of the resistance coils, and their presence is explained by the inventor, Mr. Ramsey, as being due to a desire to protect the weak filaments of the lamps, as well as to prolong the life of the lamps by preventing an excessive flow of current through them. The advantage of the series arrangement of lamps, as explained by the witnesses, is that a person turning the switch to light the lamps and, finding that they do not light, is at once apprised of the fact that the system is out of order, and the car enters upon the single track with caution.

The claim of the patent is broad enough to cover an arrangement in series or multiple series, and the only ground upon which the plaintiff can claim that the series arrangement is covered by the patent is the mention of a series of lamps in the specification and a drawing representing a series arrangement.

The palpable fact that the effect of breaking or burning out any one of the lamps will break the circuit is not such a discovery as to entitle the patentee, so arranging the lamps, to the credit of invention. It is plain that any practical electrician, though but slightly skilled in the art, having presented to him an arrangement by which the circuit was conducted through one part of a multiple series, and desiring to have it known when one of the lamps was burned out or broken, would arrange the wiring in series, instead of in multiple series. This is a mere matter of mechanical arrangement, which could be effected by any electrical mechanic, and it cannot be pretended that it required the discovery of an inventor at the period of the alleged experimental use to substitute this arrangement for the one disclosed in the Railway Journal article. So, also, it is with the removal of the resistance coils. It is a mere detail of arrangement, involving nothing but the mechanical skill of an electrician, and not involving invention. If an alleged infringer defended upon the ground that he was not using the invention described in the claim of the patent, because he substituted lamps in multiple series for those in series, or because he used a resistance coil in the circuit, the substitution of one of these mechanical devices for the other would be unhesitatingly rejected as a defense to infringement by manufacture, use, or sale of a system in other respects similar to that covered by the patent.

The plaintiff claims that the use by the railway companies was an experimental use for the purpose of perfecting the invention. The evidence shows that the system used by the Pleasant Valley and Beaver

Valley Companies was practically operative. In fact, it appears that the Beaver Valley Company installed the system upon its line because it knew of its successful operation upon the Pleasant Valley Company's line. The use was for the benefit of the two companies, and it is difficult to perceive how such use for a period of two years and eight months was necessary as experimental use for the purposes of the inventor in perfecting his system. The ingenuity of the patentee and the utility of his invention are apparent, but the law is plain that, where an invention is fully described and made public in such manner that the subject-matter can be constructed from the publication by any one skilled in the art, as in this case, and the subject-matter of the invention is put into practical and public use for a long period of time for the benefit of the user and not the inventor, without any restrictions upon its use, or upon allowing others to use it (and there is no clear evidence in this case that any such restriction was put on either railway company), such publication and prior use cannot be defended upon the ground of a mere change in mechanical details, which may, and perhaps did, add to the efficiency of the system, but which could have been effected by any one having ordinary mechanical skill as an electrician.

"In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing." Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 264, 8 Sup. Ct. 122, 31 L. Ed. 141.

The evidence in this case of experimental use is not to my mind "full, unequivocal, and convincing." The change in arrangement, involving merely mechanical skill, as did the changes in this case, cannot justify the duration of two years and eight months of time in experimentation, unless it is shown that during that time there were active and continued efforts upon the part of the inventor to correct whatever defects may have existed. It is inconceivable that it would not have suggested itself to one skilled in the art to test the effect of removal of the coils and the change in arrangement of the lamps within a shorter time after the commencement of experimental use than two years and eight months. The defense of experimental use for that long period creates the impression of being the result of an afterthought for the purpose of sustaining the validity of the patent. The question of profit to the patentee and of sale is in the circumstances immaterial.

It is conceded by the plaintiff that from 1908 to the time of bringing suit, a few days before the expiration of the patent, the system of the patent was in general public use without license by him on the lines of numerous electrical railways throughout New England and elsewhere. He had ample opportunity, when his attention was called by the defendant in 1908 to the manufacture of similar systems by others, to defend his patent, but took no steps to do so until the present bill was filed. Such acquiescence upon his part in infringement does not add

to the weight of his present claim of experimental use during 1890, 1891, and 1892, nor his present claim that the elimination of the resistance coils and the substituted arrangement of lamps in 1892 were such substantial improvements in the system as to justify the long period of alleged experimental use and the disclosure in the Railway Journal in 1891.

It is unnecessary to pass upon other defenses, as the evidence in the case is sufficient to overcome the presumption of the validity of the patent.

The patent is held invalid, and the bill will be dismissed.

SKINNER v. CAMPBELL.

(District Court, S. D. Florida. January 7, 1916.)

PATENTS ⇐328—VALIDITY—ANTICIPATION.

The Crum patent, No. 764,919, for a fruit sorter, which separated the different sizes of fruit, such as oranges, by means of rollers turning in opposite directions, *held* invalid for lack of invention, being anticipated by the Huntley patent, No. 538,330.

In Equity. Bill by Lee B. Skinner against J. P. Campbell. On final hearing. Bill dismissed.

L. W. Baldwin, of Jacksonville, Fla., and William Hunter and Munn & Munn, all of New York City, for complainant.

Marks, Marks & Holt, of Jacksonville, Fla., and McGill & Maguire, of Washington, D. C., for defendant.

CALL, District Judge. This cause comes on for final hearing upon the bill of complaint, the answer thereto, stipulation of counsel, affidavits, and testimony taken before the court, together with the exhibits filed at the hearing.

The bill is filed to restrain in the infringement of patent No. 764,919, dated July 12, 1904, issued to James B. Crum, for a fruit sorter.

The answer tenders two issues: First, that the defendant's machine does not infringe the patent; and, second, that the patent to Crum is void because the invention and the worthy features were used by others and contained in prior patents.

By stipulation it is conceded that, if the Crum patent is valid, the machine manufactured by the defendant infringes claims 1, 3, and 6, of the said patent.

The testimony before me shows that one Huntley manufactured and sold machines for sizing oranges, etc., some 10 years before the issuing of the Crum patent, and obtained a patent for same—patent No. 538,330 on April 30, 1895.

This reduces the questions to be decided in this case to the issue of whether the Crum patent infringes the Huntley patent, and whether

the Crum machine embodies the principles contained in the Huntley machine.

The two machines were produced and operated before the court, and there is no question but that each machine will do the work for which it was intended; i. e., separate the different sizes of fruit, etc. Each machine depends for its operation on the two rollers in the double machine turning in opposite directions, the Huntley machine having these rollers above the trough carrying the fruit to be sized, and the Crum machine having them on the same plane and constituting one side of the trough. The Huntley machine depends upon the fruit coming in contract with the roller to separate it, while the Crum machine relies upon an overhead board to check the fruit and discharge it. Each depends upon the law of gravity to carry the fruit through the machine. The idea embodied in each machine is to convey by gravity the fruit to the point in the machine where its course will be checked, and the outward motion of the roller will act upon it and discharge it in its proper place. There are structural differences, but these in my judgment are not so radical as to prevent an infringement by the latter machine on the prior patent.

I therefore find that the Crum patent is invalid, and since the right of the plaintiff to recover depends upon the validity of this patent, his bill of complaint must be dismissed, with costs to the defendant.

It will be so ordered.

CAMPBELL v. SKINNER.

SAME v. L. B. SKINNER MFG. CO.

(District Court, S. D. Florida. January 7, 1916.)

1. PATENTS ⊂=324(1)—INFRINGEMENT SUIT—NOTICE.
   Where plaintiff, suing for infringement of his patent, did not on the hearing object to the testimony of witnesses as to the invalidity of the patent on the ground that he had not been given notice in accordance with Rev. St. § 4920 (Comp. St. 1913, § 9466), he must be held to have waived the notice provided for, which was intended to prevent surprise.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600, 604, 605; Dec. Dig. ⊂=324(1).]

2. ESTOPPEL ⊂=65—GROUNDS—INFRINGEMENT—ESTOPPEL OF PATENTEE.
   There is no estoppel, preventing a patentee from testifying contrary to oath made by him when applying for the patent, in a suit between his assignee and a third party.
   [Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 155-158; Dec. Dig. ⊂=65.]

3. PATENTS ⊂=328—INVALIDITY—ANTICIPATION.
   The Maull patent, No. 1,071,472, for a fruit sizing machine, claims, 2, 3, 4, 5, 7, 15, and 16, *held* invalid for anticipation where they were covered by prior patents, or machines covering the claims were made and sold more than two years prior to the making of the application, and so not infringed.

In Equity. Suits by J. P. Campbell against L. B. Skinner, and by J. P. Campbell against the L. B. Skinner Manufacturing Company which were heard together. Bill dismissed in each instance.

Marks, Marks & Holt, of Jacksonville, Fla., and McGill & Maguire, of Washington, D. C., for complainant.

L. W. Baldwin, of Jacksonville, Fla., and William Hunter and Munn & Munn, all of New York City, for defendant.

CALL, District Judge. By stipulation of counsel the two cases were heard together, the decision in one suit to be controlling in the other. It was also stipulated by counsel that L. B. Skinner is the owner of patent No. 1,071,472, and that the L. B. Skinner Manufacturing Company is manufacturing and selling fruit-sizing machines under the said patent. It was also stipulated that the machines manufactured and sold by the Skinner Manufacturing Company were shown by photographs marked Exhibit A. By stipulation affidavits of experts were introduced, as well as oral testimony and various exhibits, patents, models, machines, etc., filed in evidence.

[1] A motion was made by the plaintiff to strike the testimony of the witnesses, Bailey & Maull, because no notice was given to section 4920 of the Revised Statutes, and that of the witness Maull, because he would not be heard to impeach the validity of the plaintiff's patent; Maull being the patentee, and having sold it to plaintiff.

At the hearing no objection was made on the ground first stated to the testimony of either witnesses, but was first made some days after the hearing and while waiting for plaintiff's brief. Under these circumstances I think the plaintiff must be held to have waived the notice provided for in the statute, which was evidently intended to prevent surprise to the plaintiff. If the plaintiff had been taken by surprise, unquestionably the point would have been made at the hearing.

[2] The objection was made to Maull's testimony that he was estopped, at the hearing, and ruled upon by the court. The case of De Laval Separator Co. v. Vermont Farm Machine Co., 135 Fed. 772, 68 C. C. A. 474, is decisive of the question of estoppel. I therefore deny the motion to strike the testimony of the two witnesses.

The bill of complaint is filed by the plaintiff as owner of the Maull patent, No. 1,035,887, issued on August 20, 1912, against the defendants, to restrain the infringement, and for an accounting; and it is contended that the machines made and sold by defendants infringed claims 2, 3, 4, 5, 7, 15, and 16 of said patent.

The defendants by answer deny the infringement, deny that Maull was the original, first, and sole inventor of the improvements in fruit graders claimed in the patent, and allege that substantial and material parts had been covered by prior patents, naming some 17; also that the patent in question is void, because the claimed improvements were the result of mere mechanical skill and lacking in invention; also void because, for more than two years before the filing of the application, similar devices had been manufactured and publicly sold by various persons, naming some 9 persons.

[3] I have given the testimony careful consideration, and find that each one of the claims of the patent in question were covered by former patents, or the machines covering said claims were made and sold

more than two years prior to the making of the application for the patent in suit.

My other engagements do not permit of an extended discussion of the claims, and I therefore deem it best not to attempt a partial one. I therefore find the equities with the defendants.

A decree will be entered in each case, dismissing the bill, at the costs of the plaintiff.

THE ALLIANCE.

(District Court, N. D. California, First Division. October 4, 1916.)

No. 16048.

1. ADMIRALTY ⊜10—JURISDICTION OF COURT—CONTRACTS WITHIN ADMIRALTY JURISDICTION.

Since Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, §§ 7783–7787) giving a maritime lien to one who furnishes a dry dock or marine railway for the repair of a vessel, a contract to have a marine railway in readiness, and in such a condition as to promptly place a vessel in a position where repairs could be made, is one of cognizance in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 131–149, 185–190; Dec. Dig. ⊜10.]

2. ADMIRALTY ⊜50—ENFORCEMENT OF LIEN—INTERVENTION—CROSS-LIBEL.

On libel to enforce a lien for repairs and other necessaries, including the use of a marine railway furnished a steamer under a contract with the owner, the charterer is not entitled to intervene, filing a cross-libel against the libelant, claiming damages for libelant's breach of contract in failing to furnish the marine railway at the time specified, unless the contract with the charterer set out in the cross-libel be the same as the contract with the owner.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 414–429; Dec. Dig. ⊜50.]

In Admiralty. Libel by the Pacific Shipyard & Ways Company, a corporation, against the steamer Alliance, in which the charterer filed a cross-libel. On exceptions to, and motion to dismiss, the cross-libel. Exceptions sustained, and motion to dismiss granted, unless cross-libelant amend.

W. F. Sullivan and Walter G. Holmes, both of San Francisco, Cal., for libelant.

Archibald M. Johnson, of San Francisco, Cal., for claimant.

DOOLING, District Judge. The libel is for repairs and other necessaries, including the use of a marine railway alleged to have been furnished the steamer Alliance upon the order of her owner.

The claimant is the charterer of the vessel, and in a cross-libel seeks to recover damages for a breach of contract between it and libelant, by which contract libelant agreed that on a day certain, for the purpose of making necessary repairs on the vessel, it would have its marine railway in readiness and in such condition as expeditiously to place the vessel in the position where such repairs could be made; that libelant failed to perform its contract, in that it did not have

its marine railway in such condition, but that when the vessel was placed therein and partially moved out of the water, the railway became obstructed and jammed, and libelant was unable to move it in either direction whereby the repairs were delayed for a period of 5 days and 11 hours; that by reason of such delay, occasioned by the breach of said contract, the cross-libelant incurred and paid expenses, and suffered damage in the sum of $1,271.

The exceptions and motion to dismiss are based on two grounds: (1) That the contract is not one of cognizance in the admiralty, as it was a contract to be performed on land; and (2) that the contract is not between the same parties as was the contract upon which the libel is based.

[1] Whatever may have been the rule prior to Act June 23, 1910, in reference to the use of marine railways, as that act gives a maritime lien to one who furnishes a dry dock or marine railway for the repair of a vessel, I am of the opinion that a contract regarding the use of such dock or railway for such repairs is a contract cognizable in the admiralty. The exceptions and motion based on the first ground are therefore untenable.

[2] The same cannot be said of the second ground. But it was stated on the argument that the contract in question was the identical contract upon which the libel is founded. This, however, is not directly averred in the pleadings, although it is averred that the matters set up in the cross-libel arise out of the same causes of action for which the original libel was filed. The contract stated in the libel was with the owner; the contract set out in the cross-libel was with the charterer, and I think a more specific statement of the manner in which these arise out of the same causes of action is required.

The exceptions will be sustained, and the motion to dismiss granted, on the second ground, unless cross-libelant, conformably with the truth, within 10 days amend its cross-libel to show that the contract upon which such cross-libel is based is the identical contract upon which libelant sues.

BOARD OF COM'RS OF MATTAMUSKEET DRAINAGE DIST. et al. v. A. V. WILLS & SONS et al.

(District Court, E. D. North Carolina. August 16, 1916.)

No. 379.

1. CORPORATIONS ⇐47—EFFECT OF CHANGE OF NAME.
A change of name by a corporation in conformity with a state statute does not effect any change in the legal identity of the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 134, 135; Dec. Dig. ⇐47.]

2. ACKNOWLEDGMENT ⇐38—CORPORATIONS—SUFFICIENCY OF CERTIFICATE.
Under the decisions of the Supreme Court of North Carolina, the probate of a deed of a corporation is sufficient if it substantially shows the facts required by the statute (Pell's Revisal N. C. 1908, § 1005) which ex-

pressly provides that the form prescribed "shall not exclude other forms of probate."

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 217–220; Dec. Dig. ⟸38.]

3. MORTGAGES ⟸121—MORTGAGE BY CORPORATION—EFFECT OF SUBSEQUENT MODIFICATION OF CONTRACT.

The commissioners of a drainage district and a corporation owning a large tract of land in the district entered into a contract with a firm to construct a drainage system. By its terms the contractors were to be paid monthly as the work progressed a certain amount in cash and the remainder in notes of the corporation secured by a mortgage. The notes and mortgage were executed, and the notes as required by the contract were deposited with the commissioners to be delivered to the contractors as earned. All extra work was to be paid for in cash. *Held*, that a subsequent parol agreement by the parties, made at the request of the contractors and subsequently formally ratified by the corporation by which the contractors were paid a further sum in cash before they were to receive the notes, and which necessitated the application of the notes on extra work, did not invalidate the mortgage or furnish any ground for the refusal of the contractors to proceed with the work.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 237–241; Dec. Dig. ⟸121.]

4. MORTGAGES ⟸159—PRIORITIES BETWEEN MORTGAGES.

Such mortgage is also valid and constitutes a prior lien as against a subsequent mortgage executed by the corporation on its lands which expressly recognized and excepted the prior mortgage, and this as to notes delivered by the commissioners to the contractors either before or after the execution of the second mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 312, 330; Dec. Dig. ⟸159.]

5. CONTRACTS ⟸192—CONSTRUCTION—"SALE."

Contemporaneously with the making of the drainage contract, the corporation executed a collateral contract by which it agreed that, in case of sale of any of its lands not included in the mortgage, it would deposit one-half the proceeds, whether in cash or notes, the cash to be applied in payment of the notes to the contractors as they matured and the purchase notes to be held for their further security until all were paid. The second mortgage executed by the corporation, which covered all of its lands only a part of which were covered by the drainage mortgage, secured an issue of bonds for a large amount. *Held*, that such mortgage constituted a "sale" within the meaning of the collateral contract, and that the corporation was required to deposit thereunder one-half of the proceeds of the bonds as sold until the drainage notes were paid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 846–851; Dec. Dig. ⟸192.

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

6. SPECIFIC PERFORMANCE ⟸74—CONTRACTS ENFORCEABLE—CONTRACT FOR DRAINAGE WORK.

The commissioners of a drainage district, organized under the state law and representing 587 landowners, contracted with defendants to construct a drainage system in accordance with plans and specifications annexed for the drainage of a large lake near the coast and surrounding lands. Defendants were to be paid $226,000 on monthly estimates, the first $159,000 in cash and the remainder in notes of a corporation which owned a large tract of land, secured by a mortgage. The notes and mortgage were executed and the notes placed in the hands of the commissioners for delivery to defendants as earned. After the greater part of the

work had been done and paid for and defendants had received all of the cash payments, they refused to proceed on the ground that the mortgage of the corporation, as to notes thereafter to be delivered, was invalid. The work was left in such condition that it was liable to be destroyed by the waters of the sea during high winds, and much of the land on which money had been expended damaged to an extent which could not be accurately computed. It was practically impossible to obtain a new contractor to finish the work which required special and expensive equipment and accept the notes in payment, and the commissioners were without sufficient money to pay for it. The remaining work was specifically shown by the specifications and could be completed within a year. *Held* that, under the circumstances and upon a finding that the notes were amply secured, the court might properly decree a specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 209; Dec. Dig. ⟸74.]

In Equity. Suit by the Board of Drainage Commissioners of Mattamuskeet Drainage District and others against A. V. Wills & Sons and others. Decree for complainants.

E. L. Travis, of Raleigh, N. C., for plaintiffs.

W. W. Peirce, of Goldsboro, N. C., and William & Barry Mumford, of Pittsfield, Ill., for defendants.

CONNOR, District Judge. This is a bill in equity, in which plaintiffs ask for a mandatory injunction, compelling defendants to perform their contractual obligation in prosecuting the work of dredging and draining Mattamuskeet Lake, Hyde county, N. C.

The pleadings and exhibits disclose the following case: D. N. Graves, a citizen and inhabitant of the state of Masssachusetts, together with D. H. Carter and John P. Kerr, citizens and inhabitants of the state of North Carolina, constitute the board of drainage commissioners of Mattamuskeet drainage district, Hyde county, N. C., as provided by chapter 442, Public Laws of North Carolina (modified by chapter 509 thereof) Session 1909. They will hereinafter be referred to as the "drainage commissioners." They are authorized and empowered to make the contracts hereinafter set forth. The Southern Land Reclamation Company, the name whereof has been changed, as will more fully appear, to the New Holland Farms, Inc., is a corporation created by and pursuant to the laws of North Carolina, and is the owner of the lands, hereinafter referred to, within the boundaries of the Mattamuskeet drainage district. It will hereinafter be referred to as the "reclamation company" or the "New Holland Farms, Inc."

Defendants A. V. Wills & Sons, trading as partners, are citizens and inhabitants of the state of Illinois. The defendant Federal Trust Company is a corporation created by the laws of the state of Massachusetts. For the purpose of reclaiming the lands of the reclamation company, and of other landowners in said district, plaintiffs and defendants Wills & Sons, on the 16th day of July, 1913, entered into a contract in writing, the terms of which, so far as relevant to the decision of the questions presented here, are: Defendants, hereinafter referred to as the "contractors," agreed to construct certain canals, ditches, and levees for the purpose of draining the lake, containing

48,630 acres, and lands surrounding the lake, aggregating 99,868 acres, in accordance with the specifications, maps, etc., attached to the contract. They were to receive in payment for the work the sum of $266,965.28. Payments were to be made monthly, as the work progressed, in accordance with estimates of the engineers. For the construction work, as performed up to, and including, the sum of $159,000, the contractors were to be paid in cash, which sum the drainage district then had, and which was applicable to construction work, "and no other use or purpose whatever."

The contractors agreed with the drainage commissioners that they would receive in payment of the balance of the consideration agreed upon, for said material and work, the promissory notes of the reclamation company; that such notes should be duly executed by the reclamation company in the form attached to the contract and made a part thereof. They were to bear even date with the contract, and be payable to the order of the contractors. One hundred and nineteen of the notes to be made for the principal sum of $1,000 each, and one for the sum of $961.42; each of the notes, when delivered, to be indorsed and marked by the drainage commissioners with the date of the delivery, and each to be due one year from such date of delivery and to bear interest from that date until paid at the rate of 6 per cent. per annum. The notes of the reclamation company to be secured by a first mortgage, duly executed by the company and delivered to the contractors, at the date of the contract, upon about 13,500 acres of connected lands within the drainage district which land was then owned by the reclamation company. After the full cash payment of $159,000 was made, the notes were to be taken and received by the contractors in payment of such parts of the work, at 90 cents on the dollar of their face value. If, at any time, or times, when payments should be due the contractors, in notes of the reclamation company, the drainage district should pay, or cause to be paid, to the contractors, the estimates earned, in cash, instead of notes, the contractors agreed, in sufficient legal form, to release from the lien of their mortgage contiguous land described in the mortgage in the ratio of one acre of land for each ten dollars so paid.

It was further provided:

"That any and all extra work done under this contract, by the contractors, beyond and in excess of, the principal work for which the sum of $266,965.28 is hereinabove contracted to be paid, shall be paid in cash by said drainage district, out of assets provided for that purpose."

Supplemental to and at the date and place of the contract of July 16, 1913, an agreement was executed by the reclamation company, in which it was stipulated that:

"If the said reclamation company shall, before the complete performance of the foregoing contract, or the payment in full of all notes of the Southern Land Reclamation Company, which was to be delivered to A. V. Wills & Sons, under the terms of the foregoing contract, sell any land belonging to it, lying in the Mattamuskeet drainage district, not included in the mortgage referred to in the foregoing contract, the said Southern Land Reclamation Company will deposit one-half of the cash proceeds of any such sale and one-half in amount and value of any notes or other securities, hereinafter known as, and called, 'purchase notes,' taken to cover the other part of the

purchase price of any of such lands as sold, with some bank to be agreed upon by the parties hereto, such deposits of cash, and of purchase notes, to be held and used in accordance with the following provisions."

It was, in said supplemental contract, further provided that such cash so deposited should be applied to the payment, in the order of their number, of such of the said mortgage notes as may then have been delivered by the drainage district. Such purchase notes, as may have been deposited to be held by the custodian, as further security for the payment of such mortgage notes, as may have been delivered, and were then unpaid, when payments were made of such purchase notes, the amount was to be applied in the same manner as cash payment. The cash payment, or purchase notes, taken for land by the reclamation company, deposited as provided by the supplemental contract, were not to exceed the amount of the notes held by the contractors and if, at any time, either the cash or purchase notes did exceed the amount of said notes, they were to be redelivered to the reclamation company to the amount in excess of such notes held by the contractors, at that time. The reclamation company reserved the right to pay, in cash, without discount, any amount which it should owe to the contractors and for which the drainage district held its notes to be delivered under the terms of the original contract, "and in case such cash payments being made, the mortgage notes for which such cash payments are substituted, shall thereupon be delivered by the drainage district or by its commissioners to the Southern Land Reclamation Company, instead of the contractors, and the contractors shall, thereupon, in accordance with the terms of said mortgage covering approximately 13,500 acres, make partial release from the said mortgage at the rate of an acre of land for each ten dollars in cash so paid."

Pursuant to the terms of said contract, the reclamation company on July 26, 1913, by its duly authorized officers and under its corporate seal, executed its corporate notes in the denominations, and in accordance with the terms of said contract, aggregating the sum of $119,961.42 and, on the same day, delivered said notes to the board of drainage commissioners for the purpose and upon the trusts set forth in said contract, and on the same day, said reclamation company duly executed to C. E. Dunham and C. T. Laird, trustees, a deed in trust, conveying to them a part of the land belonging to said reclamation company, being a part of what is known as "Mattamuskeet," described by metes and bounds, containing 13,511 acres, in special trust to secure the payment of said notes, which were particularly referred to and described, with power of sale in said trustees, in default of payment thereof, as they fell due. This deed of trust was duly recorded in the office of the register of deeds of Hyde county, N. C., on August 14, 1913, and constituted the first lien on said land. The deed was duly executed by said corporation and was, in all respects, a good and valid conveyance of the land for the purpose for which it was executed.

On February 14, 1914, the board of drainage commissioners, having decided to make certain changes in the character of levees, required

by the original contract, entered into a supplemental contract with the contractors to construct the boundary levee in accordance with said supplemental contract at the price of ten cents per cubic yard. It was stipulated that the said contract should be supplemental to the contract of July 16, 1913, and, except as to matter of boundary levee, in no way affect any other agreement between the parties thereto—that the work contracted for should be regarded as extra work done upon said contract. There does not appear to be any substantial disagreement between the parties in respect to the terms of the supplemental contract. The contractors, proceeding under the two contracts, began work about March 4, 1914, and continued until March 31, 1915, when it was ascertained that the amount of work performed which had been paid for in cash, in monthly payments, aggregated $159,000, being the full amount which was to be paid in cash. It was ascertained, by the engineers, that the total excavation to be made would be considerably in excess of the original estimates, and that, consequently, the contractors would ultimately have to be paid an amount in excess of the original contract price of $266,965.28, which excess would constitute extra work under the contract, which would be payable in cash. Complainant alleges that, at a meeting of the board of drainage commissioners, April, 1915, defendants, contractors, stated that they stood in need of money to pay balance due on equipment purchased for use in the work and requested that, in view of the fact that ultimately they would be entitled to be paid in cash for extra work a considerable amount in addition to the $159,000 already paid, that the board would continue to make payments in cash for monthly estimates, until a sufficient amount was paid to cover the extra work which it was then known would be necessary, and to thereafter pay in the notes of the Southern Land Reclamation Company instead of first paying in such notes for work, to the amount of $107,965.28, as the board was entitled to do under the contract, and then paying in cash for the extra work. Defendants based their request upon the ground that it would amount to the same thing in the end and enable them to meet the payments on their equipment. The board of drainage commissioners consented to grant this request. Defendants deny this allegation and say that the contract or agreement made during the month of April, 1915, was, on December 15, 1915, reduced to writing.

On November 20, 1915, the Southern Land Reclamation Company, complying with the statute of North Carolina, in such cases provided, changed its name to the New Holland Farms, Inc., which appears by reference to the certificate of the Secretary of State of North Carolina, dated June 10, 1916.

Complainant alleges that, in pursuance of the agreement of April 1915, the board of drainage commissioners continued to pay defendant cash, in monthly installments, in addition to the $159,000, paid in accordance with the original contract, until such additional cash payments amounted to the sum of $45,000, which it was estimated, and the board of commissioners avers, was sufficient to pay for all the extra work which would have to be done; that the board thereupon

paid to the contractors, in monthly installments, the notes of the reclamation company, which were accepted by the contractors, to the approximate amount of $61,000. Defendants admit the payment of cash, and notes, to the amounts alleged by the board of drainage commissioners. They deny that the notes were paid, or received pursuant to any parol agreement, as alleged, and say that said notes were delivered to the contractors pursuant to the original contract of July 16, 1913, "and not otherwise." They do not very clearly say for what work the monthly cash payments were made, but deny that it was sufficient to pay for all extra work done and to be done, and allege that the work yet remaining to be done is extra work, and if completed, will require, in compensation, an amount or sum in excess of the amount of notes executed by the reclamation company, by the sum of $20,000. Complainants allege that, in making the cash payments of $45,000, they did not do so in the exercise of their option under the contract to pay in cash any part of the original contract price which was payable in notes, but paid the same at the request of the defendants to accommodate them, and on account of the extra work which complainants found would be necessary and in reliance upon the understanding that, if this was done, defendants would thereafter accept the notes of the reclamation company to the full amount stipulated in the contract for any work done. Defendants deny this allegation.

At the meeting of the board in September, 1915, defendants demanded payment for work on the boundary ditches and levees, in cash, on the ground that this was extra work, and refused to any longer accept notes therefor, and stated that they would not continue said work unless the board would pay for same in cash. This the board refused to do, and defendants thereupon stopped work on said boundary and levee ditches. This defendants admit to be true, giving at length their version of the transaction. The recital of these transactions is essential to an understanding of the questions presented for decision in this suit. At a meeting of the board of commissioners, December 15, 1915, defendants stated, as their reason for not accepting the notes of the reclamation company for work on the boundary levees and ditches, that they were doubtful whether said notes were valid when given in payment for extra work, whereupon the complainant board of drainage commissioners, the defendants A. V. Wills & Sons and the New Holland Farms, Inc., executed a contract in writing, in which it is recited that controversies have arisen in regard to the validity of the notes if delivered in payment of extra work and that the board of drainage commissioners and A. V. Willis & Sons, and the New Holland Farms, Inc., had agreed upon a settlement and compromise of the controversy. The New Holland Farms, Inc., agreed to execute such instruments of writing as will fully waive, and entirely eliminate, all questions as to the liability of said company, or its predecessor, the Southern Land Reclamation Company, for the notes which may be delivered by the board of drainage commissioners in payment for extra work done by the contractors in constructing the drainage system in said district, and which will fully and effectually authorize said board of commissioners to give said notes in pay-

ment of such work, whether the same be extra work, or otherwise. The contractors, on their part, agreed to resume work upon the boundary ditches and levees of said district on or before the 1st day of January, 1916, and to prosecute the same diligently until completed, and to accept, in payment, for said work, or any other work, done for said board of commissioners in said district, the notes of the New Holland Farms, Inc., or its predecessor, the Southern Land Reclamation Company, duly and properly secured in the manner provided in the contract of July 16, 1913, until the said notes so accepted, together with such notes heretofore accepted by them, shall, at 90 cents on the dollar, pay for work to the amount of $107,965.28, and the board of commissioners agreed that, after the notes to said amount have been accepted, they will pay for all additional work, in cash.

Pursuant to this agreement, or contract, and for the purpose of assenting to and ratifying the execution thereof by its president, the board of directors of the New Holland Farms, Inc., met on December 21, 1915, and adopted a resolution reciting the facts set forth in said contract, and reciting, further, that it was greatly to the interest of the said New Holland Farms, Inc., the successor of the said reclamation company, that the drainage work shall be fully completed as early as possible. D. N. Graves, president, was authorized and directed to execute, for the company, in writing, an agreement that the company will waive any objection to the payment of the notes delivered to the contractors by the board of drainage commissioners for extra work and to full authorize said board of commissioners to deliver to the contractors any or all of said notes secured by said deed of trust in payment for extra work as aforesaid, and to fully approve and ratify the action of the board of drainage commissioners in delivering and paying said contractors for extra work the notes held by them under said contract of July 16, 1913. The resolution further authorized its president to covenant and agree for the company that any and all of said notes, which may have been delivered to the contractors in payment for extra work, in said district, shall be as valid and binding upon the corporation, and remain as fully secured by the deed of trust as if the same had been paid for regular work under the contract, etc.

The contractors, on January 1, 1916, pursuant to the terms of said agreement of December 15, 1915, resumed work and continued, until February 18, 1916, accepting the said notes to the amount of $8,000, when they again refused to further accept said notes. They stopped said work and refused to resume or continue the same, and assigned as their reason therefor:

(1) That by reason of the terms and provisions of the contract of July 16, 1913, the board of drainage commissioners have no power to deliver any of said notes to the contractors in payment of extra work, and that such notes, if delivered for such purpose, are not the valid and binding obligations of the Southern Land Reclamation Company, nor are they secured by, nor do they come within the provisions of, the deed of trust executed by the said reclamation company to Dunham and Laird, trustees, and that, to the extent of such of said notes as are, or may be hereafter, delivered to the contractors for extra

work, said deed in trust is not the first lien upon the land conveyed therein.

(2) That if the Southern Land Reclamation Company had the power to waive the terms of the contract, the New Holland Farms, Inc., its successor, did not have such power, and that therefore the action of its president in executing the contract of December 15, 1915, and its board of directors of December 21, 1915, ratifying and approving same, and giving to its president power to assent to and validate the delivery of the notes for extra work, was invalid as to said notes. A copy of this resolution was sent to the contractors.

Defendants further allege that, on December 1, 1915, the New Holland Farms, Inc., executed a deed of trust to the Federal Trust Company of Boston, Mass., for the purpose of securing the payment of a bond issue, made by said New Holland Farms, Inc., of $500,000, conveying the same land, included in the deed of trust, to Dunham and Laird, trustees, together with a large body of other lands owned by the said New Holland Farms, Inc., and being the same land referred to in the supplemental contract made by the Southern Land Reclamation Company and the contractors of July 16, 1913; that said deed of trust was registered in the office of the register of deeds of Hyde county, December 9, 1915. The Federal Trust Company was, by an order in this cause, made a party defendant and, upon process duly served upon it, filed its answer. The full amount of the bonds, $500,000, secured by the deed of trust to the Federal Trust Company, was issued, and $28,500 were marketed on May 25, 1916.

The controversy between the parties is, therefore, whether such of the notes, executed by the Southern Land Reclamation Company, secured by the deed of trust to Dunham and Laird, trustees, and deposited with the board of drainage commissioners, pursuant to the terms and provisions of the contract of July 16, 1913, and the modification thereof, as have been delivered, or may hereafter be delivered to the contractors, pursuant to the contracts made subsequently thereto, for extra work, are as against the New Holland Farms, Inc., valid and binding obligations, and whether, as against the defendant Federal Trust Company, and the purchasers of the bonds, secured by the deed of trust to said company, such notes are secured by the deed of trust to Dunham and Laird, trustees, and constitute the first lien on the land conveyed in said deed of trust.

If these questions are answered affirmatively, other questions regarding the rights and remedies to which the parties may be entitled, upon the facts appearing in the record, will be presented. If they are answered in the negative, the complainants are not entitled to any relief in this suit.

Defendants' answer suggests a number of questions in regard to the power of the board of drainage commissioners to enter into the several contracts; the execution of the Dunham and Laird trust deed, etc. I do not perceive any difficulty in either respect. There are also suggestions of a want of bona fides on the part of complainants. The record and evidence discloses good faith on the part of all per-

sons concerned, and a desire to carry out the obligations assumed by them.

[1] While not strictly in the order in which it is presented in the pleadings, it is convenient to inquire what, if any, effect upon the powers of the corporation was wrought by the change in the name of the Southern Land Reclamation Company, to the New Holland Farms, Inc. The New Holland Farms, Inc., is referred to in the pleadings as the successor of the reclamation company. This is not accurate. The corporation, pursuant to the provisions of Rev. N. C. 1905, c. 21, § 1175, simply amended its charter by changing its corporate name and increasing its capital stock. It remained, and continued to be, the original corporation, with all of the powers and liabilities possessed and assumed prior to the amendment; it was, in no legal sense, a new corporation, and therefore was not "the successor" of the reclamation company, but is the same corporation with another name.

It will be observed that, in the deed of trust executed to Dunham and Laird, trustees, no reference is made to the contract of July 16, 1913, nor to the disposition of the notes; it simply describes the notes, and conveys the land upon the trust declared, to secure their payment with power of sale in the trustees, upon default, etc. The trustees are not brought into, or made parties to, the contract.

[2] Defendants suggest that the execution of the deed of trust by the reclamation company to Dunham and Laird, trustees, was not proven in accordance with the provisions of the North Carolina statute. An examination of the certificates of probate, made before a notary public of the state of Massachusetts, evidenced by his notarial seal, discloses that the president and secretary of the corporation, each in his official capacity, acknowledged his signature, and that the deed was "the free act and deed of said corporation." While not so full as the form prescribed by the statute (Pell's Rev. 1908, c. 18, § 1005) which, it is declared, "shall not exclude other forms of probate," the certificate shows the essential facts that each officer signed the deed, affixed the seal, and declared it to be the act and deed of the corporation. In Witherell v. Murphy, 154 N. C. 82, 69 S. E. 748, discussing the form of probate of the deed of a corporation, it is said that, when the essential facts appear, by reading the deed in connection with the certificate, that the officer was authorized to execute that instrument for the corporation, that he was known, or proved to the officer, to be the corporate official he represented himself to be, and that he acknowledged the instrument to be the act and deed of the corporation, it is sufficient, and that a substantial showing of the requisite facts is all that is required. To one familiar with the large number of cases which have come before the courts of this state in which deeds have been attacked, and valuable property rights endangered, by critical construction of statutes, prescribing the manner in which deeds shall be admitted to probate and certified for registration, followed by "curative acts," it is reassuring to find that the courts have adopted Prof. Wigmore's suggestion that they should cease to be pedantic and become practical. The probate was

passed upon and approved by the probate officer of Hyde county and duly registered. The reclamation company has repeatedly and solemnly acknowledged and recognized its validity. The deed to the Federal Trust Company expressly refers to it, giving book and page in which it is recorded. It is difficult to understand why any parties to the deed should now attack its validity, in respect to its execution and registration. I do not entertain any doubt of its validity in either respect.

[3] Eliminating, for the present, the deed of trust executed to the Federal Trust Company, and treating the question as between the board of drainage commissioners, the Southern Land Reclamation Company, and A. V. Wills & Sons, it is difficult to perceive any reason why they did not have ample power to make the change providing that, for the reasons stated, the notes should be delivered in payment for extra work, and the whole of the other work be paid for in cash. This agreement, although not then reduced to writing, was made before the rights of any other party had attached. The change was made for manifestly good reasons and, at the request of the contractors, to enable them to receive cash for work to pay for their equipment. It did not increase the indebtedness of the reclamation company, nor divert any of its funds to other than the primary purpose for which the company was organized and the contracts made, the drainage of the lands within the drainage district, a work of large public interest and for the benefit of the reclamation company and other landowners within the territory. Although, for manifest reasons, the notes were to be delivered in monthly installments, and to become absolute obligations from the date of their delivery, when so delivered, pursuant to the terms and provisions of the contract of July 16, 1913, they were within the provisions of, and secured by, the deed of trust executed for that purpose. Certainly there can be no doubt that a court of equity would compel their payment by the trustees from the proceeds of a sale of the property, although the parties to the contract had, for a valuable consideration, agreed upon the change in the manner of their application. In other words, as between the parties, and for the purpose of effectuating their intention, the contract of July 16, 1913, the trust deed of July 26, 1913, and the agreement of December 15, 1913, would be construed together and their provisions enforced.

[4] Defendants insist that, conceding this to be true, the execution of the deed of trust to the Federal Trust Company, registered December 9, 1915, creates a lien or incumbrance on the property, prior to the deed of trust to Dunham and Laird as to notes delivered subsequent to December 9, 1915.

Plaintiff, in the eighteenth paragraph of its bill, sets out the language found in the deed of trust to the Federal Trust Company, in the covenant against incumbrances, excepting from its terms "a mortgage given by the Southern Land Reclamation Company upon certain of the aforesaid premises to C. E. Dunham and C. T. Laird, trustees, which mortgage is dated July 26, 1913, and is duly recorded in said Hyde county, registry of deeds, Book No. 13 of Mortgages,

p. 247, and which mortgage is given to secure the sum of $119,965.42 and interest," and alleges that:

"They are advised and aver that the first deed of trust securing the said notes of the Southern Land Reclamation Company to the defendants is a prior lien upon the land therein described to that of the aforesaid second deed of trust, and that such priority of lien extends to all the notes therein described in the hands of the board of drainage commissioners, or elsewhere, without regard to when they, or any of them, may be delivered by said board to defendants in payment for said drainage work or whether for extra or original work."

The defendant Federal Trust Company, answering this paragraph of the bill, says that:

"It is advised by counsel that, as matter of law, the deed of trust held by it as security for said bonds is subordinate to the lien of said mortgage given by the Southern Land Reclamation Company to C. E. Dunham and C. T. Laird, trustees, for the benefit of the defendants A. V. Wills, M. V. Wills, and E. S. Wills, partners trading as A. V. Wills & Sons, to the extent of notes issued, or to be issued, thereunder to the amount of $119,965.42, without regard to the date of delivery thereof, and it therefore admits the allegations of paragraph 18 of said bill."

It is true that the averment, made by plaintiff, is a mixed question of fact and law; but it is an allegation that the deed to the trust company is subordinate to the deed of trust to Dunham and Laird, trustees, and expressly avers that the priority of lien extends to all of the notes, whenever delivered, and whether for extra or original work—thus expressly calling attention to the question raised by defendants, contractors, and this the Federal Trust Company admits to be true. It would seem that this admission, made in a suit in which the validity of the notes delivered subsequent to the execution of the deed of trust for extra work is the very question in controversy, would, in a court of equity, estop it from again bringing the question into litigation. Passing, however, the effect of the admission as to the defendant Federal Trust Company, the question is presented whether it was not correctly advised as to its relation to the Dunham and Laird trust deed, as matter of law. Defendants, contractors, base their contention to the contrary upon several grounds. They insist, first, that the deposit of the notes with the drainage commissioners is not a valid deposit in escrow, because the members of the board, or some of them, are the same persons as the corporators of the reclamation company. This contention is without merit. The board of drainage commissioners is a body corporate created by an act of the Legislature, with ample powers to make and execute the contract, and to receive the notes to be delivered according to its provisions. Upon failure to do so, it would be subject to a mandamus to compel the discharge of the duty. The Reclamation Company, under its name of adoption, the New Holland Farms, Inc., is a corporation distinct from its stockholders, with power to make and perform its contractual obligations. Neither of these corporations are making any point in regard to their power or duty to perform the duties assumed by them; on the contrary, they are insisting upon performing, in good faith, their contracts. The contractors have re-

ceived from them, in part performance of the contracts, $200,000 and notes to the amount of about $70,000. It is difficult to see why they now wish to invalidate the contracts into which all parties entered and in the completion of which they are all so largely interested.

Defendants, contractors, however, insist that, conceding the validity of the contract of July 16, 1913, and the deposit of the notes in escrow, they become valid and binding obligations only from the date of their delivery, and that the execution of the deed of trust to the Federal Trust Company and issue of the bonds secured therein constitutes a first lien or incumbrance on the land quoad all of the notes thereafter delivered. Defendants argue that the situation is analogous to that of a mortgage given to secure advancements to be made subsequent to its execution; that, as against a second mortgagee, the first mortgage is security only to the extent of advancements made prior to its registration, or other notice of its execution. They cite a large number of cases in which the courts have so held. In Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260, a mortgage was executed for the purpose of securing future advancements. The land covered by the mortgage was thereafter conveyed to a third party. Upon a bill to foreclose, Chief Justice Marshall held that the mortgage was valid, as security for all advances made before actual notice of the execution of the second deed. Todd v. Outlaw, 79 N. C. 235. The courts have, with practical uniformity, followed this decision, when the mortgagee was under no contractual obligation to make any, or a fixed amount of, advancements; it being optional with him to make, and with the mortgagor to call for, the advancements. These decisions are based upon sound reason and wise policy. When, however, the mortgagee, either by the express terms of the mortgage, or by cotemporaneous contract, comes under an obligation to make advancements to the amount fixed in the mortgage, a different question is presented. This distinction is clearly made in Hyman v. Hauff, 138 N. Y. 48, 33 N. E. 735, it is held that when the mortgagee is bound to make the advancements, the lien relates back to the date of the mortgage, and is superior to subsequent liens. Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169.

The modern view of the question is stated by the author of Jones on Mortgages (6th Ed. § 373):

"There is strong reason and authority for the rule that a mortgage to secure future advancements which, on its face, gives information enough as to the extent and purpose of the contract, so that any one interested may, by ordinary diligence, ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited, or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchaser or creditors, as to all advances made within the terms of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before, or after the mortgagee had notice of them. If the mortgage contains enough to show a contract between the parties that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and, if he fails to make it, he is not entitled to protection as a bona fide purchaser."

While it is not necessary, in this case, to invoke the opinion of the learned and accurate author to the extent to which it leads, it is of value as indicating the trend of the judicial mind on the subject. Of course, the validity of all mortgages, as security for future advances, depends upon the bona fides of the parties; they will not be sustained as against creditors and other incumbrancers unless this appears. The conditions with which we are dealing are, to some extent, analogous to those existing in Diggs v. Fidelity & Deposit Co., 112 Md. 50, 75 Atl. 517, 20 Ann. Cas. 1274. There, a deed of trust was executed to secure a bond issue; a portion of them were deposited with the trustee to be delivered to the purchaser of after-acquired property, and for betterments and improvements to the plant, upon the certificate of engineers. The court said that:

"Neither the form nor scheme of the gas company's mortgage is of doubtful validity or unusual in character. It has been settled by decisions in this state and elsewhere that an owner of property may, by a deed of trust in the nature of a mortgage, subject it to a lien for the payment of future debts or obligations."

It would be impracticable to conduct the numerous and large transactions, involving the construction of railroads, development of the natural resources of the country, etc., unless the courts recognized and protected rights acquired by the means adopted by the parties in this instance, which, as said by the court, are "not unusual."

It is doubtful whether the deed of trust to Dunham and Laird and collateral contract pursuant to which the notes were deposited with the board of drainage commissioners can be properly called a mortgage to secure future advances. The contractors, for a valuable consideration, came under a binding and enforceable contract, with the board of commissioners, to do the work, the character and extent of which was definitely fixed, for the sum of $266,955.28, and the board of commissioners came under a binding obligation to accept the work and pay for it, in the manner and upon the terms set out in the contract. The deposit of the notes was made in furtherance of the scheme or plan agreed upon by the parties. The postponement of the delivery of the notes and the duty to deliver them as the work progressed were definitely fixed and capable of enforcement, or recovery of damages for failure or refusal to perform the obligation of the contract by either of the parties. The registration of the deed of trust, reciting the amount and denomination of the notes, payable to the contractors, gave full notice to subsequent incumbrancers of the character and amount of the debt. The terms and conditions upon which the notes were to be delivered did not change or affect the amount or character of the incumbrance. In addition to the registration of the deed of trust to Dunham and Laird, the deed of trust to the Federal Trust Company expressly refers to and is made subject to the first deed. It is settled by abundant authority that a grantee is estopped to deny the validity of a mortgage which his deed recites that the conveyance to him is subject. Johnson v. Thompson, 129 Mass. 398.

In Am. Waterworks Co. v. Farmers' Loan & Trust Company, 73 Fed. 956, 20 C. C. A. 133, Judge Thayer says:

"The New Jersey company (the purchaser of the property), we think, is estopped from asserting the invalidity of the mortgages executed by its predecessor, the Illinois company, by virtue of the well-established rule that a purchaser of property who accepts a conveyance thereof which described incumbrances existing thereon, and expressly declares that the conveyance is made subject thereto, will not be allowed to question the validity of such incumbrances."

This principle is well settled and illustrated by numerous adjudged cases. In this case the Federal Trust Company, by its answer, recognizes and admits the validity of the notes and priority of the lien created by the deed of trust to Dunham and Laird, trustees, without regard to when the notes, or any of them, may be delivered by the board of drainage commissioners to the contractors in payment for the drainage work and whether for extra or original work. It would seem that, in any view of the case, the deed of trust to Dunham and Laird, trustees, is valid and constitutes a valid first lien on the property conveyed as security for the notes without regard to the time of their delivery. Such delivery is simply the discharge of the obligation assumed by the terms of the contract, executed cotemporaneously with the deed of trust. The purpose which the law contemplates for requiring registration, notice of the character and amount of the incumbrance on the land, to creditors and subsequent incumbrancers, is fully accomplished.

Defendants, contractors, insist that, if this be conceded, the change in the terms of the original contract, by which the notes are appropriated to the payment for extra work, invalidates the priority of the lien as against the Federal Trust Company. Here again the trust company solemnly admits, with knowledge of the change, that the deed of trust executed to it is subordinate to the lien, securing the notes, without regard to the time of delivery, or the character of the work to the payment of which they are applied. Conceding that a change in the original contract, which increased the amount of the debt, or appropriated the notes to an object foreign to that originally contemplated, or which was otherwise prejudicial to the rights or interest of the trust company, or the bondholders, would postpone the lien to that of the Federal Trust Company, it is difficult to see how either of these results follow from the application of the notes to the payment of extra construction work on the property covered by both deeds of trust. It is manifest, and must have been well known to, and understood by, all parties interested, that the value of the property was dependent upon its successful drainage. It was contemplated, and set forth in the contract, that, as is usual in work of that character, it would be necessary that extra or work in addition to the original plans and specifications would be necessary. The change in the contract, made in accordance with the request, and to meet the conditions presented by the contractors, was in furtherance of the scheme or plan of drainage and for the promotion of the interest of all parties. It did not increase the amount of the notes, change their character, or expedite the time of their maturity. It is difficult to see how the change prejudiced the interest of the Federal Trust Company. Questions of this character should be dealt with by the court in the light in

which they are understood and dealt with by the parties who are practical business men. Strained and narrow construction should not be put upon contracts entered into for the purpose of promoting and accomplishing valuable and important results. Courts should endeavor, unless bound by rigid statutes, to preserve rights, and not destroy them. This is especially the duty of courts of equity, in which decrees may be so molded as to conserve and protect the rights of all parties before them. From this viewpoint, recognizing the right of the contractors to insist upon the validity and first lien for the security of the notes to be taken in part payment for the work done by them, they should not be permitted to be released from their agreement to accept the notes for extra work upon technical and unsubstantial objections. The delay on the part of the New Holland Farms, Inc., in having its officers to execute the paper, waiving all questions in respect to the validity of the notes and in executing the deed of trust to the Federal Trust Company, was calculated to create in the minds of the contractors an apprehension that the security held for the notes might be postponed. The course pursued by the Federal Trust Company shows that all parties are acting in good faith and are recognizing the validity of the notes and priority of the lien by which they are secured.

[5] There is, however, another phase of the case, in which I concur with the views advanced by the defendants, contractors, and which will place the security for, and payment of, the notes beyond any question. It will be observed that the reclamation company, New Holland Farms, Inc., by adoption of this name, is the owner of some 99,000 acres of land, including the 13,511 acres covered by the Dunham and Laird deed of trust. The reclamation company entered into a contract, cotemporaneous with the execution of the original contract and deed of trust to Dunham and Laird, trustees, and the notes to the contractors, whereby it obligated itself that, if before the completion of the work and the payment of the notes it sold any of this land, not included in the deed of trust to Dunham and Laird, trustees, for cash, or on credit, it would deposit one-half of the cash received from such sale, and one-half the "purchase notes" taken for such land sold on credit, with some bank to be agreed upon by the parties, to be applied to the discharge of such of the notes as were outstanding. The deed of trust to the Federal Trust Company covers not only the 13,511 acres, included in the Dunham and Laird trust deed, but the entire 99,000 acres. Defendants contractors insist that the execution of the deed of trust to the Federal Trust Company, and sale of the bonds secured thereby, come within the meaning and spirit of the collateral contract and constitute a sale of the land, entitling them to demand that one-half the proceeds of the bonds when sold be deposited with some bank to be agreed upon and applied to the payment of the notes, as provided by the contract.

Complainant, in reply to this contention, insists that the execution of the deed of trust is not a sale within the meaning of the contract. It is manifest that in executing the collateral contract, cotemporaneous with the original, it was the purpose and intention of the parties to strengthen the security of the notes, and to render their payment abso-

lutely certain in the event that any portion of the lands owned by the reclamation company were sold. This purpose would be defeated if the reclamation company, now the New Holland Farms, Inc., should be permitted to place the entire property beyond its control, by subjecting it to a lien for $500,000, and thereby deprive the contractors of any of the benefits or security which accrued to them under the collateral contract. To hold that the meaning of the word "sale," as used in the contract, is restricted to an absolute sale, would be to keep the promise to the ear and break it to the hope; it would be too narrow. A "mortgage" is usually defined to be a sale, with a clause of defeasance, or a condition annexed, upon the performance of which the title revests in the owner. While it may be conceded that the word "sale" does not, in many instances, include a mortgage, such meaning will be given to it when necessary to effectuate the manifest purpose and intention of the contracting parties. There is no evidence in this record as to the value of the entire holdings of the New Holland Farms, Inc., but it is evident that their value is, to a large extent, dependent upon their drainage and bringing them under cultivation. The issuance of bonds to the amount of $500,000, with notes for $119,965.42 outstanding, may result in the absolute sale of the lands for their payment. It is a familiar maxim in equity, based upon principles of fair dealing, that he who asks equity must do equity. It will be observed that the collateral contract provides that the amount of cash or "purchase notes" deposited from the sale of the lands shall not exceed the amount of the notes outstanding; hence, under the terms of the contract, the amount which will be deposited from the sale of the bonds would not, under any conditions, exceed $125,000, or one-fourth the amount of the bonds. The decree will provide for the performance by the complainant of the obligations of the collateral contract.

[6] The question which has given most anxious concern relates to the character and extent of the relief to which complainants are entitled. They allege: That, in accordance with the obligation assumed under the original and amended contract, they have paid to the contractors the full amount in cash and notes due them for work performed as per estimates of the engineers, made in accordance with the provisions of the contract, and that they are unable to make further cash payments thereon. That the contractors knew, at the time of making the contract, and at the time of making the request for the change therein, and the agreement made in pursuance thereof, that complainants had no cash with which to pay for the work other than the amount paid them and were relying upon the acceptance of the notes. That it would be difficult, if at all practicable, for complainants to procure other contractors to take up and complete the construction of the boundary and levees and ditches, because in addition to the absence of cash, or the means of raising the same, and because of the fact that it requires the preparation of special equipment, which few contractors possess, and with which defendants, contractors, have provided themselves, and the large costs of which was calculated and included in the price fixed for the entire contract. That one of the main pur-

poses for which the boundary levees and ditches are constructed is to keep out the water which overflows into said district from the Alligator river, a large tributary of Albermarle Sound, in time of high winds. That, unless the said boundary levees and ditches are completed as early as possible, there is danger that such overflow will occur and seriously injure the very large amount of work already done, whereby complainants and the large number of other landowners in said district will be irreparably damaged. That the large damage sustained by complainants by the failure of defendants to perform their conduct will damage complainants in a large amount, which damage would be irreparable and difficult to measure and ascertain. That there are 587 landowners, within said drainage district, each of whom would be substantially damaged by the failure of defendants, contractors, to complete the work in accordance with the contract, and suits by each of them for the recovery of such damage would cause a multiplicity of actions involving large costs, and the damage sustained by each would be uncertain and difficult to ascertain. That, at the time defendants entered into the contract, they executed a bond in the sum of $66,741 for the faithful performance of said work, but said bond was limited to two years and has expired by limitation, so that complainants now have no bond from which they could recover damages for the failure to perform the contract by defendants. That defendants are nonresidents and have no property or assets in this state other than the dredges, tools, and equipment employed in this work. The time fixed for completion of the contract, 30 months from its date, has expired. That complainants are ready, willing, and able to make payment for the work by defendants upon monthly estimates of the engineers, by the delivery of said notes in accordance with the terms of the contract at 90 cents on the dollar, until the work so paid for shall amount to $107,965.28 and to pay for any work in excess of that amount in cash.

They pray that the court will adjudge all of said notes to be a first lien on the land conveyed in the deed of trust to Dunham and Laird, trustees, without regard to the time they are delivered, or whether for original construction, or extra work; that defendants, contractors, be required to resume and complete said drainage work, and to accept said notes in accordance with the terms and provisions of the contract, as modified, etc.; that a mandatory injunction issue commanding defendants contractors to resume and continue the performance of said work until completed, etc.

Defendants, in their answer, allege that they have always been willing to resume the work and complete the same and accept the notes in payment thereof, if they were assured that the deed of trust given to Dunham and Laird, trustees, to secure their payment, constituted a valid first lien upon the land conveyed therein. Defendants make a number of allegations in regard to the conduct of the board of drainage commissioners, many of which are not relevant to the matter in controversy. On the hearing, upon complaint and answer, the foregoing facts were not seriously contested.

Defendants insist that, conceding the notes to be valid and the deed

of trust, given to secure their payment, the first lien on the land conveyed therein, complainants are not entitled to the relief prayed, or to any other relief in this suit.

We are thus confronted with a question which has given courts of equity anxious concern and in regard to which the decisions are not uniform. While complainants ask the court to issue a mandatory injunction commanding defendants contractors to proceed with and complete the work which they contracted to perform, it is manifest that the court is called upon to decree specific performance of an executory contract, involving labor, personal skill and judgment, extending over an uncertain period of time. Courts of equity proceed with caution in decreeing specific performance of contracts of the character with which we are dealing in this case. Prof. Pomeroy says:

"In general the specific performance of these contracts will not be decreed because the court cannot, by its ordinary means and instrumentalities, enforce its decree."

He says that the English courts hold that, "when the agreement to erect a building is defined and certain," the general rule will not be enforced. Eq. § 1403 notes.

In a well-considered note to Leonard v. Board of Directors (79 Ark. 42, 94 S. W. 922) 9 Ann. Cas. 159, after stating the general rule, followed by citation of numerous cases, it is said:

"While the general rule is well recognized that the performance of a contract to build or to construct any work will not ordinarily be decreed specifically in equity, many exceptions to the rule have been made by the courts."

In Jones v. Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485, an agreement to put in a house a heating and lighting apparatus, it appearing that there was no difficulty in arriving at the manner in which the work was to be done was enforced, it was said:

"There is no universal rule that courts of equity never will enforce a contract which requires some building to be done."

In Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 600, 16 Sup. Ct. 1173, 1187 (41 L. Ed. 265), Chief Justice Fuller says:

"The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."

Referring to the contract involved in that case and the objections urged to the courts decreeing specific performance, the Chief Justice says:

"It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interests of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the

provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract. It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.'" Pom. Eq. Jur. § 111; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

Mutuality of obligation is one of the essential elements required by the courts when specific performance is asked. Here, this element is manifest. Complainant not only admits its obligation to pay, but avers and shows its ability and willingness to do so in accordance with the terms of the contract, which are fixed and certain in respect to price, time, and conditions. The terms of the contract, in respect to the kind, character, extent, and quality of the work to be done, are all fixed. The payments are to be made monthly upon estimates made by the engineers, as provided by the contract and selected by the parties. There is no complaint or suggestion that, in the work heretofore done and paid for, constituting the larger part of the entire work contracted for, the engineers have not discharged their duty promptly and satisfactorily to all parties. The requirement that the terms of the contract shall, in all respects, be fixed and certain, is fully met in this case. It clearly appears that no substantial difference of construction or opinion has arisen between the parties in either respect. The means of payment—the notes—fixed by the contract have been executed and their security provided; the depository is ready, able, and willing to deliver them in accordance with the terms of the contract. It is a well-settled rule that the court will not decree specific performance if damages for its breach afford a complete and adequate remedy—this is basic. In regard to this requirement, it is said:

"The jurisdiction does not depend upon the nature of the contract, nor of the subject-matter, but it will be exercised whenever the legal remedy is inadequate. * * * The ground of jurisdiction includes two classes: * * * (2) When, from some peculiar feature of the contract, either in its subject-matter or in its terms, or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty." Pom. Eq. 1402, 1403.

It is quite evident that, without regard to the residence of defendants, contractors, in the state of Illinois, or the kind or value of property owned by them in this state, the character and purpose of the work to be performed and the property to be affected by its completion renders it impracticable, if not impossible, to measure with any degree of certainty the damage sustained by the refusal of defendants, contractors, to perform the contract on their part. It appears from the contract, and the plans and specifications attached as a part thereof, and the geographical and topographical location and

character of the section of the state in which "Mattamuskeet district" is situate, and the legislation providing for the drainage and reclamation of the lands therein, that large sums of money have been expended and obligations to a large amount have been assumed by the parties directly interested in their drainage for the purpose of bringing them under cultivation. It is manifest that if, in the present condition of the property and the work, the contractors should fail and refuse to continue and complete the portion of the work contracted to be done by them, much of the work already done would become useless, and that not only complainants but the large number of other landowners, who have assumed obligations and acquired rights, would be seriously, if not irreparably, damaged. Long drawn out, expensive suits at law, in which numerous and uncertain elements of damages would be involved, with uncertain results, both in respect to amount and ultimate recovery, strongly appeal to the court for equitable relief, if it can be granted without injury to either party.

"Specific performance is a conscious attempt on the part of the court to do complete justice to both the parties, with respect to all the judicial relations growing out of contract between them." Pom. Eq. § 1401, note.

Hence, the learned author says that damages are inadequate "when the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained, according to legal rules, would not be a just and reasonable substitute for, or representative of, that subject-matter in the hands of the party who is entitled to its benefit." Section 1401.

It would seem quite clear that, in view of the character of the work to be done, the effect of the failure to do it, and the status of the parties, the case comes within the class in which courts of equity grant relief because of the inadequacy of the remedy afforded in a court of law.

Defendants, contractors, insist that the court should not decree specific performance because it would be impracticable for it to enforce the decree. This contention calls for careful consideration and examination of the decisions of chancellors dealing with contracts of this character. Defendants rely upon the case of Leonard v. Board of Directors, supra. In that case, the Supreme Court of Arkansas refused to entertain a bill for specific performance of a contract, in many respects similar to the one in controversy, placing its refusal on the ground that an action for damages for its breach afforded an adequate remedy, and that there was no way in which its decree could be enforced. The learned judge says:

"The jurisdiction of equity will not be exercised to decree a specific performance, however inadequate may be the remedy for damages, where the contract is of such a nature that obedience to the decree could not be compelled by the ordinary processes of the court."

It appears that the board of directors of the levee district were empowered to contract for the work of constructing a portion of the levee and pay therefor by borrowing money upon bonds which they were authorized to issue. After a portion of the work was done, they entered into a contract, with Leonard, to complete it and accept in

payment certificates of indebtedness. The contractor entered upon the performance of the work and thereafter abandoned it, refusing to continue on the ground that the board of directors was without legal authority to issue the certificates. The suit was brought to compel the contractor to complete the work and accept the certificates. The contractor demurred to the jurisdiction of the court to enforce specific performance. The court refused to pass upon the validity of the certificates and dismissed the bill. It does not appear from the statement of the facts set out in the bill whether the plans and specifications, by which the character and quality of the work were made certain, were a part of the contract. The court clearly put its decision upon the ground that it would be unable to enforce its decree for specific performance.

In Strang v. Richmond & P. C. R. R. Co., 101 Fed. 511, 41 C. C. A. 474 (C. C. A. 4th Cir.), the court refused to enforce specific performance of a contract to build a railroad. Judge Simonton says that the bill "alleges a contract between the complainant and the defendant company to construct, furnish, and build a complete roadbed between some point * * * in North Carolina, together with necessary depots, etc.; the work to be paid for in certain bonds," etc. He notes the uncertain termini of the road and the location of the depots, station houses, character of the bridges, the time within which the work is to be completed, the total absence of any particulars of the character of the work, the inspection of its progress, time and mode of payment, saying, "All these are left in a condition of vagueness and uncertainty."

In Solomon v. Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391, specific sperformance was refused because of the absence of mutuality of obligation, long period of time over which the contract extended, and other considerations set out in the opinion.

In Marble Co. v. Ripley, 10 Wall. 339, 358 (19 L. Ed. 955), it is said:

"Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree that the court can make will end the controversy."

Several of these elements are not found in the contract with which we are dealing. In Texas Co. v. Cent. Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21 (C. C. A. 8th Cir.), several of the questions presented here are discussed by Judge Trieber in a well-considered opinion. It appears that complainants, operating an oil pipe line in Texas into Oklahoma, entered into a contract with defendant, which, through subsidiary companies, owned a number of leases, on which it operated wells, by which complainant agreed to extend its pipe line into the fields in which such wells were located in Oklahoma and make a connection with defendant's wells, and defendant agreed to run all of its oil into such line for a term of ten years, to be paid for by

complainant as provided for by the contract. Complainant built the extension of its pipe line at a large cost, and for a time received the oil from defendant's wells, after which defendant refused to make further deliveries. It further appeared that defendant was insolvent; that, without the oil contracted for, complainant's pipe line extension was comparatively valueless; and that it could not otherwise procure sufficient oil to keep its refineries in full operation. Judge Trieber, stating defendant's contention that because the contract in regard to deliveries of the oil extended over a period of ten years, etc., cites and discusses the cases relied upon to sustain defendant's position, several of which are cited in this opinion. Referring to Marble Co. v. Ripley, supra, he says:

"The contract sought to be enforced in this case runs for ten years only, and involves no 'skill, personal labor, and cultivated judgment.' What it does require is easily ascertainable, and, if carried out in good faith, ought not to give rise to any disputes requiring the interposition of the court. During the time it was complied with by appellee no disputes arose, and there is no reason for anticipating any now, if good faith will control the action of both parties."

The work which defendants agreed to perform was, by the terms of the contract, to be completed in 30 months. More than half has been completed and paid for. It would seem that, by comparison, it would not require to exceed 12 months to complete the balance of the work. The observations of Judge Trieber in regard to other phases of the case are very pertinent to the instant case. The case of Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, is easily distinguishable from this case. After noting the facts in this and other cases relied upon by defendants, he refers to the fact that equitable remedies have steadily been expanded by the court to meet the increased complexities of modern business relations. In a number of cases specific performance of contracts between railroad companies and municipal corporations, or landowners, in which the companies, in consideration of rights of way, or other privileges granted, agreed to put in side lines, establish and maintain depots, etc., have been decreed. In Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., supra, a contract in regard to the use of tracks was enforced. The Chief Justice, quoting the language used in Joy's Case, said:

"Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions." 36 Cyc. 587.

In Taylor v. Florida East Coast R. Co., 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472, a contract by the defendant to establish and maintain a spur track and depot at a point fixed upon on plaintiff's lands, in consideration

of the grant of the land upon which its road was built, was specifically enforced. The conclusion reached is amply sustained in a well-considered opinion by Mr. Justice Whitfield. In Parrott v. A. & N. C. R. R. Co., 165 N. C. 295, 81 S. E. 348, Ann. Cas. 1915D, 265, it was held that a contract, based upon a valuable consideration, to maintain a flag station and side track, when not conflicting with its duty to the public, would be specifically enforced. The question was fully considered and authorities cited in the opinions filed. Johnson v. Ohio R. R. Co., 61 W. Va. 141, 56 S. E. 200.

While there is not a perfect analogy between any of those and other cases cited, and the instant case, they all indicate and illustrate the tendency of courts to extend the equitable jurisdiction to meet the conditions growing out of business and industrial life. To what extent the interest of the public demands the completion of the contract because of the large and valuable lands included within the Mattamuskeet drainage district, thus bringing the case within the principle announced in those cases, in which contracts made by railroad companies, is interesting. The board of drainage commissioners is a quasi public corporation with the right of eminent domain. It is in accordance with a long-established and well-settled public policy of this state to grant large quasi public powers to such legislative agencies, for securing the drainage of the fertile low lands of the eastern section of the state. The drainage districts established are quasi public corporations assimilated to public school districts, etc.

The defendants, contractors, in their answer, by way of further defense and as the basis for affirmative equitable relief, set up the supplemental contract, in which the reclamation company obligates that, in the event of a sale of its lands, it will deposit one-half the proceeds to be applied to the payment of the notes, and asks that specific performance of that contract be enforced for the payment of the notes now held by defendants. They allege that, on May 3, 1916, they served a written notice on complainant board of commissioners, setting forth that, if the notes were made valid and a first lien on the land, they were ready, able, and willing to carry out and execute their contracts; that they have, and are maintaining, in said drainage district, extensive equipment and plants for the doing of said work, at great expense to themselves; that they have been prevented from completing the work by reason of the default of the complainant; and that, unless complainant complies with its contract, they will move said equipment and hold the members of the board liable for damages, etc. They set out, at much length, the several contracts entered into, and allege that, for the reasons herein set forth, the notes to be delivered since the execution of the deed of trust to the Federal Trust Company will be invalid and will not be secured by a first lien upon the property. In the tenth paragraph of the "further defense," the defendants say:

"That the defendants A. V. Wills & Sons, parties being most vitally affected by this controversy, being desirous of having the said questions of law and equity involved therein speedily determined, and their respective rights and duties in the premises declared by the court, do submit the foregoing statement of facts for the opinion, decision, and judgment of the court thereon," reserving, of course, the right of appeal.

Defendants demand the dismissal of complainant's bill; that all notes, which have been delivered to them, for work performed under the contracts, be adjudged a first lien upon all of the lands of the Southern Land Reclamation Company and the New Holland Farms, Inc., lying in Mattamuskeet drainage district; that the deed of trust to Dunham and Laird, trustees, be adjudged, in all respects, valid and enforceable, both as to its form and probate; that all of the notes of the Southern Land Reclamation Company undelivered to the contractors and now in the possession of the board of commissioners of the drainage district be adjudged invalid, inoperative, and unenforceable; that they are not secured by a first lien either for extra or original work under the contract; that the complainants be ordered to raise the cash necessary to pay defendants to resume and complete all of said drainage work. Prior to the adoption of the new equity rules (rule 30 [198 Fed. xxvi, 115 C. C. A. xxvi]), this counterclaim would have been set up by a cross-bill. If complainant's bill was without equity, it would have been dismissed, and, if the cross-bill was sustained, a decree rendered upon it for defendants. Under the present rule, assimilating the practice to that of the Code of Civil Procedure, the same result is reached, not by dismissing the bill, but by making the decree upon the counterclaim.

It is manifest, from the counterclaim, that defendants are willing and desirous of completing the contract, if they can be assured of the validity of the notes and the priority of their lien. At the time the suit was instituted, defendants were not advised in respect to the attitude of the Federal Trust Company in regard to the subordination of its lien to that of defendants. It is manifest that the court cannot grant the relief prayed for by defendants and leave the complainants without remedy for the failure by defendants to complete the work. Both parties wish the completion of the work. Neither of them assert that there is any obstruction to this end other than the question of the validity and security of the notes. To dismiss the bill and thereby the counterclaim of defendants, notwithstanding the opinion entertained by the court, in regard to the validity and security of the notes, and the right of defendants to specific performance of the supplemental contract, would be trifling with the valuable rights of all parties. Both parties concede that they understand and do not differ in regard to the character of the work, the manner of its performance, or the condition upon which the price is to be paid. The court will not assume that they will not, in good faith, perform the requirements of a decree when their rights are declared and secured. Notwithstanding their insistence that the contracts are ultra vires, that the deed of trust to Dunham and Laird, trustees, is not valid, because of the alleged defective probate and registration, and that the notes are invalid, they ask the court, in their counterclaim, to adjudge that the contracts are valid, and that the deed is duly executed and probated, and that the notes delivered to them are valid and secured by a first lien upon the property conveyed to the trustee, in all of which, the court, for the reasons set forth, concurs with defendants. The court also concurs with them in respect to their right to have specific performance of the

supplemental contract. The court, for the reasons set forth, is of the opinion that defendants should enter upon and diligently continue to completion the work which they obligated to perform. Of course, defendants are entitled to a reasonable time within which to complete the work. This will be provided for in the decree. There are several other matters, referred to in the answer, collateral to the principal matter in controversy, which may, if necessary, be taken care of in the decree.

A decree will be drawn and submitted in accordance with the views expressed in this opinion. The costs will be divided equally between complainants and defendants A. V. Wills & Sons.

ANN ARBOR R. CO. v. FELLOWS et al.

(District Court, E. D. Michigan, S. D. June 5, 1915. On the Merits, March 1, 1916.)

1. CARRIERS ⟸18(6)—STATUTE FIXING RATES—SUIT TO ENJOIN ENFORCEMENT—PRELIMINARY INJUNCTION.

A federal court will not, at the suit of a railroad company, grant a preliminary injunction suspending the enforcement of a presumptively constitutional state statute fixing passenger rates, where the statute has been in force for a number of years and acquiesced in by complainant, and it appears that the suit can be tried on its merits within a very short time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⟸18(6).]

2. CONSTITUTIONAL LAW ⟸70(3)—JUDICIAL POWER—STATUTE FIXING RATES.

The question whether a state statute fixing railroad rates is confiscatory as applied to a particular road is mainly one of fact, and in a doubtful case a court which has no power to fix or revise rates may not substitute its judgment for that of the Legislature, in which such power is vested.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. ⟸70(3).]

3. CARRIERS ⟸12(5)—STATUTORY REGULATION—CONFISCATORY RATES.

Precisely what is the just compensation which a railroad company is entitled to earn by the use of its property is seldom easy to determine, but rates which with economical and efficient management will yield a return equal to that received in other business ventures of similar character and attended with like risks can never be held confiscatory, and unless under exceptional circumstances a court is not justified in declaring invalid an enactment which permits net earnings equal to or not materially less than the interest allowed by statute in the absence of specific contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15–20; Dec. Dig. ⟸12(5).]

4. CARRIERS ⟸12(5)—STATUTORY REGULATION—CONFISCATORY RATES.

The value of the property and the revenues and expenses of a railroad company being ascertained and apportioned, and upon a finding of its net earnings on the property devoted to intrastate business, which from its passenger business approximates 6 per cent. per annum and from its freight business a higher per cent., the Michigan two-cent passenger fare law (Pub. Acts 1907, No. 54) and certain freight rates established by the Michigan Railroad Commission, under the operation of which such earnings were made, *held* not confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15–20; Dec. Dig. ⟸12(5).]

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5. CARRIERS ⟸12(5)—SUIT TO ENJOIN ENFORCEMENT OF STATUTORY RATES—VALUATION OF PROPERTY.

The method of ascertaining the present value of railroad property by taking the cost of reproduction less accumulative depreciation, while perhaps the best general method yet devised, cannot be applied in all cases and under all conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15–20; Dec. Dig. ⟸12(5).]

6. WORDS AND PHRASES—"LOCOMOTIVE TON MILE RATIO."

The phrase "locomotive ton mile ratio" means that the ton weight of a locomotive, without its tender, multiplied by the number of miles traveled, correctly represents the measure of the use of the roadbed and track structure in the service in which the locomotive is employed, and also accurately measures the proportion of the expenses of the upkeep or maintenance of the roadbed and tracks to be assigned to such service.

In Equity. Suit by the Ann Arbor Railroad Company against Cassius L. Glasgow, Grant Fellows, and others, to enjoin enforcement of the Michigan two-cent passenger fare law and orders of the Michigan Railroad Commission fixing freight rates. On motion for temporary injunction and on final hearing. Injunction denied, and bill dismissed.

Alexander L. Smith, of Toledo, Ohio, for plaintiff.

Grant Fellows, Atty. Gen., and David H. Crowley and L. W. Carr, Asst. Attys. Gen., of Lansing, Mich., for defendants.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge, under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1243]).

PER CURIAM. [1] This preliminary injunction is not sought to preserve an existing situation against a threatened change, but rather to modify a condition in which the railroad company has acquiesced for several years. No bond which can be required from plaintiff can be practically and completely efficacious to protect the traveling public, if an injunction should now issue and if plaintiff should finally fail. There is a presumption that the challenged act of the Michigan Legislature is constitutional. These considerations, peculiar to such a case as this, forbid the issue of the temporary writ, unless it is made reasonably clear that, upon the record as it stands, plaintiff is entitled to the relief sought.

If the final hearing were to be delayed one or two years, as counsel seem to think probable, we would have to pass definitely at this time upon the application as presented. In that event, we should require further development of the facts in some directions—as, for example, regarding the depreciation charge to operating expenses recommended by the Interstate Commerce Commission, but not actually made by plaintiff, and the propriety of employing the factor of speed in reaching the composite use unit adopted by plaintiff, as well as the accuracy of the speeds assumed; but, if a speedy final hearing can be had, these additional matters can be there developed to better advantage than by ex parte affidavits. We are satisfied that such final hearing can be had, and within a very brief time; and we therefore

shall not now either grant or deny the injunction, but shall hold the application open for the present, pending hearing of the principal case upon the merits, and without prejudice to further consideration or action, either on our own motion or on motion of either party, should circumstances later make it necessary.

The reason why it has been assumed that there must be a long delay seems to be that detailed expert adversary appraisals are thought to be necessary. We are not so impressed. The difference between the valuation claimed by plaintiff and the valuation fixed by the state for taxing purposes is not great enough to require such appraisals. From the evidence now available to both parties, it would seem that the court could fix an approximate valuation, and we cannot think that the issue whether or not there is confiscation could be controlled by the comparatively small difference which might develop between the result of detailed appraisal and the result obtainable by more general methods.

We all concur in the belief of the District Judge, who will be the trial judge, that, under the facts shown by the record and those of which the court takes judicial notice, neither party can be prejudiced by requiring prompt final hearing on the merits.

The clerk will notify both counsel of the filing of this memorandum.

On the Merits.

Bill filed by the Ann Arbor Railroad Company to set aside the two-cent fare law of the state of Michigan and the orders of the Michigan Railroad Commission fixing the freight rates.

Joseph B. Cotton, of New York City, Chauncey Colton, of Duluth, Minn., and Alexander L. Smith, of Toledo, Ohio, for plaintiff.

Grant Fellows, Atty. Gen., and David H. Crowley and L. W. Carr, Asst. Attys. Gen., of Lansing, Mich., for defendants.

SESSIONS, District Judge. [2] The sole question to be determined in this case is whether, as applied to plaintiff's railroad, the Michigan two-cent passenger fare law and certain freight rates established by the Michigan Railroad Commission pursuant to statutory authority are confiscatory. This question is mainly one of fact. The properties of railroad companies and other public utility corporations are devoted to public use, and therefore are necessarily subject to public regulation within constitutional limitations. Such corporations are clothed with unusual powers, and owe a corresponding duty to exercise those powers fairly and reasonably and for the public good. Every charter or franchise granted to such a corporation contains a direct obligation to yield obedience to the lawful mandates of the sovereignty to which it owes its existence. Railroad property is so far public in its nature as to be subject at all times to reasonable legislative regulation, and, on the other hand, is so far private in character that its owners cannot be deprived of any part thereof without just compensation. On one side is the imperative duty to render required service at a reasonable rate, and upon the other side is the absolute right to

be permitted to earn a fair return upon the capital necessarily invested in the enterprise.

The power to control and regulate public utility corporations is vested in the legislative and not in the judicial branch of the government. Courts can neither make rates nor review and revise those made by competent authority. Unless the law-making body so far transgresses fundamental law as to commit a legislative theft, the courts may not interfere. With reference to permitted returns upon invested capital, the margin between full and complete adequacy and confiscation may be quite wide. Hence, in a doubtful case, a court may not substitute its judgment for that of the Legislature. Hence, also, the settled rule that, to warrant a decree declaring a rate statute invalid, the proof that such statute necessarily results in confiscation must be clear, satisfactory, and convincing.

[3] Precisely what is the just compensation without which the Federal Constitution forbids the taking of property for public use is seldom easy to determine. It cannot be measured by any yardstick of mathematical certainty. It must vary with the varying conditions and circumstances of each particular problem. Rates which, with efficient and economical management, yield a return equal to that received in other business ventures of similar character and attended with like risks, can never be adjudged to be confiscatory. But the rate-making power is not confined within such narrow limits. While the rate of interest established by law upon money investments, in the absence of express contract, may not measure correctly, or even with approximate accuracy, the return which, as a matter of business policy, railroad carriers should be permitted to earn upon the fair value of their properties employed in the public service, it may well be doubted that any court would be justified in setting aside and holding for naught a legislative enactment which permitted net earnings equal to or not materially less than the interest allowed by statute upon obligations containing no specific agreement in that regard. At any rate, the circumstances would have to be very unusual and the showing very convincing to persuade a court so to do.

[4] Here, as in most rate cases, the problem to be solved is one of values, revenues, and expenses, and the division or apportionment of such values, revenues, and expenses between the passenger and freight operations, and then between the interstate and the intrastate services of the railroad, and, finally, the finding of the net return upon its intrastate passenger and freight business. The revenues of the road have been ascertained and apportioned accurately, and in that regard there is no controversy. The real contest is concerning values and expenses, and their apportionment or division. One of the chief difficulties encountered is to assign correctly the expenses of the maintenance and operation of the property used in common in the various kinds of traffic. The passenger fare statute here attacked was enacted in 1907, and the orders of the Railroad Commission with reference to freight rates, of which complaint is made, were issued and became effective in 1914 and 1915. The period of time covered by the proofs is the two fiscal years ending June 30, 1915. The record in this case

consists for the most part of the annual reports of the Ann Arbor Company to its stockholders for the years 1907 to 1915, inclusive, numerous schedules or tables prepared at the suggestion and request of the court, and setting forth in minute detail the claims, theories, and computations of the respective parties, and a large volume of oral testimony in the main explanatory of the schedules or tables so presented.

Values.

The first important factor in determining the net return which the railroad company is receiving is the value of the property upon which such return is to be computed. According to plaintiff's schedules, prepared by its chief engineer, the total present value (as of June 30, 1914) of its property in Michigan, exclusive of working assets, car ferries, and dock property, is $8,631,967, made up of these items: Fixed property of every kind, $5,100,872; rolling stock, $2,351,271; and "overheads," $1,179,824. According to the same schedules the total present value (as of June 30, 1915) of its Michigan property, exclusive of working assets, car ferries, and dock property, is $8,307,455, made up of these items: Fixed property, $4,925,657; rolling stock, $2,207,725; and "overheads," $1,174,073. According to other schedules prepared for plaintiff by an expert accountant, its working capital for the year 1914 was $306,688, and the value of that part of the station building in Toledo, Ohio, used for general administrative purposes, was $25,735, making a total value of all properties in Michigan, except car ferries and docks, for that year, $8,964,390. In 1915, according to the same expert, the corresponding figures were as follows: Working capital, $327,487; station building at Toledo, $25,092; and total value, $8,660,034.

[5] *Cost of Reproduction New Less Depreciation.*—Plaintiff has proceeded upon the theory that the cost of reproduction new less accumulated depreciation correctly represents the present value of its fixed property and rolling stock. This method of ascertaining values has received the approval of courts in a number of cases, and perhaps is the best general method yet devised. But it cannot be applied in all cases and under all conditions. In its use some important elements of value are ignored. Among other elements so partly or wholly ignored are density of population and traffic and obsolescence of equipment. It requires the same number of ties and tons of steel rails and it costs approximately the same amount of money to construct the roadbed and track of a railroad through a sparsely settled country furnishing little traffic as through a densely populated territory between large terminals yielding a large amount of business. The cost of reproducing the roadbed and track of an old railroad which has served its purpose and exhausted its traffic is nearly, if not quite, as large as the expense of rebuilding the same parts of a railroad the traffic and earnings of which are constantly increasing. The northwest one-third of plaintiff's line of road traverses a sparsely settled and little improved country, from which the timber, at one time its chief asset, has been removed, and which at present contributes to the railroad only a comparatively small amount of intrastate revenues. It is conceded that,

were it not for its translake interstate business, this division or part of the railroad could not live. Such conditions may call for higher rates, but they do not make for greater values. In the schedules here under consideration the roadbed and track in this division are given the same value, mile for mile, as the roadbed and track between Owosso and Toledo. It must be apparent that such a computation is erroneous both in theory and in fact.

Some of plaintiff's freight cars are old and out of date, and, because of their small size and capacity, cannot be used economically under present competitive conditions. Some of its passenger coaches are not modern. Its gasoline motor cars were constructed in 1911. Since then there have been many improvements in the design and structure of gasoline motors. The advance in railroad motor construction has been, to a lesser extent and degree, similar to that made in the automobile industry. An agent of the builder of these motor cars testified that cars of their type are not now being built. The theory of reproduction new less a flat percentage of annual depreciation does not sufficiently recognize the lessening of values of equipment by reason of its becoming obsolete. However, for the purpose of this case and for want of a better one, this method of determining values may be adopted, although it is not approved in its entirety.

Right of Way and Station Grounds.—The valuation placed upon the right of way and station grounds, exclusive of all improvements thereon, is $397,104, to which sum has been added more than 14 per cent. thereof for so-called "overheads." This basic valuation has been reached by applying to the right of way without improvements the estimated values of adjacent lands, including all buildings and other improvements. It is sufficient to say that this method of computing values and the practice of adding "overheads" to actual values are contrary to the letter and the spirit of the rule laid down by the Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Numerous witnesses for the defendants have testified that the aggregate present value of the lands constituting plaintiff's right of way and station grounds is the sum of $246,615. Apparently these witnesses speak from actual knowledge, and their valuations are adopted as being more nearly correct.

Fences.—Plaintiff's valuation of the fences along its right of way at $125,440 is conceded to be erroneous, and defendants' figures ($54,908) will be substituted therefor.

Depreciation.—Contrary to the schedules presented, and notwithstanding the testimony of the engineers, counsel for plaintiff, at the final arguments, earnestly insisted that no depreciation should be charged against the roadbed and track structure of the railroad. This contention cannot be sustained. The evidence shows that the life of ties is from 8 to 10 years, and of steel rails and track fastenings about 20 years. Ballast must be renewed, and bridges, trestles, and culverts decay and must be replaced. In short, each unit of the track structure is perishable, and, notwithstanding repairs, at some time reaches the end of its life. The engineers testify that a track structure as old as

that of the Ann Arbor Company in normal condition is 100 per cent. efficient, but only about 80 per cent. in value as measured by cost of reproduction new. The depreciation here allowed is in substantial conformity to such testimony.

Appreciation.—Counsel for plaintiff also insist, and the evidence indicates, that the roadbed of a railroad appreciates in value, at least during the first few years after construction. The grade becomes more compact and solid with age and use, and the slopes of the grade and the ditches become covered with vegetation, which tends to prevent erosion. However, no allowance is made for such appreciation in any of plaintiff's schedules or computations, and there is no evidence from which the value of such appreciation can be determined with any degree of certainty. It is true that one witness testified that a larger number of section men are required to keep in condition a new railroad than an old one. This may be owing to the fact that a new railroad is seldom in a normally perfect condition of completion at the beginning of its operation. At any rate, this testimony does not furnish a sound basis for the allowance of additional values.

Overheads.—Proceeding upon the theory that values are to be ascertained and fixed upon the basis of the actual rebuilding of the railroad, plaintiff has added overheads amounting to upwards of $1,000,000 and composed of the following items: 4½ per cent. of the reproduction cost of its fixed properties, without depreciation for "survey and engineering expenses and superintendence during construction"; 4 per cent. of the reproduction cost (without depreciation) of its fixed properties and rolling stock, including engineering expenses, for "interest during construction (3 per cent.) and legal expenses and organization (1 per cent.)"; and, for "contingencies 7½ per cent., depreciated to 5½ per cent." on the total reproduction cost of its fixed and personal property. Possibly it may be permissible in a rate case like this one, where values are computed by the method of reproduction less depreciation, to add something for engineering expenses and interest during construction and for legal and organization expenses although the last item is more than doubtful. But the evidence in the present case furnishes no warrant or justification for an allowance for contingencies. Contingencies are said to be of two kinds: Those of inventory and those of construction. In these days of highly systematized work there is little chance of omissions in inventory, and, while in theory this railroad is to be reconstructed, in fact it is already built and in operation, and there can be no unknown contingencies of construction. Moreover, costs of construction which make up plaintiff's valuations have been fixed at top prices charged by contractors and builders, who assume all the risks of contingent losses. Ties are valued from 10 to 25 per cent. higher than the actual cost to this company. The cost of grading and track-laying is figured upon the basis of contract prices from 10 to 30 per cent. greater than those prevailing even in these days of high prices. In fact, each item or class of property has been valued sufficiently high to include a safe and sufficient margin for contingencies, and no sound reason exists for the allowance of an additional lump sum to cover improbable losses.

Working Capital.—The right of a railroad company to include in its property, upon which it is entitled to earn a fair return, a reasonable amount of working assets, such as cash, fuel, materials, and supplies, which it actually owns and has on hand, cannot be seriously questioned. In this instance plaintiff's expert accountant has fallen into a serious and obvious error in computing the amount of such working capital. In his computation he has found the average "excess of working liabilities over working assets," "*exclusive* of cash on hand and fuel, material, and supplies on hand," and has called such excess working capital. He has thus attempted to capitalize the debts of the company. From the annual reports of the company it appears that the cash on hand which is shown in the same table or schedule is not available for use in the operation of the railroad. Most of it consists of special deposits to meet interest and other obligations. It fairly appears, however, that the railroad company had material, fuel, and other supplies on hand in 1914 of the value of $149,570, and in 1915 of the value of $144,265.

Car Ferries and Docks.—Plaintiff claims that its car ferries and dock property are worth $761,346. Before the final hearing of this case plaintiff had discontinued its translake passenger business, and a very small percentage of its translake freight business is intrastate. Besides, the statute and orders here attacked do not affect or control in any way the rates or charges for lake transportation. Competitive conditions are solely responsible for the unremunerative charges for this service. It follows that, at least as to passenger rates, the value of the car ferries and dock property should not be considered.

Summary.—Condensed schedules or tables of the values of plaintiff's property in Michigan, revised and corrected as above stated, are as follows:

1914.

Right of way and station grounds	$ 246,615 00
Other fixed property	4,633,236 00
Engineering expenses during construction (4½ per cent. of $5,446,638)	245,098 00
Rolling stock and equipment	2,351,271 00
Interest during construction and legal expenses and organization (4 per cent. of $9,083,115)	363,325 00
Working capital	149,570 00
Toledo Terminal used for general administrative purposes	25,735 00
Total	$8,014,850 00

1915.

Right of way and station grounds	$ 246,615 00
Other fixed property	4,457,144 00
Engineering expenses during construction (4½ per cent. of $5,488,766)	246,995 00
Rolling stock and equipment	2,207,725 00
Interest during construction and legal expenses and organization (4 per cent. of $9,002,631)	360,105 00
Working capital	144,265 00
Toledo Terminal used for general administrative purposes	25,092 00
Total	$7,687,941 00

Assignment and Allocation of Property Values and Operating Expenses.

In the apportionment and division of values and operating expenses of the railroad property in common service in all classes of traffic, the experts upon both sides of this controversy have advanced and employed many methods and theories, the greater number of which are new, untried, and hence unapproved. To discuss these theories separately and in detail would prolong this opinion beyond reasonable or proper limits. However, in the view taken, it is unnecessary to enter upon such a discussion. The right result and conclusion will be reached if, except as otherwise stated, the theories and methods of plaintiff's expert witnesses are accepted and employed. But it must be distinctly understood that the acceptance for convenience is not an approval of such theories.

[6] One of the theories so advanced merits at least a brief consideration, because it lies at the foundation of plaintiff's case, and therefore has been pressed with much insistence. In its division, as between passenger and freight services, of the right of way, roadbed, and track structure, and of the operating expenses incident to such property, plaintiff has employed what is known as the "locomotive ton mile ratio" or factor. This ratio is an essential part of the so-called "Oklahoma theory," which, after the decision of the Supreme Court in the Minnesota Rate Cases, some of the railroads in the Southwest evolved in an attempt to meet the requirements of that decision. An allocation made in accordance with the locomotive ton mile ratio proceeds upon the assumed basis that the ton weight of a locomotive, without its tender, multiplied by the number of miles traveled, correctly represents the measure of the use of the roadbed and track structure in the service in which the locomotive is employed, and also accurately measures the proportion of the expenses of the upkeep or maintenance of the roadbed and track to be assigned to such service. So far as known this ratio has not been adopted by any court. In Boyle v. St. Louis & S. F. R. R. Co. (D. C.) 222 Fed. 539, it was urged, but not employed, because, in that case, it was found unnecessary to make a division of either property or expenses. It is difficult to perceive how either the use or the expense of maintenance of such property can be measured even approximately with a factor which wholly ignores the train and the load behind the engine. It is true that the locomotive is a unit of property common to both services. But there the analogy ceases. It seems obvious that a locomotive pulling a short passenger train weighing about 200 tons does not make the same use of the track and roadbed as it does when hauling a long train of loaded freight cars weighing upwards of 1,000 tons, whether such use is reckoned by traffic carried, results accomplished, time consumed, or wear and tear. No sound reason has been given for claiming that an engine with a short and light load of empty cars makes the same use of the track as does the same engine with a long train of heavily loaded freight cars. It is said that the speed of the train is an important element, and that this theory recognizes the higher speed of the passenger train. Except in the very limited sense of charging more property and more expense to the passenger

service, the locomotive ton mile theory does not recognize or take into account the element of speed, any more than do those theories which are based partly or wholly upon the weight and mileage of the entire train. The relation between increased speed and increased use is not shown. Limited or fast trains are not run upon the Ann Arbor Railroad, and the evidence shows that the difference in wear upon the track caused by differences in the speeds of slow trains is neither measurable nor appreciable. This theory may be a step in advance of old theories which have been rejected and discarded, but it does not meet all the requirements of a case like the present one.

Through the courtesy of the parties to this suit, the computations, the results of which are herein stated, have been made and carefully verified by two expert accountants, Mr. Piper, of the Ann Arbor Company, and Mr. Parker, of the Attorney General's office, working together, and hence are accurate and correct.

Allocation to Passenger and Freight Services.—Applying plaintiff's theories and ratios to the corrected values above stated, the resultant assignment of property values to the passenger and freight services, respectively, is as follows:

1914.	Passenger.	Freight.	Total.
Fixed property	$1,663,526 00	$3,216,325 00	$4,879,851 00
Engineering expenses	83,554 00	161,544 00	245,098 00
Rolling stock	366,198 00	1,985,073 00	2,351,271 00
Interest, legal expenses, etc.	102,701 00	260,624 00	363,325 00
Working capital	42,279 00	107,291 00	149,570 00
Toledo Terminal	7,275 00	18,460 00	25,735 00
Totals	$2,265,533 00	$5,749,317 00	$8,014,850 00

Supplemental to the above, plaintiff has added to the passenger values and subtracted from the freight values the sum of $79,360 as a so-called fuel adjustment. In other words, it is a charge and credit for freight property employed in the carriage of fuel and other materials used in the passenger service. Such adjustment is incomplete and incorrect, in that no allowance is made for the carriage upon passenger trains of materials used and persons employed in the freight service. This item would amount to a considerable sum and might offset the charge so made. However, again adopting, but not approving, the charge and credit so made, and adding such amount to the passenger side and subtracting it from the freight side of the account, the final figures are: Passenger, $2,344,893; and freight, $5,669,957.

1915:	Passenger.	Freight.	Total.
Fixed property	$1,634,519 00	$3,069,240 00	$4,703,759 00
Engineering expenses	85,828 00	161,167 00	246,995 00
Rolling stock	402,251 00	1,805,474 00	2,207,725 00
Interest, legal expenses, etc.	106,778 00	253,327 00	360,105 00
Working capital	42,777 00	101,488 00	144,265 00
Toledo Terminal	7,440 00	17,652 00	25,092 00
Totals	$2,279,593 00	$5,408,348 00	$7,687,941 00
Fuel adjustment	+67,776 00	—67,776 00	
Final totals	$2,347,369 00	$5,340,572 00	$7,687,941 00

Expenses.—Depreciation, over and above mere repairs, is constantly taking place in the perishable units of railroad property, and, for rate-making purposes, the owner is entitled to include in operating expenses such a sum of money as will make good this depreciation. In this instance, plaintiff's chief engineer has estimated the annual depreciation of its fixed property at upwards of $235,000, and at first this amount was added to operating expenses. Later it was conceded that this sum should be reduced to $108,175.42. The reduction in the value of fences further reduces the amount so claimed to about $96,000. The evidence shows conclusively that plaintiff is not entitled to make any charge for annual depreciation of fixed property, for the reason that such depreciation has already been taken care of by moneys expended and charged upon the company's books to operating expenses. The annual reports of the company show that the moneys expended in grading, in the purchase of new ties and rails, in the construction of new and better bridges, trestles, and culverts, and of new fences, in building and rebuilding station houses and other structures, and upon the fixed property in general, have been sufficient to restore current depreciation and to keep the property up to an unusually high standard of efficiency and condition. The general manager of another railroad, who made a trip of inspection over this railroad for the purpose of qualifying himself to testify in this case, expressed great surprise at the almost perfect conditions which he found. The vice president and general manager of the Ann Arbor Company testifies that there is little or no deferred maintenance in the roadway, track, and structures, and that the property is as well maintained as traffic conditions warrant. There is no showing as to what part, if any, of the little deferred maintenance which exists has arisen and occurred during the years 1914 and 1915 here under consideration. With this charge for annual depreciation of fixed property omitted, the account of expenses, revenues, and returns in Michigan stands as follows:

1914.	Passenger.	Freight.	Total.
Revenues (actual)	$646,324 26	$1,401,753 84	$2,048,078 10
Operating expenses	510,245 73	1,239,285 97	1,749,531 70
Net income	$136,078 53	$162,467 87	$298,546 40
Value of property	2,344,893 00	5,669,957 00	8,014,850 00
Rate of return	5.803%	2.865%	3.724%
1915.	**Passenger.**	**Freight.**	**Total.**
Revenues (actual)	$632,891 57	$1,644,696 37	$2,277,587 94
Operating expenses	507,101 05	1,415,292 00	1,922,393 05
Net income	$125,790 52	$229,404 37	$355,194 89
Value of property	2,347,369 00	5,340,572 00	7,687,941 00
Rate of return	5.359%	4.296%	4.620%

Auxiliary Service.—Plaintiff carries mail, express, and milk on its passenger cars and trains. During 10 or 12 weeks in the summer season it gives sleeping car and parlor car service and an increased dining car service. These outside services require additional expenditures and yield separate revenues. Hence a further division of passenger revenues, expenses, and property values becomes necessary. The

schedules showing this division, prepared by plaintiff's expert accountant, are so incomplete, inaccurate, and misleading as to be of little value. In making these schedules the accountant has erroneously assumed that the maximum month of August is representative of the entire year. He has charged all of the expenses of operating the sleeping, dining, parlor, and official cars to the passenger service, and as a crowning inconsistency has credited all of the revenues derived from those cars and from station and train privileges and telegraph receipts to special or outside service. His ratio of division is claimed to be the relative ton mile use of car floor space devoted to the passenger and baggage and outside services respectively. Sleepers, diners, and chair cars are much heavier than the ordinary day coach. The expert accountant says that, to obtain a correct ratio, the weight of the heavier cars should be divided, and the part thereof equal to the weight of a day coach should be charged to the passenger and baggage service, and the excess weight to special service. In making his computations he has so charged the passenger service, but he has failed to charge the excess weight to the special service. He has also charged to the passenger service all of the box baggage cars, although three-quarters of the space in those cars was devoted to the carriage of milk and express. By such erroneous computations he obtains for the year 1914 a divisional ratio of 84.19 per cent. for passenger and baggage, and 15.81 per cent. for milk, express, and mail service, and for the year 1915 a like ratio of 84.55 per cent. and 15.45 per cent. The least that can be done is to correct such palpable and inexcusable mathematical errors. If the excess weight of diners, sleepers, and chair cars is placed in the column of auxiliary service, where it belongs upon the accountant's own theory, and no other change is made in this schedule, the resultant ratio for the year 1914 will be 79.55 per cent. for passenger and baggage, and 20.45 per cent. for auxiliary service; and for 1915, 80.97 per cent. for passenger and baggage and 19.03 per cent. for auxiliary service. By a similar computation, which at least has the merit of being mathematically correct, and which covers the operations of the entire year 1914, one of the expert accountants for the defendants obtains a ratio of 77.73 per cent. for passenger and baggage, and 22.27 per cent. for auxiliary service. Another of the numerous errors in these schedules consists of crediting first to the passenger and then to the auxiliary service all of the telegraph receipts, amounting in 1914 to $1,962.24 and in 1915 to $2,172.34. Of these amounts there should be credited to the freight service in 1914 the sum of $860.25, and in 1915 the sum of $922.14. After adjusting the item of telegraph receipts and applying the corrected ratios to plaintiff's schedules and to the corrected values and expenses hereinabove stated, the accounts stand as follows:

1914.	Passenger and Baggage.	Auxiliary.
Revenues	$528,203 69	$113,944 86
Expenses	405,900 48	109,431 65
Net income	$122,303 21	$4,513 21
Value of property	1,865,362 00	479,531 00
Rate of return	6.557%	0.941%

1915.	Passenger and Baggage.	Auxiliary.
Revenues	$523,508 78	$103,281 65
Expenses	402,201 68	99,071 07
Net income	$121,307 10	$4,210 58
Value of property	1,900,665 00	446,704 00
Rate of return	6.382%	0.943%

If the ratios of plaintiff's accountant (84.19%:15.81% in 1914, and 84.55%:15.45% in 1915) be applied to the corrected values and expenses and the receipts be properly credited, the resultant rates of return will be 5.380 per cent. from passenger and baggage and 5.559 per cent. from auxiliary service in 1914, and 5.563 per cent. from passenger and baggage and 4.164 per cent. from auxiliary service in 1915. Plaintiff insists that, under its contract with the government, it is carrying mail at a considerable loss, and that its milk traffic is not profitable, unless considered and treated as a mere transportation by-product. Hence, it may be fairly assumed that the lesser rate of return from outside services is more nearly correct than the greater one.

Intrastate and Interstate.—The contention that the cost per mile of the transportation of an intrastate passenger is greater than that of an interstate passenger is probably sound. But here, in one respect at least, the claim is pressed too far. Plaintiff's accountant first divides the expenses of passenger and baggage service into terminal and line haul. The further and final division of terminal property values and expenses is based upon the assumption that each intrastate passenger uses the Michigan station privileges twice, once in entraining and once in detraining, and that each interstate passenger, other than interline, uses such privileges but once. Hence, to obtain the number of terminal use units assigned to intrastate and interstate services respectively, the whole number of intrastate passengers is multiplied by two, the number of interline interstate passengers is also multiplied by two, and the number of interstate passengers, other than interline, is multiplied by one. The record shows that, upon the Ann Arbor Railroad, the average journey of the interstate passenger is more than 2½ times longer than that of the intrastate passenger. It thus appears that, by the method of computation here employed, the terminal property values and expenses per passenger mile apportioned to the intrastate service are approximately five times in amount those apportioned to the interstate service. The record also shows that, in each year, about 250,000 intrastate passengers pay cash fares upon the train, and hence make little or no use of the station privileges, and further that quite a number of so-called stations are mere platforms or sheds, without agents or other attendants. But, again applying plaintiff's theories, and recasting the figures to conform to the necessary changes in values and expenses, the final schedules are as follows:

	Passenger.		
1914.	Interstate.	Intrastate.	Total.
Revenues (actual)	$137,592 86	$390,610 83	$528,203 69
Expenses	101,876 38	304,024 10	405,900 48
Net income	$35,716 48	$86,586 73	$122,303 21
Value of property	502,374 00	1,362,988 00	1,865,362 00
Rate of return	7.110%	6.353%	6.557%

Passenger.

1915.	Interstate.	Intrastate.	Total.
Revenues (actual)	$127,709 51	$395,799 27	$523,508 78
Expenses	87,274 92	314,926 76	402,201 68
Net income	$40,434 59	$80,872 51	$121,307 10
Value of property	440.653 00	1,460.012 00	1,900,665 00
Rate of return	9.176%	5.539%	6.382%

Freight.

1914.	Interstate.	Intrastate.	Total.
Revenues (actual)	$1,091,002 70	$310,751 14	$1,401,753 84
Expenses	985,544 39	253,741 58	1,239,285 97
Net income	$105,458 31	$57,009 56	$162,467 87
Value of property	$4,893,455 00	$776,502 00	$5,669,957 00
Boat property (erroneously stated)	517,994 00	110,259 00	628,253 00
Total values	$5,411,449 00	$886,761 00	$6,298,210 00
Rate of return	1.948%	6.428%	2.579%

1915.	Interstate.	Intrastate.	Total.
Revenues (actual)	$1,287,567 00	$357,129 37	$1,644,696 37
Expenses	1,149,914 26	265,377 74	1,415,292 00
Net income	$137,652 74	$91,751 63	$229,404 37
Value of property, including boats, $741,018 00	5,305,084 24	776,505 76	6,081,590 00
Rate of return	2.595%	11.816%	3.772%

To even summarize in this opinion the many computations which have been made since the hearing of this case would only add to the unfortunate confusion and perplexities already existing. The results herein stated are those most favorable to plaintiff. The work sheets of all computations will be preserved, and will be available at any time to the parties or their counsel.

The evidence shows that much more than one-half of plaintiff's revenues are derived from the transportation of interstate freight, and that a large part of such freight is low grade and produces but little more income than expenses. It is apparent that the inadequacy of return, of which complaint is made, results from this traffic, rather than from the intrastate business of the railroad. Untried and imperfect theories, which conflict with actual conditions, are unsafe guides, and furnish no warrant for judicial nullification of legislative enactments. Plaintiff has failed in its attempt to prove that the intrastate rates fixed by the Michigan statute and by the orders of the state Railroad Commission are confiscatory.

A decree will be entered, dismissing the bill of complaint, with costs to the defendants to be taxed.

In re MEIKLEHAM.

(District Court, N. D. Georgia. September 21, 1916.)

No. 590.

1. BANKRUPTCY ⟸408(4)—DISCHARGE—SCHEDULE OF ASSETS.
The bankrupt who received a large monthly salary filed a petition about the middle of the month, but did not include in his schedules salary earned up to that time. His attorney had advised him that it was unnecessary to include such salary in the schedules, and that he would take it for fees. The bankrupt understood that it was to be a fee in the bankruptcy action, but the attorney intended to apply the sum on previous claims. On examination the bankrupt frankly disclosed his salary, and his testimony showed that he was under the impression that the schedules showed the amount of salary earned. Thereafter the bankrupt paid the amount of such salary to his trustee, less the amount specified in the schedules as an attorney's fee in the bankruptcy case. *Held*, that the bankrupt could not be denied the discharge on the ground of fraudulent concealment, though he was guilty of carelessness.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732, 733; Dec. Dig. ⟸408(4).]

2. BANKRUPTCY ⟸405—DISCHARGE—RIGHT TO OPPOSE.
One whose debt would not be barred by discharge has no right to oppose the same.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. ⟸405.]

3. BANKRUPTCY ⟸415(3)—DISCHARGE—OBJECTIONS.
Objection to discharge on the ground that a bankrupt made a false oath with reference to his homestead exemption cannot be passed upon until the question of the right to the exemption is decided.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–701, 704, 707; Dec. Dig. ⟸415(3).]

In Bankruptcy. In the matter of the bankruptcy of H. P. Meikleham. On exceptions to the report of the master overruling objections to the bankrupt's discharge. Report confirmed, and discharge granted.

Denny & Wright, Dean & Dean, and Lipscomb & Willingham, all of Rome, Ga., for objectors.

Barry Wright, of Rome, Ga., for bankrupt.

NEWMAN, District Judge. There has been delay in disposing of this case because I wished to go carefully over the evidence again, although I suppose the most of it had been read to me at the time of the argument of the case. My absence from home has also prevented my taking the matter up for final disposition.

Several matters brought up as grounds for objections to this bankrupt's discharge were disposed of practically during the argument; that is, the court did not think the matters were sufficient to stand in the way of the discharge. The only real matter for consideration now is whether or not the failure of the bankrupt to schedule about $390 of salary due him at the time the petition in bankruptcy was filed was omitted in such a way and under such circumstances as to bar his discharge.

The objections to the discharge of the bankrupt originally filed were as follows:

"First. That such application should not be granted because of the following facts, which the undersigned charges to be true, viz.: Because said bankrupt committed an offense, punishable by imprisonment, as provided under the bankrupt laws of the United States of 1898 and amendments thereto, for that said bankrupt made oath to his schedules of assets and liabilities, from which schedules of assets and liabilities said bankrupt knowingly and willfully omitted to schedule among his assets the sum of between $300 and $400 of salary due him at the time of filing his said petition, which salary had already been earned by said bankrupt at the time his said petition was filed. Objector charges that since said bankrupt filed his petition for bankruptcy in said cause, he has collected and appropriated to his own use said salary, and has omitted and failed to pay over the same to his trustee. Objector shows that said bankrupt has been receiving for a number of years, and was receiving at the time that he filed his petition in bankruptcy, and is still receiving a salary of $10,000 per year, in his capacity as agent for the Massachusetts Mills, or for Mr. Edward Lovering, the treasurer of the Massachusetts Mills; that said salary is payable on the first of each month, in 12 equal monthly installments. That his petition was filed on the ——— day of ———, 1914, and he had therefore earned on account of salary for said month the sum of $———, which should have been scheduled among his assets, and which sum should have been, by him, paid over to the trustee in this said cause. That said bankrupt knowingly and willfully failed to schedule the same among his assets, and knowingly and willfully has withheld the payment of same to said trustee.

"Second. That such application should not be granted, because of the following facts, constituting an additional ground, which the undersigned charges to be true, viz.: For that said bankrupt knowingly and fraudulently concealed his assets in that he failed to set forth in his schedule of assets between $300 and $400 of salary earned by him at the time of the filing of his petition in bankruptcy in said cause, which salary said bankrupt had already earned as agent for the Massachusetts Mills, or as the representative of Edward Lovering, the treasurer of said Massachusetts Mills.

"Third. That such application should not be granted because of the following fact: That at the time objector's debt was contracted, the proceeds of the money borrowed from her by said bankrupt was used for the purchase of 100 shares of the capital stock in a corporation known as Pell City Manufacturing Company, of the par value of $100 each; that said stock was turned over to objector as collateral security for said loan; that afterwards, during the spring of 1904, said bankrupt procured objector to lend him said stock for the specific purpose of hypothecating same to borrow the sum of $3,000, and said bankrupt represented that he desired to borrow said money in order to make another investment; that objector loaned said bankrupt said stock for that specific purpose; that afterwards, said bankrupt paid off said loan of $3,000 and got possession of said Pell City Manufacturing Company stock; that after said bankrupt repossessed himself of said stock, he failed and omitted to return the same to objector, but instead thereof he sold said stock to the State Mutual Life Insurance Company, of Rome, Ga., for the sum of $10,000, and applied the proceeds thereof in discharge of certain other indebtedness owing by him, and which grew out of certain cotton speculating deals entered into by said bankrupt; that the disposition of said stock and the proceeds therefrom, as made by said bankrupt, was without the knowledge and consent of objector; that objector loaned said stock to said bankrupt for the specific purpose of borrowing said $3,000, as above stated, and for no other purpose, and that after said $3,000 loan was paid off said bankrupt had no right or authority to dispose of said stock, or to appropriate the proceeds from same to any purpose whatever, but that he held said stock in trust for objector; that said appropriation of said stock so made by said bankrupt was a fraud upon objector and a misappropriation of assets and property belonging to her, while said bankrupt occupied a fiduciary relation, and acted in a fiduciary capacity as regards said stock."

"Wherefore objection is made to the granting of such application for a discharge, and a hearing and a judgment of the court is asked thereon."

An amendment to these objections was filed, but disallowed by the referee, and I think properly disallowed. The second and last amendment to these objections to discharge was filed by the objector on April 4, 1916, and is as follows:

"And now comes Mrs. Virginia A. Grafton, objector to the discharge of said bankrupt, and by leave of court amends the objections heretofore filed by her, and shows to the court the following additional facts:

"First. That at the time said bankrupt's petition was filed, he claimed therein a homestead exemption of certain property, alleging under oath that he is entitled to said homestead exemption by reason of the fact that 'he has the care of a dependent aged female relative.' Objector shows to the court that said statement was false, and that bankrupt knew at the time same was made that it was false, and that said bankrupt, in making said statement and swearing thereto, made a false oath in connection with his proceedings in bankruptcy.

"Second. Objector shows to the court that the facts stated above have all come to her knowledge since the filing of the original objections by her in said cause, and since the above-stated cause was re-referred to the special master by the court.

"Wherefore, objector prays that these her objections be inquired into, and that the bankrupt be refused a discharge."

These objections to discharge were referred to W. S. Rowell, Esq., as special master, for hearing and report as to the right of the bankrupt to a discharge. His report is as follows:

"Mrs. Virginia A. Grafton, a creditor of the bankrupt, filed objections to the discharge of the bankrupt under section 14b (1) and (4), Bankruptcy Act [July 1, 1898, c. 541, 30 Stat. 550 (Comp. St. 1913, § 9598)], which read as follows: 'Has (1) committed an offense punishable by imprisonment as herein provided; or * * * (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors.'

"Grounds 1 and 2 of the objections referred to the failure of the bankrupt to put into his schedule of assets a certain amount of money claimed to be due him on the 14th day of November, 1914 (the date on which his petition in bankruptcy was filed), from the Massachusetts Mills in Georgia, of which he was agent in charge.

"The third ground of the objection referred to a loan of money made by Mrs. Virginia A. Grafton to the bankrupt, and which said money is alleged to have been wrongfully diverted from the original purpose of the loan. Counsel for the bankrupt moved to strike this third ground for the reason that it was not a proper subject for objections to discharge. At the time the objection was made the special master declined to strike this ground, but now finds against the third ground, and finds that the bankrupt's discharge should not be refused for the reasons alleged in said ground.

"The first and second grounds of the objection to the discharge refer, as stated, solely to the failure to put into the schedule the salary claimed to be due to the bankrupt at the date his petition was filed. The evidence shows that the bankrupt received a salary of $10,000 per year from the Massachusetts Mills, payable monthly at the end of each month, the monthly installments amounting to $833.33. The amount earned by the bankrupt up to and including the 14th day of November, 1914, for the 14 days from November 1st, amounted to about $378.88. This amount was not scheduled in the bankrupt's petition. The evidence shows that it was knowingly withheld from said petition; that his attorney informed him that it was not necessary to put it into the schedules; that he would take it as a fee to cover amounts already due him as attorney's fees, and to M. B. Eubank, an attorney of Rome, Ga.; that

his attorney informed him that the most that could happen would be that he might be required to pay it back if this constituted a preference. Acting under this legal advice of his attorney, the bankrupt seems to have taken no further notice of this matter. He testifies, however, that he supposed when he signed the schedule that this item was in it, and, if not, he was relieved from the duty of placing it there under the advice given him by his attorney.

"The sole question in this case is whether or not the failure to place this asset in his schedule, if it was an asset, was fraudulently done; that is, if it was a fraudulent concealment of assets from the trustee. After carefully reviewing the evidence in this case, and having closely investigated the law applicable thereto, the special master finds that the bankrupt accepted in good faith the advice given by his attorney; that said advice was given in good faith, and that, acting thereunder, he did not insist on putting this salary into his schedule of assets. I use the words 'did not insist,' as the bankrupt testified that after being advised by his attorney he left the matter entirely with him. I conclude from this that he gave the matter no further thought. He testified in one place that he 'supposed it was in the schedule.'

"I am unable to conclude under the evidence that the bankrupt had any intention of committing a criminal act punishable by imprisonment. I think all the surrounding circumstances point to the fact that he had no such intention. I recognize the fact that in some cases the bankrupt would not be relieved from negligence merely because he acted under the advice of counsel, but the decisions distinctly say that if this advice was given and accepted in good faith, the bankrupt has a right to be guided by it.

"It further appears, and the bankrupt's intentions in regard to this matter are shown by the fact that at the general examination held not very long after the petition was filed, he disclosed this salary to the attorney for objecting creditors willingly, admitting that it was due him; that he had received it, but claimed that he was advised by his counsel that it was not necessary to put it in. It further appears that $290 of this money was afterwards paid to the trustee, the bankrupt's attorney claiming the balance as a retainer for representing him in the bankruptcy proceeding.

"Taking into consideration all the facts and circumstances surrounding this transaction, and applying the law thereto as it appears to the special master, he has no hesitation in finding that there was no fraudulent intent on the part of the bankrupt in not putting this salary into his schedules, and he, therefore, finds against the first and second grounds of the objections to the discharge."

To this report of the special master exceptions were filed by Mrs. Grafton, the objector to the discharge. The exceptions are:

First. To the action of the special master in passing upon the third ground of the objections to discharge as follows:

"The third ground of objections referred to a loan of money made by Mrs. Virginia A. Grafton to the bankrupt, and which said money is alleged to have been wrongfully diverted from the original purpose of the loan. Counsel for the bankrupt moved to strike this third ground for the reason that it was not a proper subject for objection to the discharge. At the time the objections were made the special master declined to strike this ground, but now finds against said third ground, and finds that the bankrupt's discharge should not be refused for the reason alleged in said ground."

The exceptions then set out the evidence with reference to Mrs. Grafton's claim against the bankrupt, which is at some length and probably unnecessary to quote.

Second. To the finding of the special master as follows:

"After carefully reviewing the evidence in this case, and having closely investigated the law applicable thereto, the special master finds that the bankrupt accepted in good faith the advice given him by his attorney; that he did not insist on putting this salary into his schedule of assets. I use

the words 'did not insist,' as the bankrupt testified that, after being advised by his attorney, he left the matter entirely to him. I conclude from this fact that he gave the matter no further thought. He tesified in one place that he 'supposed it was in the schedule.' "

Then is set out the testimony which, it is claimed, shows that this finding is incorrect.

Third. To the finding of the special master as follows:

"I am unable to conclude under the evidence that the bankrupt had any intention of committing a criminal act punishable by imprisonment. I think all the surrounding circumstances point to the fact that he had no such intention. I recognize the fact that in some cases the bankrupt would not be relieved from negligence merely because he acted under the advice of counsel, but the decisions distinctly say that if this advice was given and accepted in good faith, the bankrupt has a right to be guided by it."

Fourth. The fourth exception is to the following finding of the special master:

"It further appears, and the bankrupt's intentions in regard to this matter are shown by the fact that at the general examination held not very long after the petition was filed, he disclosed this salary to the attorneys for objecting creditors willingly, admitting that it was due him; that he had received it, but claimed that he was advised by his counsel that it was not necessary to put it in. It further appears that $290 of this money was afterwards paid to the trustee; the bankrupt's attorney claiming the balance as a retainer for representing him in the bankruptcy proceeding."

This, it is claimed, is contrary to the evidence.

The other exceptions, as I understand them, are to the same effect, although referring to different language of the master, except the twelfth, which excepts to the refusal to allow an amendment setting up some matters relative to the sale of a certain automobile, on which the court has heretofore passed.

[1] The question argued before me and the main question in this case, so far as the right of the bankrupt to have a general discharge is concerned, is the failure of the bankrupt to schedule, when his petition in bankruptcy was filed, the money due him by the Massachusetts Mills for salary from the 1st to the 14th of November, 1914, on which latter date his petition in bankruptcy was filed. It appears by all of the evidence that while the papers in the bankruptcy proceeding were being prepared by the bankrupt's attorney, the bankrupt being present, mention was made, in conversation between them, of the fact that there was due him at that time, from the mills of which he was manager, his salary from the 1st of the month up to that date, which amounted to something near $400. The bankrupt spoke of it at the time as being between $350 and $400. It seems that the attorney then said to him that it was unnecessary to allow that to go into the "general smash-up," as he expressed it; that he had better let him have it for fees. The attorney, it appears from the evidence, was referring to fees due him and another attorney for services rendered prior to that time in other matters, but the bankrupt himself seems to have thought he referred to fees in the bankruptcy case. The attorney did not refer to fees in the bankruptcy case, apparently, because he put in the schedules filed by Meikleham

$100 for attorney's fees for himself for the bankruptcy case. It appears from the evidence that the bankrupt was of the opinion all the time, up to the time that he was examined about it, that the amount due him had been stated as an asset in the schedules in the bankruptcy proceeding. He told counsel on his first examination that they would find it there, but his attorney appears to have corrected him and stated that it was not there, and it does not appear in the schedules. The bankrupt subsequently gave to his attorney, who paid the same to the trustee in bankruptcy, $290 which, acting upon the idea that he was to pay the attorney $100, made the amount which was due him by the mills at the time of the filing of the petition.

There was no concealment of the fact that the amount was due the bankrupt at the time his bankruptcy papers were prepared, and I think the evidence shows clearly that he intended it to go in as an asset. It is true that he did not pay it, but he testified that he thought he owed it to his attorney under the statement made to him by the attorney at the time the papers were being prepared.

I do not think it could be fairly said that there was such concealment of this amount as would justify the denial of the discharge. The authorities on the subject are all to the effect that it must be clearly shown, in order to prevent a discharge, that the withholding of assets from the trustee and from the bankruptcy court was intentional, willful, and fraudulent, and I do not think any one could find that to be the case here. It is true that there was great carelessness, but I do not think there was such fraudulent concealment as to deprive the bankrupt of his right to a discharge.

The bankrupt's attorney has stated in open court that it was his fault, and that he gave the advice, assuming that the attorneys, as he said, would be willing for him and his associate in former cases to have this amount of fees.

[2] The bankrupt raised the question at one time by pleading that Mrs. Grafton, his mother-in-law, the objector here, did not have the right to object to his discharge because the bankrupt would not be released of his debt to her by the discharge. I understand this to have been subsequently withdrawn, but the same matter is raised by the objector as a ground why the bankrupt should not be discharged. Of course if her debt is of such character that the bankrupt would not be released from it by the discharge, she would not have a right to object to the discharge. The position of her counsel is, however, that while they hope her debt would not be discharged even if the discharge were allowed, they still think it right on her behalf to object to the same.

It is a very doubtful question in my mind, and one upon which I do not care to express any opinion at this time, especially as it is wholly unnecessary to do so, whether Mrs. Grafton's debt is one against which the discharge would operate or not. It seems clear from the evidence that the bankrupt sold certain stock of hers which he had in his hands, and used the proceeds to pay his own personal obligations. Although there had been some transactions between them before, as I understand the evidence, at the time he had the stock

he was simply holding it for Mrs. Grafton. It seems she proceeded to take judgment against him for the $10,000 and interest, a general, common-law judgment, and this, it is suggested, may stand in the way of her right to recover against him notwithstanding the discharge. As to whether this is true or not also I do not care to express any opinion. I simply say that I think, under the evidence, it may at least be said to be doubtful whether the objector here has any interest as to whether he is discharged or not. She is the sole objector to the discharge; none of the other creditors appearing in the matter. In this connection, a case recently decided by the Supreme Court of the United States (Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718) will be found exceedingly interesting on the matters involved.

Whatever may be true about this, however, I think that the only ground of objection that need be considered is the failure to schedule the amount due the bankrupt at the time he went into bankruptcy, and what he did about that did not constitute such a fraudulent concealment of assets as would bar a discharge.

[3] The objection that the bankrupt made a false oath with reference to his homestead exemption certainly cannot be passed upon until the question is settled of the bankrupt's right to the exemption, and even if it should be determined that he is not entitled to the exemption, that would not show that he swore willfully false in his application for the same. This ground was not argued, as I remember it, and I suppose is not seriously insisted upon.

All of the exceptions to the master's report must be overruled, the report confirmed, and the discharge granted.

COHEN v. NIXON & WRIGHT et al.

In re BUXTON.

(District Court, S. D. Georgia. September 30, 1916.)

1. BANKRUPTCY ⇐288(1)—JURISDICTION OF COURT—ADVERSE CLAIMS.

After property of a bankrupt, which was in his possession at the time of his bankruptcy, has come within the jurisdiction and custody of the bankruptcy court by virtue of the filing of the petition and the subsequent adjudication, a creditor holding a lien or security deed thereon cannot acquire title to or possession of the property, so as to become an adverse claimant and exclude the jurisdiction of the bankruptcy court to determine his rights by a summary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⇐288(1).]

2. BANKRUPTCY ⇐214—LIENS—ENFORCEMENT AFTER BANKRUPTCY.

A creditor, holding a security deed on real estate of a bankrupt, which under the law of Georgia leaves the debtor in possession, but gives the creditor the right to advertise and sell the property on default, cannot exercise such right after the property has passed into possession of the trustee, without the permission of the bankruptcy court, and such a sale

while the property is in custodia legis is void, and does not divest the title of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324–327, 343, 344; Dec. Dig. ⊜=214.]

In Bankruptcy. In the matter of W. R. Buxton, bankrupt. On petition of G. M. Cohen, trustee, against Nixon & Wright and another. On review of decision of referee. Affirmed.

In April, 1911, W. R. Buxton, of Burke county, Ga., borrowed $1,600 from Nixon & Wright, and to secure payment of same gave to them a deed to a tract of land containing 500 acres in Burke county and a house and lot in the town of Girard, in said county. The deed contained a power of sale authorizing said Nixon & Wright, in default of the payment of said indebtedness, to sell said property at public outcry before the courthouse door of Burke county, after advertising the sale once a week for four weeks, and to execute deeds to the purchaser at such sale. In March, 1912, Buxton was duly adjudicated a bankrupt, and he scheduled said two pieces of property and also the security deed to Nixon & Wright. G. M. Cohen was duly elected and qualified as trustee. The bankrupt was in possession of both pieces of property at the time of the filing of his petition and of his adjudication. The 500-acre tract of land contained some land which was in cultivation, for which the bankrupt had the note of the tenant. The bankrupt also rented out the town house and lot. The trustee did not actually go on the 500-acre tract of land, but he took possession of the rent note and sold same, together with the other notes and accounts of the bankrupt's estate. He did, however, go upon the town lot, and notified the tenant in possession that he, the trustee, was in possession. He paid insurance on the house, and collected $22.36 rent on same. The trustee, on March 28, 1912, recorded in the office of the clerk of the superior court of Burke county a certified copy of the order adjudicating said Buxton a bankrupt, and on the 14th of June, 1912, he recorded in the same office a certified copy of the order approving his bond as such trustee. Subsequently, in October, 1912, Nixon & Wright, in pursuance of the power of sale contained in the deed from the bankrupt, duly sold said two pieces of property at public outcry, after having advertised same in accordance with the power contained in the deed. The 500-acre tract was bid in by Nixon & Wright for $750, and the house and lot was bid in by Mrs. Mary R. Heath for $350. The trustee had no notice of this sale; but Nixon & Wright, for some time before exercising the power of sale, had full knowledge of the fact that Buxton had gone into bankruptcy.

Three or four months after the property was sold, the trustee learned of the sale which had been made of the property by Nixon & Wright under their deed, and he thereupon filed his petition against Nixon & Wright and against Mrs. Mary R. Heath, alleging the above-stated facts, and also alleging that the property involved was worth the sum of $3,000, and that there was an equity in same in the bankrupt's estate, and praying that the deeds which had been made to the purchasers at the above-stated sale should be surrendered up and canceled, and that said two pieces of property should be restored to his possession. The defendants appeared, and filed their demurrer to said petition, in which they averred that the "referee's court had no jurisdiction to institute proceedings in behalf of a trustee in bankruptcy to annul a valid legal proceeding brought in a state court by a creditor to enforce a valid lien, which had accrued more than four months prior to the filing of the petition in bankruptcy," and that the petition showed on its face that Nixon & Wright had such a valid lien on the property in question, given about a year prior to the adjudication of the bankrupt, and that neither their lien nor their remedy to enforce same was affected by bankruptcy, and that, therefore, the sale of the property under the power contained in the deed was valid, and that complainant had no right to any relief. They also filed an answer in which they made the same averments, and also claimed that the power of sale in the deed was fairly exercised, and that the sale was made after due

advertisement, and that the property brought all that it was worth, and that they had the right to make the sale of the property under the power contained in the deed, and that this sale passed good title to the purchasers.

The referee heard the case, and evidence was taken in behalf of the respective parties. At the conclusion of the hearing the referee rendered an opinion, holding that the bankrupt was in possession of the property in controversy at the time of his adjudication, and that this possession passed to the trustee, and was in the trustee at the time of the sale by Nixon & Wright under their security deed, and that inasmuch as they exercised this power of sale with knowledge of the bankruptcy of W. R. Buxton, and without the permission of the bankruptcy court, such sale was illegal, and the deeds made in pursuance thereof void. The referee thereupon entered an order directing Nixon & Wright and Mrs. Mary R. Heath to surrender up and cancel the deeds which they respectively held to the tracts in question, and to restore said tracts of land to the trustee. Defendants duly filed a petition to review this order of the referee.

Geo. W. Owens and F. T. Saussy, both of Savannah, Ga., for trustee.
C. H. & R. S. Cohen, of Augusta, Ga., for defendants.

LAMBDIN, District Judge (after stating the facts as above). This matter is before me upon a petition to review the above-stated order of the referee. From the foregoing statement of facts it appears that, more than four months before W. R. Buxton went into bankruptcy, he executed to Nixon & Wright a deed to a 500-acre tract of land and a house and lot in Burke county, Ga., where he lived, for the purpose of securing a loan of $1,600, about which there seems to be no question. He made default in the payment of this debt, and thereafter went into bankruptcy, being at that time in possession by tenants of the land described in the security deed to Nixon & Wright. The complainant was duly appointed trustee, and, as set out in the foregoing statement, he never entered upon the 500-acre tract of land, but sold the rent note which the bankrupt had taken for same. He went to the town house and lot, however, and notified the tenant that he was in possession as trustee of the bankrupt, and he insured the house and collected rents on same. About eight months after the appointment of the trustee, Nixon & Wright duly exercised the power of sale contained in their security deed, and sold at public outcry the tracts of land in question, and themselves became the purchasers of the 500-acre tract of land at the price of $750, and the house and lot was bought by the defendant Mrs. Mary R. Heath for $350. The trustee knew nothing of this sale until several months afterwards; but Nixon & Wright had full knowledge of the fact that W. R. Buxton had been adjudged a bankrupt for some months prior thereto. As required by section 21e of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. 1913, § 9605]), the trustee several months before the sale duly filed and recorded in the office of the clerk of the superior court of Burke county a certified copy of the order approving his bond as trustee of the bankrupt, and also recorded a certified copy of the order of adjudication. The question here is whether the sale made by Nixon & Wright under the security deed held by them after their debtor had gone into bankruptcy, and which was made without the knowledge or consent of the bankruptcy court, was valid or not.

[1] 1. At the time of the filing of the petition in bankruptcy, and of the adjudication, the bankrupt, as above stated, was in possession of the real estate in controversy. Prior to that time, however, he had conveyed said property to the defendants Nixon & Wright for the purpose of securing an indebtedness, such conveyance being known under the Georgia law as a security deed, the effect of which was to vest the legal title to said property in Nixon & Wright for the purpose aforesaid. Inasmuch as in Georgia a mortgage does not pass title, but only creates a lien, being in that respect different from a mortgage at common law, the form of security on real estate generally adopted by creditors in this state is a security deed, because same is more effectual as security for an indebtedness, on account of the fact that it cuts out the right of the debtor's wife to dower and a year's support, in the event of the death of the debtor before the payment of the debt. However, the grantor retains possession, and an equity of redemption or beneficial interest still remains in the debtor, which is capable of being transferred by him, and therefore, under section 70a (5) of the Bankruptcy Act (Comp. St. 1913, § 9654), by operation of law such equity or beneficial interest is vested in the trustee. "The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition." Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S. 301, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262.

Defendants do not by their demurrer clearly make the point that they could not be summarily proceeded against; yet I think that the summary proceeding in this case was correctly upheld by the referee. After property of the bankrupt, which is in his possession at the time of his bankruptcy, has come within the jurisdiction and custody of the bankruptcy court by virtue of the filing of the petition in bankruptcy and his subsequent adjudication, a creditor holding a lien or security deed cannot, in my opinion, thereafter acquire title to the property or the possession thereof, so as thereby to become an adverse claimant, so that his rights, if any, so acquired may not be inquired into and determined by a summary proceeding. In re Epstein (Cir. Ct. of Appeals, 8th Cir.) 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465, 19 Am. Bankr. Rep. 89.

[2] 2. On the merits of the case, the court is of the opinion that Nixon & Wright had no right to exercise the power of sale contained in their security deed after their debtor had gone into bankruptcy, without the permission of the bankruptcy court. This question is of grave importance to the proper administration of estates in bankruptcy. It is true that, under section 67d of the Bankruptcy Act (Comp. St. 1913, § 9651), valid liens are protected and preserved in bankruptcy. Yet the bankruptcy law is paramount, and, while such liens are preserved, the holder of a mortgage or a security deed (as in this case) takes his security subject to the chance that proceedings in bankruptcy may be instituted, and that the property held by him as security may be subject to become administered by the bankruptcy court. The right of the bankruptcy court to administer such property or the equity or estate of the bankrupt therein

is paramount, and while the bankruptcy court will protect valid liens, yet it has the abstract legal right to administer the property. Any other view would seriously obstruct and impede the proper administration of the estate of the bankrupt. As stated in the opinion of Circuit Judge Gilbert, speaking for the United States Circuit Court of Appeals of the Ninth Circuit in Re Jersey Island Packing Company, 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689:

"It is true that the Bankruptcy Act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such lien is an ordinary mortgage, or a deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage * * * takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

This conclusion follows from the well-settled doctrine that from the filing of the petition in bankruptcy the estate of the bankrupt is in custodia legis—is constructively in the custody of the bankruptcy court. This principle is clearly and authoritatively stated by the Supreme Court of the United States in the case of Acme Harvester Company v. Beekman Lumber Company, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, as follows:

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller, in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405, where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866), and on adjudication title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court'—it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. * * * The filing of the petition asserts the jurisdiction of the federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an

attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits which would virtually amount to preferences in favor of such creditors."

Indeed, as stated by the Supreme Court of the United States in the case of Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322, where property which was in the possession of a receiver had been sold under execution:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. * * * And the individuals having such prior interest (in such property) must, if they desire to avail themeselves of them, apply to the court either for liberty to bring ejectment, or to be examined pro interesse suo; and this, though their right to the possession is clear."

See, also, Murphy v. John Hofman Company, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; Hitz v. Jenks, 185 U. S. 155, at pages 165, 166, 167, 22 Sup. Ct. 598, 46 L. Ed. 851; Pugh et al. v. Loisel (C. C. A., 5th Cir.) 219 Fed. 417, 135 C. C. A. 221; Geo. B. Matthews & Sons et al. v. Jos. Webre Co. (D. C.) 213 Fed. 396.

A similar question to the one here involved was ruled upon by the Circuit Court of Appeals of the Eighth Circuit in the case of In re Epstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465, 19 Am. Bankr. Rep. 89, where the facts were as follows: Before the bankruptcy proceedings were filed, certain real estate of the bankrupt had been sold for taxes, but the title and the possession remained with the bankrupt. After the lapse of the three years designated in the redemption statute, and while the property was still in the custody of the court of bankruptcy as a part of the bankrupt's estate, the holder of the tax sale certificate, without the leave of the bankruptcy court, applied to the county treasurer and obtained a tax deed to the property. Thereafter the trustee, learning of the sale and deed, tendered to the claimant thereunder the amount for which the property had been sold, with interest thereon, etc., and demanded a surrender of the tax title. The tender and request were refused, and upon the trustee's petition the claimant was ordered to show cause why the deed should not be set aside. The claimant contended that his right could not be adjudicated in a summary proceeding, and also that he had obtained good title to the property. The Circuit Court of Appeals decided both these questions against the claimant, and Judge Van Devanter, Circuit Judge, speaking for the court, said:

"The question of the merits must also, upon authority, be ruled in favor of the trustee [citing several cases]. We do not mean that property in the course of administration under the Bankruptcy Act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it, * * * but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void."

Almost the identical question here involved was passed upon by the District Court of Texas in Re Hasie, 206 Fed. 789, where that court held:

"That a sale [under the power of sale contained in a trust deed] after the bankruptcy of the grantor and while the property is in the possession of his

trustee as a part of the estate, without the consent of the bankruptcy court, is void, and does not divest the title of the trustee in bankruptcy."

The reasoning of the court in that case is peculiarly applicable to the facts involved here, and the principle there ruled, follows inevitably from the doctrine announced by the Supreme Court of the United States in the Acme Harvester Company Case, supra, that the estate of the bankrupt is in custodia legis from the time of the filing of the petition, and that the administration of such estate should not be interfered with.

See, also, the case of William L. Dayton v. A. H. Stanard, Treas., 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, decided June 12, 1916, by the Supreme Court of the United States, in which the court used this language:

"This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in custodia legis and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain [citing authorities].

See, also, the case of Fairbanks Steam Shovel Co. v. Wills, Trustee, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, 36 Am. Bankr. Rep. 754; Fulghum v. Williams Co., 114 Ga. 643, 40 S. E. 695, 1 L. R. A. (N. S.) 1055, 88 Am. St. Rep. 48; Corbett v. Riddle (C. C. A., 4th Cir.) 209 Fed. 811, 126 C. C. A. 535.

The case here is quite different from cases cited by counsel for defendants, in which the state courts had first obtained possession of the property by the foreclosure of a valid lien, or by receivership proceeding, prior to the filing of the petition in bankruptcy. The principle ruled in such cases is based on the comity existing between the courts, and upon the doctrine that the first court taking jurisdiction of the property should be allowed to retain such jurisdiction. However, even in such cases the jurisdiction of the bankruptcy court is paramount, and such proceedings in state courts may be stayed, if necessary to the proper administration of the estate of the bankrupt. However, in the case at bar the comity of courts is not involved, as Nixon & Wright did not attempt to foreclose their security deed in the state court, but endeavored themselves to realize upon their security by public sale, not under the supervision of any court.

The court does not think that the principle ruled in the case of Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, cited by counsel for defendants, is applicable here. In the Hiscock Case certain insurance policies were pledged to the bank, and the court found that the bank had both title to and possession of the policies for more than two years before the filing of the petition. In the case here the possession of the property and a beneficial interest in same were in the bankrupt when the petition was filed, and, such being the case, said property at once came into the custody of the court, and it would seriously impair the administration of bankruptcy estates if such custody were to be allowed to be interfered with.

It is probable that the fact that the estate of the bankrupt was be-

ing administered by the bankruptcy court had the effect of chilling the bidding at the sale made by Nixon & Wright, and that therefore the property did not bring its full value. In the opinion of the court, not only does the bankruptcy law itself, but public policy as well, require that the court shall set aside such a transaction as the one under consideration, although in this case defendants appear to have acted in good faith, and not to have been guilty of fraud; otherwise, the bankruptcy law would be set at naught, and the door of fraud opened, and the proper administration of estates in bankruptcy seriously impeded.

An order will be taken directing that the referee shall find the amount due by the bankrupt to Nixon & Wright upon the papers which they held against him, and that he take into account the rents, issues, and profits, etc., by the defendants, and the amounts necessarily expended by them in the way of taxes and other charges for the preservation of the property, and that thereupon the entire amount due Nixon & Wright be established by an order of the referee, and that the trustee take possession of the two pieces of property involved and bring same to sale at as early a date as possible, and that if said two pieces of property together do not bring as much as the amount so found by the referee to be due to Nixon & Wright, then the deeds held by the defendants will be confirmed, and the trustee directed to quitclaim to the defendants all his equity, title, and interest in said tracts of land to said defendants, but that if said two pieces of property, which shall be sold separately, together bring more than the amount found to be due to Nixon & Wright, the deeds held by Nixon & Wright and Mrs. Heath to said tracts of land shall be surrendered up and canceled, and the trustee in such event is directed to execute title to said tracts of land to the purchaser or purchasers at the sale so made by the trustee.

UNITED STATES v. MINNEAPOLIS & ST. L. R. CO.

(District Court, S. D. Iowa, Central Division. October 16, 1916.)

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—VIOLATION.
Under Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), limiting the hours of service of employés upon railroads to 16 hours per day, absolute releases of employés of freight trains for periods not exceeding 2⅓ hours occurring at meal times does not, where the employés were engaged for over 16 hours, operate to break the continuity of service and avoid the penalty for violation of the act, for the act should receive a liberal construction to give effect to its purpose, which was to promote the safety of employés and travelers by preventing railroad employés from continuing in service excessive periods, and railroad employés would hardly be likely to obtain much real rest or relaxation in so short a period, particularly as they were obliged to partake of their meals therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

2. MASTER AND SERVANT ⟸17—HOURS OF SERVICE ACT.
In such cases, where the railroad company had arranged the periods of rest for the purpose of complying with the law and was acting in good

faith, it should not be made to suffer a heavy penalty and a fine of only $100 for each violation will be imposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ⇐17.]

At Law. Petition by the United States of America against the Minneapolis & St. Louis Railroad Company, charging a violation of the Hours of Service Act. Judgment for plaintiff.

The petition contains 19 counts, each count charging violation of the act of Congress "limiting the hours of service of employés" upon railroads, approved March 4, 1907.

Defendant filed answer, substantially admitting all of the facts alleged in each count of the petition, but pleading as to each count a certain period of "release" of each of the employés between the beginning of the service and the termination thereof; such period of release being, as to two counts, 2 hours and 20 minutes, and, as to the balance of the counts, 2 hours, and, because of such periods of release, the defendant denies liability.

Finding of Facts.

The employés, who, it is charged in the 19 counts of petition, were required to serve for more than 16 hours each, consist of four groups, as follows:

(1) J. D. Haggin, engineer; H. C. Hoyer, fireman.

This engineer and fireman were operating an extra "helper" engine between Marshalltown and the town of Abbott. On December 10, 1914, the said engineer and fireman began service at 9:40 o'clock p. m., and continued service until 3:20 o'clock p. m., on December 11, 1914, a period which, if continuous, is 17 hours and 40 minutes. They returned from a trip to Abbott at 4:35 a. m., December 11th, at which time they got an absolute release from service until 6:55 o'clock a. m., a period of 2 hours and 20 minutes.

The engine was left at the water tank. The engineer went to the roundhouse, about a block away, and registered, and went from there to a restaurant and had breakfast, which took about 30 minutes, and then returned to the roundhouse, spending about 15 minutes upon his way visiting and talking, and then remained at the roundhouse until 6:55, the termination of the period of release, and then took charge of his engine. He lived in Marshalltown, some six blocks from where the engine was left, but did not go to his home because he did not want to awaken his wife. There were no facilities for rest in the roundhouse except some wooden benches, and he laid down upon one of those, and slept a little—half an hour or more. He did not remove his clothes, or retire for rest, except as aforesaid.

Hoyer, the fireman, left the engine at the same time as the engineer, but did not have to register, but went direct to the restaurant, which was about two blocks from the engine; had his breakfast. Had a regular place for sleeping about eight blocks from the yards, but he did not go there to sleep, and did not sleep at all. "Fooled around" until about starting time; played some pool at the restaurant.

The engineer and fireman both understood that they were fully released, and that the time was their own, and that they could do with it as they pleased.

(2) Group 2 consists of: J. P. Boyce, engineer; J. W. Gibson, engineer; B. McDonough, fireman; V. Miller, fireman; C. Van Draska, conductor; C. A. Benson, brakeman; M. C. Satchell, brakeman.

These men constituted a crew, operating a freight train with two engines, Grinnell to Oskaloosa, and return, and they entered service at 6:30 a. m., December 27, 1914, and terminated service at 11:45 p. m., on December 27th, 17 hours and 15 minutes after beginning service, with a period of release at Oskaloosa from 5 o'clock to 7 o'clock p. m., a period of 2 hours.

What this crew was doing during this period of time does not appear, except in so far as it may be inferred, because of the time of day, that they ate their supper.

(3) The third group consists of: J. T. Elder, engineer; E. L. Howell, fireman; S. S. Walton, conductor; W. H. Risney, brakeman; T. E. Young,

brakeman—composing a crew operating freight trains, Oskaloosa to Marshalltown, Iowa. They entered upon service at 8:45 a. m., January 20, 1915, and continued service until 2 a. m. January 21st, a period of 17 hours and 15 minutes, with a period of release of 2 hours at Marshalltown, Iowa, from 3:35 p. m. to 5:35 p. m. on January 20th. The crew entered service at 8:45 a. m., but waited until 9:40 before the train was ready to start. At Marshalltown, the engine was left at the roundhouse, about half a block from the depot. The engineer went to the roundhouse and reported, then went to a restaurant about two blocks away, and ate his supper, which took 20 or 25 minutes. There was no place specially provided for sleeping. There were some pillows and bedding in the caboose furnished by the brakemen and conductor for their own use, and they could sleep upon the cushioned seats extending lengthwise of the caboose, and this courtesy was extended to the fireman and engineer, if requested.

Howell, the fireman, left the engine the same time as the engineer, and went to the restaurant and had supper. Neither the fireman, nor engineer, had any home or place to sleep in Marshalltown, except as aforesaid, and except as the benches were present in the roundhouse.

Walton, the conductor, also went to the restaurant; had no place for sleeping in Marshalltown, except as aforesaid, and it does not appear that he slept any at that point.

What the brakemen did does not appear, except as it may be assumed that they also had supper.

(4) Group 4 consists of: B. F. Rinehart, engineer; W. S. Lewis, fireman; E. Hearne, conductor; A. C. Miller, brakeman; John Donner, brakeman—being a crew operating freight train, Oskaloosa to Marshalltown, Iowa. They entered service on January 28, 1915, at 6:15 p. m., and terminated service at 12:10 p. m. January 29th, being a total period of 17 hours and 55 minutes, with a 2-hour period of release from 4:50 a. m. to 6:50 a. m. on January 29th at Marshalltown, Iowa.

Rinehart lived at Oskaloosa; had no special place to sleep in Marshalltown; ate his breakfast three or four blocks from where he left his engine; there were places where workmen could sleep within a block or a block and a half of the yards at Marshalltown. The fireman had breakfast about the same time; did not go to sleep; no sleeping place in Marshalltown. There was bedding in the caboose, and Hearne, the conductor, went to the caboose and went to sleep for a while. The accommodations in the caboose were the cushioned seats, lengthwise of the car, about 2½ feet wide, and some 34 feet long; seats on both sides.

There is nothing definite as to what was done during the interval by Miller and Donner, the brakemen; but they had the privilege of sleeping there.

Claude R. Porter, U. S. Atty., of Centerville, Iowa.

Bowen & Alberson, of Des Moines, Iowa, for defendant.

WADE, District Judge (after stating the facts as above). The petition contains 19 counts, each count charging violation of the act of Congress "limiting the hours of service of employés" upon railroads, approved March 4, 1907.

There were four groups of employés, all in the freight service, on comparatively short runs, with the usual stops and delays for connections, and in all things practically typical of such service.

There is no question under the issues but that, as to each group, more than 16 hours' continuous service was required of the employés, unless in computing such service there be deducted certain periods of absolute release for a definite time.

Group 1 was in service from 9:40 p. m. December 10th to 3:20 p. m. December 11th, 17 hours and 40 minutes, with a period of absolute release of 2 hours and 20 minutes from 4:35 a. m. to 6:55 a. m.

Group 2 was in service from 6:30 a. m. December 27th until 11:45 p. m. December 27th, 17 hours and 15 minutes, with a period of absolute release from 5 to 7 o'clock p. m., a period of 2 hours.

Group 3 entered service on January 20th at 8:45 a. m. and continued until 2 o'clock a. m. January 21st, 17 hours and 15 minutes, with an absolute release of 2 hours from 3:35 p. m. to 5:35 p. m.

Group 4 entered upon service at 6:15 p. m. January 28th and terminated service at 12:10 p. m. January 29th, and were in continuous service for 17 hours and 55 minutes, except for an absolute release for 2 hours—4:50 a. m. to 6:50 a. m. January 29th.

[1] So that the real questions to be determined in this case are whether the periods of release aforesaid broke the continuity of the service so that the employés were not required to remain on duty "for a longer period than sixteen consecutive hours."

Evidence was introduced showing what certain of the employés did during the periods of release, and disclosing the opportunities, under the circumstances, for rest.

It will be observed that these periods of rest of 2 hours and 20 minutes in one case, and 2 hours in the others, occurred at a time when the men had to eat, and I think this fact has some bearing in the case. The circumstances and the conduct of the different employés appear to be fairly typical of the circumstances and conduct of railway employés generally who might be given a release at the times and places involved, or at similar times and places.

As to one group, the period of release was at Oskaloosa, one of the terminals of the service, and in the other three, at Marshalltown, one of the terminals in their service.

So that the question is fairly presented as to whether or not a period of release for 2 hours, or 2 hours and 20 minutes at a terminal, at meal time, is such a period as to break the continuity of service, and avoid the penalty for violation of the act.

After a careful study of all the cases, I am content to adopt the conclusion in Southern Pacific Co. v. United States (9th Cir.) 222 Fed. 46, 137 C. C. A. 584, which recognizes the rule that there may be "intermissions" of such period and under such circumstances as to break the continuity of the service. In this case it is held, and in my judgment properly held, that whether these intermissions are such as the law will recognize depends upon their character as periods of substantial rest.

It is also held:

"That the release of the employé must be definite and certain as to the period of time, and substantial and opportune as to the period of rest. A release for meals, or to stand and wait for another train, is not sufficient. There must be a substantial and opportune period; otherwise, the duty is a continuous one."

Taking into consideration the purpose of the law "to promote the safety of employés and travelers," were the periods of release in this case "periods of substantial rest"? Were they "substantial and opportune as to the period of rest"?

In view of the adjudicated cases, I confess that this is a close question. It must be conceded that the statute is entitled to a liberal con-

struction, with a view to effectuate the intention of Congress and promote the purpose which it had in view. The statute is still in the early stage of interpretation. In the present view of the courts, it is purely a question of fact as to whether a certain interval of time, during which an employé has an absolute release, is of such a character as to avoid the application of the rule.

Applying the test announced in Southern Pacific Co. v. United States, supra, it is my judgment that the periods of release were not such as to break the continuity, and that therefore, as to each and all of the employés, the service was continuous within the meaning of the statute.

I am not prepared to hold that an absolute release for a period of two hours at a time, other than at meal time, would not be such a period as might be considered "substantial and opportune" for rest. No arbitrary period can be fixed. The circumstances must determine. Sixteen hours' continuous service is a long service in such work. The employés in this case were out upon their trips 17 hours and 40 minutes, 17 hours and 15 minutes, 17 hours and 15 minutes, and 17 hours and 55 minutes, respectively; out of 24 hours, there was less than 7 hours left. The periods of release, in the very nature of things, could not be periods of "substantial rest." Rest is largely psychological. The circumstances must be such as to induce rest. The problem is not solved by saying that the men could have gone to bed and slept for an hour, or an hour and 20 minutes, aside from the time they were at their meals. We are dealing with human nature. The public is interested in actual rest, not in opportunities for rest; and, while I realize that the employer cannot be held responsible for failure of employés to rest when the opportunity is given them, yet I feel that the opportunity, to be "substantial and opportune," must be under such circumstances that the average employé will in fact rest.

The law contemplates results and effects. It seeks to keep the dangerous business of railroading in the hands of men who are not worn out by fatigue and loss of sleep. I can readily see where, if employés were given an absolute release for 2 hours, in the middle of the afternoon, or at 10 o'clock at night, that the tendency might be to immediately seek repose; while, on the other hand, it must be apparent that where, as illustrated in this case, the engineer has a release for 2 hours and 20 minutes, he leaves his engine, goes to the roundhouse and registers, walks two blocks to a restaurant, gets ready for breakfast, and has his breakfast, followed probably by a smoke, the circumstances and his natural feelings would not be such as to lead him to go and lie down to rest or to sleep. It is a time of more or less diversion, and the natural tendency would be to do, what most of these men did, "sit around" and talk and visit, and "kill time" until ready to start on the return trip.

An engineer must look over his engine; he must make his report; he must be back at his engine at a certain time. If he should go to sleep, he would have to be called at least 15 or 20 minutes before time in order to be ready. So that, when we consider all of these things, 2 hours, or 2 hours and 20 minutes, is a very short period.

It has been held, and I think properly held, that an hour at meal time does not break the continuity of the service. It has been held that three hours of absolute release would break the continuity of the service.

It is my holding that, when the release is at such time as that a meal is eaten during the period, under ordinary circumstances, 2 hours, or 2 hours and 20 minutes, is not a period of "substantial rest." It is not an "opportune period" for rest, and, this being my view, there will be a judgment against the defendant in this case upon the 19 counts.

[2] As to the amount of the judgment: It appears that the defendant has proceeded in the fixing of these periods of release with the purpose of complying with the law, and that it is in good faith in its claim that the periods of release exempts it from liability. I realize that the case is in a sense a "test case," and I do not believe that the defendant should be made to suffer a heavy penalty under the circumstances. I feel that the ends of justice will be subserved by imposing in this case a fine of $100 upon each count—a total of $1,900.

Counsel for defendant ask for a finding of facts. This I have made, and am filing herewith, together with the judgment herein.

HUDSON NAV. CO. v. MURRAY.

(District Court, D. New Jersey. September 14, 1916.)

1. COURTS ⟸269—JURISDICTION—LOCAL ACTIONS.
A bill by a New Jersey corporation to have judicially declared to be illegal and void stock issued to defendant and evidenced by certificates also prayed that defendant, a nonresident, be required to surrender and deliver the certificates. *Held*, that as prayers of the bill presented the main object of the suit, which was to procure an adjudication regarding the validity of defendant's title to the stock, the location of the certificates themselves is not a decisive factor, the stock itself, because of the residence of the corporation, having a situs in New Jersey; hence the fact that the certificates were fraudulently brought into the state will not deprive the local courts of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⟸269.]

2. COURTS ⟸19—JURISDICTION OF PROPERTY—STOCK—SITUS.
Corporate stock has a situs in the state wherein the corporation is chartered and domiciled, regardless of the location of the certificates, which merely evidence the stock; hence a suit in the state of the corporation's domicile, to declare invalid the stock issued, is not one in personam.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47–52; Dec. Dig. ⟸19.]

3. COURTS ⟸19—JURISDICTION OF PROPERTY—ACTIONS IN PERSONAM.
Under 1 Comp. St. N. J. 1910, p. 414, §§ 12–18, relating to substituted service, a suit by a New Jersey corporation against a nonresident defendant to have declared invalid an issue of stock, held by such defendant, is

one quasi in rem, regardless of the location of the corporation's property, the stock itself having a situs in the state, and hence a decree on such service is not open to objection that it is one in personam, based on mere substituted service.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47–52; Dec. Dig. ⟸19.]

4. Removal of Causes ⟸111—Effect of Removal—Inquiry by Federal Court into Jurisdiction.

When a cause is removed from a state to a federal court, the latter tribunal will determine for itself whether jurisdiction has been validly acquired, in such respect not being bound by state statutes and decisions.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 237, 239; Dec. Dig. ⟸111.]

5. Appearance ⟸9(6)—For Purpose of Removal—Effect.

Appearance by defendant for the purpose of removing a cause to a federal court does not amount to a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 50; Dec. Dig. ⟸9(6).]

6. Removal of Causes ⟸114—Effect—Jurisdiction of State Court.

Where under 1 Comp. St. N. J. 1910, p. 414, §§ 12–18, a Court of Chancery by substituted service had acquired jurisdiction of suit by a corporation against a nonresident defendant to declare invalid stock held by him, the federal District Court, after removal, will not set aside the service because such service was not authorized under Judicial Code, § 57 (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1913, § 1039]), relating to substituted service in the federal courts; this being particularly true as that section is limited to actions begun in federal courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241–244; Dec. Dig. ⟸114.]

7. Constitutional Law ⟸309(2)—Due Process of Law—What Constitutes.

Where in a suit quasi in rem a state Court of Chancery under 1 Comp. St. N. J. 1910, p. 414, §§ 12–18, directed a nonresident defendant to appear, plead, answer, or demur to the bill within two months, and directed service upon him of notice of pendency of the suit, and the notice was duly served, defendant was not, by reason of the substituted service denied due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ⟸309(2).]

8. Removal of Causes ⟸114—Effect of Removal.

Where after substituted service has been made, a cause is removed to the federal court, plaintiff need not obtain another order from the federal court for substituted service.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 241–244; Dec. Dig. ⟸114.]

In Equity. Bill by the Hudson Navigation Company against Edward F. Murray, removed from state court. On motion to vacate an order of the Court of Chancery of New Jersey, directing defendant, a nonresident, to appear and plead to complainant's bill and to set aside the substituted service made by virtue of such order. Motion denied.

Henry E. Mattison, William J. Roche, of Troy, N. Y., and Alfred H. Strickland, of New York City, for the motion.

James Benny, of Bayonne, N. J., and Archibald R. Watson, of New York City, opposed.

HAIGHT, District Judge. After an order was made by this court, in a cause between the same parties, vacating an order for substituted service made therein pursuant to section 57 of the Judicial Code (Hudson Navigation Co. v. Murray [D. C.] 233 Fed. 466), the present complainant (who was the plaintiff in that action) filed a bill in the Court of Chancery of New Jersey against the same defendant, wherein he seeks the same relief as was sought in the action originally brought in this court. It appearing that the defendant was a nonresident of New Jersey and could not be found therein, an order was made by that court, by virtue of the power vested in it by the New Jersey statutes (1 N. J. Comp. Stat. 414, §§ 12 to 18), directing the defendant to appear, plead, answer, or demur to the plaintiff's bill within two months, and providing for service upon him of notice of the pendency of such suit. The notice was duly served as in the order provided, which was in accordance with the provisions of the state statute and rules of that court. The defendant thereupon sought and procured the removal of the cause to this court, because of diversity of citizenship of the parties. He now appears specially, as in the first suit, to challenge the jurisdiction of the court to proceed against him, and seeks to have the order, authorizing the substituted service, as well as the service, vacated.

[1, 2] As in the first suit, the primary contention, as well as the premise upon which most of the argument in support of this motion is based, is that the stock certificates were fraudulently brought into the state of New Jersey by the plaintiff for the purpose of investing its courts with jurisdiction in this suit. It was pointed out in the opinion in the first case that the physical presence of the stock certificates within this district was not essential to authorize the substituted service provided for in the Judicial Code, because it was not sought to remove any incumbrance or cloud upon the title to them. Nor in this suit, so far as the validity of the order of the Court of Chancery is concerned, does the physical presence or absence of the certificates in New Jersey make any difference. The location of the stock itself (of which the certificates are merely evidence) is the decisive factor. While it is true that the bill prays, among other things, that the defendant be required to surrender and deliver the certificates (as did also that which was before the court is the Amparo Mining Company Case, to be hereafter cited), yet the main object of the suit, and one of the prayers for relief, is that the stock issued to the defendant, and evidenced by the certificates, may be judicially declared to be illegal and void. Hence, for the purposes of this motion, it must be considered that the object of the suit is to procure an adjudication regarding the validity of the title of the defendant to certain shares of stock of a New Jersey corporation. It admits of no doubt that such stock has a situs in New Jersey, irrespective of the location of the certificates, for the purposes of a suit brought there to determine questions regarding the title thereto, and that a proceeding to that end is one quasi in rem. Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Amparo Mining Co. v. Fidelity Trust Co., 75 N. J. Eq. 555, 73 Atl. 249 (N. J. Ct. E. & A.); s. c., 74 N.

J. Eq. 197, 71 Atl. 605 (Ct. Chan.); Andrews v. Guayaquil & Q. Ry. Co., 69 N. J. Eq. 211, 60 Atl. 568 (Ct. Chan.), affirmed 71 N. J. Eq. 768, 71 Atl. 1133; Sohege v. Singer Mfg. Co., 73 N. J. Eq. 567, 68 Atl. 64 (Ct. Chan.). The reasons why the physical presence of the certificates within the jurisdiction does not constitute the action one in personam, and as such not susceptible of being maintained by substituted service, are clearly pointed out by Vice Chancellor Stevenson and Mr. Justice Swayze in the two before cited opinions in the Amparo Mining Company Case. See, also, the remarks of Mr. Justice Harlan, 177 U. S. at the bottom of page 13 et seq., 20 Sup. Ct. 559, 44 L. Ed. 647, in the Jellenik Case. The stock as distinguished from the certificates, it will be borne in mind, is, in legal contemplation, in the custody of the complainant, over whom, of course, the court has acquired jurisdiction.

[3] As was stated in the opinion filed by this court in the first case, the New Jersey statute, which provides for substituted service upon nonresident defendants, is not as limited in its application as is the federal statute, which was then before this court. The former, although general in its language, is confined in its application to actions in rem or quasi in rem, and similar actions, and has no reference to actions in personam. Amparo Mining Co. v. Fidelity Trust Co., 75 N. J. Eq. 560, 73 Atl. 249; Wilson v. American Palace Car Co., 65 N. J. Eq. 730, 733, 55 Atl. 997 (Ct. E. & A.). It is not necessary, therefore, in this case, as it was in that, to ascertain whether there is any property within the state of New Jersey upon the title to which the defendant's alleged invalid stock has cast a cloud; the important question on this phase of the case is whether the action is one susceptible of being maintained by substituted service; in other words, whether it is one quasi in rem, as to which it is so well settled, as to need no citation of authorities, that a court may acquire jurisdiction by substituted service. This question has already been answered in the affirmative. Hence there can be no doubt that the Court of Chancery of New Jersey, if the manner of service and extent of the notice of the pendency of the action were sufficient, acquired jurisdiction in this suit over the defendant by the substituted service, and could, without his appearance, have made a binding and valid decree, which would have been entitled to full faith and credit elsewhere, respecting the validity of the stock alleged to be owned by him, provided it did not seek to compel him personally to make some disposition of the stock.

[4, 5] The next question is whether a federal court will recognize the service as sufficient to confer jurisdiction, when the question is raised therein. Undoubtedly when a cause is removed from a state to a federal court, the latter will determine for itself whether jurisdiction has been validly acquired, and in this respect is not bound by the state statutes and decisions; and the appearance by a defendant for the purpose of removing a cause to a federal court does not amount to a general appearance. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; Clark v. Wells, 203 U. S. 164, 171, 27 Sup. Ct. 43, 51 L. Ed. 138; Mechanical Appliance Co.

v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; Cain v. Commercial Pub. Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534

[6] But this does not mean, as was contended on behalf of defendant at the oral argument (although this contention seems to be modified in the supplemental brief), that simply because the method of substituted service provided for in the state statute does not conform to that prescribed in the federal statute (section 57 of the Judicial Code), or because the state statute permits substituted service in cases for which the federal statute has made no provision, that a federal court, when a case is removed to it, must set aside the service which was otherwise perfectly valid and in harmony with the requirements of the federal Constitution and the principles of natural justice, and which would have justified a binding decree in the state court. Such a proposition finds no support in reason and, so far as I am aware, in authority, although ample opportunity was afforded to plaintiff's counsel to acquaint me with any such. Most unjust consequences might flow from such a rule. It would permit a defendant, in effect, to avoid an action to which he could be properly held to respond in a state court without violating any provision of the federal Constitution or any principle of natural justice, simply because Congress had failed to provide for substituted service in the federal courts in that particular kind of an action. This view, I think, finds support in the opinion in Clark v. Wells, supra. In that case an action was begun in a state court, and jurisdiction acquired by attachment. The case was removed to a federal court. The latter made an order for service by publication in accordance with the method of procedure prescribed by the state statute. It was contended that, as a personal judgment can only be rendered upon personal service, and service by publication under state statute cannot be made in a federal court, and as the act of March 3, 1875 (18 Stat. 472), which is the same as section 57 of the Judicial Code, was inapplicable to the case, the effect of the removal was to render nugatory the attachment proceedings in the state court. While that part of the removal statute pertaining to suits instituted by attachment (see section 36 of the Judicial Code [Comp. St. 1913, § 1018]) entered very largely into the determination of the question, nevertheless, the remarks of Mr. Justice Day (203 U. S. 171 et seq., 27 Sup. Ct. 45, 51 L. Ed. 138) seem to indicate that, irrespective of that statute, jurisdiction, properly acquired by the state court, would have been recognized in the federal court. He said:

"The transfer of the cause to the United States court gave the latter court control of the case as it was when the state court was deprived of its jurisdiction. * * * The defendant had a right to remove to the federal court, but it is neither reasonable nor consonant with the federal statute, preserving the lien of the attachment, that the effect of such removal shall simply be to dismiss the action wherein the state court had acquired jurisdiction by the lawful seizure of the defendant's property within the state."

The distinction must always be borne in mind between a case where a state court has acquired jurisdiction in a method not repugnant to the provisions of the federal Constitution and the principles of natural justice and a case where it has attempted to acquire jurisdiction in a manner contrary thereto. In the latter cases the principle upon

which the federal courts will decline to recognize as valid the method prescribed by the state statute is that the state, in the first instance, acquired no jurisdiction. But when the state has properly acquired jurisdiction, I fail to see how a federal court can decline to recognize it. In addition section 57 of the Judicial Code, in terms, applies only to suits commenced in a District Court. It would therefore seem to be inapplicable, except as it may be considered to formulate a standard of what is to be considered reasonable notice, to a suit begun in a state court and removed to a federal court. This view finds support, I think, by analogy in the decision of Judge Lanning in this district in Maeder v. Buffalo Bill's Wild West Co. (C. C.) 132 Fed. 280, 282. The instances in which the federal courts, in cases removed thereto, have declined to be bound by the statute or decisions of the state respecting substituted service, are those where such service was authorized in actions which, by their nature, were not susceptible of substituted service under the provisions of the federal Constitution or the recognized principles of law and justice, or in which the manner of substituted service and the extent of the notice given did not conform to due process of law. Instances of the first-mentioned class are found in the cases just previously cited, and of the latter in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520.

[7] The conclusion already having been reached that this action is one which, by its nature, is susceptible of being maintained by substituted service, the only question, therefore, remaining is whether the manner of service and extent of the notice thereby given is sufficient. I am unable to perceive why both do not conform to every requirement of due process of law. See Roller v. Holly, supra. Nor is any reason to the contrary advanced, except that it is not exactly the same as that prescribed by section 57 of the Judicial Code. But this argument is not persuasive. The differences are not fundamental and important, but are only those to be expected when two distinct legislative bodies are acting on the same subject.

[8] Defendant's contention—that after the cause was removed the plaintiff should have obtained another order from this court for substituted service and publication—is refuted by the decision in Clark v. Wells, supra, 203 U. S. 172, 27 Sup. Ct. 43, 51 L. Ed. 138.

It, therefore, follows that defendant's motion must be denied, with costs.

In re SCHULTZ DRY GOODS, CARPET & READY-TO-WEAR CO.

(District Court, W. D. Missouri, C. D. October 27, 1916.)

No. 540.

BANKRUPTCY ⟸314(1)—CORPORATION—PROVABLE CLAIMS—DEBTS OF STOCKHOLDERS.

Notes given for money borrowed by the maker to purchase the stock of a mercantile corporation, and so used, cannot be proved against the corporation in bankruptcy as against either prior or subsequent creditors, even though the maker thereby acquired practically all of the stock; nor is the position of the holder improved by the substitution of notes executed by the corporation without consideration, nor by the fact that former stockholders, from the proceeds of the sale of their stock, paid certain indebtedness of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469, 471, 478, 483, 485; Dec. Dig. ⟸314(1).]

In Bankruptcy. In the matter of Schultz Dry Goods, Carpet & Ready-to-Wear Company, bankrupt. On petition of Marshall Field & Co. and other creditors to review decision of referee allowing certain claims. Reversed.

Pope & Lohman, of Jefferson City, Mo., for appellants.

David W. Peters and Calfee & Westhues, all of Jefferson City, Mo., for trustee.

VAN VALKENBURGH, District Judge. The question presented is whether notes aggregating $42,000 in favor of J. F. Moerschel, executed by Frank J. Linhoff, and one note for $8,000, payable on its face to Emma C. Linhoff, wife of Frank J. Linhoff, and signed by the latter, should be allowed against the bankrupt estate. The referee admitted these claims, and it is to correct this alleged error that this petition for review is brought to this court.

All the notes to Moerschel are signed by Frank J. Linhoff; that to Emma C. Linhoff is signed Schultz Dry Goods & Carpet Company, the predecessor of the present bankrupt. It is dated February 28, 1910, but Mr. Linhoff testifies that he executed it some time in the fall of 1914, after the Schultz Dry Goods & Carpet Company, as such, had ceased to exist; its charter having expired by limitation. This note, executed by Linhoff in the name of the Schultz Dry Goods & Carpet Company, was merely to replace an $8,000 note originally made by Linhoff to Moerschel, the father of Mrs. Linhoff, who gave this note to her as a present, and without further consideration. This note, therefore, occupies in law the same position as those presented by Moerschel himself.

In general, the statement of facts made by the referee in his certificate to the court, apart from the conclusions of law which he has drawn from them, may be accepted as correct. They are justified by the testimony, and there appear to be no material differences between

counsel as to such facts. Whether regarded as a purchase of corporate stock or as a purchase of the dry goods business, the notes evidence, in effect, a lending of credit, or loan by Moerschel to his son-in-law, Linhoff, individually, for that purpose. The transaction did consist in the purchase of the stock of the stockholders in the Schultz Dry Goods & Carpet Company; 238 shares being transferred to Linhoff and 1 share each to Mrs. Linhoff and her brother, Ernest C. Moerschel, who were elected directors and officers of the company, to succeed those whose stock had been purchased. Thus the corporate existence was maintained intact until the charter expired; then, for a brief period, the business was continued in the same name and without alteration in the situation, although in theory, the original corporation had ceased to exist.

The new corporation, the present bankrupt, was then organized upon the basis and theory of exact succession to the older corporation; the amount of capital stock and the shares and ownership remaining the same. Bankruptcy was sought, and the adjudication made of the latter corporation, as such, largely at the instance of the holders of these contested claims; so that no question now can be made in this action as to the validity of such corporate existence. The Schultz Dry Goods, Carpet & Ready-to-Wear Company is, in all respects, the successor of the Schultz Dry Goods & Carpet Company, took over all the assets, and is impressed with all the obligations of the former company; the relationship between that company and creditors, and all parties doing business with it, are the same as before, and we may consider and determine this case exactly as though no change in the corporate entity had been made.

Linhoff at the outset undertook to acquire this business from its then owners; he apparently had little or no money available for that purpose; he borrowed practically the entire amount in cash from banks, and gave notes for the residue to Mr. Schultz. Upon all these notes Moerschel was surety, and subsequently he was compelled, as he had probably all along intended, to pay these notes; and notes for like amounts were made by Linhoff to him in lieu thereof. Upon the face of the papers, as in fact, the relation of debtor and creditor was maintained throughout between Linhoff and Moerschel. The loan was made by Moerschel to Linhoff. The trustee, in effect, so finds, and there can be no question about this. Moerschel states the situation in a nutshell as follows:

"He [Linhoff] came up here and wanted to go in business, and he bought, it and I promised to help him out, and I had to stick to it. He loaned some money from the banks, and I went security. I signed the notes."

Claimants now urge that, because Linhoff practically owned the entire business, these personal obligations of his are chargeable against the company, and are entitled to participate in the distribution of its assets. Their counsel concede that, as against any creditor of the corporation existing at the time of the original transaction, these claims would be postponed; but they say that with respect to subsequent creditors, who became such after the existence of this so-called indebted-

ness and its alleged assumption by the corporation, these claims stand upon an equal footing. If allowed, they will absorb more than one-half of the dividends to be paid by the trustee. The immediate feeling of a chancellor, to whom such claims are addressed, is that they should not, in equity, be sustained. We turn, at once, for concrete reason and authority to confirm this feeling and impression. Such confirmation is not far to seek. It is founded upon the great weight of authority, and upon reasoning and a policy of the law which is impregnable. The notes, the obligation, the indebtedness, are those of Frank J. Linhoff as an individual. This relationship has been preserved throughout the entire transaction. It matters not what Moerschel may have thought, or may now think, as to the law; the fact is he loaned this money to his son-in-law, and took his son-in-law's notes therefor. He could not sue upon these notes and recover against another as the real maker. Sparks et al. v. Dispatch Trans. Co., 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351.

It is claimed, however, that in this equitable proceeding such recovery may be had, and reliance is placed upon the decision of this court, as affirmed by the Court of Appeals of this Circuit, in Flower v. Commercial Trust Co., 223 Fed. 318, 138 C. C. A. 580, and Flower v. Central National Bank, 223 Fed. 323, 138 C. C. A. 585. But in those cases the Circuit Court of Appeals merely decided that the loan was actually made to the corporation itself, and for its benefit, and that the proceeds thereof actually entered into its business. In this case it quite as conclusively appears that the loan was not made to the corporation, nor for uses in its business, but to Frank J. Linhoff, to enable him to buy the corporate stock of the then holders. The money paid to those owners was taken by them and appropriated, of course, to their own personal use and benefit. If we were to allow this loan to Linhoff to become a charge upon the corporate property, it would have the effect, at once, without consideration to the corporation, to reduce its corporate assets to that extent, in this case to an unconscionable amount. It was one of these notes that was transferred to Emma C. Linhoff without consideration moving from her so far as the corporation was concerned; again, without consideration, it was transformed from a Linhoff note into a corporation note. She was a stockholder, officer, and director in that corporation. She has no higher right nor claim than had her grantor, Moerschel. There is present upon the minutes of the company no formal authorization or recognition of this act, and it would have been ultra vires and void as against creditors if there had been such.

But it is claimed that something like $12,400 did actually pass to the benefit of the corporation, because debts to that amount were extinguished out of the purchase price. The cases last above referred to are relied upon to sustain the allowance of this sum in any event; but this is not true where the loan is not made to the corporation, and where the funds find their way into its treasury incidentally and indirectly. In Flower v. Commercial Trust Co. and Central National Bank, supra, this court, in its opinion, said:

"It may also be conceded that, if a loan be made to a stranger, a third party cannot be held merely because the money has found its way indirectly into his hands through dealings between the borrower and himself."

And this statement was in no sense criticized or rejected by the Court of Appeals, but, on the contrary, the holding of this court was in all things confirmed, upon the broad ground that there the loan was, in fact, made to the corporation as such. Here it appears that Moerschel, in effect, loaned the money to Linhoff. Linhoff paid it over to the Schultzes, and the Schultzes, out of the money so received by them, did discharge indebtedness to the amount stated. Such a transaction does not alter the relationship incontestably created and existing between Moerschel and Linhoff.

But counsel urge that Linhoff in fact bought all this stock, and that this, therefore, became a one-man corporation; that such a corporation may assume the indebtedness of its individual owner, and even give security therefor. They concede, however, that the rights of then existing creditors could not be affected. In answer to this, it should be stated that technically the company never became a one-man corporation. Shares of stock in other stockholders were left outstanding, and the corporate existence was maintained. No notice was given to creditors, existing or prospective, of any such radical change in the make-up of this business enterprise. Reports made to them made no mention of this indebtedness, nor its source. The manner in which the notes were carried upon the books of either the bankrupt company or Moerschel, or both, if they were, in fact, so carried, does not affect the question. Creditors are not bound by the contents of such books, which they are neither bound nor presumed to examine in the absence of circumstances suggesting such a course.

But, even though this were a one-man corporation, by reason of the acquisition of the entire stock, the situation would not be different. It must be conceded, of course, that, as between Moerschel and Linhoff alone, the claim of Moerschel could be impressed upon any of Linhoff's property, and, perhaps, in this case, directly upon his interest in this company; but to say that this can be done as against third parties, who have, in good faith, dealt with the corporation as such, and extended credit upon the faith of its corporate existence and the legal deductions legitimately made therefrom, is to lose sight of the fundamental principles of Missouri corporation law. This transaction amounts indirectly, and in effect, to the assumption by a corporation of the indebtedness of one of its officers and stockholders for the purchase of its capital stock, and this, as decided by the Missouri court of last resort, is expressly prohibited. Hunter v. Garanflo, 246 Mo. 131, 151 S. W. 741. The rule in the federal jurisdictions is not otherwise. It applies to subsequent as well as prior creditors upon the strongest of reasoning. In re Haas Co., 131 Fed. 232, 65 C. C. A. 218. It is there said:

"The corporation, as a statutory person, with power to transact business, invite credit, incur obligations, and to discharge them, is an entity entirely distinct from its individual shareholders, and from their power to transact business, invite credit, incur obligations, and to discharge the same. * * * So

long as the corporation is a going concern, there can be no lawful diversion of capital and assets that would diminish the security upon which continuing or future credit will be presumably based."

The general principle involved is thus stated:

"A corporation has no power to execute its notes, secured by a mortgage of its property, for individual debts of its stockholders incurred in the purchase of their stock, to the exclusion of creditors of the corporation, although their claims arose after the mortgage was executed and recorded."

And upon like principle such notes cannot participate in the distribution of corporate assets, to the displacement and impairment of the legitimate debts of the corporation, especially when contracted without knowledge of the existence of such claims. In Hunter v. Garanflo, supra, it was said that the provisions of the Missouri Constitution are—

"directed against the stockholders, and are primarily intended for the benefit of the public, by securing, as far as possible, the integrity of the fund for the protection of those who may deal with it, as well as those who may become the purchasers of its stock upon the faith of the representations made in the act of its incorporation."

The decisions of our own Circuit Court of Appeals are fully in accord with the principles thus announced. Mapes v. German Bank of Tilden, Neb., 176 Fed. 89, 99 C. C. A. 609; Park Hotel Co. v. National Bank, 86 Fed. 742, 30 C. C. A. 409. As bearing upon the question, also, see Merchants' Bank v. Baird, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; Trust Company v. Boynton, 71 Fed. 797, 19 C. C. A. 118; Smith v. Nelson Land & Cattle Co., 212 Fed. 56, 128 C. C. A. 512; In re Lance Lumber Co. (D. C.) 224 Fed. 598; Bowen v. National Bank et al., 94 Fed. 925, 36 C. C. A. 553; St. Vincent College v. Hallett, 201 Fed. 471, 119 C. C. A. 647. And as confirming the doctrine of In re Haas Co., 131 Fed. 232, 65 C. C. A. 218, supra, see, also, In re Romadka Bros. Co., 216 Fed. 113, 132 C. C. A. 357.

The case of In re New York Car Wheel Works (D. C.) 141 Fed. 430, is not in point, because there the indorsement by the corporation of the notes of another corporation was not an accommodation in a legal sense, but was based upon a valuable consideration, because the purchase might reasonably have been made, and undoubtedly was made, to protect the interest which it already had in the second corporation; the endorsing corporation at the time owned all the stock of the other, and therefore there was a valuable consideration moving to it for the endorsement made.

It follows, from what has been said, that the order of the referee in admitting the notes of Moerschel and Mrs. Linhoff for allowance was erroneous, and that order must be reversed, and the case remitted to the referee, with directions to disallow the same as against these petitioners and others similarly situated, and for other proceedings not inconsistent with the views herein expressed.

It is so ordered.

KAHMANN & McMURRAY v. ÆTNA INS. CO.

(District Court, E. D. Louisiana. July 26, 1916.)

No. 14081.

INSURANCE ⟸595—MARINE INSURANCE—ACTION ON POLICY—DEFENSES.

Libelants' tug was insured by respondent, the policy providing that there should be no abandonment as for a constructive total loss unless the cost of repairs would equal 75 per cent. of her agreed value. It also provided that in case of partial loss two years after her original survey libelants should pay one-third the cost of repairs. After such time the tug was injured by striking a sunken rock, run to shore, and sunk in shallow water. Libelants abandoned her and so notified respondent, which had her raised and repaired at a cost of less than one-third of her agreed value. It then tendered her to libelants subject to payment of one-third of the cost of repairs, but the tender was refused, and she was afterward wrecked in a storm where she was laid up. *Held*, that respondent had fully discharged its obligation under the policy, and that at the time of the wreck the vessel was at libelants' risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1486–1491; Dec. Dig. ⟸595.]

In Admiralty. Suit by Kahmann & McMurray, owners of the steamtug Greyhound, against the Ætna Insurance Company. Decree for respondent.

John D. Grace, of New Orleans, La., for libelants.

McCloskey & Benedict and Frank Wm. Hart, all of New Orleans, La., for respondent.

FOSTER, District Judge. This is a suit on a policy of insurance. The libelants, Kahmann & McMurray, were the owners of the tugboat Greyhound. The respondent, the Ætna Insurance Company, issued its policy of insurance on her hull, etc., for $2,500. The policy provided: That in case of loss the assured should use every effort to safeguard and recover the vessel, and if recovered to cause her to be forthwith repaired; that in case of neglect or refusal of insured to repair the vessel the insurer was authorized to have her repaired for the account of the assured; that there should be no abandonment as for a constructive loss unless the necessary repairs, exclusive of the cost of raising her and taking her to the dock, should be equivalent to 75 per cent. of the agreed value of the vessel; that in case of a partial loss (two years after the date of her original custom house survey) one-third of the repairs were to be paid for by the owners; and that if paid for by the insurer to be a lien on the vessel. The agreed value was $3,000.

On the 3d day of January, 1908, more than two years after her original custom house survey, the Greyhound struck a sunken obstruction in the Atchafalaya river, staving a hole in her bow. She was run to the bank and there sunk in shallow water. Lines were run out and she was comparatively secure. Libelants telegraphed to the respondent news of the accident, her captain and crew abandoned

her, and later on February 7, 1908, gave notice of the abandonment to the insurance company and claimed a total loss. In the same letter they notified the insurance company the policy had been assigned to Victor von Schuler. In the meantime the insurance company raised the vessel and took her to Morgan City, where she was hauled out and repaired. After she was raised and after the notice of abandonment, the owners sent a surveyor to view the wreck, and he reported that it was impossible to determine what repairs were necessary until the vessel was hauled out on the ways and the mud cleaned out and an examination made of her machinery. At that time she was afloat. The repairs amounted to $751, and the cost of raising and docking to $845. On March 31, 1908, the respondents gave notice to the libelants that the vessel had been repaired and restored to the same condition in which she was before the accident, and tendered her subject to the payment of the agreed proportion due them under the policy. By mistake they demanded more than was due, to wit, one-third of the total, but the letter showed the two items above referred to. Libelants, however, declined to pay anything and stood on their original notice of abandonment and filed the libel. The vessel remained laid up at the ship yard at Morgan City. On September 20, 1909, a storm of exceptional violence arose, and she was wrecked. This time she was a total loss.

It is evident that libelants were not authorized to abandon the vessel under the terms of the policy. The repairs necessary to put her in the same condition as before the accident did not amount to 50 per cent. of the agreed value, and the facts did not justify a belief on their part that she was a constructive total loss. Therefore it was the duty of libelants to have raised the boat and to have had her repaired themselves. Having declined to do so, they are not in a position to complain of the subsequent raising and repairing of the vessel by the insurance company. It would seem the insurance company acted in good faith and gave libelants due and ample notice that they intended to repair the boat, and the evidence establishes the boat was put in a seaworthy condition. After being repaired and launched, the vessel was tendered to libelants. Under the policy libelants owed some part of the claim. The insurance company demanded too much, but the amount actually due was apparent. Libelants, however, made no effort to settle the matter. The insurance company had fully discharged its obligations under the policy, and when the vessel was subsequently lost in the storm of September, 1909, she was at libelants' risk.

The libel will be dismissed.

UNITED STATES v. BOZEMAN.

(District Court, W. D. Washington, N. D. September 6, 1916.)

No. 3348.

WITNESSES ⟸61(1)—COMPETENCY—WIFE.

In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]) by transporting his wife in interstate commerce for immoral purposes, the wife, though no personal violence on her was shown, is a competent witness against accused; a serious wrong being done her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 174, 175; Dec. Dig. ⟸61(1).]

Sydney Bozeman was charged with violating the White Slave Act, and he moves to strike testimony. Motion denied.

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

Charles T. Donworth, of Seattle, Wash., for defendant.

NETERER, District Judge. The defendant is on trial for violation of the White Slave Act. The wife, Rose Bozeman, testified to the charges in the indictment. Motion is made to strike her testimony, because no personal violence upon her is shown. This motion is based upon Johnson v. U. S., 221 Fed. 250, 137 C. C. A. 106, decided by the Circuit Court of Appeals for the Eighth Circuit, which fully sustains defendant's view. My conclusion is based upon the decision of the Circuit Court of Appeals for this Circuit in Cohen v. U. S., 214 Fed. 23, on page 29, 130 C. C. A. 417, on page 423, in which the court says:

"We are of the opinion that the personal injury to the wife which permits the admission of her testimony against her husband within the exception recognized by the common law * * * is not confined to cases of personal violence, but may include cases involving a tort against the wife or a serious moral wrong inflicted upon her, and that in a case of the prosecution of a man for bringing his wife from one state to another with intent that she shall practice prostitution in violation of the White Slave Act, his act in so doing is such a personal injury to her as to entitle her to testify against him."

The holding of the Circuit Court was approved by the Supreme Court of the United States (235 U. S. 696, 35 Sup. Ct. 199, 59 L. Ed. 430), where the court denied petition for a writ of certiorari. The above conclusion is also indorsed by the District Court in United States v. Rispoli, 189 Fed. 271, and U. S. v. Gwynne, 209 Fed. 993.

The motion is denied.

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1916.)

No. 4593.

1. POST OFFICE ⟸21(1)—CONTRACTS FOR CARRYING MAILS—MODE OF ENTERING INTO CONTRACTS.
Where a railroad company, which had been carrying the mails, accepted a distance circular relating to the carrying of mails, providing that it should carry the mails subject to the acts of Congress and regulations of the Post Office Department, a contractual relation was established, and the rights of the parties are to be measured by the distance circular.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27–29; Dec. Dig. ⟸21(1).]

2. POST OFFICE ⟸21(1)—CONTRACTS FOR CARRYING MAILS—MODIFICATION.
Where a contract for the carrying of the mails was embodied in a distance circular furnished by the Post Office Department, the contract as made was binding on the United States, and a modification by it was unauthorized.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27–29; Dec. Dig. ⟸21(1).]

3. POST OFFICE ⟸21(4)—CARRYING OF MAILS—POWER OF POSTMASTER GENERAL.
The power of the Postmaster General to impose fines upon carriers of the mails for delinquencies, conferred by Rev. St. § 3962 (Comp. St. 1913, § 7450), not being known to the common law, cannot be enlarged by inference or intendment.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 32–39; Dec. Dig. ⟸21(4).]

4. POST OFFICE ⟸21(1)—CONTRACTS—CONSTRUCTION.
Where for a long time a railroad company acquiesced in postal regulations applicable to contracts and statutes relating to the carrying of the mails, such acquiescence will not be disregarded without the most persuasive reasons.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27–29; Dec. Dig. ⟸21(1).]

5. CONTRACTS ⟸147(1)—CONSTRUCTION—DUTY OF COURT.
The prima facie duty of a court in construing a contract is to ascertain and effectuate the intention of the parties, as shown by the language of the instrument, their relation to each other, and the subject-matter of the contract.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. ⟸147(1).]

6. POST OFFICE ⟸21(4)—CONTRACTS FOR CARRYING OF THE MAILS—AUTHORITY OF POSTMASTER GENERAL TO IMPOSE FINES.
A contract for the carrying of the mails was entered into by a railroad company's acceptance of a distance circular furnished by the Postmaster General, which declared that the company should perform mail service upon the conditions prescribed and the regulations of the department applicable to railway mail service. Rev. St. § 3962, declares that the Postmaster General may make deductions from the pay of contractors for failure to perform services according to contract, and impose fines upon them for other delinquencies, and may deduct the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be occasioned by the fault of the carrier. It had been the custom of the parties in relation to such contracts to allow the Post Office Department to make payments of sums due as they accrued, and to

deduct from earnings under subsequent contracts the amount of fines imposed for delinquencies. After the contract was entered into the Post Office Department deducted from earnings under such contract the amount of a fine for a delinquency occurring under an earlier contract. *Held*, in view of the long acquiescence of the railroad company and the obvious intention of the parties that they should be governed by the rules and regulations of the Post Office Department, such deduction was justified.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 32–39; Dec. Dig. ⟸21(4).]

7. POST OFFICE ⟸21(4)—CARRIAGE OF MAILS—FINES FOR DELINQUENCY.

Under such statute, the Postmaster General is not, where the delinquency resulted in the destruction of mails, restricted to a fine in three times the amount earned by the railway company on the trip on which the delinquency occurred, but may make deduction commensurate with the loss sustained; public policy requiring that the mails shall be carried subject to postal regulations, and the statute authorizing the imposition of fines for delinquencies other than the failure to perform services according to the contract.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 32–39; Dec. Dig. ⟸21(4).]

8. POST OFFICE ⟸21(4)—CARRIAGE OF MAILS—AUTHORITY OF POSTMASTER GENERAL.

Under Rev. St. § 3962, the Postmaster General may impose on mail carriers fines for delinquencies without limitation, and his determination is not subject to review, unless he manifestly abuses or exceeds the power conferred.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 32–39; Dec. Dig. ⟸21(4).]

In Error to the District Court of the United States for the District of Minnesota.

Action by the Great Northern Railway Company against the United States. There was a judgment for the United States, and plaintiff brings error. Affirmed.

Sanford H. E. Freund, of St. Paul, Minn. (E. C. Lindley, of St. Paul, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

ELLIOTT, District Judge. This is an action prosecuted by the plaintiff in error (hereinafter referred to as the plaintiff) to recover of the defendant in error (hereinafter referred to as the defendant), the sum of $400, with interest thereon from November 7, 1911, the same being the amount deducted by the Postmaster General from sums due the plaintiff under an agreement for carrying the United States mail on the route named in the pleadings, for a period of four years, commencing July 1, 1911, and ending June 30, 1915, the same being a fine imposed by the Postmaster General, on October 23, 1911, for and on account of a wreck of the railway company's train at Clontarf, Minn., a point on said route, November 25, 1908. It is admitted on the face of the record that the relation of the parties, plaintiff and defendant, with reference to the carrying of mail on said route, and the right of

the plaintiff to recover herein, was and is controlled by the following state of facts:

That for a number of years immediately preceding July 1, 1911, the plaintiff had been transporting the mails of the United States over its line of railway over the said route, designated as No. 141,006, authorized thereto by the Postmaster General and in accordance with the postal laws, regulations, and practices of the Post Office Department. That the four-year term for which the compensation for such services had theretofore been adjusted in accordance with said laws, and the rules and practice of said department, expired by limitation June 30, 1911. That theretofore, February 17, 1911, the Postmaster General, in conformity with the practice of the Post Office Department, under the authority of the statutes of the United States, submitted to plaintiff a "distance circular" proposing the continuance of the carrying of said mails over said route by the plaintiff for a new term, beginning July 1, 1911, and to end June 30, 1915. That thereupon the plaintiff complied with the terms and conditions required by the said circular and executed the same under date of February 17, 1911, and duly transmitted the same to the Post Office Department. That said circular, so executed and forwarded, contained the following provision:

"The company named below [plaintiff] agrees to accept and perform mail service upon the conditions prescribed below and the regulations of the department applicable to railway mail service."

That said "distance circular" was required, was furnished, executed, and delivered in accordance with the plans theretofore provided by the Postmaster General, and readjusted the compensation on said route in accordance with the provisions of section 4002 of the Revised Statutes of the United States (Comp. St. 1913, § 7483), and Act July 12, 1876, c. 179, 19 Stat. 78, 82, as amended by Act June 17, 1878, c. 259, 20 Stat. 140, 142, at the rate therein specified, and by an order of the Postmaster General dated October 13, 1911, and made a part thereof, which order provided, in addition to the compensation for services to be rendered, a specification of cars, and also provided:

"This adjustment is subject to future orders, and to fines and deductions * * *"

—which said order was so made in accordance with the uniform practice of the Post Office Department, and the provisions of the Revised Statutes of the United States, was dated October 13, 1911, and notice of such order on that date given to the plaintiff. That theretofore, during the period preceding the term beginning July 1, 1911, on, to wit, November 28, 1908, a wreck occurred on the line of the plaintiff, at Clontarf, a station on said route, and a large quantity of mail and mail equipment was destroyed, and which wreck was caused by plaintiff's negligent operation of its train on which said mail was being transported. That thereafter, and before the expiration of the four-year period ending June 30, 1911, on November 7, 1910, the plaintiff was notified by the defendant, through the Second Assistant Postmaster General, to show cause why a fine should not be imposed for

the loss of said mail and equipment in accordance with the provisions of section 3962 of the Revised Statutes of the United States.

After the expiration of the term ending June 30, 1911, and after the beginning of the new term, to wit, October 23, 1911, the Post Office Department, in accordance with the terms of said section 3962 of the Revised Statutes of the United States, imposed a fine of $400 on the plaintiff for and on account of the said "delinquency" in the transportation of the mails, and at once notified plaintiff of the imposition of said fine, and thereupon the defendant did withhold and deduct the said $400 from the compensation earned by the plaintiff under its agreement with the defendant for and during the term beginning July 1, 1911. Defendant's Exhibit A was a certified copy of certain files and records of the Post Office Department, and was a notice to defendant of the imposition of certain fines by the Post Office Department for delinquencies during the first term above referred to, amounting to $13, with a notice as follows:

"October 30, 1907.

"Sir: The amount noted on reverse side of this notice has been ordered deducted from the pay of your company on the route and for the quarter named. This action is taken in pursuance of authority conferred by section 3962, Revised Statutes of the United States. The right is reserved to make disallowances from future payments for other failures or delinquencies, if any have heretofore occurred, and to correct errors and omissions.

"Very respectfully, J. T. McCleary,

"Second Assistant Postmaster General."

Another portion of Exhibit A referred to a different page of the same record and contained a list of seven delinquencies, amounting to $36, was dated April 31, 1908, with notice and reservation of right to make disallowances for delinquencies, if any had theretofore occurred in the language above noted, and as a part of said Exhibit A, same being another page of said exhibit, was a further notation of five delinquencies, amounting to $8, dated October 4, 1909, with the same notice. Page 5 of said exhibit was a notice of three delinquencies, dated August 4, 1910, with the same notice as the exhibit last above named. Page 6 of said Exhibit A was a notice of assessment of fine for two delinquencies, dated April 4, 1911, with the same notice.

Upon the acceptance of the distance circular the plaintiff agreed to perform the service of carrying the mail "upon the conditions prescribed by law and the regulations of the department applicable to railway mail service," but takes exception to Postmaster General's order No. 412, dated June 7, 1907. Thereupon the Second Assistant Postmaster General, under date of July 6, 1911, wrote the plaintiff as follows:

"Sir: This office is in receipt of a distance circular for route No. 141,006, from Minneapolis to Moorhead, Minn., signed by you, for the term beginning July 1, 1911, and ending June 30, 1915, for railroad mail service by your company. Note is taken of the modification made by you in the agreement clause, in which you except order No. 412 issued by the Postmaster General June 7, 1907. In regard to this I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General, and it must be understood that, in the perform-

ance of the service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General, which are now or may become applicable during the term of this service."

November 2, 1911, the Postmaster General approved the orders and regulations originating claims and affecting the accounts of the Post Office Department and postal service, including, among others, the following: First identifying the route in question; then:

"From July 1, 1911, to June 30, 1915, pay the Great Northern Railway Company, monthly, for the transportation of the mails between Minneapolis and Moorhead, Minn., at the rate [rate and specifications of cars, etc., omitted] in accordance with agreement. This adjustment is subject to future orders, and to fines and deductions. * * *"

And notice of said adjustment was on October 13, 1911, transmitted by defendant to plaintiff, which notice included the following:

"This adjustment is subject to future orders, and to fines and deductions. * * *"

Judgment below was for defendant. Plaintiff brings writ of error, and contends, first, that the distance circular above named, and its acceptance, constitute a contract. Defendant insists that under the facts above set forth that the contract between the plaintiff and defendant was one not reduced to one form or instrument of writing, but was evidenced by the agreement of the railway company to perform services in accordance with the postal laws and regulations on its part, and by the readjustment of the compensation under Revised Statutes, § 4002, and the act of July 12, 1876 (19 Stat. 82), and supplemental acts, by the Postmaster General, on the part of the United States, that the contract was a continuing one which had been entered into long prior to July 1, 1911.

[1, 2] These contracts were for four years and were expressly authorized by law. They were therefore valid and binding on the United States, as well as upon the railroad company, for that length of time. They contained within themselves a mode for lessening or, if deemed best, for discontinuing entirely the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States would have been liable to damages for its breach in the same manner and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. C. & N. W. Ry. Co. v. United States, 104 U. S. 680, 26 L. Ed. 891.

Contractual relation is established by the distance circular and its acceptance, and is uniformly assumed and recognized by the courts. Where the service is performed under such distance circular and acceptance, it is performed under a contract between the government and the company doing the service. United States v. Atlantic Coast Line R. R. Co. (C. C.) 189 Fed. 779. In speaking of a contract of this kind, Justice Lamar said, in delivering the opinion of the Supreme Court

in Atchison, Topeka & Santa Fé Railway Co. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236:

"This contract was to expire June 30, 1907, by limitation; and, with a view of obtaining data, and proposing terms for a new arrangement to begin July 1, 1907, the postal authorities, in February, mailed to the company a 'distance circular,' which, among other things, stated that the company was 'to accept and perform mail service under the conditions prescribed by law and the regulations of the department.'"

In Jacksonville, Pensacola & Mobile Ry. Co. v. United States, 118 U. S. 626, 7 Sup. Ct. 48, 30 L. Ed. 273, plaintiff had a written contract with the government for the transportation of the mails between certain designated points from July, 1871, to July, 1875, at prescribed rates. After the termination of the contract, the plaintiff continued to carry the mail, as previously, without notice from the Postmaster General that the price to be allowed for the service would be in any respect different, until March, 1876, when he fixed the rate of compensation at a less sum for the service until June 30, 1876. Plaintiff performed the service notwithstanding this reduction and the reduced price was received. From July, 1876, to June, 1880, the same service was performed by the plaintiff, but further reductions from the compensation previously allowed, were made, under the acts of Congress of July, 1876, and June, 1878. Notice was given to the company, but the service was continued. A suit was brought by the railway company to recover the difference between the price thus allowed and the price paid previous to July, 1876, at which time the original contract terminated. It was contended that by the continuance of the service of the plaintiff after June 30, 1876, without objection by the Postmaster General, a contract was implied that the same compensation should be subsequently allowed. This contention was denied, and it was held that:

"All that the plaintiff could ask or expect under the law was that the Postmaster General should prescribe a reasonable compensation for its services, and that the service would be continued so long as the public interest should require. No implication of law could extend further than this."

It was further held that:

"It would be against all analogies to hold that a continuance of service after the termination of a written contract for years creates an obligation of a renewed contract, not merely upon a like compensation but for the same duration of time. There is no principle that could justify the implication."

Neither the railway company nor the United States were bound to continue the indefinite relation begun with the contract representing the first four years' service above referred to, and under which the rights and liabilities of each arose from day to day, as the services were performed by one and for the benefit of the other. Atchison, Topeka & Santa Fé Ry. Co. v. United States, 225 U. S. 649, 32 Sup. Ct. 702, 56 L. Ed. 1236. Instances might be multiplied where different courts have recognized the contractual relation between the government and its mail carriers, and we are therefore of the opinion that a distance circular and its acceptance constitute a contract for a separate and distinct term of four years. That the Postmaster General himself recog-

nizes this fact is shown by the admission in the answer and counterclaim filed herein, wherein it is said that the Postmaster General "entered into a certain agreement with the plaintiff for the transportation of the mail," referring to this same distance circular and its acceptance.

[3-6] Having found that this distance circular and its acceptance constitutes a separate contract, it is the contention of the plaintiff that the Postmaster General is without authority to satisfy a fine imposed for a delinquency under a previous contract, fully completed. It is admitted that the four-year term within which the "delinquency" occurred expired by limitation June 30, 1911, that the damage to defendant's mails and equipment resulted from the plaintiff's negligence, and that the defendant imposed a fine of $400 therefor and retained the same from the moneys due and earned during the term beginning July 1, 1911. Section 3962 of the Revised Statutes provides:

"The Postmaster General may make deductions from the pay of contractors, for failure to perform service according to contract, *and impose fines upon them for other delinquencies.* He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

It will be observed that the power to fix and make deductions is conferred upon the Postmaster General, subject to the limitation that he may deduct the price of the trip in all cases where the trip is not made, and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier and "he may impose fines for other delinquencies." This power to impose a fine is one that is not known to the common law and cannot be enlarged by inference or intendment. Its remedy must be found in the specific contract which authorizes it. United States v. Atlantic Coast Line R. R. Co. (D. C.) 206 Fed. 190–196. It is a fair and reasonable conclusion that, in fixing the rate of compensation for carrying the mail, due regard was had to the provisions of section 3962 of the Revised Statutes, and the construction theretofore put upon it by the department in fixing the extent of the carrier's liability for defaults and delinquencies, and that such construction was in the contemplation of both plaintiff and defendant at the time of making the contract.

The regulation of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain; but the record in this case discloses that plaintiff, at the time of entering into the contract that became operative July 1, 1911, understood the interpretation that had been placed upon contracts of this character, and the authority under the provisions of section 3962 to deduct the amount of fines for delinquencies in a prior term from the earnings of a subsequent term, and consented thereto in other adjustments. This acquiescence in this regulation and rule of the department is not to be disregarded without the most cogent and persuasive reasons. United States v. Atlantic Coast Line R. R. Co. (D. C.) 206 Fed. 199; Robertson v. Downing, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269. In addition to this, the defendant, through its Postmaster General, gave notice to plaintiff, at the time of each separate adjustment, that the same was made subject to future orders and

to fines and deductions. There is neither record of protest nor of any expression of dissatisfaction with this reservation on the part of the defendant, and it is undisputed that the contract for service beginning July 1, 1911, was made with knowledge of this reservation, of this rule and regulation, and of the intent and purpose on the part of the government to deduct from future earnings the amount of any fine for past delinquencies that had not been adjusted. It appears from the record that specific written notice was given by the defendant to plaintiff at the time of notice of acceptance of this contract of service, to begin July 1, 1911, that:

"It must be understood that in the performance of the service from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations and orders of the Postmaster General which are now or may become applicable during the term of this service."

No question of public policy can be invoked to control the court in placing a fair, reasonable construction on the language of the contract, or to disturb the application of rules and interpretations founded upon reason and justice. The primary duty of a court, in determining the rights of the parties, is to ascertain and effectuate the intention of the parties. This must be done by examining the language used and looking to the relation which the parties bear to each other and the subject-matter of the contract. United States v. Atlantic Coast Line R. R. Co. (D. C.) 206 Fed. 200. We think, clearly, the assessment of the fine for past delinquencies and the deduction thereof from the amounts earned under the contract to begin July 1, 1911, were within the contemplation of both the plaintiff and defendant at the time this contract was made.

This authority has been claimed to be within the terms of these contracts for the carrying of the United States mails, and the benefits of the exercise of such authority have been claimed by railway companies, and recognized by the decisions of this and other courts. It affirmatively appeared by the stipulation of facts in Union Pacific Railroad Co. v. United States, 219 Fed. 427, 134 C. C. A. 325, that the contract between the government and the company in that case was for the period July 1, 1902, to June 30, 1906, and that at the expiration of that contract another contract, over the same route, was entered into by and between the parties thereto for the carriage of mail over that route from July 1, 1906, to June 30, 1910, and thereafter another contract was entered into between the same parties for the carriage of mail over the same route from July 1, 1910, to June 30, 1914. The wreck in that case occurred on the 7th day of December, 1905, the same being within the period of the first of the three contracts above named. The entire period of the first contract expired; then the second period from July 1, 1906, to June 30, 1910, expired; the company entered upon the third four-year period of carrying the mail, July 1, 1910. On July 1, 1910, a notice was received by the company that the sum of $3,000 for said delinquency occurring December 7, 1905, had been deducted from the pay of the company accruing for the month of June, 1910. The railway company there received the advantage of its position that

it had agreed to accept and perform the service upon the conditions prescribed by law and the regulations of the department, including Postal Regulation 1335, which was admitted and received as evidence in the case at bar, which provides, in substance, that fines will be imposed unless satisfactory excuse be made in due time for the delinquency therein named, which includes the delinquency complained of here. Paragraph 2 of said section 1335 provides that:

"The fine will in each case be such sum as the Postmaster General may impose in view of the gravity of the delinquency and will be deducted from the contractor's pay for the service on the route on which the delinquency occurred."

The United States sought to recover the value of the registered mail which was destroyed, and a right of recovery was denied by the opinion of this court, for the reason that, under the agreed facts presented in the record, it had exhausted the remedy provided by law for whatever damages resulted from the railroad wreck in question, prior to the commencement of the suit, thus placing a construction upon the rights of the parties binding the government of the United States to a contemplation, at the time that contract was entered into, of doing just what is complained of in the case at bar, and in that case the action of the Postmaster General in the assessment of the fine, protected the carrier from the larger damage sought to be recovered in that action. It does not appear, however, that the question now insisted upon in the case at bar, was raised in that case; the defendant relying upon the fact that the fine had been imposed, and the government admitting, not only that the fine had been imposed, but that it had been imposed under the authority of section 3962 of the Revised Statutes, section 1335 of the Postal Regulations, and in conformity with the provisions of the contract under which the mails were being carried.

In United States v. Atlantic Coast Line Railroad Co. (D. C.) 206 Fed. 190, it appears from the statement of facts that the Postmaster General on February 13, 1900, entered into a contract with defendant (presumably for a period of four years from July 1, 1900, to June 30, 1904); that on the 8th day of April, 1904, a registered package was transmitted through the mail and was placed in the mail car attached to defendant's train April 18, 1904. On the night of that day there was a wreck and the package was lost. The collision was caused by the negligence of the defendant. Pursuant to the provisions of section 3962 the Postmaster General on October 2, 1906, deducted from the amount due the defendant for mail service, under a contract "because of the destruction of mail and equipment in the wreck of train 35 near Lucama April 18, 1904, $500." Thereafter the United States brought an action for damages for loss of the mail equipment and registered mail matter while in transit over its line of railroad. Under these circumstances the defendant company relied for one of its defenses upon accord and satisfaction by reason of the imposition of the fine by the government for such delinquency, under section 3962 of the Revised Statutes. This statute was referred to by the court as throwing light upon the interpretation of the contract and ascertaining the intention of the parties in respect to the liability of the defendant, and the remedy for

breach of its obligation. No question was there raised that the deductions had not been made from the earnings within the term of four years that included the date of the accident, but was actually deducted from the earnings of a subsequent term. The defendant there claimed the benefit of the interpretation of the contract and the action of the Postmaster General identical with that complained of in the case at bar. It was there held that the fine imposed by the Postmaster General operated as an accord and satisfaction of all claims accruing to plaintiff by reason of the destruction of the mail car. 206 Fed. 212, citing United States v. Oliver (C. C.) 36 Fed. 758.

The record in this case discloses that certain delinquencies, other than the one in question, occurred in the term which began July 1, 1903, and ended June 30, 1907, and the Postmaster General directed the amounts of the fines to be withheld from moneys earned by the plaintiff, under a readjustment made subsequent to the time of the occurrence of the delinquency, for which they were imposed. It does not appear that any objection was ever made by plaintiff to this practice and custom of the department under its interpretation of its authority under the statutes, rules, and regulations and provisions of the contract, though known to the plaintiff, and the moneys earned were paid regularly at stated periods, regardless of charges or fines to be imposed for past occurrences, to the advantage of the plaintiff. A different interpretation of the contract, rules, and regulations would have necessitated the government retaining in its hands the moneys earned by the plaintiff beyond the time upon which payments fell due, by the terms of the contract, until such time as adjustments could be made for *all* delinquencies occurring during the period named in the particular contract.

We are of the opinion that the action of the Postmaster General, complained of in the case at bar, was predicated upon an interpretation of the contract, statutes of the United States, and rules and regulations of the department, a construction of long standing, acquiesced in by the plaintiff, was in contemplation of both parties, and was specifically provided for in the distance circular and its acceptance, constituting the contract for service by the plaintiff beginning July 1, 1911, and the plaintiff cannot be heard to question defendant's right to make the deductions complained of in this action.

[7] The plaintiff, however, insists that, even if the Postmaster General had the right to make the proper deduction for the delinquency complained of herein, he could not in any event impose as a fine more than three times the amount earned by the railway company on the trip on which the delinquency occurred. He cites section 3962 of the Revised Statutes, which reads:

"The Postmaster General may make deductions from the pay of contractors, for failure to perform service according to contract, *and impose fines upon them for other delinquencies.* He may deduct the price of the trip in all cases where the trip is not performed, *and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.*"

Public policy requires that the mail shall be carried subject to Postal Regulations. The plaintiff in carrying the mails was not hauling

freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect was serving as an agency of government and as much subject to the laws and regulations as every other branch of the post office. Atchison, Topeka & Santa Fé Ry. Co. v. United States, 225 U. S. 640–649, 32 Sup. Ct. 702, 56 L. Ed. 1236. This view of the plaintiff entirely overlooks the provision of the above statute, as follows:

"And impose fines upon them for other delinquencies."

For such delinquencies no limitation is attempted to be placed, and pursuant to that provision of statute, paragraph 2 of section 1335 of the Postal Rules and Regulations was enacted, and it is provided that:

The "fine will in each case be such sum as the Postmaster General may impose in view of the gravity of the delinquency."

This court, in considering the right of the United States to recover of a carrier damages for losses sustained by reason of a "delinquency" such as is contemplated by this statute, said:

"This view of the case ought not to be objected to by the United States, as it leaves with them a full and complete remedy at all times by the imposition of such penalties and deductions against any contractors, as will fully reimburse the government for whatever loss it may have sustained." Union Pacific R. R. Co. v. United States, 219 Fed. 427–437, 134 C. C. A. 325, 335.

It is further there stated that:

"Congress by section 3962, supra, has authorized the Postmaster General to make deductions from the pay of any contractors for failures to perform service according to contract, and to impose fines upon them for other delinquencies, and the fact that the Postmaster General by regulation No. 1335, above quoted, has specified the acts for which penalties may be imposed and deductions made, and the loss of mail in question being within the terms of said regulation, and the fact that heretofore, during the existence of the government, no case like the one at bar has been instituted, except United States v. Atlantic Coast Line Railroad Co., supra, leads irresistibly to the conclusion that the remedy of the United States for the loss of mail through the default of contractors is through the imposition of fines and the making of deductions, as provided for, in said section above quoted."

We have no difficulty therefore in determining that the Postmaster General had the right to make a deduction for the delinquency under this provision of statute, commensurate with the loss sustained by the government by reason of such delinquency, and that the provisions of said statute do not limit or attempt to limit or control the action of such officer or measure the amount of the fine by the value of the trip of the mail train wrecked.

[8] Objection is made by the plaintiff that this interpretation of section 3962 of the Revised Statutes places the power of imposing a fine within the Postmaster General of the United States, without limitation. We are of the opinion that, unless the Postmaster General manifestly abuses or exceeds the power thus conferred upon him, his action is the exercise of the power conferred upon him by the statutes and recognized by the terms of the contracts to be within his discretion, and is

not subject to review by the courts. Allman v. United States, 131 U. S. 31–35, 9 Sup. Ct. 632, 33 L. Ed. 51.

The order of the trial court, directing the entry of judgment in favor of the defendant and against the plaintiff, is affirmed.

LOEWE v. SAVINGS BANK OF DANBURY.

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

No. 286.

1. COURTS ⟸366(10)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION —ATTACHMENT.

The remedy by attachment being statutory, the rights of an attacking creditor in a federal court are governed by the state law, as declared by the highest court of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 965; Dec. Dig. ⟸366(10).]

2. GARNISHMENT ⟸115—LIEN OF GARNISHMENT—INTEREST ON SAVINGS BANK DEPOSIT.

Although by the law of Connecticut an attachment creditor acquires only the rights which the debtor had at the time of attachment, where an attachment is served by garnishment of a savings bank in which the debtor is a depositor and the bank is bound by contract to pay interest or dividends on the deposit, the interest accruing thereafter is but an incident of the deposit and is bound by the attachment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 234; Dec. Dig. ⟸115.]

In Error to the District Court of the United States for the District of Connecticut; Edwin S. Thomas, Judge.

Action at law by Dietrich E. Loewe, as surviving partner of the firm of D. E. Loewe & Co., against the Savings Bank of Danbury. From the judgment (226 Fed. 294), plaintiff brings error. Modified and affirmed.

Daniel Davenport, of Bridgeport, Conn., and Walter Gordon Merritt, of New York City, for plaintiff in error.

John H. Light, of South Norwalk, Conn., and John R. Booth and J. Moss Ives, both of Danbury, Conn., for defendant in error.

Martin J. Cunningham, of Danbury, Conn., and William F. Tammany, of South Norwalk, Conn., for United Hatters of North America.

Before COXE and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

ROGERS, Circuit Judge. An action was commenced by the present plaintiff and others in the Circuit Court of the United States for the District of Connecticut 13 years ago to recover damages from the members of a trade union charged with conspiracy in restraint of interstate commerce. The questions involved were before that court

at various times, and were before this court on several occasions, and were three times before the Supreme Court of the United States. The plaintiffs were manufacturers of hats at Danbury, Conn., where they maintained a factory. The defendants in the original suit were members of a combination called the United Hatters of North America, and they were charged with being in a conspiracy to compel the plaintiffs to unionize their factory. The Supreme Court in Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815 (1908), sustained the right to maintain the action. In 1912 the Supreme Court refused a writ of certiorari, and in 235 U. S. 522, 35 Sup. Ct. 1170, 59 L. Ed. 341 (1915), that court, affirming the decision of this court in 209 Fed. 721, 126 C. C. A. 445 (1913), sustained a judgment rendered against the defendants in that action in the sum of $353,130.90.

When the action above referred to, known as the Danbury Hatter's Case, was commenced, a writ of attachment was issued dated August 31, 1903, demanding $240,000 damages and costs. The writ directed the United States marshal for the district of Connecticut to attach to the value of $250,000 the goods and estate of over 150 named defendants, and it was duly served upon them and upon the Savings Bank of Danbury, defendant herein, "as agent, trustee, and debtor of and to each of the aforesaid persons named therein as defendants."

The process under which the money deposited in the Savings Bank was attached was issued under section 880 of the General Statutes of Connecticut, Revision of 1902, which reads as follows:

"When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered, are concealed in the hands of his agent or trustee so that they cannot be found or attached, or where a debt is due from any person to such defendant, or where any debt, legacy, distributive share, is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the session of the court to which it is returnable, with such agent, trustee, or debtor of the defendant, or, as the case may be, with the executor, administrator, or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy, all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy, or distributive share, due or that may become due to him from such executor, administrator, or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

When the judgment was obtained in the main action, an execution was taken out and put into the hands of the marshal, who, acting by the direction of the plaintiffs, made demand upon the Savings Bank of Danbury, the defendant herein, as agent, trustee, and debtor of and to each of the judgment debtors severally of the sums named in the execution and of any estate of each of the several judgment debtors severally. This demand the Savings Bank refused to comply with, although at the time it was served it was indebted to each of the defendants severally in various amounts which it refused at the time to disclose. At the time the marshal made his demand, the Savings

Bank had on deposit $18,461.54 to the credit of various of the defendants. The execution was returned wholly unsatisfied.

An action in scire facias was then brought pursuant to section 931 of the General Statutes of Connecticut, Revision of 1902, to recover attached Savings Bank accounts levied upon by the writ of attachment above mentioned. Section 931 reads as follows:

"If judgment be rendered in favor of the plaintiff in any action by foreign attachment, all the effects in the hands of the garnishee at the time of the attachment, or debts then due from him to the defendant, and any debt, legacy, or distributive share, due or to become due to the defendant from any garnishee as an executor, administrator, or trustee, shall be liable for the payment of such judgment; and the plaintiff, on praying out an execution, may direct the officer serving the same to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of any debt due to the defendant, and such garnishee shall pay said debt or produce said effects, to be taken and applied on said execution; and if he shall have, in any manner, disposed of the effects of the principal in his hands when the copy of the writ was left with him, or shall not expose and subject them to be taken on the execution, or shall not pay to the officer, when demanded, the debt due to the defendant at the time the copy of the writ was left with him, such garnishee shall be liable to satisfy such judgment out of his own estate, as his proper debt, if the effects, or debt, be of sufficient value or amount; if not, then to the value of such effects, or to the amount of such debt. A scire facias may be taken out from the clerk of the court where the judgment was rendered, to be served upon such [court] garnishee, requiring him to appear before such court and show cause, if any he have, to the contrary; and the plaintiff may require the defendant, and the defendant shall have the right, to disclose, on oath, whether he has any of the effects of the debtor in his hands, or is indebted to him; and the parties may introduce any other proper testimony respecting such facts. If it be found that the defendant has the effects of such debtor in his hands, or is indebted to him, or if he makes default of appearance, or refuses to disclose on oath, judgment shall be rendered against him, as for his own debt, to be paid out of his own estate with costs; but if it appear on the trial that the effects are of less value, or the debt of less amount than the judgment recovered against the debtor, judgment shall be rendered to the value of the goods, or to the amount of the debt; and if it appear that the defendant has no effects of such debtor in his hands, or is not indebted to him, he shall recover costs."

And Congress in 1872 provided as follows:

"In common-law causes in the Circuit and District Courts * * * the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided by the laws of the state in which such court is held" for the courts thereof; "and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the" states where they are held "in relation to attachments and other process: * * * Provided, that similar preliminary affidavits or proofs, and similar security as required by such" state "laws, shall be first furnished by the party seeking such attachment or other remedy." Act June 1, 1872, c. 255, § 6, 17 Stat. 197.

No question has been raised but that the action is one which the plaintiff is entitled to bring under the laws of Connecticut and of the United States.

It appears that in December, 1903, after the attachment of the deposits in the Savings Bank and before the rendition of final judgment in the original action, the defendants in that action assigned to the United Hatters of North America, a voluntary association having

an office or principal place of business in the city and state of New York, the dividends or interest accruing on said deposits and which were declared after the attachment.

The United Hatters of North America was given notice of the pendency of the proceeding according to the terms of the Connecticut statute under which the proceeding was instituted, and it appeared and filed an answer in which it alleged that the dividends or interest accruing and declared subsequent to the original attachment were not held by the attachment but passed to it and became its property by virtue of the assignments. The United Hatters notified the Savings Bank that it claimed to own the dividends declared or the interest due on such accounts and demanded payment of the same which payment was refused.

It is admitted that at the time of the attachment the amount held in the Savings Bank account to the credit of the various defendants in the original action amounted to $18,461.54. And the District Judge has found that subsequent to the commencement of the present proceeding the defendant with the consent of the United Hatters paid to the plaintiff $17,558.37, on June 26, 1915, and the further sum of $474.65 on account of the principal of said deposits.

The important question involved is whether the interest or dividends which have accumulated in the hands of the defendant, and which would belong to the depositors but for the assignment, belong to the judgment creditor by virtue of the original attachment, or to the assignee of the fund by virtue of the assignment made after the attachment.

It is understood that similar actions are pending, brought by the plaintiff against other savings banks in Connecticut, involving the same issue, and that the parties have stipulated that the judgment in those actions is to be controlled by the decision in this suit. The accumulated dividends on the various deposits in the various actions are said to amount to about $20,000.

The District Judge came to the conclusion that the attaching creditor was not entitled to the interest or dividends, but that the same belonged to the United Hatters as assignee. He accordingly gave judgment to the plaintiff in the sum of $428.52; that being the amount of the principal which it is admitted remained unpaid in the hands of the Savings Bank of Danbury, the defendant in the action.

The attachment of deposits in a savings bank is a proceeding unknown to the common law. In Haber v. Nassitts, 12 Fla. 589, 608, the Supreme Court of Florida declares that:

> "No such process was known at common law, and the proceeding is traced to a custom of London whereby, 'if a plaint was affirmed and returned nihil,' the plaintiff had a garnishment against debtors of the defendant, and after certain proceedings was entitled to judgment."

However that may be, the remedy by attachment in this country owes its existence entirely to statutory enactment. In Penoyar v. Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248 (1896) the New York Court of Appeals in speaking of the remedy by attachment says:

"It exists, as a provisional remedy, only when authorized by statute, and, as such, is comparatively recent in its origin."

And see Gause v. Cone, 73 Tex. 241, 11 S. W. 162 (1889); Hubbell v. Kingman, 52 Conn. 19 (1884); Kittredge v. Bellows, 7 N. H. 399; Baldwin v. Flagg, 43 N. J. Law, 495. But in Mack v. Parks, 74 Mass. (8 Gray) 517, 69 Am. Dec. 267 (1858), the court said:

"Our system of attachment on mesne process was derived from the ancient rule of the common law, by which, as part of the service of civil process, goods which were properly subject to distress were allowed also to be taken by a species of distress, and held as vadii or pledges to compel the appearance of the defendant."

[1] As the remedy by attachment is statutory, the rights of an attaching creditor are governed by the state law as declared by the highest court of the state enacting the statute, and the decisions of that court will be followed by a court of the United States having jurisdiction of the proceedings. Wolf v. Cook (C. C.) 40 Fed. 432 (1889); Rice v. Alder-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15 (1895); L. Bucki & Son Lumber Co. v. Fidelity & Deposit Company of Maryland, 109 Fed. 393, 48 C. C. A. 436 (1901).

And as the remedy by attachment is regarded as being in derogation of the common law, the courts have sometimes construed strictly the statutes giving the remedy. Ritchie v. Sayers (C. C.) 100 Fed. 520; Brigham v. Avery, 48 Vt. 602; Penoyar v. Kelsey, supra. But in a number of the states the statutes themselves expressly provide that they are not to be strictly construed. See C. J. 37. In other states the courts, having regard to the intention of the Legislatures, have been inclined to adopt a liberal construction independently of express statutory provision. Hannibal, etc., R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Gunby v. Porter, 80 Md. 402, 31 Atl. 324; Best v. British, etc., Co., 128 N. C. 351, 38 S. E. 923; Strock v. Little, 45 Pa. 416; Cole v. Utah Sugar Co., 35 Utah, 148, 99 Pac. 681. The Connecticut statute, once construed strictly (Hubbell v. Kingman, supra), is now liberally construed (Ransom v. Bidwell, 89 Conn. 137, 93 Atl. 134 [1915]). The policy of the state of Connecticut is declared by its highest court in the case last cited to be that:

"All the property of a debtor not exempt from execution shall be made subject to the payment of his debts, and that every facility consistent with the reasonable immunity of the debtor should be afforded to subject such property to legal process."

[2] Under such statutes as that in Connecticut, it is, of course, not questioned but that a creditor of a depositor in a savings bank can attach the deposit. A bank is bound to respect such process, and the courts do not permit it to apply the fund attached to the payment of any debt due from the depositor to any one. Bolles on Modern Law of Banking, vol. 2, p. 778. The difficulty arises when the fund so deposited is upon interest and it becomes necessary to determine whether the attachment binds interest thereafter accruing. The District Judge thought it did not. He fully recognized the principle that the question should be governed by the decisions of the Connecticut court so far as those decisions throw light upon the

subject. He reviewed at some length the decisions in that state. There are a number of cases in which the Connecticut court has decided that attaching creditors acquire no more or greater rights than the depositors had at the time of the attachments, and he therefore concluded that all interest accruing after the attachment belonged to the assignee by virtue of the assignment and not to the attaching creditors.

But the exact question presented in this action has never been presented to the Supreme Court of the state of Connecticut. That court has held that under the foreign attachment statute of that state there is no right to attach unless there is an existing obligation or debt due, and that where there is a condition precedent to the liability there is not an existing indebtedness which can be garnished. See Fitch v. Waite, 5 Conn. 117 (1823); Coburn v. City of Hartford, 38 Conn. 290 (1871); Holcomb v. Town of Winchester, 52 Conn. 447, 52 Am. Rep. 609 (1885); Sand Blast File Sharpening Co. v. Parsons, 54 Conn. 310, 7 Atl. 716 (1886); Cunningham Lumber Co. v. N. Y., N. H. & H. R. R. Co., 77 Conn. 628, 60 Atl. 107 (1905). These decisions, however, are not conclusive of the question involved in the present action. Not only is the question one upon which the Connecticut courts have not passed, but it is one upon which there seems to be little authority. While it is true that under the Connecticut decisions it is the existing obligation or the debt due which is bound by the attachment, and that at the time the attachment was served the dividends in question had not been declared and were not in existence, nevertheless they would be subject to the attachment if they are to be considered a necessary incident of the deposits. For whatever binds the principal binds that which is inseparable from the principal. An attachment of a freehold, for example, gives a lien on the timber trees and on the building attached thereto. In Coke on Littleton, 151b, it is said that a thing is "incident to another when it appertains to, or follows on that other which is more worthy or principal." The lexicographers say that an "incident" is a thing that is necessarily or inseparately connected with another. That it is something characteristically, naturally, or legally depending upon, connected with, or contained in another thing as its principal. Webster says that it is something necessarily appertaining to or depending on another, which is termed the principal. So that the question is whether the "dividends" on these deposits so appertained to and were so connected with the latter that the attachment of the deposits created a lien on the deposits and the dividends including those subsequently declared. In Shinn on Attachment and Garnishment (1896) vol. 1, § 316, pp. 609, 610, the writer says:

"Whether or not the rents and profits accruing upon the attached property are subject to the attachment lien cannot be said to be judicially ascertained."

In Cook on Corporations (7th Ed. 1913) vol. 2, § 484, p. 1359, that writer says that:

"Dividends on the stock which is attached follow the stock and are covered by the attachment."

In Jacobus v. Monongahela National Bank (C. C.) 35 Fed. 395 (1888), a case in a United States District Court, a creditor attached shares of stock in a railroad company, the shares standing in the name of Jacobus, and, when the railroad company and Jacobus were summoned as garnishees, Jacobus pleaded nulla bona and the railroad company pleaded that the stock belonged to Jacobus. The original case was decided in 1883 by the Supreme Court of the United States (109 U. S. 275, 3 Sup. Ct. 219, 27 L. Ed. 935) in favor of the garnishees. It appears that, at the time the attachment was served, the railroad company had in its hands a dividend of $264 on said stock, and from time to time thereafter 21 other dividends of $264 each were declared and all said dividends were retained by said railroad company until the decision by the Supreme Court, when the railroad company paid the money to Jacobus without interest. Suit was then brought on the recognizance furnished by the bank to pay damages caused by the attachment, and the question arose as to whether the attachment compelled the railroad company to withhold the payment of subsequent dividends. The court held that the attaching creditor was entitled to the dividends and said:

"The dividends were but an incident to the stock—the mere fruits thereof —and were as much within the grasp of the attachment as the corpus of the stock was."

In Moore v. Gennett, 2 Tenn. Ch. 375 (1875), Chancellor Cooper in an attachment case said that:

"Dividends are as much an incident to the stock as rent is to the reversion of land, or interest to a debt."

He added:

"Besides, the increase or income of property, after the levy of an attachment, is given to the creditor by Code, § 3536."

The connection clearly shows that in his opinion the provision of the Code was merely declaratory of what the law would have been without the Code.

In Syracuse City Bank v. Coville, 19 How. Prac. (N. Y.) 385 (1860), the court held that, where an attachment issued and was levied on a money bond payable in installments and at the time only one installment was due, the creditor only acquired a lien on the amount actually due upon the bond at the time of service of the writ. The case is distinguishable from the case of Jacobus v. Monongahela National Bank, supra, and is not to be regarded as controverting it in the least. What was attached in the Syracuse City Bank Case was the debt due at the time of the levy. The debts due on the subsequent installments were not incidents of the debt attached, but were wholly independent thereof.

In the case under consideration the property attached was not stock, but deposits in the Savings Bank. Now a savings bank is conducted solely for the benefit of its depositors. It receives deposits and loans them for their benefit; and a savings bank, which is conducted solely for the benefit of the depositors and in which the profits after deducting necessary expenses inure wholly to the benefit of the depositors,

does not stand in the relation of a debtor to a creditor as does an ordinary bank to its depositors. Its relation is more nearly that of trustee and cestui que trust. State v. People's National Bank, 75 N. H. 27, 70 Atl. 542, 21 Ann. Cas. 1204. The depositors intrust their money to the bank as their trustee to keep and invest the same according to the charter and the laws. If there is a profit, they receive it; if there is a loss, they share it according to the amount of their deposits. In Cary v. Savings Union, 22 Wall. 38, 28 L. Ed. 779 (1874), the Supreme Court held that the share of profits paid by a savings bank to its depositors constituted "dividends." Chief Justice Waite wrote the opinion, in the course of which he said:

"The interest received for the loan of each deposit was not kept by itself, and paid to the depositors after deducting a charge to cover expenses, but all was placed in a common fund, and, when the net result of the business was ascertained, that was divided among the several contributors according to the value of their contributions. Such a division clearly produces a dividend according to the common understanding of that term."

The question in the case was whether the share of the profits paid a depositor was to be considered as "interest" or as "dividends." But that was a case where the Savings Bank had a capital stock and a reserve fund, and under its charter the directors at the expiration of every six months, after deducting certain salaries and expenses, would set apart a certain proportion of the profits, not exceeding one-tenth, to the stockholders as a compensation for furnishing the capital. "Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing." 2 Morse on Banks, § 618. The mere designation of a bank as a savings bank does not make it one. To determine its true character, its organization, powers, and mode of doing business must be considered. 3 R. C. L. p. 694. And the record in this case does not disclose the organization, powers, and mode of doing business of the Danbury Savings Bank. We do not know whether it had a capital stock or not. If it did not have but held the deposits as a trustee and not as a debtor, the plaintiff could still attach them. The law is clear that, if a trustee has funds in his hands belonging to a cestui que trust, they are liable to foreign attachment. Easterly v. Keney, 36 Conn. 18 (1869). Whether the income funds so held produce "dividends" in a technical sense is not important to the decision of this case, such income being, in our opinion, an incident of the deposits in either case.

The matter may be considered from another viewpoint. In Mattingly v. Boyd, 20 How. 128, 15 L. Ed. 845 (1857), the Supreme Court said that:

"As a general rule, a garnishee is not bound to pay interest, because he is liable to be called on to pay at all times. 11 Sargent & Rawle, 188; Drake, Pr. 725; 1 Washington V. R. 149."

Undoubtedly what the court referred to was not the interest due from a debtor to a creditor at the time of the service of the process, but interest on the money thereafter; and in that case, while acknowledging the general rule to be as stated, the garnishee was charged with

interest from the time when the attachment process was served for the reason that he had used the money, and interest was charged from October 23, 1827, when process was served to August 25, 1851.

In Woodruff v. Bacon, 35 Conn. 97 (1868), the Supreme Court of Connecticut applied the same principle to a case in which the garnishee had used the fund. The court said:

"But we cannot recognize the principle that should allow the plaintiffs to recover the debt and not allow them to recover the interest which is the mere incident to the debt arising from the defendant's use of it."

So in Cox v. Cronan, 82 Conn. 176, 72 Atl. 927, 135 Am. St. Rep. 268 (1909), the same court said:

"When money belonging to a defendant is attached in the hands of a third party by process of foreign attachment, the garnishee cannot safely pay it over to either party pending the continuance of the suit in which it is attached, but must hold it to abide the result of the action. If he is not under contract to pay interest and makes no use of the money, but retains it as a mere stakeholder, he will not be liable for interest until the result of the suit determines to which party he shall pay it. Candee v. Skinner, 40 Conn. 464; Phœnix Ins. Co. v. Carey, 80 Conn. 426, 432, 68 Atl. 993. But when he mingles the money attached with his own and has the use of it, he is liable for the interest on it."

In American & English Encyclopedia of Law, 837, 838, the rule is laid down as follows:

"It is well settled that a garnishee is liable to the plaintiff for interest on the amount of his indebtedness to the defendant during the pending of the garnishment proceedings if he had promised the defendant to pay interest or if he received interest or used the money during that time."

In 22 Cyc. 1559, 1560, the rule is stated as follows:

"Attachment or Garnishment.—(1) In General. Where interest upon a debt is recoverable as damages, and not by reason of a contract to pay it, the debtor is not usually liable for interest during a period in which he is prevented from making payment by reason of the debt being attached or garnished in his hand by some third person, or by the debtor being summoned as a trustee of the creditor under trustee process. But if the contract on which the debt is founded draws interest during the time payment is thus delayed interest will not be suspended. If a debtor against whom trustee or garnishment proceedings are issued causes unreasonable delay in making his answer thereto or otherwise for the purpose of obtaining a longer use of the money, or falsely denies his indebtedness, he will be liable for interest during the pendency of the proceedings. (2) Use of Funds by Garnishee. If a garnishee, during the pendency of the proceedings, employs the funds in his hands so as to derive a profit therefrom, he will generally be held to account for interest."

In Bassett v. Kinney, 24 Conn. 267, 63 Am. Dec. 161 (1855), the court held that a person to whom money is intrusted to be paid over to a designated recipient, and who deposits the money in bank for some time, afterward paying it over to the person entitled to receive it, is liable to such person for the interest paid to him, on the money while deposited in the bank, although such interest is paid after the money has been turned over. Where it affirmatively appears that the funds have been profitably employed and the principal has been augmented by virtue of such profitable employment, the principal and the increment are inseparable and belong to the attaching creditor. If

the attached fund, in this case the deposits, produces earnings during the period of the attachment, those earnings are an incident of the attached fund and subject to the lien. It makes no difference by what name the earnings may be called, whether interest or dividends. As long as the attached fund is used for profit, the profit, whether earned for the benefit of the garnishee or the debtor, is impounded for the benefit of the attaching creditor and is subject to the same ultimate disposition as the principal of which it is the incident. Is it said that in this case the Savings Bank was not using the funds for its own benefit but for the benefit of the depositors? But surely that cannot help the case, for if the argument be sound then this extraordinary result would follow: That a person garnisheed could not use the attached funds for his own benefit without being chargeable with interest, but he could use them for the benefit of the debtor defendant who is being pursued by the attaching creditor and if he did the defendant and not the attaching creditor would be entitled to the accumulated interest. A principle leading to such an unjust and irrational result cannot be sound and need not be further considered.

That the deposits attached were used and earned a profit during the period of litigation is conceded. The court below made the following finding of fact which was embodied in the judgment:

"That since that attachment, the defendant herein has, in accordance with the terms of its charter, used and improved the moneys so deposited with it and has regularly declared dividends upon said several deposits payable from the income and profits earned by the defendant from these and its other deposits, and that the aggregate amount of dividends so declared upon the several deposits, levied upon by said writ of attachment, is $11,278.13."

The plaintiff contends that he is entitled to recover 6 per cent. interest from the date of the demand made by the marshal after final judgment on December 24, 1912. The General Statutes of Connecticut, Revision of 1902, section 3440, provide that the net income of savings banks in excess of one-eighth of 1 per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semiannually divided among its depositors. It is then added that no dividend shall exceed a rate of 4 per cent. per annum except as provided in section 3441. The plaintiff's claim to 6 per cent. does not rest upon anything in that section, but upon the principle that the refusal to comply with the marshal's demand was wrongful, and, when one wrongfully withholds moneys, he is chargeable with the legal rate of interest, which in Connecticut is 6 per cent. At the time the marshal made his demand, the interest or dividends were claimed by the United Hatters of North America under the assignment, and the proceeding now under review was instituted to determine the rights of the respective parties. A withholding by the defendant under such circumstances cannot be regarded as unlawful, and the interest to be allowed must be limited to the savings bank rate.

The judgment below must be modified so as to include the dividends declared by the defendant according to law. Those dividends the plaintiff is entitled to recover in addition to the balance of the deposits $428.52, and his costs in both courts.

The judgment, so modified, is affirmed.

STAATS v. BIOGRAPH CO.

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

No. 281.

1. CORPORATIONS ⟸152—DECLARATION OF DIVIDENDS—POWER OF DIRECTORS.
It is the general rule that, when a corporation has a surplus, whether a dividend shall be made rests on the fair and honest discretion of the directors, which cannot be controlled by the courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564–567; Dec. Dig. ⟸152.]

2. CORPORATIONS ⟸155(2)—DECLARATION OF DIVIDEND—POWER OF DIRECTORS TO RESCIND.
If a cash dividend is declared by a board of directors and is announced to the stockholders and the corporation has a sufficient surplus to pay the same, a debt is created, and the board has no power to rescind its action; but in case of a stock dividend, to be paid by an additional issue of stock, the board may rescind its action in good faith at any time before the stock is issued.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 561; Dec. Dig. ⟸155(2).]

3. CORPORATIONS ⟸155(2)—DECLARATION OF DIVIDEND—RESCISSION OF ACTION BY DIRECTORS.
The directors of defendant corporation declared a dividend to be evidenced by scrip certificates redeemable by defendant on or before a certain date at par in cash, stock, or evidences of indebtedness at its option. It had sufficient surplus to warrant the dividend. The certificates were not issued, and, the European War having seriously affected defendant's business, its directors rescinded the resolution declaring the dividend. *Held*, that such action was still within their power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 561; Dec. Dig. ⟸155(2).]

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

Action at law by Richard H. Staats against the Biograph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The defendant is a corporation organized in 1895 pursuant to the laws of the state of New Jersey. It has an authorized capital of $2,000,000, and of this amount $1,999,000 is outstanding, and is engaged in the moving picture business.

The plaintiff is a citizen of the state of New York and is the record owner of 550 shares of the par value of $55,000 of the stock of the defendant company, and has been since prior to January 1, 1913.

On December 28, 1914, the board of directors of defendant declared a dividend of 50 per cent. on its outstanding capital stock, payable February 1, 1915, to the stockholders of record of January 18, 1915. The dividend as declared was payable February 1, 1915. It was to be paid in registered scrip certificates containing upon their face an agreement by the defendant that they might be converted on or before December 31, 1916, at par, without interest, wholly or partly in cash, wholly or partly at par, or wholly or partly in such form of interest-bearing obligation as might be deemed by the directors to the best interests of the company. Announcement of this action was made in a circular to the stockholders, dated December 28, 1914.

Without authorization from the stockholders and on August 10, 1915, and without the plaintiff's consent, the directors passed a resolution rescinding the declaration of the dividend previously declared, and this action was announced in a circular to the stockholders dated August 26, 1915.

On September 14, 1915, the plaintiff made a demand on the defendant for the delivery of the registered scrip certificates which he claimed pursuant to the resolution of December 28, 1914. The demand was not complied with, and this action is brought to recover $27,500; that being the face amount of the scrip certificates which were issuable to him in respect of the $55,000 par value of the stock held by him. At the close of the trial of the action a motion was made to dismiss the complaint. That motion was denied. Both sides asked the court to direct a verdict, and a verdict was directed for the defendant; an exception being reserved for the plaintiff.

Van Vorst, Marshall & Smith, of New York City (Alexander B. Siegel, of New York City, of counsel), for plaintiff in error.

David Gerber, of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question involved herein concerns the power of a board of directors of a corporation to rescind a resolution declaring a scrip dividend, after the resolution declaring the dividend has been announced, and notwithstanding the existence of a surplus at the time of the adoption of both resolutions.

It is conceded that no dispute as to the facts exists. The decision below was limited by its terms to a decision against the plaintiff on questions of law alone.

Prior to 1913 the defendant company had paid cash dividends at the rate of 12 per cent. annually; but on February 28, 1913, the directors decided to reduce the rate to 6 per cent. annually.

The company had purchased land in the Bronx borough in New York City, upon which it proposed to construct a new plant. The reduction in the dividend was for the purpose of facilitating the completion and equipment of this new plant. On December 31, 1912, the company had a surplus of $831,149 after deducting a reserve for depreciation. All of this surplus was profit earned by the company in excess of dividends paid to the stockholders. The balance sheet of the company on June 30, 1915, shows that there was on that day a profit and loss surplus of $1,101,696.83. The evidence shows that at the end of every month during the year of 1915 the surplus always was in excess of $1,000,000. Nevertheless on August 10, 1915, the board adopted the following resolution:

"Resolved, that the action taken at the meeting of the board of directors held December 28, 1914, declaring a scrip dividend of fifty (50) per cent., be and the same is hereby rescinded."

It is not claimed that the corporation had between the time of the declaration of the dividend and its rescission suffered any unforeseen or material loss. All the surplus which existed when the resolution declaring the 50 per cent. scrip dividend was passed still existed when the revoking resolution was adopted, and in fact at the time the latter resolution was passed the surplus had been somewhat increased above what it was when the original declaration was made, and at no time since has it fallen below $1,000,000.

But it appears that intermediate the passage of the resolution declaring the dividend, December 28, 1914, and its rescission, August

10, 1915, the business of the company was seriously affected by the European War. Conditions had so changed that the officers of the company voluntarily consented that their salaries should be reduced. On his own request the president's expense allowance of $7,500 per annum was discontinued, and his salary, which had been $18,750 a year, was reduced to $15,000. The company had to borrow cash from its directors to meet its needs. The operating expenses of the company were about $50,000 a week. A few days prior to the adoption of the rescinding resolution, it borrowed from its president $27,000, who with others accepted the notes of the company unsecured by any collateral.

The president testified that:

"At the time the dividend was declared, the business had fallen off considerably, but it was believed from the best information obtainable that it would be only temporary shrinkage. Early in the following year, or say in the spring of the following year, the business fell off very rapidly, until it now amounts to practically nothing. There was also at the same time a very serious change in the business of this country and Canada. There were certain facts which the directors considered at their meeting of December 28, 1914, which were very encouraging and looked like a substantial change for the better. But within a very few months the reverse began to take place."

He was asked:

"You had difficulty in getting your films across into countries that are in war?"

And he replied:

"Well, we had more difficulty in getting orders. Formerly we would send a small positive print abroad of each production. That would be shown to the buyers on the other side, not only for European markets, but also for Australia. They would order on samples and on a certain day they would cable to ship so many positives. That meant that they ordered two or more weeks in advance of the time required. Later on conditions changed to such an extent that the various buyers would not place their orders more than a few days in advance of the time required for delivery, and we were obliged to ship machinery to the other side and hold our negatives here until we made all the positives we could sell or lease in the American and Canadian markets. Then we shipped the negatives to the other side, and had the positive prints made there, so that we could accept orders up to leaving less than 24 hours before the time required for delivery. That was a very serious change. Furthermore, the duty imposed was so great, the duty requirements put in force by the Canadian government, that our agent, the man who represents us in all foreign countries, cabled us to suspend all shipments even of positives. By that time the business ceased entirely."

The resolution of rescission was adopted after many hours of discussion of the American and of the foreign market.

No scrip dividend has been paid to a single stockholder, and apparently all the stockholders with the exception of this plaintiff have acquiesced in the action of the directors. If this action can be maintained and the plaintiff can recover the damages he sues for and other stockholders insist on like payments to them, it will require approximately $1,000,000, an amount which probably could only be realized by converting this company's fixed assets into cash and winding up its business. The question presented is one of considerable importance, and has received careful consideration.

[1] This seems to be an attempt on the part of a single stockholder to dictate to a directorate and to compel it against its will and honest

judgment to pay a dividend to him in cash or stock. The general rule is well established that, when a corporation has a surplus, whether a dividend shall be made rests in the fair and honest discretion of the directors, uncontrollable by the courts. Williams v. Western Union Telegraph Co., 93 N. Y. 162; Gibbons v. Mahon, 136 U. S. 549, 565, 10 Sup. Ct. 1057, 34 L. Ed. 525 (1890).

There have been numerous attempts to induce courts to interfere with directors in the exercise of their discretion, but they have quite uniformly refused to do so, unless it appeared that the directors had willfully abused their discretion and acted in bad faith and in neglect of duty. It takes a very strong case to induce a court to order directors to declare a dividend. A court has no jurisdiction to do so unless fraud or a breach of trust is involved. Cook on Corporations (7th Ed.) vol. 2, § 545, p. 1588.

In the case at bar there is nothing to lead us to doubt the perfect honesty and good faith of this board of directors, and the soundness of their judgment in this matter. But this plaintiff is not in this court asking us to compel the board of directors to declare a dividend. He is here, he asserts, because the board has declared the dividend and announced it, and then recalled its action and rescinded the vote.

In proper cases courts protect minorities, even minorities of one, against the oppression of the majority of stockholders and of boards of directors. It sometimes happens, however, that a minority institute "strike" suits and seek to oppress majorities and to involve the corporation itself in disaster for purposes of their own and for reasons not always revealed. So that there are cases in which courts are compelled to protect minorities against majorities and majorities against minorities.

In this case it does not escape observation that the plaintiff's right to a stock dividend, if he has such a right and can enforce it, would gain him nothing. We say it would gain him nothing, because, while a stock dividend would increase the number of his shares, it proportionately diminishes the value of each of his shares, leaving the aggregate value as it was before. He acquires the ownership of more shares, but he adds nothing to his proportionate ownership of the assets of the corporation. Green v. Bissell, 79 Conn. 547, 555, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287 (1907). What he expects through this suit is not the stock but the cash value of the stock. But the question which this court must pass upon, whatever the consequences in this particular case may be, is whether a board of directors, having declared the dividend in the form already stated, had the power to rescind its action.

We may, however, remark in passing that while it might be very disastrous to the welfare of the defendant, under the circumstances in which it now finds itself, if any large number of its stockholders could come into a court of law as this plaintiff has done and enforce the demand that they receive the value of the stock dividend as declared, yet the corporation might easily have avoided any such situation. For we confess our inability to see how the corporation or its stockholders

could in the least degree have been prejudiced if the scrip dividend had been issued as originally voted, and the corporation had then elected to pay it in stock. The property of the corporation would not have been impaired in the slightest extent.

The right to reconsider the declaration of a dividend would seem to depend upon the circumstances under which the dividend was declared, as well as upon the character of the dividend itself.

1. If a board of directors, for example, should declare a dividend, and, before any public announcement of the action has been made, should reconsider the vote and rescind the action, its right to do so, perhaps, could not successfully be challenged.

2. If a board of directors should declare a dividend when there are at the time the declaration is made no profits to divide, and if public announcement of the declaration of the dividend should be made, it may be that the right to reconsider and rescind would not be denied. Until such a dividend is paid there would seem to be a locus poenitentiæ, and the directors might recall their ultra vires act. They would not be under any obligation to consummate an illegal act which is merely in fieri. Thompson on Corporations, vol. 2, § 2135.

[2] 3. But if a board of directors should declare a cash dividend and make a public announcement of the fact, the courts have held that thereafter the board has no right to reconsider and rescind its action. The reason seems to be that the declaration of the dividend sets apart from the profits of the corporation a sum which is to be paid to the stockholders in proportion to their shares, and that it creates a debt due from the corporation to each shareholder, resulting in the relation of debtor and creditor. A dividend divides the property which belongs to the corporation into that which the corporation retains and that which the corporation agrees to pay to the stockholders, and which it is thereby bound to pay. That which one person is bound to pay to another is a debt. Lockhart v. Van Alstyne, 31 Mich. 76, 78, 18 Am. Rep. 156 (1875). Such a dividend cannot be rescinded because a debtor does not have it within his power to "rescind" his debt. Beers v. Bridgeport Spring Co., 42 Conn. 17 (1875); McLaren v. Planing Mill Co., 117 Mo. App. 40, 50, 93 S. W. 819 (1906); King v. Patterson, etc., R. Co., 29 N. J. Law, 82, 87 (1860); Ford v. Easthampton Rubber Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462 (1893); Cook on Corporations (7th Ed.) vol. 2, § 541, p. 1580. And sometimes the corporation becomes not merely a debtor, but is a trustee, as where the corporation has not only declared a dividend, but has deposited a fund out of which the dividends are to be paid. Le Roy v. Globe Insurance Co., 2 Edw. ch. 657 (N. Y.) (1836); Van Dyck v. McQuade, 86 N. Y. 38, 52 (1881). A trust relation, having been established, cannot be terminated at the pleasure of the board of directors by a vote rescinding its former action.

In Taylor on Corporations (5th Ed.) § 568, it is said that:

"The discretion of the corporate management is exhausted in declaring the dividend; thereupon their only function is to pay it to the stockholders."

So in Machen on Modern Law of Corporations, vol. 2, § 1358, that writer says:

"As a dividend when declared becomes a debt of the company, it follows that a dividend once properly declared, cannot be revoked."

Morawetz, in his book on Corporations (volume 1, § 445), says that:

"A dividend properly declared by the directors of a corporation cannot subsequently be revoked; those persons who were shareholders on the books of the company at the time when the dividend was declared have a legal claim against the company for the payment of the amount of the dividend."

And in Marshall on Corporations, § 283, it is said:

"Since the right of the stockholders of a corporation to a dividend becomes vested as soon as the dividend has been fully declared by the directors, and the corporation becomes their debtor for their respective shares, it follows that neither the same board of directors nor their successors can afterwards reconsider their action and revoke the declaration without the stockholders' consent."

4. A difference seems to exist between a cash dividend and a stock dividend, so that, if a board of directors declare a stock dividend, the authorities appear to recognize the right of the board subsequently to rescind its action at any time prior to the actual issuance of the stock.

The leading case on the subject is that of Terry v. Eagle Lock Co., 47 Conn. 141 (1879). It appears in that case that at a meeting of stockholders of the defendant company held on August 5, 1875, it was voted to increase the capital stock 2,000 shares, and that the said increase be out of the surplus earnings of the company. It was at the same time voted that the directors be authorized and directed to cause the stock to be issued to the present stockholders pro rata. On August 18, 1875, a specially called stockholders' meeting was held, and a vote was passed rescinding the vote of August 5th increasing the capital stock. The plaintiff stockholder who had not been present at the meeting at which the former vote was rescinded asked to have his pro rata share of the increase issued to him, or the value thereof paid to him, claiming that by the first vote he had a vested right of which he could not be deprived by the subsequent rescission. The court, in referring to the alternative prayer in the plaintiff's petition asking for a proportionate part of the supposed increase of stock or the cash value of his proportion of the increase, declared it very clear that the alternative prayer ought not to be granted, as it would in effect be making it a cash dividend, something "the company never intended. It would withdraw from the working funds of the company that amount which would not have been the result had the stock dividend been carried into effect. It is in effect asking the court to make a dividend instead of enforcing one made by the company." The Connecticut court denied, also, the stockholders' right to compel the company to issue the stock certificates, and it clearly pointed out the difference existing between a cash and a stock dividend. In the course of its opinion the court said:

"There is a difference, however, between a cash and a stock dividend. The former is created by a simple vote of the directors, and the amount thereby becomes severed from the general fund and belongs to the stockholders pro

rata. The latter can be initiated only by a vote of the stockholders. That is followed by issuing the stock, and the increase can only be completed legally by filing with the town clerk and with the secretary of the state the certificates required by law. Suppose the vote had been to increase, not from the surplus earnings, but by a sale of the newly created stock. In such a case, it cannot be said that the capital is actually increased until the new stock is subscribed for at least. Until then there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not per se an increase. Nor it is such where the increase contemplated is from the surplus earnings.

"Again, a cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment. Such dividends do not materially affect the value of the stock. A stock dividend is exceptional. It does not add to his ready cash, but it changes the form of his investment by increasing his number of shares thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same. It is of no special importance whether that value be divided into few or many shares.

"These differences are somewhat material, and serve to show that the petitioner's right, if he has such a right, to an increase of the number of his shares, was at the time a mere nominal right, and one which possessed no appreciable pecuniary value. It is at least doubtful whether a court of equity will in any case aid in enforcing such a right. But however this may be, there are other reasons of a pretty substantial character why the prayer of the petition should not be granted.

"The petitioner's right, as we have seen, was a mere naked right which he might waive without losing anything, and might enforce, if it could be enforced, without gaining anything. It became a mere question of expediency —shall the surplus be actually converted into capital, or remain surplus and be used as capital? The corporation chose the latter; and the petitioner, having nothing to gain or lose in either case, acquiesced in that decision."

In Dock v. Schlichter Jute Cordage Co., 167 Pa. 370, 379, 31 Atl. 656 (1895), a stock dividend was declared on July 16, 1890, and on March 16, 1891, it was rescinded. The court held that a resolution adopted by the directors of a corporation distributing among the shareholders shares of stock of the company which had been purchased by the company out of its earnings cannot be subsequently rescinded where it is not shown that such distribution would be injurious to the business of the company. It was said that if, upon the declaration of a dividend, the company deposited the moneys to pay the dividends with a banker and drew its check to the order of each entitled on the fund so deposited, or, in the case of a stock dividend if the company executed its power of attorney to transfer the shares and these awaited delivery, the stockholder's right would be a vested one which could not be taken from him by a rescinding vote of the directors. Then followed this statement:

"It is believed that, when there has been no such appropriation as that above mentioned, a company by its board of directors in a proper case and for cause may rescind a resolution declaring a dividend; as where owing to destruction of a plant by fire immediately following such resolution. If in the business and honest judgment of the board the earnings intended to be distributed should be recalled and used for the restoration of the destroyed property, it would be within its power to so deal with them; but, unless some similar thing appear, the declaration of a dividend of earnings is the announcement of an obligation due each shareholder for which proceedings may be had as legal methods indicate, and the burden of manifesting that the debt or obligation is not due after such a declaration is upon the company."

In the above case the court wrote no opinion, but affirmed "on the clear, concise and convincing report of the master."

In Billingham v. Gleason Mfg. Co., 101 App. Div. 476, 91 N. Y. Supp. 1046, the directors passed a resolution providing for a regular cash dividend and for a scrip dividend. The scrip certificates were issued, and the court held that they constituted an indebtedness. An action was brought on one of them against the company, and the court held the action maintainable, and in speaking of the certificate the court said:

"It was so much set apart and reserved for him as undivided earnings. His share was ascertained and his right to it was fixed. It was a divided share of past earnings, and, as we think, became a severed indebtedness of the company, for nothing is better understood than that a dividend when declared is a debt due absolutely to the stockholders."

In the case at bar the scrip certificates were never issued.

In Machen on Modern Law of Corporations, vol. 1, § 601, the law is stated as follows:

"Rescission of Stock Dividends. A stock dividend should also be distinguished from a cash dividend, in that, in the case of cash dividend, the right of the shareholder becomes indefeasible immediately upon the declaration of the dividend, and the company cannot subsequently rescind its action. In the case of a stock dividend, on the other hand, until the formalities required by law as conditions precedent to an increase of capital have been completed, all is in fieri, so that until then the company may revoke the dividend. The reason of this rule applies, however, only where the stock dividend involves an increase of the company's nominal capital, and therefore a dividend payable in shares which had been purchased by the company should be in this respect assimilated to a cash dividend and is irrevocable."

[3] It is undoubtedly true that directors may repeal any previous resolution or rescind any previous action unless repeal or rescission would involve a breach of contract or disturb a vested right. The resolution originally adopted by the directors certainly created no debt. The declaration was not to pay a cash dividend absolutely, for the directors had an option which they reserved as to whether they would or would not pay in cash. The distinguishing and necessary feature of a "debt" is that a fixed and specific amount is owing by a certain and express agreement, and that does not exist under the circumstances we find in this case. The directors did not bind themselves to pay a cash dividend absolutely, and in all events, and if they should ultimately elect to pay in cash, they were left free to determine how much should be in cash and how much should be in stock. And as to the declaration as to the stock dividend it should be said that the whole matter rested in fieri, and, not having become obligatory, was subject to repeal.

Notwithstanding the fact that the resolution declaring the dividend reserved to the corporation an option to pay in cash or to pay in stock, the plaintiff demands $27,500, the amount he would be entitled to receive if the dividend were paid in cash. But the law is well settled that where one is bound by covenants to do one of two things, and does neither, then, in an action by the covenantee, the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most bene-

ficial to the covenantee; and the courts of equity have applied the same principle to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust. See Robinson v. Robinson, 1 De Gex, M. & G. 247.

It would seem that, if the resolution declaring the dividend could be held in law to have created a contractual obligation, then as an option was reserved the corporation would have the right to insist that its liability should be restricted to damages for its failure to do that which is least beneficial to the promisee. In this case that would be to restrict its liability to the damages which arose from the failure to issue the stock dividend; and according to the decision in Terry v. Eagle Lock Company, supra, the right to the stock dividend is a "mere naked right which he might waive without losing anything, and might enforce, if it could be enforced, without gaining anything." At the most, the damage would be nominal. If the defendant had performed, the complainant simply would have had the number of his shares of stock increased and the value of each share in the same proportion decreased.

The action taken by the directors on December 28, 1914, which declared the scrip dividend and which was subsequently repealed, as already stated, declared a dividend payable on February 1, 1915, in registered scrip certificates containing upon their face an agreement by the company that they should be converted on or before December 31, 1916, at par without interest, wholly or partly in cash, wholly or partly in stock at par, or wholly or partly in such form of interest-bearing obligation as might be deemed by the directors to be for the best interest of the company. This is not a suit in equity to compel specific performance and the issuance of the scrip certificates, but it is an action at law for damages for the failure to perform the agreement and issue the registered scrip certificates payable on February 1, 1915. The suit was not brought until October, 1915. Nevertheless the defendant claims that the action was prematurely brought. The basis for this contention is that while the scrip certificates were to be issued on February 1, 1915, the holders of such certificates were not entitled under the express language of the resolution to demand either cash or stock on them from the corporation until December 31, 1916, unless the corporation chose prior to that date to honor them, and that even on the latter date the corporation would have an option to pay in cash or stock as it might deem best. Has the corporation lost its rights to determine whether to pay in cash or stock on that date by its rescission of that contract prior to that time, assuming that a contract existed? We shall not at length review the cases relating to anticipatory breaches of executory contracts. The doctrine concerning anticipatory breaches was announced in Hochster v. De La Tour, 2 Ellis & Blackburn, 678, where Lord Campbell held that the man who wrongfully renounced a contract into which he had entered could not justly complain if he was immediately sued for a compensation in damages without awaiting the time when the contract was by its terms to be performed. And in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1900), the cases in England

and in this country were reviewed, and the Supreme Court in an opinion by Chief Justice Fuller laid down the law in similar terms. But while the law is undoubted now that the doctrine announced in the cases above referred to is applicable to certain classes of contracts, still the courts do not agree that the doctrine is applicable to all classes of contracts. In a recent case in the Court of Appeals in New York, that court declares that the rule that renunciation of a continuous executory contract by one party before the day of performance giving the other the right to sue at once for damages is usually applied only to contracts of a special character. Ga Nun v. Palmer, 202 N. Y. 483, 493, 96 N. E. 99, 36 L. R. A. (N. S.) 922 (1911). And in Kelly v. Security Mutual Life Insurance Co., 186 N. Y. 16, 19, 78 N. E. 584, 9 Ann. Cas. 661 (1906), the New York Court of Appeals declared that the doctrine "is not generally applied to contracts for the payment of money at a future time."

We do not, however, pass on this question as to the right to sue for an anticipatory breach, for in our opinion there was in this case no contract to be breached.

Decree affirmed.

THE JEANIE.

ALASKA COAST CO. v. ALASKA PACIFIC FISHERIES.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916. Modified October 30, 1916.)

No. 2647.

1. SHIPPING ⟸106—DAMAGE TO CARGO—CONTRACT OF AFFREIGHTMENT.

Where respondent's steamer, pursuant to an oral agreement, brought out shipments of salmon from libelant's canneries in Alaska, libelant was not bound by the terms of bills of lading delivered by the vessel to watchmen at the canneries, who were not shown to have authority to act for libelant in making the contracts of shipment.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414–419; Dec. Dig. ⟸106.]

2. SHIPPING ⟸142—INJURY TO CARGO—SUIT FOR DAMAGES.

A stipulation by a vessel owner to enter its appearance and give security for the payment of any recovery in a suit contemplated by a shipper against the vessel for damage to cargo, made to prevent seizure of the vessel, *held* to have waived any claim that the suit was barred under the terms of the bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 496; Dec. Dig. ⟸142.]

3. SHIPPING ⟸121(2)—DAMAGE TO CARGO—SEAWORTHINESS OF SHIP—"SEAWORTHY."

Whether a vessel is "seaworthy," as between owner and shipper, depends on whether she is reasonably fit to carry safely and without damage the particular cargo which she undertakes to transport.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 450, 451; Dec. Dig. ⟸121(2).

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

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4. SHIPPING ⟸121(2)—DAMAGE TO CARGO—SEAWORTHINESS OF SHIP.
A cargo of canned salmon in cases carried from Alaskan ports to Seattle by respondent's steamer was damaged by water and coal dust which reached the cases and soiled and rusted the cans. When the first part of the cargo was loaded, there was still some coal in the same hold, and nothing was done to keep them separate. The coal was afterward unloaded, but the hold was not thoroughly cleaned, and water also entered, some because of a loose plank, and some because of insufficient tarpaulins over the hatches. *Held*, that the vessel was not put in seaworthy condition for the cargo to be carried.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 450, 451; Dec. Dig. ⟸121(2).]

5. SHIPPING ⟸132(3)—DAMAGE TO CARGO—SEAWORTHINESS—BURDEN OF PROOF.
The burden of proving that damage to cargo from seawater which entered the vessel was due to perils of the sea rests upon the vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479–481; Dec. Dig. ⟸132(3).]

6. SHIPPING ⟸137—DAMAGE TO CARGO—HARTER ACT.
Under the strict construction which it is the tendency of the courts to apply to Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [Comp. St. 1913, § 8031], which exempts a shipowner who has exercised due diligence to make the vessel seaworthy and properly manned, equipped, and supplied from liability for damage resulting from faults or errors in navigation or management of the vessel, such section does not apply to acts connected with the stowage or handling of the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟸137.]

7. SHIPPING ⟸120—DAMAGE TO CARGO—LIABILITY OF SHIP.
A shipowner is not relieved from liability for loss or damage to cargo from perils of the sea, where his own fault or negligence contributed to such loss or damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 440–448, 466; Dec. Dig. ⟸120.]

8. SHIPPING ⟸131—SUIT FOR DAMAGE TO CARGO—MEASURE OF DAMAGES.
Where a shipment of salmon was damaged when delivered to such extent that the cans had to be reconditioned before marketing, the shipper is entitled to recover the amount of his loss from a decline in the market price during the time necessarily required for such work.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 467; Dec. Dig. ⟸131.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in rem by the Alaska Pacific Fisheries against the steamship Jeanie, the Alaska Coast Company, claimant, to recover for damage to a shipment of canned salmon. Decree for libelant, and claimant appeals. Reversed.

For opinion below, see 225 Fed. 178.

The Jeanie was a wooden, steam vessel of about 1,000 tons burden and about 22 years old. On the voyage in question the vessel was under charter to W. F. Swan and W. C. Dawson, for trade between Seattle and Alaska points. The vessel left Seattle in December, 1912, on her north-bound voyage, with cargo, including coal in bulk, under the command of P. H. Karbbe as master.

The appellee was at that time the owner of three fish canneries in Southeastern Alaska; one situated at Chilkoot, on Chilkoot Inlet, another at Yes Bay, Behm Canal, and a third on Chomly Sound, Prince of Wales Island. These three canneries had been in operation during the packing season of 1912, packing salmon in cases. The canneries had ceased operations in October, having on hand a quantity of canned salmon ready for shipment and stored in the warehouses connected with the canneries. The cases were left in charge of a watchman at each of the canneries.

The Jeanie sailed north in December; was stranded overnight in the mud at Wrangell Narrows, but was pulled off by her own power at high tide on the following morning, and proceeded to Juneau, where a portion of the cargo of coal was discharged. In Alaska the master of the Jeanie received orders from Charles A. Burckhardt, at Seattle, the appellee's president and manager, to bring out the cases of salmon stored at the canneries mentioned. After leaving Juneau, the vessel proceeded north to Chilkoot, and on December 19, 1912, took on board from appellee's cannery a number of cases of salmon, for which the purser claims to have delivered to the watchman at the cannery a bill of lading or shipping receipt for 10,638 cases. This salmon was stored in No. 1 hold, which contained a quantity of coal in bulk. After leaving Chilkoot, the vessel returned south to Gypsum, but the weather and wharfage conditions were such that no cargo could be discharged at that port; and the vessel proceeded to Sitka, where a quantity of coal was discharged. An attempt was then made to proceed south to Sulzer by the outside passage, but heavy seas and wind caused the captain to turn through the inside passage to Ketchikan, where the remainder of the coal was discharged. Leaving Ketchikan, the vessel proceeded north and east through the Behm Canal to Yes Bay, where the holds of the vessel were cleaned out, and on December 30, 1912, salmon was taken on board from appellee's cannery at that point, for which the purser claims to have delivered to appellee's watchman a bill of lading for 14,027 cases. The vessel then proceeded south and west to Chomly, where on January 2, 1913, salmon was taken on board from appellee's cannery at that point, and the purser claims to have delivered to appellee's watchman a bill of lading for 5,000 cases, making the total number of cases taken from appellee's canneries at Chilkoot, Yes Bay, and Chomly 29,665, according to the bills of lading claimed to have been delivered by the purser. But whether such bills of lading were in fact delivered by the purser is a question of fact in the case. The cases actually received on board the vessel were in perfect good order and condition for shipment, but were not the number mentioned in the bills of lading. On January 3, 1913, the vessel sailed for Seattle, by the way of Ketchikan, meeting with severe storms on the way, and arriving at Seattle on January 8, 1913. Referring to this trip in a protest executed by him at Seattle on January 22, 1913, P. H. Karbbe, master, states: "During the entire trip south vessel experienced exceptional heavy weather, shipping tremendous quantities of water over her decks at times, the decks never being dry, either from the heavy seas or snow, and vessel leaked on the trip south considerably more than usual, necessitating keeping the pumps going more or less continuously."

A preliminary survey of the Jeanie had been made June 22, 1912, and a thorough survey made July 26, 1912, in dry dock. Certain repairs were recommended and made, and the vessel certified to be in good seaworthy condition and fit to carry dry and perishable cargo. No further repairs were made until September following, when some calking was done around the steam winches on the deck, and other minor repairs made. Some of the tarpaulins in use were old, perforated, and rotten, and did not prevent leakage of water into the interior of the vessel where the cargo was stored. There was no bulkhead between the salmon and the coal remaining on the vessel when the first salmon was taken on. During the voyage from Gypsum to Sitka a loose plank alongside the keelson was discovered in the lower forehold of the ship, in the middle of the hatch in the clear space between the salmon and the coal, that had been lifted up by the force of the bilge water and was lying to one side, which caused the water to wash out of the bilges and flood the salmon. This plank was replaced, and remained secure during the remainder of the voyage.

Upon the arrival of the vessel at Seattle on January 8, 1913, it was found

that the exterior of a number of the cans was damaged by water and coal dust, and the entire cargo was overhauled. The number of cases from Chilkoot was found to be 10,745, from Yes Bay, 14,164, and from Chomly, 4,735, or a total of 29,644 instead of 29,665 as shown by the bills of lading. It was found necessary to recondition many of the cases, some being merely wiped off and relacquered, and some cleaned, relacquered, and relabeled; and the whole cargo, so far as necessary, was put in first-class, marketable condition, at an expense of $4,283.06.

The appellant having refused to pay for such overhauling, appellee settled the bill therefor on April 8, 1913, and was about to bring a libel in rem against the Jeanie to recover damages for the injury to the shipment, when an agreement in writing was entered into between the parties, dated April 7, 1913, under the terms of which it was agreed that appellant would "stand in the place of and accept services on behalf of the steamer Jeanie in connection with any claim against said steamer, and will at any time that the party of the second part may desire to commence litigation appear in court on behalf of said steamer, and will give security for the payment of any claim which may rightfully be due against said steamer, notwithstanding the fact that the steamer may not, at the time of the beginning of the suit, be within the jurisdiction of the court."

On September 29, 1913, the Alaska Pacific Fisheries filed its original libel, to recover for damage to the shipment, alleging: "That all of said damages were caused by the unseaworthiness of said vessel and by the bad stowage and by the want of proper dunnage thereof on board said vessel, and by the negligence, carelessness, improper conduct, and want of attention of the master, his mariners and servants, in loading said salmon in the hold of said vessel without having removed therefrom large quantities of coal and coal dust, and in failing and neglecting to keep the decks of said vessel properly calked, the hatches properly battened down during said voyage and in failing to keep the same covered with safe, adequate, and secure tarpaulins and in failing to maintain adequate pumps on said vessel and to operate the same and keep the water out of the bilges of said vessel and out of the hold of said vessel where said salmon was stowed, and in permitting the bilge water negligently allowed to collect and remain in said vessel from entering the hold where said salmon were stowed, whereby said salmon were permeated with coal dust and water and damaged as above alleged, and by not having delivered the same in good order and condition and free from damage."

Waiving formal seizure of the vessel, the Alaska Coast Company entered its appearance in the case and filed its claim for the vessel, together with stipulation in the sum of $15,000, with surety, for the release thereof; and later filed its answer on October 16, 1913, in which it set up the defense that prior to and at the time of the commencement of the voyage "the then owner of the said steamship Jeanie exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped, and supplied, * * * that at all the times mentioned in said libel the said steamship Jeanie was seaworthy, properly manned, equipped, and supplied, and that the damage to said merchandise, if any such damage occurred in said merchandise while it was aboard said vessel, was caused by extremely rough weather encountered on the said voyage, by perils of the sea, and by faults or errors in navigation or in the management of the said vessel on the said voyage."

On March 21, 1914, an amended libel was filed, containing all the material allegations of the first libel and a further allegation, as follows: "That during said period of delay and detention of said merchandise for necessary reconditioning of the same, the market price thereof declined, so that the difference in the market value thereof was the sum of $7,935.40 less at the time the work was completed than the value thereof on January 10, 1913, the date on which said merchandise was discharged from said steamship Jeanie, and the libelant sustained a loss, by reason of such diminished value, to the amount of $7,935.40."

An amended answer was filed March 25, 1914, repeating all the allegations and denials contained in the previous answer, and pleading, as an affirmative defense, the issuance to libelant of bills of lading or shipping receipts for the cargo and failure of libelant to comply with their terms in making claim

for its alleged damage and in bringing suit therefor. In its amended answer claimant alleged that: "The said bills of lading or shipping receipts constitute the agreement, or contract, between the libelant and the said steamer Jeanie for the carriage and delivery of said consignments of salmon. * * * That the said shipment of said salmon was accepted and carried under the conditions and stipulations contained in and on the back of said bills of lading or shipping receipts and not otherwise. * * * That it is provided in each of said bills of lading or shipping receipts, among other things, as follows: 'All claims for damage to or loss of any property to be presented to the carrier, or the nearest agent thereof within ten days from date of notice thereof—the arrival of vessel at port of place of discharge, or knowledge of the stranding or loss of vessel to be deemed notice—and that after sixty days from such date, no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property, and a failure to present such claim within said ten days or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said carrier or any of the stockholders thereof, for any damage or loss. The claim for loss or of damage to any of the said property shall be restricted to the cash value of same at the port of shipment, at the date of shipment.' That no claim was presented by this libelant, or by the said consignee, or by any one on their behalf to the carrier, or to any agent of the carrier, or to the said charterers, or to the said steamship, within 10 days after the arrival of vessel at port of discharge, nor was any action brought against the said steamship or her owners or her master or against the said charterers for the alleged loss or damage to the said goods within 60 days after the arrival of said vessel at port of discharge."

By the second amended libel, filed February 17, 1915, which in addition to the allegations of the former libels contained matter in the nature of a reply, it was alleged: "That it is not true that the several bills of lading set forth in said amended answer, or either of them, or any other bill of lading for any of the said shipments of salmon, were delivered to or accepted by this libelant; * * * and it is not true that the said shipments of salmon, or either of them, were accepted or carried under the conditions and stipulations contained in and on the back of said bills of lading. * * * That it is not true that no claim for the damage to said merchandise was presented by this libelant or by the said consignee or by any one in their behalf to the carrier or to any agent of the carrier, or to the said charterer or to the said steamship within 10 days after the arrival of the vessel at the port of discharge."

The District Court held that, as to the particular cargo in question at least, the vessel was unseaworthy; that there was an oral understanding between the parties with relation to the shipment of this cargo; and, while no terms appear to have been detailed or specially understood, liability could not be limited except by mutual consent; that as the bills of lading were not issued to any authoritative persons and there was no understanding with relation to them, the libelant could not be bound by their stipulations; that the master and crew did not use due care in protecting the cargo from the coal dust and water, and claimant cannot claim exemption under the provisions of section 3 of the Harter Act (27 Stat. 445); and that libelant was entitled to recover from claimant and United States Fidelity & Guaranty Company, as surety, the sum of $4,283.06 expended by the former in having the cargo overhauled and reconditioned, $7,935.00 for damage sustained as a result of decline in market value during the period during which the cargo was reconditioned, and interest and costs.

From this decree, claimant appeals.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellant.

C. H. Hanford and Kerr & McCord, all of Seattle, Wash., for appellee.

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

MORROW, Circuit Judge (after stating the facts as above). 1. It is contended by the appellant that this suit cannot be maintained because the appellee did not, as required by the bills of lading, present to the appellant its claim for loss and damage within 10 days from the date of the arrival of the vessel at the port of discharge, and did not, within 60 days from such date, bring this suit for such loss and damage.

[1, 2] We are of the opinion that this objection to the action cannot be sustained: First. Because it does not appear from the evidence that such bills of lading, if delivered, were delivered to any person whose acceptance of the same bound the appellee. If, as claimed by the appellant, the bills of lading were delivered to the watchmen at the canneries, there is no evidence that these watchmen had, or assumed to have, any authority from the appellee to enter into any shipping contract with any officer of the vessel. No one signed the bills of lading for or on behalf of the appellee, and the order of the appellee's president and manager to the master of the vessel to bring out the salmon did not bind the appellee to the terms set forth in the forms of the bills of lading in use by the vessel. The evidence is not sufficient to establish an agreement with respect to such a limitation upon the carrier's liability. Second. Because it appears that on the 7th day of April, 1913, and after the appellee had by examination ascertained the damage to its cargo and the appellee was about to bring a suit in rem against the vessel to recover the loss and damage so ascertained, the parties entered into a stipulation, wherein it was recited, among other things, that subsequent to the arrival of appellant's vessel at Seattle on January 8, 1913, it was found that the cargo of salmon owned by the appellee had been more or less damaged on the voyage; that to avoid all unnecessary expenses in connection with any litigation in the determination of any liability for the loss of or damage to said salmon, in consideration of the sum of $1, paid by the appellant to the appellee, and the premises mentioned, the appellee would refrain from taking any legal proceedings in the matter of the protection of its claim by filing a libel against the steamer Jeanie, and the appellant on its part undertook and agreed that it would stand in the place of and accept services on behalf of the Jeanie in connection with any claim against said steamer, and would, at any time that the appellee might desire to commence litigation, appear in court on behalf of the said steamer and would give security for the payment of any claim which might rightfully be due against said steamer, notwithstanding the fact that the steamer might not, at the time of the beginning of the suit, be within the jurisdiction of the court. This stipulation, as a legal as well as a practical business transaction entered into for a valuable consideration, is inconsistent with the terms of limitation in the bills of lading under consideration, and must be deemed an admission that such terms did not exist or were waived by the appellant.

[3] 2. Whether the Jeanie was seaworthy for the transportation of appellee's cargo on the voyage under consideration depends upon the question whether she was "reasonably fit to carry the cargo which

she had undertaken to transport." The Silvia, 171 U. S. 462, 464, 19 Sup. Ct. 7, 8 (43 L. Ed. 241). "As seaworthiness depends, not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect." The Southwark, 191 U. S. 1, 9, 24 Sup. Ct. 1, 4 (48 L. Ed. 65). "A ship may be seaworthy as to one sort of cargo and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship and carried on a voyage, the master guarantees the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the [particular] merchandise which it takes on board. A ship is impliedly warranted to be seaworthy quoad that article, and, if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the non sequitur that it is capable of carrying safely and without damage, some other article of a different character." The Thames, 61 Fed. 1014, 1022, 10 C. C. A. 232, 240, cited by the Supreme Court in The Southwark, 191 U. S. 11, 24 Sup. Ct. 1, 48 L. Ed. 65. Whether a vessel is reasonably fit to carry her cargo, must be determined upon all the circumstances and evidence in the case. Int. Nav. Co. v. Farr, etc., Co., 181 U. S. 218, 224, 21 Sup. Ct. 591, 45 L. Ed. 830.

[4] The cargo which the appellant undertook to transport for the appellee consisted of 29,657 cases of canned salmon (13 short, leaving 29,644 cases delivered), all in good order and condition when received on board appellant's vessel; that is to say, they were in a clean and marketable condition. When delivered at Seattle, a large number of the cases were found in an unclean, damaged, and unmarketable condition by reason of having come in contact with coal dust mixed with water. This condition made it necessary to overhaul and examine the entire cargo, clean the cans that were covered with dirt and coal dust, clean and remove the rust from cans that had been wet and damaged by rust, relacquer such cans, and relabel a large number of cans where the labels had been damaged or removed. It appears from the evidence that previous to receiving appellee's cargo for transportation from Alaska to Seattle, a cargo of coal in bulk had been carried in the vessel and delivered at ports in Alaska, but a large quantity of coal remained in the vessel when the first shipment of appellee's cargo was received on board at Chilkoot, and between that cargo and the coal no bulkhead or other separating device was placed. Before the next shipment was received on board at Yes Bay, the coal had been discharged, and some effort made to clean the vessel, but that this cleaning had not been effective or thorough is evidenced by the fact that shipments received on board at Yes Bay and Chomly were also damaged by coal dust and water. It appears, further, that water, mixed with coal dust, accumulated in the hold of the vessel and, coming in contact with the cargo, injured and damaged the cans in the manner stated. Part of this water coming in contact with the

cargo is accounted for by a plank alongside the keelson coming loose and letting bilge water into the hold. The plank was replaced, but the water, mixed with coal dust, had probably reached the cargo. The wetting of the cargo is also accounted for by the rotten and perforated condition of some of the tarpaulins covering the hatches, through which the water penetrated, and, taking up the coal dust, washed it upon the cargo.

To have made this vessel seaworthy to carry this cargo, it was the duty of the carrier, before receiving the cargo, to have effectively separated the first shipment from the coal and to have cleaned the vessel thoroughly of coal dust, so that none of it would be carried by either air or water and deposited on the cargo, and it was the further duty of the carrier to furnish the vessel with sound and serviceable tarpaulins, and make the hatches water-tight against seas that might reasonably be expected to sweep over the vessel. It is contended on the part of the appellant that the water entered the vessel through a seam or crack between the deck and hatch coaming and other seams and cracks opened by the strain upon the vessel caused by the heavy weather encountered on the voyage. In other words, it is contended that the damage to the cargo was caused by perils of the sea.

[5] The burden of proving seaworthiness as against this cause of damage was upon the appellant (The Edwin I. Morrison, 153 U. S. 199, 212, 14 Sup. Ct. 823, 38 L. Ed. 688; The Southwark, 191 U. S. 1, 16, 24 Sup. Ct. 1, 48 L. Ed. 65; The Wildcroft, 201 U. S. 378, 389, 26 Sup. Ct. 467, 50 L. Ed. 794) with the presumption in favor of the appellee that it was the fault of the appellant. The Queen and cases there cited (D. C.) 78 Fed. 155, 171. We do not think that the appellant has overcome this presumption or maintained the burden of proof placed upon it. The presence of coal dust in the cargo has not been accounted for as a peril of the sea; on the contrary, its presence is accounted for by the fact that the previous cargo was coal, from which the first shipment of appellee's cargo was not sufficiently separated, and the dust of that cargo had not been sufficiently removed from the interior spaces of the vessel when the remainder of appellee's cargo was received on board. In that respect the vessel was not seaworthy for the transportation of that cargo. The presence of water in contact with the cargo is accounted for, in part, by the leaky condition of the tarpaulins covering the hatches and, in part, by a plank alongside the keelson coming loose and letting bilge water into the hold. The evidence is that this plank was replaced and continued in position during the remainder of the voyage. Why, then, did it come loose at all? It was after this plank had come loose and had been replaced that the vessel encountered the heavy seas and suffered the strain claimed by the appellant to have been the cause for the opened seams near the hatch and other places on deck, but the heavy seas and strain did not disturb this plank. If the strain was so great, why did this plank remain in position after having been replaced? Must we not conclude that it was not properly secured when the first shipment of appellee's cargo was taken on board, and, in this respect, that the vessel was not seaworthy for this cargo?

[6] But the appellant contends that, even if these charges be true, the vessel is not liable under the provisions of section 3 of the act of February 13, 1893 (Harter Act, 27 Stat. 445). That section provides, in substance, that, if the owner—

"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 faults or errors in navigation or in the management of said vessel."

The trend of judicial decisions has been to construe this act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases. The tendency has been to leave the liability of the ship and the owner as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability. The Germanic, 124 Fed. 1, 5, 59 C. C. A. 521 (Circuit Court of Appeals, Second Circuit), affirmed in Supreme Court, Id., 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610. Under this rule of construction, it has been held that section 3 of the act is limited to faults primarily connected with the navigation or the management of the vessel and not with the cargo. Knott v. Botany Mills, 179 U. S. 69, 73, 74, 21 Sup. Ct. 30, 45 L. Ed. 90; The Germanic, 196 U. S. 589, 597, 25 Sup. Ct. 317, 49 L. Ed. 610.

In this case the faults relate to the unseaworthy condition of the vessel and the care and custody of the cargo, and not to the navigation and management of the vessel. There is no complaint that the vessel was not properly navigated or managed; the complaint is primarily that the vessel was unseaworthy, and that by the misconduct and negligence of the master and crew a large part of the cargo was improperly stored in the lower hold of the vessel without being separated from the coal, and that the remainder was not properly dunnaged to protect it from injury by contact with bilge water, that they were negligent in not keeping the hatches covered with safe, adequate and secure tarpaulins to prevent the water leaking through the hatches into the interior of the vessel, and were negligent and guilty of misconduct in leaving the whole of the interior space of the vessel in an unclean and unfit condition for the storage of the cargo by reason of the presence of coal dust. If we now examine sections 1 and 2 of the act, we find that liability for loss and damage arising from such neglect and misconduct as is here charged is a liability from which the shipowner is not relieved, and cannot be relieved, by any contract or agreement. Section 1 prohibits the shipowner from inserting in any bill of lading any clause, covenant, or agreement whereby he "shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge;" and section 2 prohibits the shipowner from inserting in any bill of lading—

"any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master,

officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

[7] This brings us to the question whether, conceding all that the appellant claims for perils of the sea, the carrier is relieved from liability for loss or damage from such perils where the carrier has by his fault or negligence contributed to such loss or damage. In Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 438, 9 Sup. Ct. 469, 470 (32 L. Ed. 788), the Supreme Court, commenting on the difference in liability on the part of the insurance company and the carrier with respect to loss and damage caused by perils of the sea, said:

"Collision or stranding is doubtless a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. * * * But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed."

This decision was rendered in 1888, and prior to the Harter Act, but this act does not touch the law here declared, except in the navigation and management of the vessel; the obligation of the carrier with respect to the cargo remains the same. The Supreme Court cites the case of The Xantho, in the House of Lords, 12 App. Cas. 503, 510, 515. Lord Herschell, in that case, states that the true view with respect to the carrier's liability had been stated by Willes, J., in Grill v. General Iron Screw Collier Company, L. R. 1 C. P. 600, 611, as follows:

"I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."

Upon the evidence in this case, the rule here stated fixes beyond question the liability upon the appellant for the loss and damage to appellee's cargo.

[8] 3. The court below awarded damages in favor of the appellee in the sum of $12,796.26, with interest at the rate of 6 per cent. per annum from the date of the decree. The total sum is made up in part by the sum of $4,283.06, paid by the appellee for the labor and material required to recondition the cargo, and interest on the sum so paid

amounting to $578.20. This expense was necessary to place the cargo in as good condition as when it was received on board the vessel. It appears to have been the usual and reasonable charge for such work, and was properly allowed. The total sum allowed in the decree includes the further sum of $7,935 for the depreciation in the market value of the cargo during the period required to place it in a marketable condition. The appellee was entitled to have its cargo delivered in a marketable condition when the vessel arrived on January 8, 1913. It appears from the evidence that on January 10, 1913, the market value was $85,630. It was not in a marketable condition, with an exception to be hereafter noticed, until March 20th, when it had been overhauled and reconditioned, and when the market value of the whole cargo had fallen to $77,695. The difference is the sum of $7,935, incorporated in the decree. It appears from the evidence that this difference arises out of a fall in the market value of 30 cents per case on 10,498 cases of salmon designated as "Chums," making a loss of $3,149.40, and a fall in the market value of $1 per case on 4,786 cases of salmon designated as "Medium Reds," making a loss in this quality of salmon of $4,786.00, and a total of $7,935.40 for both "Chums" and "Medium Reds." With respect to the remainder of the cargo, consisting of 14,373 cases of salmon designated as "Pinks," there was no fall in the market value.

It appears that appellee sold to the Pacific Commercial Company, at Manila, some time in the month of January, 1913, 5,500 cases of salmon designated as "Chums." The shipment was made on February 8, 1913, and it was found convenient to take this shipment from the reconditioned part of the cargo brought down by the Jeanie, instead of from the stock on hand. This salmon was then in a marketable condition, and delivered to the appellee for the market. What it sold for, the evidence does not disclose. The presumption is that it was sold for the price prevailing in January. In any event, the burden was clearly upon the appellee to prove the loss on this particular lot of salmon, if any there were, and it is not sufficient to say that this lot was merely substituted for an equal number of cases taken from the stock on hand, and that the loss was upon the like amount in stock, to be estimated as of March 20th. There was a market price for this quantity of salmon as of the date of its sale in January, and, in the absence of proof as to what that price was, we are of the opinion that a loss on this lot of salmon has not been proven, and that the estimated loss of 30 cents a case, making $1,650, should be deducted from the decree.

We are of the opinion that the overhauling of the entire cargo was necessary under all the circumstances, and that the expense incurred therefor was just and reasonable. The amount, $4,283.06, was promptly paid by the appellee, and it was entitled to interest charged thereon amounting to $578.20, or a total of $4,861.26. For the loss in the market price of the salmon, the lower court found the loss and damage to be the sum of $7,935. From this sum we find there should be deducted $1,650, leaving the damage on this account $6,285.00, or a

total of $11,146.26,[1] upon which sum interest shall be allowed to the date of the final decree to be entered herein.

The decree of the District Court will therefore be reversed, with directions to enter a decree in favor of the appellee for $11,146.26, with interest and costs, including costs on this appeal.

UNITED STATES v. WHITMIRE et al.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

No. 4699.

1. INDIANS ⟸13—INDIAN LANDS—ALLOTMENT—CANCELLATION.
Where an allotment of land was duly made to a freedman, a member of the Cherokee Nation, neither the Secretary of the Interior nor any subordinate officer of that department may cancel it.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

2. INDIANS ⟸13—INDIAN LANDS—ALLOTMENT—RIGHT TO.
A freedman, a member of the Cherokee Nation, secured an allotment of tribal lands on false testimony that he was the owner of the improvements thereon. The owner of the improvements, a white woman who had intermarried with a member of the Nation, filed a contest within nine months, but, it being determined in another case that she was not a member of the Nation, transferred the improvements to her granddaughter. The transfer was made several years after the allotment. Act July 1, 1902, c. 1375, 32 Stat. 716, relating to the allotment of Indian lands, gives the owner of improvements the prior right, as against other members of the tribe, to select the land on which the improvements are located, and provides for contests; but section 69 limits the time for filing a contest to nine months after the allotment. The freedman, on the day of receiving the allotment, transferred the land to another. *Held* that, though Act March 2, 1907, c. 2521, 34 Stat. 1220, subsequently enacted, authorizes a white person, who had intermarried with a Cherokee citizen and had made permanent improvements on tribal lands, to sell such improvements, the granddaughter of the owner of the improvements could not contest, not having instituted her contest in time, and the freedman being entitled to select the land, save as against the owner of the improvements, and therefore, though the freedman obtained his allotment on false testimony, the allotment and his conveyance cannot be set aside by the officials of the Department of the Interior, as constituting a cloud on the title of the Nation.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

3. INDIANS ⟸22—INDIAN LANDS—IMPROVEMENTS—RIGHT TO COMPENSATION.
Where a white person, who has intermarried with a member of the Cherokee Nation and improved tribal property, transferred the improvements before the enactment of Act March 2, 1907, such person lost the right to have the improvements appraised in accordance with the act.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 47; Dec. Dig. ⟸22.]

4. INDIANS ⟸15(1)—INDIAN LANDS—ALLOTMENT—RELINQUISHMENT.
Though the allottee of lands belonging to the Cherokee Nation, who had conveyed them, relinquished his allotment in a contest, a proceeding

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

[1] As modified pursuant to order entered October 30, 1916.

to which his grantee was not a party, the rights of the grantee were unaffected.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 37, 40; Dec. Dig. ⊂⊃15(1).]

5. INDIANS ⊂⊃15(1)—INDIAN LANDS—ALLOTMENT—RIGHTS OF GRANTEE.
Where an allotment received by a freedman of the Cherokee Nation was not subject to attack, though obtained on false testimony, the title of the freedman's grantee could not be attacked, though he knew the allotment was obtained by such testimony.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 34, 37, 40; Dec. Dig. ⊂⊃15(1).]

6. INDIANS ⊂⊃13—INDIAN LANDS—ALLOTMENT—FREEDMAN'S CERTIFICATE—CONVEYANCE.
As Act July 1, 1902, § 21, makes the allotment certificate issued by the Dawes Commission conclusive evidence of the right of the allottee to the land of the Cherokee Nation described, a conveyance of the allottee before the issuance of the patent carries title.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⊂⊃13.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against Albert Whitmire and John O. Greenlees. From a decree for defendants, the United States appeals. Affirmed.

William S. Rogers, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

W. A. Chase, of Nowata, Okl. (W. H. Kornegay, of Vinita, Okl., on the brief), for appellee John P. Greenlees.

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

TRIEBER, District Judge. Judge Campbell, in his opinion in this case, set out the facts so fully and correctly that we adopt his statement of facts. His statement is:

"On January 25, 1905, defendant Albert Whitmire was a duly enrolled adult freedman citizen of the Cherokee Nation, entitled to an allottable share in the lands of said tribe. On that date he applied to the Commission to the Five Civilized Tribes to have allotted to him certain lands, a portion of which was lot 4 of section 31, township 26 north, range 17 east, the land in controversy in this case. By the act of April 21, 1904, the restrictions upon the alienation of allotted lands other than homesteads of adult freedman citizens of the Five Civilized Tribes had been removed. After the passage of this act, the defendant Greenlees engaged in the enterprise of securing certain of these freedmen entitled to allotments to file upon unallotted lands of the Cherokee Nation which he desired to acquire, and after such allotments were made he would take deeds therefor from the allottees. For some time prior to January, 1905, C. E. Holderman had been employed by Greenlees to assist him in the procurement of such freedmen to file upon such tracts of unallotted land as he desired. Shortly before the land in controversy was applied for by Whitmire, Greenlees met Holderman and said to him, 'Now you know that Reinhardt farm up there;' and Holderman said, 'Yes, I know the farm; I

have been over the farm and know the land;' to which Greenlees responded, 'If you look on the plat when you go back to Tahlequah, you will find 40 acres of vacant land on the Reinhardt farm in section 31, and that is excessive holdings; he cannot hold it, and I want you to get a negro on it as quick as you can, and buy it.' Holderman answered, 'Now, I don't know exactly what is on that land, but there is some worm fences on there, or old rail fences, and if my recollection is right it has got a growth of this water oak timber on it.' And Greenlees says, 'That is the land; that is what I want; you file up and buy it for me as quick as you can.' Thereupon Holderman got in touch with Whitmire, who agreed to apply for the land as a portion of his allotment, and, when secured, to sell it to Greenlees for $450. Holderman then took Whitmire to the office of the Commission, and on the date first mentioned Whitmire made his formal application for the land. Whitmire had never been on the land and did not own the improvements thereon. Holderman was sworn by the Commission as a witness in support of the application, and testified that he had been over the land, as to the character of the improvements, and that Whitmire was the owner thereof, and that no one else owned the improvements or any part thereof, which was false, and known by him at the time to be false. Thereupon the land was set apart to Whitmire by the Commission, as a portion of his allotment selection, and certificate of allotment issued to him. Thereafter and on the same day Whitmire executed to Greenlees a warranty deed covering the land in controversy.

"On May 3, 1905, James M. Coker applied to the Commission to select an allotment of the land in controversy for his wife, Mary E. Coker, who was and had been for a long time the owner of the improvements thereon, which was refused on account of the prior selection by Whitmire; and on the same day he instituted for his wife, Mary E. Coker, a contest against Whitmire, asserting her right to allot the land by virtue of her ownership of the improvements upon the land. Mary E. Coker's claim to citizenship in the Cherokee Nation was then pending before the Department of the Interior, she being an intermarried Cherokee citizen. Her right to such citizenship was determined adverse to her by the Supreme Court of the United States in Cherokee Intermarriage Cases, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96, decided November 5, 1906, and her right to such citizenship was finally denied by the Department on January 26, 1907. On January 1, 1907, Mary E. Coker executed to Charles H. Reinhardt, as guardian of Alma Fay Reinhardt, a bill of sale covering the improvements upon the land in controversy. No further steps seem to have been taken in the matter of this contest until April 13, 1907, when Mary A. Reinhardt, mother and natural guardian of Alma Fay Reinhardt, filed with the Commission in the contest case a petition to be allowed to substitute the name of Alma Fay Reinhardt as party contestant in lieu of the name of Mary E. Coker, the original contestant, which motion recites the above-mentioned bill of sale and that Alma Fay Reinhardt has taken possession of the improvements and is the owner thereof. This motion was denied by the Commission as appears from the opinion and order of the Commissioner of the Five Civilized Tribes of date May 22, 1907, and made part of the record in this case. The Commissioner says:

" 'As will be seen from the above petition, the said Mary E. Coker did not attempt to dispose of the improvements located upon the land in controversy until January 1, 1907, on which date she attempted to assign the same to Alma Fay Reinhardt, who, by reason of said assignment, acquired no preferential right to take the land in allotment as against a citizen of the Cherokee Nation entitled to an allotment and who had, prior thereto, filed on same. Mullen v. Vawter, Chickasaw, No. 1677, and cases cited. Furthermore, the records in the possession of this office show that Albert Whitmire, the contestee, filed on the land in controversy on January 25, 1905, while the petition on behalf of Alma Fay Reinhardt to have her substituted in place of Mary E. Coker, the original contestant in Cherokee Allotment Contest No. 3202, was not filed until April 13, 1907, or over two years subsequent to the time that the said Albert Whitmire filed on said controverted land, and under the provisions of section 2 of the act of April 26, 1906 (34 Stat. 137, c. 1876), to the effect that

contests must be instituted within nine months after the original filing thereon by the adverse party, the said Alma Fay Reinhardt would be barred from instituting contest on her own behalf by reason of the expiration of the nine months limitation in such cases made and provided, and it being a general rule of law that the substitution of parties to a cause of action will not be permitted for the purpose of defeating the statute of limitations, the Commissioner is of the opinion that the petition filed by Mary A. Reinhardt as mother and natural guardian of Alma Fay Reinhardt, to substitute the name of the latter as party contestant in Cherokee Allotment Contest No. 3202, in lieu of the name of Mary E. Coker, the name of the original contestant therein, should be denied.'

"From this order Alma Fay Reinhardt appealed to the Commissioner of Indian Affairs, and the papers were duly transmitted to that office on December 14, 1907. Whitmire, having disposed of the land on the day that he allotted it, took no further interest in the matter of the contest, but, at the solicitation of Greenlees, authorized Riddle & Clapham, attorneys at Vinita, and Howe & Wright, attorneys at Washington, to represent him in the matter before the Commissioner of Indian Affairs, and the appearance of Howe & Wright was entered in the Department on December 19, 1907. Later, at the solicitation of relatives of Alma Fay Reinhardt, he authorized James K. Jones, of Washington, to represent him before the Department, and on March 2, 1908, Jones filed with the Commissioner of Indian Affairs a paper, signed by Whitmire, declaring his desire to relinquish all right to the land in contest and requesting that his allotment be canceled, so far as it related to this land. On March 4, 1908, this relinquishment was allowed, and the appeal dismissed. In the meantime, at the solicitation of Greenlees, Whitmire was induced to attempt to repudiate the so-called relinquishment, and executed an instrument to the effect that this relinquishment had been secured from him under a misconception induced by misrepresentations made to him by J. L. Allen, attorney for Alma Fay Reinhardt. This instrument was filed with the Department on March 9, 1908. On March 20, 1908, Whitmire appeared in Washington, evidently having been induced to go there by relatives of Alma Fay Reinhardt in the interests of her claim to the land, and with his attorney, Jones, appeared at the office of the Commissioner of Indian Affairs, and there stated under oath that Jones was the only attorney authorized to represent him in the contest, and that the papers filed by other parties were signed by him in ignorance of the allegations therein, and that he desired to withdraw from the contest, since he had never seen the land and did not desire to deprive the true owner of the improvements of the right to select the land in controversy.

"Thereafter, on April 2, 1908, the papers were returned to the Commissioner of the Five Civilized Tribes, with directions to thoroughly investigate and report the circumstances attending the execution of the application to relinquish, and, if he thought the application to relinquish should be allowed, to report whether the land should be awarded to Alma Fay Reinhardt. An investigation was made, and on June 24, 1908, the Commissioner to the Five Civilized Tribes made a report in which he found that Holderman, as agent for Greenlees, committed a fraud on the Commission to the Five Civilized Tribes, by reason of the false testimony given by him, as above stated, as to the ownership of the improvements when Whitmire made his selection of the land; that Whitmire was trying in good faith to relinquish his rights to the land, and that his relinquishment should be accepted; that the ownership of the improvements, having been transferred January 1, 1907, to Alma Fay Reinhardt, who took possession thereof at the time, her application to select said land in allotment should be accepted. The Commissioner of Indian Affairs concurred in the finding of the Commissioner of the Five Civilized Tribes, relative to the testimony of Holderman, as agent of Greenlees, at the time of Whitmire's selection, that the improvements belong to the latter. The Commissioner further found that, when Whitmire made his selection of the land, Greenlees, a noncitizen, was the real party in interest, who, through his agent, Holderman, secured an alleged warranty deed to the land from Whitmire for a consideration of $450, in a few minutes

after its selection by Whitmire; that the attorneys, Riddle & Clapham and Howe & Wright, had represented only the interest of Greenlees, claiming solely as a grantee of Whitmire, a Cherokee freedman, whose title to the land was incomplete when the alleged conveyance was made, and that Whitmire's application to relinquish should be accepted, and that Alma Fay Reinhardt had a preferential right to select the land, being the owner of the improvements.

"October 16, 1908, Greenlees, through his counsel, filed with the Department an appeal as intervener, alleging that the Commissioner of Indian Affairs erred in holding that he was not a party to the contest and not entitled to prosecute any right therein, and that Alma Fay Reinhardt had any rights in the premises. On October 23, 1908, attorneys appearing ostensibly for Whitmire, the contestee, filed a motion to dismiss Greenlees' appeal on the ground that he had no such interest as entitled him to be heard on appeal. On October 30, 1908, Greenlees through his counsel filed with the Department a petition for the exercise of its supervisory authority, praying that the record in the case be reviewed generally, so that his right might receive consideration, and a decision be rendered on the merits, stating that under the rulings of the Department a noncitizen may not prosecute an appeal from a decision in a properly instituted contest, and for that reason he invoked the supervisory action of the Department to protect his interests. In the final decision of the Secretary of the Interior, which was rendered on November 20, 1908, by Jesse E. Wilson, Assistant Secretary, after reviewing the case as above set forth, it is said:

"'A careful examination of the whole record shows that the findings of fact by the Commissioner and your office are sustained by preponderance of evidence. The testimony given by Holderman, as agent for said Greenlees when he induced said Whitmire to select the land in question, was untrue; and the fact that said Holderman secured from said Whitmire a warranty deed of said land to said Greenlees, in consideration for $450, immediately after the selection by Whitmire, gave Greenlees no vested right to the land; and if he has been injured by the action of Whitmire in the premises, he must rely upon his warranty in said deed for his remedy. * * * Since it is shown that said Greenlees, by his agent, did not act in good faith in procuring said tract to be allotted to said Whitmire, as above set forth, no good reason is shown why the petition for the exercise of the supervisory authority should be granted. The petition of said Greenlees should remain in the record, and not be returned to the petitioner, as recommended by the Commissioner. The petition for the supervisory authority of the Department is accordingly denied, and the motion to dismiss said appeal is hereby granted.'

"This action was begun by the United States in October, 1909, against the defendants Whitmire and Greenlees. The bill alleges that Whitmire is a duly enrolled freedman of the Cherokee Nation, and as such was entitled to take an allotment under the provisions of the Cherokee Allotment Act of July 1, 1902. It alleges the selection by him of the land in controversy on January 25, 1905, and the issuance to him of an allotment certificate therefor on that date. It alleges the false statement made to the Commission by Holderman relative to Whitmire's ownership of the improvements, and that the allotment certificate was procured to be issued to Whitmire by reason of this false statement with regard to the ownership of the improvements, and was therefore issued under a mistake of fact as to the ownership of the improvements. The bill then alleges an attempt on the part of Mary E. Coker to select the land as her allotment and the institution of her contest against Whitmire, her subsequent sale of the improvements to Alma Fay Reinhardt, and the relinquishment by Whitmire of any interest in the land, and the cancellation and annulment of his certificate of allotment by the Department.

"The bill charges the taking of the deed from Whitmire by Greenlees on January 25, 1905, within nine months from the date of allotment, and that Greenlees at the time knew that Whitmire was not the owner of the improvements, and that they belonged to Mary E. Coker, and that Whitmire was wholly without power or authority to make a valid conveyance of the lands to Greenlees; that Greenlees had full notice of the contest proceedings, and

appeared therein and attempted to present an appeal therefrom; that said deed from Whitmire to Greenlees is void, and constitutes a cloud upon the title to the lands in controversy. It further appears from the bill that in October, 1909, in a suit in the district court of Craig county, Okl., in which Alma Fay Reinhardt was plaintiff and the defendant Greenlees was defendant, Greenlees obtained a decree adjudging him to be the owner of and entitled to the possession of the land in controversy; that neither the United States nor the Cherokee Nation had notice of or was a party to this action; and that the District Court of Craig County was without jurisdiction to render such decree. Prayer that the allotment certificate issued to Whitmire and the deed from Whitmire to Greenlees be canceled as clouds upon the title of the Cherokee Nation, and that defendant Greenlees be enjoined from exercising any rights in and to said land under said state court decree."

Did the fact that the selection of the land in controversy by Whitmire was made upon false representations as to the ownership of the improvements upon the land justify the Department in canceling it by reason of the consent of Whitmire?

[1-6] The contest of Mary E. Coker, which was instituted within the nine months required by law, was abandoned. There was, therefore, no contest pending before the Department, which was instituted within the proper time. Unless the allotment to Whitmire in January, 1905, was absolutely void by reason of the false testimony regarding the ownership of the improvements, his right to select the land in allotment could not, under section 69 of the act of Congress of July 1, 1902 (32 Stat. 716, 726, c. 1375) be contested. Ballinger v. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464. As Mrs. Coker was a noncitizen of the Cherokee Nation, and denied enrollment as a citizen, Whitmire, who was a duly enrolled adult freedman citizen of the Nation, had the right to select the land, and unless successfully contested, on a contest instituted within nine months, his title became perfect and as of the date of the selection (Thomason v. Wellman & Rhoades, 206 Fed. 895, 124 C. C. A. 555), and neither the Secretary of the Interior, nor any subordinate officer of the Department had the right thereafter to cancel the allotment (United States v. Dowden, 220 Fed. 277, 136 C. C. A. 293). The action of the Department canceling Whitmire's allotment was without authority of law and void.

Was the fraud practiced by Whitmire and Greenlees, the latter acting by his agent, Holderman, of such a nature as to authorize a court of equity in a direct proceeding to cancel it? By the provisions of Act July 1, 1902, c. 1375, the owner of the improvements, who was entitled to an allotment, had the prior right as against any other citizen to select the land upon which the improvements were located, and where any other citizen first selected such land, the owner of the improvements, being entitled to an allotment, could within nine months contest such selection. This clearly applied only to those who under the law were entitled to allotments, by reason of being enrolled citizens of the Cherokee Nation. Mrs. Coker was not such a citizen, and therefore was not entitled to make a selection, and Whitmire, or any other enrolled citizen of the Nation, had a perfect right to select the land and have it allotted to him, although he was not the owner of the improvements.

By Act March 2, 1907, c. 2521, 34 Stat. 1220, white persons who had intermarried with Cherokee citizens prior to December 16, 1895, and made permanent and valuable improvements on land belonging to the Nation, prior to the decision of the Cherokee Intermarriage Cases, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96, the class Mrs. Coker belonged to, were given the right to sell such improvements, but only to a citizen of the Cherokee Nation entitled to select an allotment. This act contains a proviso which reads:

"That where citizens of the Cherokee Nation entitled to allotments have heretofore applied for lands on which intermarried white persons own improvements, such citizens, entitled to allotments, shall have the prior right to purchase such improvements as herein provided."

From this it clearly appears that Congress recognized the right of a citizen of the Nation, who was not the owner of the improvements, to make formal selection of the lands on which they were situated, subject only to make compensation for the improvements to the white person, who had intermarried with a citizen before December 16, 1895. As was held by Judge Campbell, all that Mrs. Coker's ownership of the improvements would have entitled her to, had she not conveyed them to her granddaughter, would have been compensation for the improvements, but she could not have deprived Whitmire of the allotment. As her conveyance to her granddaughter was made prior to the enactment of this act, she had lost her right to have the land appraised, in order to obtain the benefits of the provisions of that act. Boudinot v. Morris, 26 Okl. 768, 110 Pac. 894.

The fact that Whitmire relinquished this allotment on March 2, 1908, cannot affect the rights of his vendee, Greenlees, as Whitmire, at that date, had nothing to relinquish, and Greenlees was not a party to the proceedings pending before the Department. Garfield v. Goldsby, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168. As Whitmire's title was good, it is immaterial that Greenlees had knowledge of Whitmire's false statement as to the ownership of the improvements. There was no restriction on the right of Whitmire to sell the land as soon as his allotment had been made, and his deed conveyed a perfect title.

Section 21 of Act July 1, 1902, c. 1375, makes the allotment certificate issued by the Dawes Commission conclusive evidence of the right of allottee to the land described therein. The fact that no patent had been issued to Whitmire when he made the conveyance to Greenlees is immaterial. When the right to a patent has once become vested under the law, it is equivalent, so far as the government is concerned, to a patent actually issued. Simmons v. Wagner, 101 U. S. 260, 25 L. Ed. 910; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; Hedrick v. Railroad Co., 167 U. S. 673, 17 Sup. Ct. 922, 42 L. Ed. 320; Wallace v. Adams, 143 Fed. 716, 74 C. C. A. 540; affirmed Id., 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547. An allotment certificate has the same effect as the action of the Land Department in the disposition of the public lands within its control. Wallace v. Adams, supra; United States v. Dowden, supra.

Counsel for the plaintiff in error rely and lay great stress on what

has been determined by the Supreme Court of Oklahoma in Abbott v. Perry, 149 Pac. 202, and other cases similar to that case. But they can have no possible application to the facts of the instant case. In those cases a contest had been properly instituted before the department, within the time prescribed by law, and after a hearing determined upon conflicting evidence, and the court followed the well-established rule of law that the findings of facts made by the proper officials, constituted by law to determine such facts, when sustained by substantial evidence, are conclusive and binding on the courts. Howe v. Parker, 190 Fed. 738, 746, 111 C. C. A. 466, 474.

In the case at bar there was no determination of a legal contest pending before the Department when the allotment was canceled. The contest of Alma Fay Reinhardt was dismissed by the Indian Commission, and upon appeal to the Commissioner of Indian Affairs the cancellation was made by the Commissioner, not because the Commission had erred in its decision, but solely upon the ground that Whitmire had filed a relinquishment.

Whether Greenlees could have maintained an action to recover this land as a plaintiff, in view of the fact that he did not come into court with clean hands, is not involved in this case, and therefore cannot be determined.

The decree of the court below was right and is affirmed.

UNITED STATES v. GRASS CREEK OIL & GAS CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

No. 4704.

1. APPEAL AND ERROR ⟹1009(4)—REVIEW—FINDINGS OF FACT—EQUITY CASES.
   Findings of fact by the chancellor, though not conclusive upon appeal, are presumptively correct, and unless clearly against the weight of the evidence, will not be disturbed, particularly where the testimony was given orally.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⟹1009(4).]

2. MINES AND MINERALS ⟹38(17)—PUBLIC MINERAL LANDS—RIGHTS OF OCCUPANTS—EVIDENCE.
   In a suit to oust defendants from possession of land, which had been withdrawn from entry under Pickett Act June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. 1913, §§ 4523, 4524), evidence *held* to warrant a finding that at the time of the withdrawal defendants were in possession of the land.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 103; Dec. Dig. ⟹38(17).]

3. MINES AND MINERALS ⟹2—PUBLIC MINERAL LANDS—RIGHT OF ENTRY—BONA FIDE CLAIMANTS—"DILIGENT PROSECUTION."
   Pickett Act June 25, 1910, authorizing the withdrawing of lands from mineral exploration and entry, provides that the right of any person, who at the date of any order of withdrawal is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work to the discovery of gas or oil, shall not be impaired by such order. Prior to the withdrawal of land from entry, a geologist and min-

ing engineer, as attorney in fact, had located claims thereon after doing some preliminary prospecting, and at the time the order was made defendants had possession of the land under a contract of lease, and were making preparations to drill for oil for commercial purposes, bringing their equipment thereon and holding possession of the land through a caretaker. *Held*, that where defendants continued in possession, drilled wells, and produced oil in commercial quantities, their rights in the land were not affected by the order of withdrawal, for they had possession while preparing their equipment, and were bona fide occupants in diligent prosecution of the work of discovery.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. ⟸2.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit by the United States against the Grass Creek Oil & Gas Company and another. From a decree for defendants, the United States appeals. Affirmed.

This is an appeal from a decree in favor of the appellees, who were defendants in the court below. The complaint made a number of others than the appellees parties defendant, but the appellees were the only defendants who contested the action. The complaint seeks to oust the defendants from the possession of the northwest quarter and the east half of the southwest quarter of section 18, township 46 north of range 98 west, in the state of Wyoming.

It is charged that the lands are a part of the public domain and the title is in the United States; on May 6, 1914, the President of the United States, under the authority vested in him by the act of Congress of June 25, 1910 (36 Stat. 847, c. 421 [Comp. St. 1913, §§ 4523, 4524]), known as the "Pickett Act," withdrew these lands from mineral exploration and from all forms of location, settlement, selection, filing, entry, patent, or disposal under the public land laws of the United States; that since then these lands have not been subject to occupation or exploration for petroleum, or mineral oil, or gas, under the public land laws of the United States; that on or about the 20th day of July, 1913, one Thomas S. Harrison, styling himself attorney in fact for a number of parties, joined as defendants, caused to be filed for record and recorded upon the records of Hot Springs county, Wyo., the county in which these lands are situated, certain paper writings in the names of these parties, purporting to be location certificates, evidencing the claim and location by them of said lands, as petroleum placer mining claims, under and pursuant to the mining laws of the United States; that on the 5th day of May, 1914, one C. C. Worland caused to be filed similar papers for certain parties named and joined as defendants in this action, also covering the lands in controversy, as did the Harrison location papers; that by certain instruments of writing these Harrison claims were transferred and assigned to the defendants; that none of the defendants, nor any other person, had discovered petroleum or mineral oil or gas or other minerals in or on said lands, or any part thereof, on or before the 6th day of May, 1914; that none of the defendants, nor any other person, was on or prior to the said 6th day of May, 1914, the bona fide occupant or claimant of said lands, and that none of said defendants, nor any other person, was on said 6th day of May, 1914, in the diligent prosecution of work leading to the discovery of oil or gas on said lands, or continuing thereon in diligent prosecution of such work; that on or about the 24th day of July, 1914, and 24th day of August, 1914, the defendant Ohio Oil Company was a trespasser on said lands, engaged in drilling wells thereon, produced petroleum or mineral oil thereon, and since then has extracted petroleum or mineral oil and gas, the exact amount whereof is to the plaintiff unknown; that subsequent to said 6th day of May, 1914, the defendants, and particularly the Ohio Oil Company, in defiance of said order of withdrawal, and in violation of the proprietary and other rights of plaintiff, unlawfully entered and trespassed upon said lands and, continuing, asserted title thereto; that the said Ohio Oil Company has wells, together with certain mining property, machinery,

tools, and fixtures necessary to the operation of said oil wells on said land and drilled as alleged; that the other defendants claim some right or title to the said lands; that all of said pretended petroleum placer mining claims are null and void, and of no effect. The prayer of the bill is that said lands be declared to have been, from and after the said 6th day of May, 1914, lawfully withdrawn from mineral exploration and all forms of location, settlement, etc.; that the defendants be adjudged to have no estate, right, title, or interest thereto; that they be enjoined from asserting or claiming any right, title or interest in and to said lands, and from trespassing thereon; that an accounting be had; and that the plaintiff have a decree for the value of the oil thus unlawfully taken.

The answer of the Ohio Oil Company alleges that on the 27th day of August, 1913, the said Thomas S. Harrison, as attorney in fact for the parties named in the bill, caused to be filed and recorded on the records of the county of Hot Springs, in the state of Wyoming, notices of locations, showing the locations to have been made on the 20th of July, 1913, by the said locators; that it was done in accordance with the mining laws of the United States, for placer mining claims then and there located and claimed for mineral oil; that this defendant and its codefendant, the Grass Creek Oil & Gas Company, claim title to said lands; that this defendant has thereon two wells, together with certain mining property, machinery, tools, and fixtures, for the operation of said oil wells so drilled. It then denies all other allegations of the bill, and sets up as further defense that prior to the 20th day of July, 1913, the lands in controversy were public lands, unoccupied, vacant, and unclaimed, and subject to location and sale under the mining laws of the United States; that on said day said lands were taken possession of, and located under the said mining laws, as petroleum oil placer mining claims, by S. L. Wiley, S. A. Lane, R. W. Harrison, D. A. Ehrlich, R. S. Green, Ed. M. Harrison, W. O. Sanzenbacher, and Pauline Harrison, all of whom were then and there citizens of the United States and duly qualified under the mining laws to locate and purchase lands of the United States containing minerals; that the northwest quarter of section 18 was so located as the "Meeteetse No. 4 Oil Placer Mining Claim," and the east half of the southwest quarter of said section 18 as the "Meeteetse No. 15 Oil Placer Mining Claim"; that immediately after these persons had taken possession of these lands they caused work to be done and performed upon each of the said mining locations for the purpose of discovering and developing the mineral upon each thereof; that by reason of such work petroleum mineral oil was discovered on each of said claims prior to October 1, 1913; that for some time prior to and on the 6th day of May, 1914, and continuously thereafter, the defendant was on said lands in diligent prosecution of work leading to the discovery of oil in commercial quantities, being then and there a bona fide occupant and claimant of said lands, and that such subsequent work and labor, done by the defendant on behalf of said locators and as their lessee, developed petroleum oil on each of said claims in commercial quantities; that the said locators have transferred their interest in full compliance with the local laws, the laws of the United States and of the state of Wyoming, as hereinafter more fully stated; that on the 16th day of June, 1914, in pursuance of an oral contract previously entered into by and between the owners and the Ohio Oil Company, under which it had taken possession before May 6, 1914, made a written lease for the northwest quarter of section 18, located as the "Meeteetse No. 4 Oil Placer Mining Claim," and said Ohio Oil Company has been in possession ever since the oral contract for said lease was made; that on the 16th day of June, 1914, the locators executed a lease to one B. H. Hopkins for the east half of the southwest quarter of said section 18, which is known as the "Meeteetse No. 15 Oil Placer Mining Claim," which lease was on the 17th day of June, 1914, assigned by said Hopkins to the Midwest Refining Company, and on August 27, 1914, the Midwest Refining Company, for value assigned and transferred all its right, title and interest to this tract to the Ohio Oil Company, that on July 24, 1914, said locators by deed conveyed all their right, title and interest to its co-defendant, the Grass Creek Oil & Gas Company, which now is the owner thereof, and this defendant its lessee.

The answer of the Grass Creek Oil & Gas Company is practically the same as that of the Ohio Oil Company.

The final hearing was on oral testimony, and the court found both issues in favor of the defendants, that of the discovery, and that the defendants on May 6, 1914, were bona fide occupants and claimants of these lands, in the diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work. From this decree the United States prosecutes this appeal.

F. P. Hobgood, Jr., Sp. Asst. Atty. Gen. (C. L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

William A. Riner, of Cheyenne, Wyo. (Timothy F. Burke, of Cheyenne, Wyo., on the brief), for appellees.

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

TRIEBER, District Judge (after stating the facts as above). Under the issues and proofs two questions arise. First. Was there a discovery of mineral oil by the defendants or those under whom they claim, on the lands in controversy, on or before the 6th day of May, 1914, when the withdrawal order of the lands was made by the President? Second. Were the defendants at the date of said order of withdrawal bona fide occupants or claimants of these lands, engaged in diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work, until oil was discovered?

[1] In view of the conclusions reached, we deem it unnecessary to determine the first issue, as a finding in favor of the defendants on either issue must result in the affirmance of the decree. It is a well-settled rule governing appellate courts that the findings of fact by a chancellor, although not conclusive upon appeal in equity, are presumptively correct and persuasive. Unless an error has occurred in the application of the law, or a serious mistake has been made in the application of the evidence, or the finding is clearly against the weight of the evidence, such findings will not be disturbed. And this rule is especially applicable when the evidence was heard orally by the chancellor, and he thus had the opportunity to see the witnesses, observe their demeanor while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98; Harper v. Taylor, 193 Fed. 944, 113 C. C. A. 572; United States v. Marshall, 210 Fed. 595, 127 C. C. A. 231; Tobey v. Kilbourne, 222 Fed. 760, 138 C. C. A. 308. The new equity rules have made no change in these respects. American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129.

[2, 3] The act of Congress under which the withdrawal of these lands was made by the President on May 6, 1914, is known as the "Pickett Act," passed June 25, 1910 (36 Stat. 847, c. 421). That act, so far as it applies to the issues in this case, contains the following proviso:

"Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is the 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."

As it is claimed on behalf of the appellant that the finding of the trial judge was not warranted by the evidence, and that he committed obvious errors in the application of the law, it becomes necessary to review the evidence. As we deem it unnecessary to determine the correctness of the finding on the first issue, that of the discovery of oil in 1913, we shall confine ourselves to the statement and consideration of the evidence relating to the other issue. Most of the facts on this issue are undisputed and not questioned by either party.

As early as April, 1913, Mr. Harrison, a geologist and mining engineer, visited this section, now known as the "Grass Creek oil field"; that in July, 1913, he employed a civil engineer to locate the lands according to the government surveys; that thereupon he located a number of mineral claims as attorney in fact for certain parties, all of whom were qualified to make the locations, among them the lands in controversy. He placed proper location notices on the land, had the location notices properly recorded in conformity with the laws of the United States, of the state of Wyoming, and the rules of miners in that section. He established camps, and drilled for oil on these lands, continuing until September, 1913, when it is claimed oil was discovered. He thereupon sought to obtain the necessary capital to develop these locations. In April, 1914, he showed these lands to representatives of the defendant the Ohio Oil Company, with a view of leasing them to it, indicating to them what he called the "discovery holes," which he had caused to be drilled in 1913. On April 19, 1914, he entered into an oral contract for the lease of these lands to the Ohio Oil Company, the agreement being made with Mr. McFadyen, who was field superintendent of the Ohio Oil Company. This agreement was made subject to the approval of the officers of the company. A few days thereafter, in April, 1914, this approval was obtained by telegraphic communication, whereupon Mr. McFadyen at once entered upon the lands and placed in charge thereof, as caretaker, one Virgil Jackson, who remained on the land as the employé of the Ohio Oil Company as caretaker from that time until after May 6, 1914. On May 4, 1914, Mr. McFadyen ordered the lumber and material, which was owned by the Ohio Oil Company and suitable for developing the land for oil, which was then in the town of Casper, to be sent immediately to Kirby, which is the nearest railroad station to these lands. On May 5, 1914, Mr. Harrison returned to these lands, bringing with him tent equipments for the accommodation of the workmen, and which were immediately put up. On the same day, May 5, 1914, Mr. McFadyen, for the Ohio Oil Company, entered into a verbal contract with Mr. Good, at Thermopolis, to drill wells on these lands, and to proceed at once. Mr. Good shipped the drilling tools to the land on May 9, 1914, for the purpose of doing the work, and continued uninterruptedly until Oc-

tober 1, 1914. He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus had been erected and was in working order, finishing the well on July 24, 1914, when, having drilled to a depth of 1,047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet.

On May 6, 1914, Mr. Harrison found some persons on these lands, who claimed to be locators under what is known as the Worland locations; but he treated them as trespassers and compelled them to leave, which they did. In this connection it is proper to state that these Worland locators, although made parties defendant to this action, made no defense whatever, nor any claim to the lands by cross-complaint against appellees, thus abandoning any claim which they may have had to the land in controversy, and by implication, at least, recognizing the superior rights of the Harrison locators, under whom appellees claim. On the same day Mr. Harrison made contracts for supplies to be used in connection with the work of drilling for oil. An engineer of the Ohio Oil Company arrived on that day with a carpenter, who started the work of building the camps on that day and continued until they were completed. Tents were also put up on that day. In the meantime Mr. McFadyen was looking after the prompt loading and forwarding of the Ohio Company's rigs, which had been ordered to be forwarded to the land.

Prior to May 6, 1914, the Ohio Oil Company had expended in money and assumed liabilities under its contracts for work on the land, amounting to $2,000. The material and lumber for the camps arrived on May 7, 1914, and work was begun at once. On May 10, 1914, the cook house had been completed, and the car containing the equipment reached the railroad station nearest to these lands, and was placed on the siding for unloading. Knowledge of the withdrawal order did not reach the parties until May 14, or 15, 1914. Since then the Ohio Oil Company has expended for the development of these two tracts of land large sums of money; on the northwest quarter $11,157.92, and on the other tract $10,152.97. Thereafter and before the institution of this suit there was spent by the Ohio Oil Company $629.36 in operating the wells and $15,000 for the construction of a 37,500-barrel steel storage tank. These sums do not include the expenditures made by Mr. Harrison prior to his contract with the Ohio Company.

There was evidence introduced on the part of the government that on May 5, 1914, a Mr. Walker went on the land with a party of prospectors, and he did not see any work under way, that at a few points he found some three-inch pieces of pipe and a drill hole on each of the quarters. A Mr. Orchard, another witness for the government, testified that he went on these lands March 25, 1914, and saw no improvements, except a few pieces of pipe sticking out of the ground. Mr. Valentine, another witness for the government, testified that he was on these lands on May 5, 1914, and saw no one there, but saw a

piece of pipe sticking out of the ground on the southeast quarter, but nothing on the northwest quarter.

In our opinion the evidence clearly justified the finding by the chancellor that, from the time Jackson was employed and placed on the land as caretaker for the defendant, the Ohio Oil Company was an occupant of the land. But it is claimed that, even if that is true, the defendant the Ohio Oil Company was not a bona fide occupant or claimant of these lands, in the diligent prosecution of work leading to the discovery of oil or gas on May 6, 1914, when the order of withdrawal was made. It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the act of Congress.

We are of the opinion that this is too narrow a view to take of this statute. The enactment of this proviso by Congress could have had but one object in view, and that was to protect the rights of all persons who, at the date of an order of withdrawal, are occupying or claiming oil-bearing lands in good faith, for the purpose of acquiring them under the laws of the United States, and are diligently prosecuting the work leading to the discovery of oil. Before the enactment of this statute discovery of the mineral was essential to make a location. As frequently, in fact in most instances, prospecting was necessary in order to determine whether oil or gas are on the public lands, and large sums of money were necessarily expended to ascertain this fact, Congress by this proviso in the act of 1910 extended its protecting arm to those acting in good faith in an effort to ascertain whether there was oil or gas under them. In our opinion, when a citizen of the United States, in good faith enters upon public land for the purpose of discovering oil or gas, takes possession of the land by placing a caretaker thereon while he is taking proper steps to obtain the material necessary for the work of constructing the camps, enters into contracts for drilling, acting as expeditiously as possible in erecting camps and preparing for the drilling, spends money and enters into contracts whereby he becomes liable for sums of money to prosecute the work leading to the discovery of oil or gas, and as soon as it is possible, by the exercise of proper diligence, begins the work of drilling, and continues it diligently and expeditiously until oil is discovered in commercial quantities, he is within the protection of this proviso. As was stated in Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417, although that case did not involve this act of Congress, but was a contest between claimants:

"We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of the materials necessary therefor."

The learned counsel for the government in fact concedes the correctness of this proposition. In his brief he says:

"It is not contended by the government that the construction of a camp might not be a part of such work, but that, unless such camp is for the purpose

of furnishing a base for drilling operations upon the claims in controversy, its construction is not diligent prosecution of work, so far as the claims in controversy are concerned."

The evidence clearly shows that the defendants brought themselves within this rule. Everything they did was "for the purpose of furnishing a base for drilling operations on the lands in controversy." For what other purpose did they make these expenditures, and enter into contracts for erecting the camps, and the drilling by Mr. Good? The learned trial judge committed no error in the application of the law to the facts, as shown by the evidence, and the evidence sustains his findings beyond question.

The decree of the District Court is affirmed.

OKLA OIL CO., Appellants, et al. v. BARTLETT, Appellee.

(Circuit Court of Appeals, Eighth Circuit. September 8, 1916.)

No. 4561.

1. INDIANS ⊂=15(1)—LANDS—CONVEYANCE BY HEIRS OF DECEASED ALLOTTEE.
Under Act May 27, 1908, c. 199, § 9, 35 Stat. 315, which provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, provided that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee," and the Probate Code of Oklahoma, providing that "wills must be proven and letters testamentary or of administration granted (1) in the county of which the decedent was a resident at the time of his death, in whatever place he may have died," the county court of such county is the only one having authority to approve such a deed by a full-blood heir, and its approval by the county court of another county, in which no judicial proceeding for the settlement of the estate has been instituted, is a nullity, and the deed is void and subject to collateral attack.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. ⊂=15(1).]

2. INDIANS ⊂=15(1)—LANDS—CONVEYANCE BY HEIRS OF DECEASED ALLOTTEE.
The doctrine of estoppel cannot be invoked against the Indian grantor in such a deed, to validate the same, since both he and the property are under the control of the government, which has by the statute prescribed the only method by which a valid conveyance may be made.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37; Dec. Dig. ⊂=15(1).]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by H. U. Bartlett against the Okla Oil Company and others. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 218 Fed. 380.

A. A. Davidson, of Tulsa, Okl. (R. S. Sherman and J. A. Veasey, both of Tulsa, Okl., on the brief), for appellants.

George S. Ramsey, of Muskogee, Okl. (Edgar A. De Meules and Malcolm E. Rosser, both of Muskogee, Okl., on the brief), for appellee.

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

ELLIOTT, District Judge. This is an appeal from the rulings and decree of the United States District Court for the Eastern District of Oklahoma, in favor of appellee and against appellant, in an action by appellee against appellant, in which appellee, hereinafter referred to as plaintiff, claimed title to the premises therein described, under and by virtue of a certain deed executed to plaintiff, by Jack Gouge, Betty and Big Jack, dated May 13, 1912, which deed was approved by the county court of McIntosh county, Okl., on that date, and thereafter duly recorded. Appellant, hereinafter referred to as defendant, claimed title to the same premises under and by virtue of a certain deed executed to defendant's grantor, by said Jack Gouge, on April 18, 1910, which deed was approved by the county court of Hughes county, Okl., on that date, and thereafter duly recorded.

The agreed statement of facts upon which the case was tried, in so far as they are material here, show: That Chunna Gouge was a citizen of the Creek Nation and enrolled by the Dawes Commission as a full-blood Creek Indian; enrollment duly approved. That she died in McIntosh county, Okl., intestate and unmarried, about November 17, 1907, and at the time of her death was a resident and citizen of McIntosh county, Okl. That she left no issue surviving her, but did leave, surviving her, her father, Jack Gouge, her mother, Lucinda, both of whom were citizens of the Creek Nation and enrolled as full-blood Creek Indians by said Commission, enrollment duly approved, which enrollment showed said deceased and her said father and mother to be full-blood Creek Indians. That Lucinda, the mother, died January, 1908, in said McIntosh county, left no issue, but left her said husband, Jack Gouge, and her father and mother, Big Jack and Betty, who were also full-blood Creek Indians. That no court having jurisdiction to appoint an administrator or executor of the estate of either of said deceased ever exercised any jurisdiction to appoint an administrator of the estate of either Chunna Gouge or Lucinda, and the estates of neither were ever administered or settled by administration proceedings in any court. That the land in controversy in this action was set apart to Chunna Gouge, during her lifetime, as an allotment from the Creek Nation by the Commission to the Five Civilized Tribes, and after her death, during the month of March, 1909, patents confirming the title to said allotment were executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior, naming therein Chunna Gouge as the grantee. That on the 13th day of May, 1912, said Jack Gouge, father of Chunna Gouge, and husband of Lucinda, with Big Jack and Betty, who were the father and mother of Lucinda, for a valuable consideration, executed, acknowledged, and delivered to the plaintiff their certain warranty deed to the land in controversy, the same being the said allotment of said Chunna Gouge, which on that date was duly approved by the county court in and for McIntosh county, state of Oklahoma, under the authority of section 9 of the act of Congress of May 27, 1908 (35 Stat. 312), and plaintiff's deed

was filed in the office of the register of deeds of Creek county, where the land was situated, May 15, 1912. That the plaintiff was at the time the suit was commenced, and is now, in the possession of the premises in controversy. That on the 18th day of April, 1910, said Jack Gouge executed and delivered to Edwin R. Nix a warranty deed to the premises in controversy, which deed was approved by order of the county court in and for Hughes county, Okl. Said deed was executed for a valuable consideration, and the county court of Hughes county approved said deed on the verified petition of Jack Gouge, a copy of which is attached to the agreed statement of facts. That thereafter, June 20, 1911, Edwin R. Nix and wife duly deeded said premises to the defendant, Okla Oil Company, and the Okla Oil Company on April 26, 1913, executed and delivered to defendant Dixon Q. Brown a deed to said premises.

It is further admitted that the plaintiff acquired the deed of May 13, 1912, with actual notice that Jack Gouge had executed, on April 18, 1910, the deed to Edwin R. Nix, and with actual notice that the county court of Hughes county, Okl., had approved the said deed relied upon by the defendant. Copies of the two petitions for approval of the two deeds above referred to were submitted—the one for the approval of the deed under which plaintiff claims being to the county court of McIntosh county, signed by Jack Gouge, Big Jack, and Betty; the other petition to confirm the deed under which defendant claims being to the county court of Hughes county, Okl., and signed by Jack Gouge. On the petition second above named, the county court of Hughes county, Okl., on the 18th day of April, 1910, duly entered its order, in substance reciting the filing of the petition on that date, and that the court after a full investigation and examination, and after taking testimony of the petitioner and other witnesses, found that the premises in controversy were allotted to Chunna Gouge as her distributive share of the lands held in common by the Muskogee or Creek Tribe of Indians, being in the state of Oklahoma, describing them; that Chunna Gouge appeared on the roll as a full-blood Creek Indian, roll No. 478; that she died on the ——— day of January, 1908, intestate, in Hughes county, in the state of Oklahoma, and was a resident of the said county and state; that she left surviving her, as her sole and only heir at law, her father, Jack Gouge, a full-blood Creek Indian, and that he was of the age of 33 years; that he resided in that county and that Chunna Gouge resided and was domiciled in that county at the time of her death. Thereupon the court found that Jack Gouge executed and delivered to Edwin R. Nix the warranty deed above referred to, on the 18th day of April, 1910, conveying to Nix all of his title thereto, for a consideration of $200, and further found that said consideration was just and adequate, that the same had been fully paid, and that the deed should be approved. Thereupon it was therefore considered, ordered, adjudged, and decreed that said deed be and the same was thereby approved. On the petition first above named, the county court of McIntosh county, Okl., made its order confirming said deed, in substance and effect as above recited

with reference to the confirmation of the deed by defendant's grantor by the county judge of Hughes county, except that the court found that Chunna Gouge, deceased, at the time of her death, resided in McIntosh county, Okl. (*which is now conceded to be the fact*), and the court further found in the latter that the plaintiff had paid to the petitioner the sum of $400, subject to the approval of the court, and the court found said consideration was the fair market value of said conveyance, and thereupon ordered, adjudged, and decreed that the conveyance be fully confirmed and approved.

Prior to the joining of issue, the plaintiff having set up the facts substantially as thereafter stipulated, the defendant moved the court to dismiss plaintiff's bill of complaint for the reason that the same did not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant, and also filed an answer denying that the plaintiff was the legal and equitable owner in fee simple of said premises, pleading the facts substantially as above set forth, and averring that the defendant, by virtue of the conveyance under which it claimed, acquired the valid title to the lands in controversy, and also averred that prior to the 13th day of May, 1912, at which time the plaintiff acquired the conveyance relied upon by him, the plaintiff had constructive notice of the warranty deed executed by said Jack Gouge to defendant's grantor, and that said Jack Gouge, in the petition which he had filed, affirmatively alleged that said Chunna Gouge died a resident of Hughes county; that in said order said county court of Hughes county found as a fact that she did die a resident of said Hughes county, Okl.; that defendant paid a good and valuable consideration for the deed relied upon by him, and that said deed was taken in reliance upon the order of the county court for Hughes county, Okl., approving said deed. Defendant averred, further, that the plaintiff as the grantee of said Jack Gouge, and for the further reason that he acquired his said deed with full notice and knowledge of the matters above set forth, was estopped to dispute the title of the defendant, and prayed a dismissal of the complaint.

[1] Plaintiff claims title to the premises in controversy under deed dated May 13, 1912, executed by Jack Gouge, and others, approved by the county court of McIntosh county, which court, it is admitted, had "jurisdiction of the settlement of the estate of said deceased allottee," Chunna Gouge. Defendant claims title under a deed to his grantors executed by said Jack Gouge on April 18, 1910, approved by the county court of Hughes county, which court, it is now admitted, had no "jurisdiction of the settlement of the estate of said deceased allottee." It is further admitted by both plaintiff and defendant that only the estate inherited by Jack Gouge is claimed by the defendant herein, and that either of the two deeds to plaintiff and defendant, respectively, are sufficient to convey the entire interest of said Jack Gouge, if otherwise valid.

The first question presented is: Which of the two deeds given by Jack Gouge is valid, and therefore operated to transfer his title to the

premises in controversy? By the act of Congress approved May 27, 1908 (35 Stat. 312), it is provided:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The first inquiry is as to what county court had "jurisdiction of the settlement of the estate of said deceased allottee," Chunna Gouge. There is no controversy upon that proposition. The Probate Code of Oklahoma provides:

"Wills must be proven and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death, in whatever place he may have died. * * *"

It is admitted that decedent, Chunna Gouge, was not a resident, at the time of her death, of Hughes county, Okl., but was a resident of McIntosh county, Okl., and therefore, under such admitted facts, the county court of McIntosh county, Okl., had "jurisdiction of the settlement of the estate of said deceased allottee."

But it is contended by defendant that the order of the county court of Hughes county, Okl., approving the deed upon which he relies, is conclusive upon the question that Chunna Gouge died a resident of Hughes county, Okl., when such order of approval is sought to be avoided in a collateral proceeding. In support of this contention of the defendant, it is insisted that the approval of the deed of Jack Gouge, by the county court of the county of Hughes, was an act of a tribunal exercising judicial power, and as the approval was necessarily predicated upon a determination of the court's jurisdiction to act—that is, a determination that Chunna Gouge died a resident of Hughes county, Okl.—that such finding by said county court is conclusive when attacked in this way.

Counsel for both plaintiff and defendant have cited numerous decisions where courts have reviewed the acts of different tribunals and determined whether or not such acts were the exercise of judicial power. A review or analysis of these various decisions can serve no good purpose here. The jurisdiction of the county court of Hughes county was only that expressed in the act of Congress above quoted, and, while our attention is called to the fact that it has been held by the Supreme Court of Oklahoma, in re Mullen v. Short, 38 Okl. 333, 133 Pac. 230, that the county court of the county of which the deceased allottee of the Five Civilized Tribes was a resident at the time of his death is authorized by the above-quoted section of the act of Congress to approve conveyances of any interest of any full-blood Indian heir to lands inherited from such deceased allottee, whether a regular proceeding for the settlement of the estate of such decedent has been instituted or not, there is no intimation in this decision that a county court of any other county than that in which the decedent resided at the time of his death, has such jurisdiction.

The test of the jurisdiction of the county court of Hughes county is not right decision, but the right to enter upon the inquiry and make some decision. Only one county court in Oklahoma, under the provisions of this statute, had the right to discharge the duty imposed by this statute of the United States. There was no general jurisdiction of the estates of deceased allottees given to all county courts in the different counties of the state of Oklahoma, and therefore there was no power to deal with the question of jurisdiction, or to hear the particular facts in any case relating to the question of residence at the time of the death of the allottee, and to determine whether or not they were sufficient to invoke the exercise of that power. The determination by the Hughes county court of the question of its jurisdiction under this statute of the United States to perform the duty herein prescribed was not the determination of a court of general jurisdiction, vested with judicial power to determine all the issues in the proceeding, including the question of its own jurisdiction.

Doubtless Congress had the power to prescribe rules and regulations for the determination of this issue. No such provision is contained in the statute of the United States creating the authority. Congress, instead of such provision, did, however, condition the right and duty to approve such deed to the "court having jurisdiction of the settlement of the estate of said deceased allottee." This left the determination of that issue to the statutes of the state of Oklahoma. Such statute is as above quoted, and therefore "the court having jurisdiction of the settlement of the estate of said deceased allottee" was the only court given the right to approve such deed. The duty to approve the deed of this heir of said deceased allottee, by the terms of said act, vested in the county court of McIntosh county alone, because it was the county in which Chunna Gouge resided at the time of her death, and therefore by the terms of the statute of Oklahoma the county court of that county had jurisdiction to settle her estate.

If a regular proceeding for the settlement of the estate of Chunna Gouge, deceased, had been instituted in the county of Hughes, alleging the facts necessary to give that court jurisdiction under the provisions of the Oklahoma statute above referred to, and if that court had found such jurisdiction and proceeded with the administration, and if the approval of defendant's deed had followed such regular proceeding for the settlement of the estate, clearly it could not have been attacked collaterally. The determination of the conditions imposed by the act of Congress would then have been made in the manner provided by the statutes of Oklahoma by a county court having jurisdiction to make such determination, both by the laws and the provisions of the Constitution of said state. It is probably true that this authority to approve the deed of an heir of a deceased allottee vests in the county court having jurisdiction of the settlement of the estate of a deceased allottee, and that such authority is not necessarily dependent upon the institution of a regular proceeding for the settlement of the estate of the deceased allottee, because no such requirement is provided in the statute giving the authority.

We repeat, however, that it is our judgment that the authority and the right to act is conditioned upon the fact, whether determined in a proper proceeding or not, and therefore action by a county court other than the one having jurisdiction of the settlement of the estate of such deceased allottee is without authority. The county court, in approving the conveyance by the heirs of deceased allottees, under the statute of the United States above set forth, does not exercise judicial power conferred by the laws or Constitution of the state of Oklahoma, nor any federal judiciary power. Truskett et al. v. Closser, 198 Fed. 835, 117 C. C. A. 477.

The purpose of said act of Congress was to permit lands to be conveyed by full-blood Indian heirs of deceased allottees with the specific restriction that such conveyances were invalid, unless approved by the county court therein named, and was intended to prevent imprudent sales by this class of Indians. Marchie Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. That part of section 9 of the act of Congress of May 27, 1908, c. 199, 35 Stat. 312, which provides "that no conveyance of any interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," does not require of said court the performance of any judicial function. Tiger v. Creek Co. Court, 45 Okl. 701, 146 Pac. 912; Jennings v. Wood et al., 192 Fed. 507, 112 C. C. A. 657. We therefore conclude that the deed by Jack Gouge to defendant's grantors, approved by the county court of Hughes county, Okl., which court, it is conceded, did not have jurisdiction of the settlement of the estate of Chunna Gouge, deceased, was invalid, and defendant has and can claim no interest in or to the premises in controversy by virtue thereof.

[2] The defendant, however, pleads and urges that Jack Gouge and his grantee, the plaintiff, are estopped from asserting that Chunna Gouge died a resident of a county other than Hughes county, in view of the representation as to the fact of allottee's residence, contained in the verified petition of Jack Gouge filed by him in the county court of Hughes county, the deed executed by Gouge thereunder, recorded prior to the date of his deed to the plaintiff, his acceptance and retention of the consideration for such deed, and the knowledge of his grantee, the plaintiff, of the fact that the county court of Hughes county had approved the deed of April 18, 1910. This contention cannot be sustained. The proceedings before the county court of Hughes county, Okl., were void and could not be cured by ratification or waiver. The deed approved by said county court, without jurisdiction, was a nullity, and such conveyance was void. There could be no purchaser in good faith under these proceedings. No laches can be imputed to Jack Gouge. He and his land were under the control of the government. Laughton v. Nadeau et al. (C. C.) 75 Fed. 789; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719.

The United States statute prohibited the defendant or his grantor from taking title to the property in controversy without the approval of the county court having jurisdiction of the settlement of the estate

of said deceased allottee, and defendant cannot indirectly build a title by estoppel or any statute of limitations. Sheldon v. Donahoe, 40 Kan. 346, 19 Pac. 901. Jack Gouge attempted to convey and defendant's grantor attempted to acquire the premises in controversy in violation of the provisions of the statute of the United States above set forth, in that there was no approval of the county court having jurisdiction of the settlement of the estate of the deceased allottee, and thereby acted contrary to the policy of the law, and in violation of said United States statute, and is not estopped to deny the validity of the deed, and defendant's grantor acquired no rights by estoppel or otherwise. Starr v. Long Jim, 227 U. S. 613, 33 Sup. Ct. 358, 57 L. Ed. 670; Franklin v. Lynch, 233 U. S. 269, 34 Sup. Ct. 505, 58 L. Ed. 954; Monson v. Simonson, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260.

The decree entered by the trial court herein, in favor of the plaintiff and against the defendant, quieting the title to the premises in controversy, is affirmed.

MAY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4559.

1. CRIMINAL LAW ⟸1178—ASSIGNMENTS OF ERROR—WAIVER.
Assignments of error abandoned in the brief will not be considered on appeal.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. ⟸1178.]

2. CRIMINAL LAW ⟸1045—APPEAL—MATTERS FOR CONSIDERATION.
An assignment of error as to a matter on which the trial court did not rule will not be considered on appeal.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2652, 2685; Dec. Dig. ⟸1045.]

3. INDICTMENT AND INFORMATION ⟸137(3)—MOTION TO QUASH.
The question whether a person not authorized appeared before the grand jury returning the indictment may be raised by motion to quash. although plea in abatement is the proper remedy in all cases of contested fact.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 482, 484; Dec. Dig. ⟸137(3).]

4. CRIMINAL LAW ⟸322—EVIDENCE—PRESUMPTIONS—OFFICIAL ACTION.
Where an Assistant Attorney General signed a communication for and on behalf of the Attorney General, it must be presumed that he was acting lawfully and not usurping authority.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 728; Dec. Dig. ⟸322.]

5. ATTORNEY GENERAL ⟸2—GRAND JURY ⟸34—ASSISTANTS—APPOINTMENT.
Rev. St. § 161 (Comp. St. 1913, § 235) declares that the head of each department may prescribe regulations for his department, while section 177 (section 259) provides that in case of the death, resignation, absence, or sickness of the head, the first or sole assistant shall, unless otherwise

directed by the President perform the duties of such head of department. Section 348 (section 517) provides that in the department of justice there shall be three Assistant Attorneys General, who shall assist the Attorney General, while section 360 (section 535) authorizes the Attorney General to require any solicitor or officer of the department of justice to perform any duty required of the department. Act June 30, 1906, c. 3935, 34 Stat. 816 (Comp. St. 1913, § 534), provides that the Attorney General, or any attorney or counselor specially appointed by the Attorney General, may, when specifically directed by the Attorney General, conduct any legal proceedings, civil or criminal, including grand jury proceedings, whether he be a resident of the district in which such proceeding is brought or not. By a letter signed by an Assistant Attorney General for the Attorney General, an attorney was appointed special assistant for the purpose of assisting in prosecutions in a district of which the special assistant was not a resident, and pursuant to the direction of the Attorney General he appeared and participated in the grand jury proceedings which culminated in the return of an indictment. *Held*, that as it is physically impossible for the head of an executive department to himself sign every official communication emanating from his department, and as it must be presumed that the assistant was acting for the Attorney General, the special attorney was qualified to act, and might participate in the grand jury investigations.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 2; Dec. Dig. ⟸2; Grand Jury, Cent. Dig. §§ 73, 85; Dec Dig. ⟸34.]

6. ATTORNEY GENERAL ⟸2—INDICTMENT AND INFORMATION ⟸137(3)—SPECIAL ASSISTANTS—DE FACTO OFFICERS.

In such case, the special attorney so appointed by the Attorney General was at least a de facto officer, and his right to participate in the grand jury proceedings cannot be questioned on motion to quash the indictment returned by the grand jury.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 2; Dec Dig. ⟸2; Indictment and Information, Cent. Dig. §§ 482–487; Dec. Dig. ⟸137(3).]

7. ATTORNEY GENERAL ⟸2—SPECIAL ATTORNEYS—APPOINTMENT.

A specially appointed assistant to the Attorney General, not a resident of the district wherein a prosecution is had, should present duly certified copies of his appointment and oath of office to any court in which he is called upon to act, so that the same may be recorded.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 2; Dec. Dig. ⟸2.]

In Error to the District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

Joseph May and another were convicted of violating Act of Congress August 2, 1886, c. 840, 24 Stat. 209, relating to sale and manufacture of oleomargarine, and Joseph May, the named defendant, brings error. Affirmed.

Chester H. Krum and Walter N. Davis, both of St. Louis, Mo., for plaintiff in error.

Robert W. Childs, Sp. Asst. Atty. Gen. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. Joseph May with one Will Brown was tried, convicted, and sentenced to the penitentiary upon two in-

dictments consolidated for the purpose of trial, for violating the provisions of an act of Congress, approved August 2, 1886, relating to the sale and manufacture of oleomargarine. He seeks a reversal of the judgment for error committed by the trial court in overruling his motion to quash the indictments.

[1-5] We thus limit the assignments of error for the reason that the alleged error of the court in ruling on the motion in arrest is abandoned in the brief, and there was no ruling of the court on the question of whether the attorney for the United States should have been required to make an opening argument at the close of the case. The motion to quash was in the following language:

"Come now the above-named defendants Joseph May, Will Brown, et al., by their attorney, and move the court to set aside the indictment found herein against them in said cause for the following reasons:

"First. Because Robert Childs, who is not a citizen or resident of the Eastern District of Missouri, and who is not the district attorney, nor an assistant district attorney, and who was not a witness, was present in the grand jury room, examining witnesses, and participating in the proceedings herein against said defendants when said indictment was found, and that he had no right to be there.

"Second. That the said Robert Childs, not being United States district attorney, nor one of the regular assistants for this district, failed to procure the express permission of the District Court of Missouri to appear before said grand jury.

"Third. That the said Robert Childs failed to show by what authority he exercised the right to appear before the grand jury, and that he failed to file any appointment or permission issued to him with the clerk of the District Court for this district, and has failed to place in the custody of the clerk of the District Court for this district the oath required by law to be by him taken."

For such irregularity in relation to the grand jury as is complained of, a motion to quash seems to be made use of in many instances instead of a plea in abatement, although the plea in abatement is the proper remedy in all cases of contested fact. United States v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; United States v. Philadelphia & Reading Railway Co. (D. C.) 221 Fed. 683; United States v. Virginia-Carolina Chemical Co. (C. C.) 163 Fed. 66; United States v. Heinze (C. C.) 177 Fed. 770; Latham v. United States, 226 Fed. 420, 141 C. C. A. 250.

No disputed question of fact arose in the court below in disposing of the motion to quash. Mr. Childs testified, when called by counsel for the defendant in support of the motion to quash, as follows:

"I am an attorney at law. Between the 18th and 23d days of December, 1914, I attended before the grand jury at St. Louis, Mo., and questioned witnesses in oleomargarine cases. I am not a resident of the Eastern District of Missouri, nor am I the United States district attorney for said district, or one of the regularly appointed assistants to said attorney. I received no authority from the District Court of said district to appear before the grand jury; neither my oath of office nor my appointment was filed with the court."

One of the indictments consolidated was returned March 24, 1913, and with which Mr. Childs had nothing to do. The other indictment was returned December 23, 1914, and it is to this indictment that

the appearance of Mr. Childs before the grand jury relates. Mr. Childs, to show his authority to appear before the grand jury, introduced in evidence the following letters, and his oath of office:

"October 13, 1914.

"Robert W. Childs, Esq., % United States Attorney, Chicago, Illinois—Sir: You are hereby appointed a special assistant to the Attorney General for the purpose of assisting in the preparation for trial, and in the trial in the District Court of the Eastern District of Missouri, of the so-called oleomargarine cases there pending, or to be pending.

"Your compensation will be at the rate of $25.00 per day for each day of actual service in the discharge of these duties, and you will also be allowed your actual and necessary expenses of travel and subsistence, subject to the provisions of Department Circular No. 486, when away from Chicago, Illinois, which is hereby fixed as your official headquarters, all payable from the appropriation for 'Pay of Special Assistant Attorneys, United States Courts.'

"This appointment is subject to any change which may be made by this department, and may be terminated at any time by the Attorney General.

"Please execute and return the enclosed oath of office.

"Respectfully, For the Attorney General,
"Sam'l J. Graham, Assistant Attorney General."

"I, Robert W. Childs, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of special assistant to the Attorney General on which I am about to enter. So help me God.

Robert W. Childs.

"Subscribed and sworn to before me this 14th day of December, A. D. 1914.

"[Seal.] Esther A. Dunshee, Notary Public."

"December 3, 1914.

"Robert W. Childs, Esq., % United States Attorney, Chicago, Illinois—Sir: In connection with your appointment dated October 13, 1914, as a special assistant to the Attorney General for the purpose of assisting in the preparation for trial, and in the trial, in the District Court of the Eastern District of Missouri, of the so-called oleomargarine cases there pending or to be pending, you are hereby authorized to go to St. Louis the week of the 14th instant for the purpose of preparing these cases for trial and securing the statements of witnesses, and are also authorized and directed to conduct grand jury proceedings in the Eastern District of Missouri in connection with the investigation of these cases.

"Respectfully, T. W. Gregory, Attorney General."

We do not mention the letter written by the Attorney General and dated January 22, 1915, as we are of the opinion that if the appearance of Mr. Childs before the grand jury in December, 1914, was unauthorized, the letter of January 22, 1915, would not help the matter. The oath above mentioned was filed in the Department of Justice. The act of Congress of June 30, 1906 (34 Stat. 816) provides as follows:

"That the Attorney General or any officer of * * * justice or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, * * * which district attorneys now are or hereafter may be * * * authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

The contention that the appearance of Mr. Childs before the grand jury was unauthorized is based principally upon the proposition that the act of Congress above quoted requires the appointment to be made by the Attorney General, whereas the letter of October 13, 1914, above mentioned, was signed, "For the Attorney General, Sam'l J. Graham, Assistant Attorney General," and therefore the appointment was not made by the Attorney General. We do not think there is any merit in this contention. Sections 360, 348, 161, and 177, R. S. U. S., provide as follows:

Section 360: "The Attorney General may require any solicitor or officer of the Department of Justice to perform any duty required of the department or any officer thereof."

Section 348: "There shall be in the Department of Justice three officers, learned in the law, called the Assistant Attorneys General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall assist the Attorney General and Solicitor General in the performance of their duties. * * *"

Section 161: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Section 177: "In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

It will be seen by reference to the foregoing sections that there is such an officer known to the law as an Assistant Attorney General, who is charged by the statute with the duty of assisting the Attorney General. It will also be seen that in case of death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided in section 179 (Comp. St. 1913, § 261), perform the duties of such head until a successor is appointed or such absence or sickness shall cease. Also that the head of each department is authorized to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, the custody, use, and preservation of the records, papers, and property appertaining to it.

The letter of October 13, 1914, signed by Mr. Graham, appears upon its face to have been from the Department of Justice and from the Attorney General, and that the Attorney General used the hand of his assistant in signing the same, as it is physically impossible for the head of an executive department to sign, himself, every official communication that emanates from his department. Hannibal Bridge Co. v. United States, 221 U. S. 206, 31 Sup. Ct. 603, 55 L. Ed. 699; Causey v. United States, 240 U. S. 399, 36 Sup. Ct. 365, 60 L. Ed. 711, Supreme Court opinion filed March 6, 1916. We also must presume that the signature of the Assistant Attorney General to the letter of October 13, 1914, was by public and proper authority. We cannot presume that he used usurped authority, but a legitimate authority

previously given him by the Attorney General. United States v. Peralta, 60 U. S. (19 How.) 343, 15 L. Ed. 678; United States v. Adams (C. C.) 24 Fed. 351; Parish v. United States, 100 U. S. 500, 25 L. Ed. 763.

We do not think the act of June 30, 1906, in conferring the power of appointment upon the Attorney General, should be construed to mean that the Attorney General must, in all cases, sign the appointment himself, but that the power of appointment is conferred upon the Attorney General as other powers are conferred to be exercised by him personally or through his lawful assistants when duly authorized for such purpose. The Assistant Attorney General having acted expressly for the Attorney General, in the absence of any proof to the contrary, we must presume that he was duly authorized to sign the letter, appointing Mr. Childs as a special assistant to the Attorney General for the purpose of performing the duties mentioned in the appointment. Paraphrasing what was said by the Supreme Court in Marsh v. Nichols, Shepard & Co., 128 U. S. 605, 9 Sup. Ct. 168, 32 L. Ed. 538, we may say that the signing of the letter by Mr. Graham as Assistant Attorney General for the Attorney General implies that one of the conditions on which he was authorized to act in that capacity had arisen, and that with his signature added the letter was complete.

[6, 7] There are many technical reasons for affirming the order of the District Court in overruling the motion to quash, but we have considered the matter on its merits as it was suggested at the bar that it was desirable that this course be taken. This is not a proceeding to try the title of Mr. Childs to the office of special assistant to the Attorney General for the purposes mentioned in the appointment. It is a motion to quash an indictment for the reason that an unauthorized person took part in the proceedings of the grand jury which resulted in the indictment. Such a motion only attacks the authority of Mr. Childs in a collateral way, and beyond all question he was a de facto officer, acting by color of authority, and his acts are valid until it is judicially declared by a competent tribunal in a proceeding for that purpose that he has no right to the office, the duties of which he is performing. McDowell v. United States, 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271; Manning v. Weeks, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264. As a matter of correct practice and orderly procedure, we think duly certified copies of the appointment and oath of office of Special Assistant Attorneys appointed under the act of June 30, 1906, should be presented to any court in which the assistant attorney is called upon to act, that the same may be placed upon the records of the court.

No error appearing in the proceedings of the court below, the judgment is affirmed.

In re NOVELTY WEB CO.

DAVID et al. v. NEWMAN et al.

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

No. 2142.

1. CHATTEL MORTGAGES ⟸63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

1 Comp. St. N. J. 1910, p. 463, § 4, makes chattel mortgages void as against subsequent purchasers and mortgagees in good faith, unless the mortgage is recorded and has annexed thereto an affidavit or affirmation by the holder of the mortgage stating the consideration thereof and as nearly as possible the amount due and to grow due thereon. A chattel mortgage was dated June 17th, and an affidavit sworn to June 20th stated that the consideration was that the deponent had that day loaned to the mortgagor a specified sum for one year, with interest, that the mortgage was given to secure the payment thereof, and that there was due and to grow due thereon the sums specified, with interest from June 17th. The loan was in fact made by parties other than the mortgagee, who held the mortgage for their benefit, and no money was loaned on June 20th, though the moneys were subsequently advanced as agreed to the amount specified. *Held* that, while a substantial compliance with the statute is sufficient, yet that merely relieves a chattel mortgage from attack because the affidavit is inartificially drawn, and not technically precise, and does not waive the command that the affidavit must state fully and plainly the consideration on which the mortgage is founded, and so the assertion of the relation of creditor and debtor between the mortgagee and the mortgagor, when none such existed, invalidated the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⟸63.]

2. CHATTEL MORTGAGES ⟸63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

In such case, the mortgage is invalid because of the falsity of the statement that deponent had loaned to the mortgagor a sum of money; the deponent not having then made any loan to the mortgagor, and not so doing subsequently, though the loan was made by third persons.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⟸63.]

3. CHATTEL MORTGAGES ⟸63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

The mortgage is invalid because of the falsity of the statement that when the affidavit was made there was a sum due under the mortgage, when no loan had at that time been made.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⟸63.]

4. CHATTEL MORTGAGES ⟸63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

As the affidavit attached to the mortgage set forth that there was to grow due on the mortgage the sum of $3,000, and it was intended thereby to cover the contemplated loan by installments, the mortgage is invalid, because the statement wholly failed to disclose the nature and to verify the truth of the consideration.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⟸63.]

5. CHATTEL MORTGAGES ⊂=63—STATUTORY AFFIDAVITS—REQUISITES AND SUFFICIENCY.

In such case, where the moneys were to be advanced by third persons, the mortgagee holding the mortgage for their benefit, the statements in the affidavit as to the debt due and to grow due were so indefinite and general as to render the mortgage invalid for noncompliance with the act.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. ⊂=63.]

Petition to Review and Revise an Order of the District Court of the United States for the District of New Jersey, in Bankruptcy; Thos. G. Haight, Judge.

In the matter of the Novelty Web Company, bankrupt. On petition to review and revise an order of the District Court (228 Fed. 1007) adjudging a chattel mortgage, given by the bankrupt to B. Edmund David and others, to be invalid, and not to constitute a lien on the assets of the bankrupt, entitled to priority in payment over a claim of E. M. Guinzburg for rent. Affirmed.

W. V. Rosenkrans, of Paterson, N. J., for petitioners.

Jay C. Guggenheimer, of New York City, for respondents.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. In a controversy in bankruptcy involving the allowance and precedence of claims under a chattel mortgage and for rent, the referee allowed both claims but awarded priority to the claim under the chattel mortgage. The fund being insufficient to pay both, the landlord on review by the District Court attacked the validity of the mortgage on the ground that the affidavit annexed to it did not conform to the requirements of the statute of the State of New Jersey in that behalf. The District Court, sustaining this contention, held the mortgage invalid. Its finding is before us on a petition to review and revise, presenting the single question of the validity of the mortgage based upon the sufficiency and truth of the affidavit.

The facts bearing upon the question are these: The Novelty Web Company was in financial difficulties. The creditors granted it an extension and selected three of their number as trustees to continue its business for their benefit. Funds were needed both immediately and presently to meet maturing obligations. These the trustees, with another, undertook to supply to the amount of $3,000 and to pay the same at different times and in different sums as the exigencies arose. For this loan, the company agreed to give its chattel mortgage as security, but as most of the money was to be advanced by the trustees, it was thought advisable to make the mortgage to another. So the mortgage was drawn by the company in favor of one Leo Herz, as mortgagee, who upon delivery assigned it to the claimants, and through whom in return the money was paid by the claimants to the mortgagor. Herz was a person used as a party to the mortgage merely for convenience, being neither a creditor of the company nor a partici-

pant in the proposed loan. The mortgage was dated June 17, the mortgagee's affidavit was made June 20, and the mortgage was recorded June 21, in the year 1912. On the date of Herz' affidavit stating the consideration of the mortgage, no part of the loan had been paid the mortgagor and no debt had been created either between the mortgagor and Herz or between the mortgagor and the claimants. The first instalment was paid on June 21, the day following the date of the affidavit. Others were paid on different dates, the last on September 19. The possession of the mortgaged property remained throughout with the mortgagor.

There is no question of fraud in this case, as it is conceded that the full consideration for the mortgage was subsequently advanced and was properly used in the business of the mortgagor company.

[1] The infirmity of the mortgage is found in its accompanying affidavit. The statute of New Jersey regulating the execution and registry of chattel mortgages (Compiled Statutes of New Jersey, vol. 1, page 463, § 4) declares, that every chattel mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, * * * unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent, or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon," be recorded in the proper office as directed.

This statutory requirement is similar in general purpose to like requirements of statutes of other states. With the object of preventing fraud in the pledging of chattels by mortgage and as a means of authenticating and verifying the contents of the mortgage, many states provide by statute that a chattel mortgage to be valid shall be accompanied by an affidavit made by one of the parties, either showing that the mortgage is made without intent to hinder and defraud creditors or disclosing the consideration, and indicating as nearly as possible the amount due and to grow due. The provisions, as well as the interpretation of such statutes, depend in different jurisdictions very largely upon the light in which chattel mortgages are regarded as a security. Under the policy of the law in some jurisdictions, chattel mortgage securities are condemned because of their tendency to deceive and defraud creditors, however honest the intention of the parties may be. Under such a policy, statutory requirements and judicial interpretations are correspondingly rigorous. Parker v. Morrison, 46 N. H. 280; Kennard v. Gray, 58 N. H. 51. In the development of the policy of other jurisdictions, the common use of such instruments in commercial transactions has influenced legislation to a relaxation of technical requirements and judicial decisions to liberal constructions. Howell v. Stone, 75 N. J. Eq. 289, 71 Atl. 914; American Soda Fountain Co. v. Stolzenbach, 75 N. J. Law, 721, 68 Atl. 1078, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822. In these two aspects of chattel mortgages, two rules respecting compliance with statutory requirements have grown up. One is a technical compliance with the

literal terms of the statute; the other is a substantial compliance with its requirements. The former rule prevailed in New Jersey under the statute in question, until the decisions in Howell v. Stone, supra, and American Soda Fountain Co. v. Stolzenbach, supra. Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571, affirmed Spielman v. Knowles, 50 N. J. Eq. 796, 27 Atl. 1033; Dunham v. Cramer, 63 N. J. Eq. 151, 51 Atl. 1011. Prior to those decisions, the requirement of the statute respecting the affidavit accompanying a chattel mortgage was "a statutory requirement of considerable technicality." But by those decisions that rule was rejected and the rule of substantial compliance adopted. It is upon this change in the law that the claimants under the chattel mortgage in this case base their claim to the fund in contest, maintaining that under the more liberal rule the affidavit annexed to the mortgage shows an honest and substantial compliance with the statute in stating the consideration of the mortgage.

In changing its attitude with regard to the chattel mortgage statute of the State of New Jersey, the Court of Errors and Appeals of that state certainly did not annul or dispense with any of the requirements of that statute. It simply relaxed the manner in which the original requirements should be complied with. It did nothing more than hold, that in the absence of fraud, chattel mortgages should be sustained "whenever there is an honest and substantial compliance with the statute," and that a chattel mortgage should not be open to attack merely because the affidavit is inartificially drawn and not technically precise. American Soda Fountain Co. v. Stolzenbach, supra; Howell v. Stone, supra; Simpson v. Anderson, 75 N. J. Eq. 581, 73 Atl. 493; Breit v. Solferino, 77 N. J. Law, 436, 72 Atl. 79. The original legislative purpose of the statute still maintains, which is "to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, under oath, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by judicial investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover." Graham Button Co. v. Spielmann, supra.

The requirements of the statute are not lessened nor is its mandate weakened by the rule of substantial compliance. The command of the statute is imperative that "unless the mortgage, when recorded, is accompanied by an affidavit which states fully and plainly (completely and truthfully) the consideration on which it is founded, * * * the courts shall treat the mortgage as absolutely void as against the creditors of the mortgagor," irrespective of mistakes, bad faith and of the intention to defraud. Graham Button Co. v. Spielmann, supra; Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C, 78; Fletcher v. Bonnet, 51 N. J. Eq. 615, 28 Atl. 601; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402.

Was the affidavit which the claimants caused to be annexed to the chattel mortgage in question, a substantial, though inartificial, compliance with the statute? The affidavit is as follows:

"Leo Herz, the mortgagee in the foregoing mortgage named, being duly sworn, on his oath says that the true consideration of said mortgage is as follows, to wit, that deponent this day loaned to the said Novelty Web Company, party of the first part hereto, the sum of Three Thousand Dollars, for one year, with interest thereon at the rate of six per centum per annum, and that this mortgage is given to secure the payment thereof, and deponent further says that there is due and to grow due on said mortgage the sum of Three Thousand Dollars, besides lawful interest thereon from the seventeenth day of June, Nineteen Hundred and Twelve."

We are of opinion that this affidavit is not in any aspect a substantial compliance with the requirements of the statute, for the following reasons:

1. The assertion of the relation of creditor and debtor between the mortgagor and mortgagee, when no such relation in fact existed, is a fault. Dunham v. Cramer, 63 N. J. Eq. 151, 157, 51 Atl. 1011.

[2] 2. The statement that the "deponent *this day* loaned" to the mortgagor the sum of $3,000 is untrue, in that neither upon that day nor upon any subsequent day did the deponent loan any sum to the mortgagor.

[3] 3. The statement that "there is due" upon the mortgage the sum of $3,000 is false, in that no mortgage consideration had passed upon the date of the affidavit, and no sum was then due to any one.

[4] 4. The statement that there is "to grow due" on the mortgage the sum of $3,000 if intended to cover the contemplated loan by instalments, wholly fails to disclose the nature and to verify the truth of the consideration to arise out of that transaction.

[5] 5. The statement of the debt "due and to grow due," considered with reference to the real transaction, is so general and indefinite, and fails so completely to disclose what was actually intended, that it plainly contravenes the fundamental purpose of the legislation. If such a statement were held to be a substantial compliance with the law, the very object of the statute would unquestionably be defeated.

The hardship which the claimants doubtless suffer in failing to obtain a valid chattel mortgage for what appears to be an unexceptionable loan, is chargeable to their own failure to do the things which the law required of them in order to obtain such a security.

The judgment below is affirmed.

HAMBURG-AMERICAN LINE v. ATLANTIC TRANSPORT CO.

(Circuit Court of Appeals, Third Circuit. October 21, 1916.)

No. 2103.

EXPLOSIVES ⟸7—INJURIES FROM ACCIDENTAL EXPLOSION—LIABILITY OF STEVEDORE.

A stevedoring company *held* not liable to a steamship company for damage caused by the explosion of "Knallkorke," or explosive corks for use in toy pistols packed in cases, when being unloaded from plaintiff's steamer as part of a cargo shipped from Germany; there being no evidence that defendant was negligent in the handling of the cases, and it appearing that it was not warned by plaintiff and had no knowledge

that the cargo was dangerous to handle, and that in fact it had never been so considered, being permitted to be carried on German governmental passenger trains.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. ⊂=7.]

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

Action at law by the Hamburg-American Line against the Atlantic Transport Company. Judgment of compulsory nonsuit, and plaintiff brings error. Affirmed.

Howard M. Long, of Philadelphia, Pa., and A. L. Brougham, of New York City, for plaintiff in error.

Charles Biddle and Frank P. Prichard, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. The Hamburg-American Line, a corporation of the free city of Hamburg, Germany, brought this action against the Atlantic Transport Company, a corporation of West Virginia, engaging in stevedoring, to recover $150,497.78 damages shown to have been caused by the alleged negligence of the said stevedore in unloading a cargo from the plaintiff's freighter, Arcadia. On the trial of the cause, the court below, after hearing the plaintiff's evidence, granted defendant's motion for a compulsory nonsuit. On its subsequent refusal to take off the same, this writ of error was taken. No opinion was filed by the trial judge, but the grounds for his granting the nonsuit were stated in terse form, viz.:

"Under the evidence in this case, I am satisfied that the plaintiff has not made out a case to go to the jury. The result here, and the damages which flowed from this result, were not those which would have been reasonably anticipated under the circumstances, and the evidence shows conclusively, to my mind, that whatever knowledge was brought home to the defendant in this case, was equally, if not more fully, known to the plaintiff. I will enter a nonsuit."

An examination of the proofs shows the court committed no error in so holding. Such proofs tended to show that the Arcadia, en route from Hamburg, docked at Philadelphia, and her cargo was being unloaded by the defendant company. In such cargo, and stowed in a separate hatch, were 14 cases of explosive corks for use in toy pistols. These corks were packed in cotton in small pasteboard boxes, a number of which were placed in wooden boxes about three feet by two and two and a half. In a central hole in the small end of the cork was a small explosive mixture of phosphorus, chlorate of potash, and glue. When this disk was struck by the plunger of the toy pistol, an explosion followed. The toy charge is aptly described in English as "explosive corks," and in German as "Knallkorke." In and of itself the explosive in a single cork is harmless, the mixture being that commonly used in packages of candy and bonbons, where

it is exploded when the bonbon covering is ruptured by a sudden jerk. But collectively, as the outcome proved, their explosive force was tremendous, as shown by the havoc done this steel steamer. There is no proof in the cause of any such collective explosion of them ever having occurred before, or that they were regarded as a dangerous article to transport. They were in common use in Germany for upwards of 20 years, but were new to this country.

These particular cases were packed for shipment according to German government traffic regulations, and as such were entitled to be carried on German government railroad passenger trains either as express or mail matter. In that regard the head of a large express and forwarding business in Hamburg testified on behalf of the plaintiff as follows:

"I knew each one of the Knallkorke contained a small amount of explosive substance in the bore hole of the cork; but I was not informed and did not know that there was any danger of the contents of the cases exploding while in transit or while being handled, and I was not warned in any way that the Knallkorke, as packed for shipment and as shipped by me, were explosive or otherwise dangerous; but, on the contrary, I was informed on May 13, 1908, by the manufacturer, G. Wolff, of Rixdorf, that the goods, as packed for shipment, were not explosive (Nicht explodierbar). I had information that each one of the Knallkorke, separately, was explosive if the explosive substance in the bore hole of the cork was struck by the metal plunger of the Knallfix tube; but such explosion was not violent or dangerous, and I did not have any information that the Knallkorke could be exploded en masse while in the cases in which they were packed, and did not know the cases were in any way explosive or otherwise dangerous, but was informed that they were nonexplosive. As stated above, some of the railroad bills of lading carried the information that the cases contained Knallkorke manufactured and packed according to the railroad traffic regulations; all of them carried the information that the cases contained Knallkorke; and the shipments all came to Hamburg over the government railroads, thus indicating to me proper compliance with the railway traffic regulations. At least one of the earlier bills of lading covering shipments to me from the manufacturer, Wolff, of Rixdorf, carried the information that the cases of Knallkorke were nonexplosive describing the goods as 'Knallkorke'—'Nicht explodierbar,' over the signature of the manufacturer properly authenticated. The word 'Knallkorke' means 'detonating corks,' or 'explosive corks'; but anybody who knew what the article was would not have believed that the Knallkorke, when packed for shipment, belonged to that class of explosive goods which are dangerous to life or property."

The proofs further show that the name "Knallkorke" conveyed no intimation of explosive quality. Thus Ross, a United States custom house examiner of 15 years' experience, testified he saw the name on the manifest when he checked up the cargo with the chief officer of the Arcadia, that he had never heard of the word "Knallkorke" before, and that it had no significance to him. He testified the cases were marked "Vorsicht," which means "Look out," "careful," "handle with care," glass, crockery, toys, etc.

The plaintiff's proof also was that, beyond the name "Knallkorke" and the customary handling warnings, no notice was given to the stevedores by the Hamburg Company that these cases contained explosive articles. The absence of such notice and the omission to give it by the plaintiff is shown by its witness Detweiler, the chief clerk of the defendant company, who received and examined the manifest and

cargo plan. He testified he saw the word "Knallkorke" in the manifest and bills of lading. In answer to the question whether he knew the meaning of the word "Knallkorke," he testified:

"I knew we had cargoes, shipments, very frequently; I knew that Knall was used in connection with Knall bonbons; those shipments came in very frequently, so I did not pay any particular attention to Knallkorke; it did not mean anything to me."

In that regard, Mr. Detweiler testified:

"In addition to the manifests, or when the manifests came in, I always look over them for dangerous cargo, inflammable stuff, which is sometimes carried; but it is always noted on there 'inflammable,' 'danger,' and stowed on the deck, or some mark of that kind, which calls our attention to it. Then we receive letters from the Hamburg-American Line, if there is any cargo on the steamer requiring special care or handling, or any special preparation for handling, that is to say, and shipment of heavy machinery, or bleach, which requires special cleaning hose, to be taken out, merchandise of that character, merchandise that requires special care or handling, we get a letter from the Hamburg-American Line, and notification is sent to the dock to Mr. Shell, the dock superintendent. Q. Did you get any letter from the Hamburg-American Line with reference to Knallkorke? A. We did not."

From these proofs it is clear the defendant had no notice of the explosive character of these corks, and there was nothing in the markings of the cases to lead it to expect that the consequences of careless handling of them would be anything beyond the breakage consequent on handling packages containing fragile goods. Instead, in that respect we must not overlook the fact that this is a suit by the steamship carrier, and that, if the facts proved brought home to the stevedore company knowledge or notice of the explosive character of these packages of corks, the steamship company was equally apprized of the fact; and if, with such knowledge, it failed to take any precaution to prevent explosions, it would seem to follow that it directly contributed to the accident. If, however, it be said the facts were such as to put the defendant on inquiry as to the explosive character of these corks, the proofs are clear that such inquiry would not have resulted in any information that the shipment was explosive. In that regard the evidence is the manufacturers claimed they were nonexplosive; that they were received on the German government railways as mail and express matter; hat they were transported by express carriers; and that on a conference and inquiry by five steamship companies, including the plaintiff, to determine their character as freight, no suggestion was made that they were explosive. In the absence, therefore, of any such facts, notice, or knowledge as warned the steamship company of the explosive character of these shipments, it is manifest the stevedore company was visited with no such knowledge and the court below was right in saying:

"Whatever knowledge was brought home to the defendant in the case was equally, if not more fully, known to the plaintiff."

In the absence of such knowledge, and the defendant having no reason to anticipate an explosion from handling these cases, it is clear to us that no grounds were laid for charging the defendant

with negligence, and consequently for the recovery of damages for an explosion which the defendant company had no reason to anticipate, and against which it was not required to guard with that measure of high care which the handling of explosives calls for on the part of those engaged in such work. The proofs tend to show defendant's longshoremen did not know the significance of the German markings to handle with care. We may concede, for present purposes, it was the duty of a stevedore company, engaged in handling foreign trade, to take notice of such markings and have its employés observe them, and we may concede the evidence in this case tends to show these packages were handled as ordinary rough freight, and that, if thereby fragile inclosures were broken, a stevedore company could be held responsible for negligence. But from the evidence before us it would seem that the real cause of this explosion was not concussion or the rough handling of the package, but that a stevedore's hook may have penetrated the box cover of the soft wood and its abrasion set off the explosive. In that regard the proof is that subsequent experiment showed that heavy concussion would not, but any light friction would, explode these Knallkorke. In that regard the testimony of a witness called by the steamship company was:

"Q. Describe those tests. A. The first test was by friction; that is, I put a number in a box, say 12 or 14, and I just touched the center one, and they all exploded. Q. With what? You tested it with what? A. Just a piece of wire, to abrade the surface the least bit, just abraded the surface the least bit, and it exploded. Q. You touched the surface of the explosive substance in the hole? A. Yes, sir. Q. When that exploded, what happened to the rest of them alongside of it? When that one you touched exploded, what happened to the rest of them alongside of it? A. They all exploded. They were sensitive to the shock of the first one. Q. They exploded, too? A. Yes, sir. Q. What other tests did you make? A. Then I tested them by heat. Q. What did you find? A. I found the substance went off about 300 and 302 by slowly rising temperature. Q. 302 degrees of what? A. Fahrenheit. Q. Did you make any other tests of the substance? A. I made a test before the coroner. Q. I mean did you make any other tests to find out whether they exploded by concussion or not? A. Yes; I tried them with a hammer, but the top of the cork acted as a cushion. Q. They did not explode then? A. No."

On the whole, we are of opinion the court below committed no error in granting and refusing to take off the nonsuit. In announcing such conclusion, we are not unmindful of the conclusion reached by the Supreme Court of Pennsylvania in Martin v. Atlantic Transport Co., 237 Pa. St. 15, 85 Atl. 29; but we note the fact that that case involved the liability of the stevedore company to its employés, to whom it owed a duty, while here the suit is by the steamship company, to which the stevedore company owed no such duty. The proofs, as well as the questions involved, in the two cases are different.

The judgment below is affirmed.

AMERICAN SMELTING & REFINING CO. v. RIVERSIDE DAIRY & STOCK FARM.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1916.)

No. 4635.

1. DAMAGES ⟸112—GROWING CROPS—MEASURE OF DAMAGES.
The measure of damages to growing crops injured by smelter smoke and fumes is the difference between the market value of the crop that would probably have been raised, but for the smoke, at the nearest time and place when it had a market value, and the market value of the crop actually raised, less the expense and labor which was saved by reason of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281–283; Dec. Dig. ⟸112.]

2. APPEAL AND ERROR ⟸1067—REVIEW—HARMLESS ERROR.
In an action for injuries to growing crops, the refusal of an instruction correctly stating the measure of damages is reversible error, where no such instruction was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⟸1067; Trial, Cent. Dig. § 475.]

3. DAMAGES ⟸62(1)—NUISANCE ⟸50(5)—DUTY TO AVOID LOSS.
While one injured by another's tort should use ordinary care to prevent the damages from being enhanced, the rule has no application to a case of nuisance, or where the injury could only have been prevented by an extraordinary effort or cost; the test being what a reasonably prudent man would do under the circumstances.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 119; Dec. Dig. ⟸62(1); Nuisance, Cent. Dig. § 127; Dec. Dig. ⟸50(5).]

4. NUISANCE ⟸50(5)—INJURIES—CARE TO PREVENT DAMAGE.
Where persons interested in the plaintiff corporation, which was engaged in dairying, noticed that some of the cattle were not doing well, and there was some discussion whether the condition of the cattle was caused by the poisoning of pastures from smoke emitted from defendant's smelter, but there was nothing more than a suspicion, plaintiff will not be denied relief on the ground that it should have taken steps to prevent the damage, for the injury was a continuing nuisance, and the evil effects could have been avoided only by abandonment of the land for dairying purposes and a complete interruption of plaintiff's business, which would have required considerable expense and effort.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 127; Dec. Dig. ⟸50(5).]

5. APPEAL AND ERROR ⟸843(4)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Where the judgment was reversed on other grounds, and the failure of the answer to urge a particular defense could be cured by amendment, the question whether the answer raised the defense need not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3336; Dec. Dig. ⟸843(4).]

6. NUISANCE ⟸49(5)—PROOF—DAMAGES.
Where plaintiff's crops were injured by smelter smoke liberated by defendant, recovery will not be denied because the amount of the injury was not ascertainable with certainty and precision, although it cannot be based on mere conjecture; the essential elements of the cause of action being established.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. ⟸49(5).]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the Riverside Dairy & Stock Farm, a corporation, against the American Smelting & Refining Company, a corporation. There was judgment for plaintiff, and defendant brings error. Reversed and remanded.

F. H. Brownell, of New York City, and Richards & Richards, Bagley & Ashton, and William M. McCrea, all of Salt Lake City, Utah, for plaintiff in error.

Mathonihah Thomas and O. P. Soule, both of Salt Lake City, Utah, for defendant in error.

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

VAN VALKENBURGH, District Judge. The writ of error in this action is prosecuted from a judgment rendered in favor of defendant in error, hereinafter called the plaintiff, against the plaintiff in error, hereinafter designated the defendant, in the District Court of the United States within and for the district of Utah, upon a complaint in an action for damages, claimed to have been suffered by plaintiff in the manner following:

The complaint recites that the plaintiff and defendant are corporations; that the plaintiff was the owner, in possession, and entitled to the possession of real property situated in Salt Lake county, state of Utah; that since about December 1, 1911, the plaintiff was engaged in carrying on and conducting a dairy and stock farm upon said premises; that since that time, and for some years prior thereto, the defendant was the owner of and engaged in the operation of a smelter, situated about 2½ miles southeasterly of plaintiff's lands, and that by reason of the operation of said smelter large quantities of smoke, gases, fumes, and particles of a poisonous and deleterious character were emitted from said smelter, and were injurious to and destructive of all forms of animal and vegetable life, and were carried over and upon the premises of the plaintiff, thereby causing the crops upon plaintiff's premises to be less abundant, and thereby rendering such crops poisonous, unwholesome, and unfit to be eaten by animals; that by reason thereof the plaintiff suffered injury to and destruction of crops growing upon said premises; and that by inhaling said poisonous substances, and by eating the hay and other products grown upon the premises, and so impregnated with said poisonous elements, the horses and cattle of the plaintiff became unhealthy, and some of them permanently injured. The complaint further recites injuries to the crops, alleged to have been sustained during the years 1912 and 1913, and damage by reason of the death of horses, cows, and calves, and permanent injuries to cows and bulls. By its answer the defendant substantially traversed these allegations of the complaint, and denied responsibility for the injuries and damages charged to have been sustained by the plaintiff. Upon the issues joined, the case was tried before a jury, and judgment

was rendered upon a verdict in favor of the plaintiff in the sum of $3,000. The foregoing statement of facts is taken, without material change, from the brief of plaintiff in error, defendant below, and adopted as correct by counsel for defendant in error. The consideration of the case is still further simplified by this additional statement by counsel for plaintiff in error:

"For the purpose of the presentation of this writ of error it would serve no useful purpose at this time to attempt a more complete statement of the facts, for the reason that such of the facts and of the evidence as is important will be set forth in discussing the several errors here relied upon. Suffice it to say that the plaintiff sought to establish, and introduced evidence tending to show, that the defendant in its operations did emit poisonous substances that were carried over and upon plaintiff's premises, inflicting the injury and causing the damage set forth in its complaint, and that the defendant introduced evidence tending to show that in its operations the defendant did not emit any substances during the times mentioned in the complaint that could or did cause any injury or damage whatsoever to the plaintiff. Upon these questions all that can be said is that there was a conflict in the evidence, and it is not the purpose of the defendant in the prosecution of this writ to ask this court to review them."

We come, then, directly to the specifications of error assigned. They are, substantially, three in number: (1) The refusal of defendant's requested instruction No. 14, by which the question of the proper measure of damage to growing crops was sought to be explained to the jury. (2) The refusal of instructions 3 to 13, inclusive, which sought to submit to the jury the question of whether, in a case of this nature, the plaintiff was required to minimize its damage upon becoming aware that such damage was threatened. (3) The insufficiency of the evidence to justify submitting to the jury the question of damages to certain crops during certain years. These three specifications will be considered in the order named.

[1, 2] Defendant's request No. 14 reads as follows:

"Now as to certain of these matters the law furnishes a specific rule as to the measure of damage. The ordinary rule as to injury to personal property is that the damage is measured by the depreciation in market value of the property due to the wrongful act, estimated as of the time and place of the injury. But when you apply this rule to growing crops, its application is impossible; a growing crop, one that has not matured, has no market value, so that we must apply the rule in a modified sense. Regard must be had to the time when the crop would first have a market value, and the market value at that time and in the nearest place must be estimated. Practically, to apply the rule, you must consider what was the crop that the plaintiff would have raised if the crop had been uninjured by smelter smoke; ascertain the market value of that crop at the nearest time and place when it had a market value, and from that subtract the market value of the crop actually raised. Now the difference would not constitute the damage, for this reason: That certain expense and labor would have been saved the plaintiff by reason of this very wrong. For instance, oats, corn, beets, alfalfa, and pasture that were not raised would not have to be harvested or marketed, and any crop that was not raised would not have to be marketed or gathered. So that, from this difference to which I have called your attention, you must further subtract the expense which the plaintiff was saved. The remainder would be the plaintiff's total damage, not the damage suffered by reason of the smelter smoke and fumes, so that it would still be necessary for you to determine the proportion of this damage that was inflicted by this defendant."

The court refused this instruction, and upon the question of the proper measure of damage to growing crops charged the jury as follows:

"If you find that the operations of the defendant in fact injured those crops, as claimed, you should find a verdict for the amount of such recovery, measured by the depreciation in the market value of crops injured by reason of the injury inflicted by the defendant, estimated as of the time and place of the injury."

This instruction, requested by plaintiff in error, is a sufficiently correct statement of the manner of applying the rule upon the question of the proper measure of damage to growing crops, and either it or some substantial equivalent should have been given to the jury for their guidance. In United States Smelting Co. v. Sisam, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976, an instruction of very similar import was approved by this court. It was there said:

"The measure of damages to a growing crop by a wrongful act which destroys it is its value at the time and place of its destruction. The measure of the damage to a growing crop, injured, but not rendered worthless, is the difference between the value of that crop before and after the injury at the time and place thereof. Where a crop is injured from time to time throughout its growing season until its maturity by sulphurous fumes and their products, but is not destroyed, so that it is cultivated throughout the season, harvested, and marketed, the damage to it may be lawfully measured under these rules by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury."

It will be observed that one of the essential elements to be considered in arriving at the ultimate damage, to wit, "the expense of fitting for market that portion of the probable product which was prevented from maturing by the injury," was tendered by the instruction asked and omitted in the charge of the court. The refusal of that instruction, therefore, was reversible error.

[3, 4] Inasmuch as the judgment below must be reversed upon the ground just stated, it would ordinarily be unnecessary to discuss the remaining assignments; but, since the case must be remanded for another trial, we deem it advisable to add some further suggestions. The second specification of error is based upon the refusal of certain instructions which tendered the question of whether, in a case of this nature, a plaintiff is required to minimize his damage upon becoming aware that such damage is impending. It appears from the testimony that during the summer and fall of 1912 plaintiff's cattle did not seem to be doing well. One of the witnesses, who was interested in the plaintiff corporation, noticed what he thought to be smelter smoke on plaintiff's premises, and there was some discussion among some of the officers of the company as to whether this smelter smoke was not injuriously affecting the cattle by poisoning the pasturage upon which the cattle were grazing. This discussion appears to have resulted in no settled conviction, nor in any conclusion above plain suspicion and speculation. No doubt the general rule is, as stated by Mr. Sutherland in his work on Damages (volume 1, 3d Ed., § 88, p. 257), that:

"The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him."

This, however, is not absolute under all circumstances and has been subjected to substantial modification, as well stated in Cyc. vol. 13, p. 75:

"One whose property is endangered or injured by the negligence of another must exercise reasonable care to protect it from further injury; and especially is this rule true where notice of the wrong or injury has been brought home to the party seeking to recover damages, and he has taken no steps to protect himself from further loss. The rule only requires a party to protect himself from the injurious consequences of the wrongful act by the exercise of ordinary care and moderate expense; such rule has no application where the injury could only be prevented by extraordinary effort or cost."

The rule has been held not to apply in cases of nuisance, nor of intentional or positive and continuous torts.

"A person injured by a nuisance is not precluded from a recovery by the fact that he might, by small exertion and a small expenditure, have prevented the injury; the rule being that, as it was the defendant's duty to abstain from the creation of the nuisance, and having created it, adjoining owners are not bound to guard against the consequences ensuing therefrom, when in order to do so they are required to expend time or money. * * * A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another." Wood on Nuisances (3d Ed.) §§ 844, 435; 8 R. C. L. 445; Paddock v. Somes, 102 Mo. 226, 238, 14 S. W. 746, 10 L. R. A. 254; Niagara Oil Co. v. Ogle, 177 Ind. 292, 98 N. E. 60, 64, 42 L. R. A. (N. S.) 714, Ann. Cas. 1914D, 67.

The rule is most commonly applied where plain and certain damage has already accrued, and it is obvious that still further injury will follow unless prompt and reasonable measures are taken to prevent. Slavin v. State of New York, 152 N. Y. 45, 46 N. E. 321; City of Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711. The decisions uniformly hold that such acts of prevention as involve a little timely labor and expense, reasonable exertion, and the exercise of due diligence with the means at hand, are the most than can be required of a plaintiff in any given case. The test is: What would an ordinarily prudent man be expected to do under like circumstances? Sutherland on Damages (3d Ed.) pars. 88 and 90, pages 257 to 262; Gilbert v. Kennedy, 22 Mich. 117, 132, 133; Sedgwick on Damages (9th Ed.) vol. 1, par. 226n, p. 446; Harrison v. Railway, 88 Mo. 625; Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117; Burdon Central Sugar Refining Co. v. Ferris Sugar Mfg. Co. (D. C.) 78 Fed. 417, 427, 428; Western Real Estate Trustees v. Hughes, 172 Fed. 206, 96 C. C. A. 658.

"The rule in question (if based upon the supposed duty) is simply one of good faith and fair dealing." Gilbert v. Kennedy, supra.

Under the doctrine to be deduced from the authorities, we do not believe the duty was imposed upon defendant in error to take the steps

which would obviously have been necessary to avoid the injury it sustained. Neither the cause nor the extent of that injury was so clear and determinate as to suggest with certainty the measures which must necessarily be taken by ordinarily prudent men. Furthermore, the defendant in error was a dairy company, occupying and using its premises in the ordinary course of its business. It could have avoided the effects of this continuing nuisance only by the abandonment of its land and the complete interruption of that business. This would involve expense and effort greatly in excess of that required under any reasonable application of the rule invoked.

[5] It is further urged by defendant in error that a defense in mitigation of damages cannot be shown under a simple denial, but must be specially pleaded. Under the practice obtaining in Utah, the point seems to be well taken. Comp. Laws Utah, 1907, § 2968; Reed v. Union Central Life Insurance Co., 21 Utah, 295, 61 Pac. 21. Inasmuch as, however, upon trial anew, this defect in the answer, if it be one, may be corrected by amendment, it is unnecessary to pass upon the question of pleading at this time.

[6] The third specification urged by plaintiff in error challenged the sufficiency of the evidence to justify submitting to the jury the question of damages to certain crops during certain years. The crops referred to are described as 1912 oats, corn, and beets, and 1913 corn and alfalfa. An examination of the record produces the impression that this criticism is not without substance—at least in part. Since, however, upon another trial the situation presented may be entirely changed, it will be sufficient here to indicate briefly, and in general terms, the character of proof required to warrant submission and to sustain a verdict. While it is undoubtedly true that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery, and that the injured party is entitled to complete indemnity, even though the amount is not ascertainable with certainty and precision (Sutherland on Damages [3d Ed.] pp. 3009, 3010; 8 R. C. L. 442; United States Smelting Co. v. Sisam, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. [N. S.] 976), nevertheless it should not be left out of mind that "any substantial recovery must not be based on guesswork or inference, but must be supported by evidence of facts, circumstances, and data justifying an inference that the damages awarded are a just and reasonable compensation for the injury suffered" (13 Cyc. p. 218, and cases cited). While the damages may be of such nature that the amount cannot be calculated by some fixed and certain rule, still all the essential elements of the cause of action must be established, and the evidence must support legal inferences under which just and reasonable compensation may be computed by the best rule available under the circumstances of the special case.

The judgment below will be reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

It is so ordered.

BROATCH et al. v. BOYSEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

No. 4409.

1. EQUITY ⊜66—MAXIMS—HE WHO SEEKS EQUITY MUST DO EQUITY.
Where defendant, who agreed to obtain mining leases on Indian lands for the benefit of himself and others, expended considerable sums in an injunction suit to perfect his rights and prevent the Indian agent from excluding him from the reservation, defendant is entitled, having acquired land, to demand that complainants, who sought, on the theory of a trust, to share in such lands, pay their proportionate share of the fees and expenditures, though the agreement did not contemplate the hiring of counsel, for he who seeks equity must do equity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. ⊜66.]

2. TRUSTS ⊜374—ENFORCEMENT—EXPENDITURES.
Complainants cannot prevent defendant from recovering a proportionate share of the expenditures on the ground that they were of no benefit to them.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607–612; Dec. Dig. ⊜374.]

3. TRUSTS ⊜374—ENFORCEMENT—EXPENDITURES.
Though defendant conveyed the land to a mining company which he dominated, and though he disposed of a part of the stock, nevertheless complainants, before being entitled to share in the property, are bound to pay their proportionate share of expenses of prospecting the land and of preparing it for mining operations, whether the expenditures occurred before or after conveyance, or before or after commencement of the suit.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607–612; Dec. Dig. ⊜374.]

4. APPEAL AND ERROR ⊜743(1), 760(1)—OBJECTIONS—RECORD.
Where neither the assignment of errors nor the brief of appellants referred to any pleadings or proof in the record which would have sustained the decree they contended should have been rendered, the contention must be overruled on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3095; Dec. Dig. ⊜743(1), 760(1).]

5. TRUSTS ⊜374—ESTABLISHMENT—DECREE—VALIDITY.
Where complainants sought to establish a trust in lands patented by complainant, and the decree establishing the trust and requiring conveyance directed that complainants should, as a condition precedent, pay their proportionate share of the expenditures incurred by defendant, the decree is not subject to objection on the ground that defendant had disposed of a part of the land and could not comply therewith, for in case of inability the court having jurisdiction might direct compliance so far as possible, with compensation for failure to convey a portion of the land.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607–612; Dec. Dig. ⊜374.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by William J. Broatch and others against Asmus Boysen and another. From the accounting and final decree, complainants appeal. Remanded, with directions to modify decree.

T. B. Hardin and Harold B. Elgar, both of New York City, for appellants.

John W. Lacey, of Cheyenne, Wyo. (Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for appellees.

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

SANBORN, Circuit Judge. The appellants challenge the accounting and final decree made by the court below pursuant to the decision of this court and its mandate in Broatch v. Boysen et al., 175 Fed. 702, 710, 99 C. C. A. 278. In April, 1899, Boysen agreed with the appellants and others that they would, at their joint expense, prospect for, and, if possible, obtain from the United States, a lease of a large tract of land in the Shoshone and Wind River Indian reservation in Wyoing available for coal and other minerals. Boysen in 1899 proceeded to acquire such a lease of 178,000 acres of land for 10 years. In March, 1905 (Act March 3, 1905, c. 1452, 33 Stat. 1016), Congress passed an act which gave him, the lessee, a preferential right for 30 days after the government surveys of the reservation were completed to locate and enter for $10 an acre 640 acres of mineral or coal land in a square form in that reservation. He then searched out, located, and entered the tract of land he was entitled to take, and the patent therefor was issued to him on May 19, 1907. In the year 1905 he organized the Asmus Boysen Mining Company, and after he had entered the land made a contract to convey it to that corporation. He expended large sums of money in prospecting for coal and for other minerals, in order that he might select, both for his lease and for his patent, land valuable for coal and for other minerals, and he expended much more in endeavors to develop mines upon these lands. After he had entered and secured the patented land, the appellants brought this suit against Boysen and the Boysen Mining Company to charge the patented land with a trust in their favor, and this court directed the court below to render a decree, and it did so:

"That an accounting be had of the amount expended by Boysen in acquiring the lease and the patented land and in the development thereof, and also of any amounts which he had received therefrom; that unless each of the complainants (appellants here) John T. Clarke and William J. Broatch pay to the defendant Asmus Boysen Mining Company, a corporation to whom the lands have been conveyed since the institution of this suit, the sum of two thousand dollars ($2,000), and in addition thereto the amount which one-sixteenth of said expenditures shall exceed the sum of $2,000, within 60 days after the accounting shall be closed and finally approved by the court, then the bill be dismissed as to them; that unless each of the complainants (appellants here) Robert C. Wertz and Charles J. Woodhurst pay to the defendant the Asmus Boysen Mining Company the amount which one-sixteenth of said expenditures exceeds the sum of $2,000, then the bill be dismissed as to each of them; and that in case any of them make the payment within 60 days, then the Asmus Boysen Mining Company shall convey to each of said four complainants who make such payment one-sixteenth interest in the said real estate described in the patent."

Pursuant to these directions the District Court took the accounting, found and adjudged that within 60 days from the date of its decree

each of the complainants Clarke and Broatch pay to the Mining Company $5,972.06, and each of the complainants Wertz and Woodhurst pay to the Mining Company $3,972.06, that upon payment by any of them of the amount required of him the Mining Company convey to him one-sixteenth of the patented real estate, and that upon the failure of any of them to make such payment within 60 days after the entry of the decree the bill be dismissed as to him. The basis of this decree was that the court found that Boysen had legitimately expended in acquiring the lease and the patented land and in the development thereof $12,000 counsel fees, $6,803.10 as the price of the patented land, $61,875 in driving the Cross Cut tunnel, $16,000 in driving the Anderson tunnel, $3,000 in driving smaller tunnels, and $3,000 in sinking a shaft, making in the aggregate $102,678.10, and that he had received from the sale of stock of the Boysen Mining Company $39,125, so that he had expended $63,553.10 more than he had received.

[1] Counsel for the complainant challenge this accounting in various ways. They assail the allowance of the $12,000 for counsel fees on the grounds that the payment thereof was not within the trustee's authority under the agreement of April, 1899, that it was not reasonable compensation for the services, that the services were not performed until after the selection of the land by Boysen, and that the expenditure of this money was of no benefit to the complainants. The record contains persuasive proof that after Boysen, with much expense and toil, for which he has received no allowance in this accounting, had secured, by means of the act of March 3, 1905, the preferential right to locate and enter "not exceeding 640 acres of mineral and coal lands" in the Indian reservation, the Secretary of the Interior, through the Indian agent and the Indian police, prohibited and prevented him from entering upon the reservation, or surveying or prospecting any land thereon, for the purpose of exercising his preferential right and selecting his mineral and coal land. Thereupon he retained eminent counsel, who brought a suit for him in the court below for an injunction forbidding the Indian agent and his agents, servants, and employés from preventing Mr. Boysen from entering upon and prospecting the reservation, in order to make a selection of his tract of 640 acres of mineral and coal land. That suit was tried by Hon. John A. Riner, the same judge who personally took the accounting in this case, and he granted the injunction prayed. The Indian agent appealed to this court, and the decree below was here affirmed. It was only by means of this decree that Mr. Boysen was able to do the necessary prospecting and examining of the lands upon the reservation to warrant his selection of the land which the appellants are now so strenuously seeking to share with him. Boysen testified that he paid his counsel $12,000 for their services in that case, and no witness comes to deny it. Counsel for Boysen, at the hearing on the accounting before the court below, offered to prove the value of these services, if desired by opposing counsel, and the latter postponed that proof, and it was never made. But Judge Riner knew the counsel who brought and conducted the suit for the injunction, and the character and value of their services,

for they had tried that suit before him, and this court, which heard the appeal from his decree, is not entirely ignorant upon that subject, and our conclusion is that there was no error in his finding that those services were reasonably necessary and were reasonably worth $12,000.

Nor are the objections that the payment of these fees were not within the scope of the authority of the trustee under the old agreement of 1899, or that the services were rendered after the patented land was selected, fatal. It is conceded that neither this nor many other expenditures relating to this selection and development of the patented land were either contemplated by the parties, nor was the trustee in the old agreement of 1899 authorized by them to make or pay them. That is not the ground of their allowance by the courts. They rest on the maxim that he who seeks equity must do equity, that Boysen used the lease which he had acquired under the contract of 1899 to procure the preferential right to, and finally to procure, the patented land, that he hired and paid his counsel to bring the injunction suit, paid for the patented land, drove tunnels and sunk a shaft to prospect and develop it, that the appellants now seek the decree of a court of equity for a share in this land, which he thus selected and endeavored to develop, and that it is just and equitable that the grant of their prayer for a share in this property should be conditioned by the court, as it has been, by the requirement that they first pay to Mr. Boysen their proportionate share of the reasonable expenditures he has made in order to prospect, acquire, and develop the lease and the patented land. The counsel fees fall far within this maxim upon which their allowance rests, and the record proves that the services for which they were paid were rendered before the patented land was acquired, for the purpose of selecting and obtaining it.

[2] Another objection to the allowance of the amount paid for these fees is that the services for which this amount was paid were of no benefit to the appellants. The answer is they seek the land those services aided to secure, and since they were incurred and paid by Boysen in undoubted good faith, for the purpose of procuring this land, and the evidence satisfies they aided to do so, it would be inequitable to permit the appellants to share in it without paying their proportion of this legitimate expense of procuring it.

[3] Objection is made to the allowance of any amounts whatever for prospecting or developing the leased land or the patented land: (1) Because the evidence fails clearly and definitely to show that the amounts allowed by the court below were expended prior to the selection of the land, in order to make the selection, or prior to the commencement of this suit and the filing of the lis pendens herein. But there is substantial and persuasive evidence of the expenditure by Mr. Boysen of at least the amounts allowed for the purpose of acquiring the lease and the patented land, and for the purpose of developing the leased land and the patented land. The allowance of amounts expended by him in the development of these lands after they were selected, and after this suit was commenced and the lis pendens filed, fall equally under the mandate of this court, the decree for the accounting, and the maxim

that he who seeks equity should do equity. (2) That some of the amounts expended for development of the patented land were spent in prospecting for copper. But expenditures in developing the land by prospecting for copper within it fall in the same class as the expenditures last mentioned, and they were allowable for the same reason as were other expenses of development. (3) That a large portion of the amounts allowed for sinking the shaft and prospecting upon the patented property was made after the land was conveyed to the Boysen Mining Company, that all of these amounts were expended by the Mining Company for the benefit of its own stockholders, that they were not expended by Boysen as trustee, and that they were not expended until after the commencement of this suit. But the evidence convinces that the Boysen Mining Company was but the creature of Boysen, that he owned and controlled a majority of its stock, that he furnished, either directly or indirectly, substantially all the money, except the $39,125 obtained from the sale of some of its stock, charged against Mr. Boysen by the court below in the accounting, that was expended in sinking the shaft, prospecting upon and developing the patented property, and as the appellants ask the court to cause the Boysen Mining Company to convey to them their share of this property, it would be inequitable to do so without requiring them to pay their share of these expenditures in developing, whether Boysen made them before or after the conveyance to the Mining Company, or before or after the commencement of this suit.

[4] There was a provision in the agreement of 1899 that, if any of the parties to it failed to make the payments required of them under the contract, their interests in the partnership created thereby might be sold by the trustee on 30 days' notice; and it is assigned as error that the court below failed to decree the sale of 9 shares of other parties to that agreement than Boysen and the appellants. But no reference is found in the assignment of errors, or in the brief of appellants, to any pleadings or proof in the record which would have sustained any such decree, and none has been discovered.

[5] Complaint is made that the decree on the accounting requires each of the appellants to make the payment required of him within 60 days after the entry of the decree, and that it provides that in case any of them fails to do so the suit shall be dismissed as to him, because the title to 88 acres of the patented land is no longer in the Boysen Mining Company, and it cannot convey one-sixteenth interest therein to any of the appellants. But the decree requires the Boysen Mining Company to convey one-sixteenth interest of the patented land to each of the appellants upon his making the payment required of him. That conveyance is conditioned on the payment required, and in the nature of the case the payment is conditioned upon the conveyance, and ample power is vested in the court below to prevent injustice under this decree. If the Mining Company has not now the title and power necessary to convey one-sixteenth interest in the entire patented tract, it may yet acquire that title and power before any of the appellants is ready to pay the amount required of him, and the Mining Company may make the conveyance. If it cannot and does not do so, the

court below has ample jurisdiction and power, and may then exercise it by supplemental decree, or by modification of the decree for the accounting, so as to require the Mining Company to convey the one-sixteenth interest as far as it can do so, and to make compensation for its failure to convey one-sixteenth interest in the entire tract as is often provided in cases of specific performance of contracts. Fry on Specific Performance of Contracts (3d Ed.) §§ 1222, 1223, 1224; Pomeroy on Contracts (2d Ed.) § 438. The portion of the decree upon the accounting here challenged is in accord with the mandate and opinion of this court and with the decree for the accounting, and it is not erroneous.

It is assigned as error that the amount required by the decree upon the accounting to be paid by each of the appellants is $2,000 more than it should be. Appellees confess this error, and the record discloses the fact that it must have arisen, not from any mistake in the accounting which resulted in the finding of a balance of credit to Boysen of $63,533.10, but in the division of that sum by 16, and in the cases of Clarke and Broatch in the addition of $2,000 to that quotient. There was no other error in the decree. That decree, therefore, must be so modified that the amount required to be paid by each of the appellants Broatch and Clarke shall become $3,972.06, and the amount to be paid by each of the appellants Wertz and Woodhurst shall become $1,972.06.

Let the case be remanded to the court below, with directions to that court so to modify its decree, and, thus modified, that decree is affirmed.

BOARD OF EDUCATION OF SALT LAKE CITY, UTAH, et al. v. LEARY
(three cases).

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

Nos. 175, 4708, 4709.

1. BANKRUPTCY ⟸440—REVIEW—PETITION TO REVISE.

Where, in a proceeding by a trustee in bankruptcy for a summary order to obtain possession of property, the District Court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⟸440.]

2. BANKRUPTCY ⟸293(1)—PROCEEDINGS—JURISDICTION OF DISTRICT COURT.

Where defendant had possession of property long prior to the filing of the petition in bankruptcy, claiming a lien thereon and asserting title to it under contract, the bankruptcy court, on petition by the trustee for a summary order requiring delivery of possession, is without jurisdiction to determine title to the property, defendant filing an answer asserting its adverse claim of lien and title and challenging the summary jurisdiction of the court, for in such case the court could proceed to summarily adjudicate the matter only by consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(1).]

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3. BANKRUPTCY ⊂=288(1)—PROCEEDINGS—JURISDICTION—APPEARANCE.

Upon a contractor's default, the board of education of a city took possession of his property used in the work, asserting a lien thereon, and subsequently recovered judgment against the contractor and his surety, which provided that upon payment the surety should be subrogated to all the rights of the board. On petition by the trustee in bankruptcy of the contractor for a summary order requiring delivery of possession, the surety, which had not paid the judgment, voluntarily appeared, but announced that counsel for the board would represent its interests. *Held* that, as the surety had not paid the judgment and was not subrogated to the rights of the board, the bankruptcy court did not have jurisdiction over the proceeding on the theory that the surety was the real party in interest, and, having voluntarily appeared, a plenary suit was unnecessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288(1).]

Petition to Revise Order, Appeal from, and in Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Petition by William H. Leary, trustee in bankruptcy, of the Wright-Osborn Company, a corporation, bankrupt, against the Board of Education of Sale Lake City, Utah, and another. A summary order of the referee was confirmed by the District Court on petition for review, and defendants petition to revise, appeal, and bring error. Appeal and writ of error dismissed, petition to revise sustained, and order set aside.

A. L. Hoppaugh, of Salt Lake City, Utah (E. A. Walton, Benner X. Smith, M. E. Wilson, and T. D. Walton, all of Salt Lake City, Utah, on the brief), for petitioners, appellants and plaintiffs in error.

J. D. Skeen, of Salt Lake City, Utah (D. A. Skeen and W. H. Wilkins, both of Salt Lake City, Utah, on the brief), for respondent, appellee, and defendant in error.

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

VAN VALKENBURGH, District Judge. July 1, 1912, the Board of Education of Salt Lake City, Utah, contracted with Wright-Osborn Company, a corporation, to install a heating and ventilating system in the Salt Lake High School Building for the sum of $53,789. The contractor furnished to the Board of Education a performance bond with Fidelity & Deposit Company of Maryland as surety. The written contract between the parties contained the following among other provisions:

"Should the contractor 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 said second party shall be at liberty, after three days' written notice to the contractor or to any of his agents, 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 contractor under the contract, and such certificates of the architects, together

with the action of the board thereon, shall be final and conclusive; and if the architects shall certify that such action be taken, the said second party shall also be at liberty at once to terminate the employment of the contractor for the said work, and immediately to enter upon the premises and to take possession of all materials thereon, together with all tools, machinery, apparatus, and conveniences, and in case of such discontinuance of the employment of the contractor, he 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 expenses incurred by the said second party in finishing the work, such excess shall be paid by the said second party to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the said second party. The expense incurred by the said second party, as herein provided, either for furnishing materials, or for finishing the work and any damages incurred through such default, together with the value of the use of tools, machinery, materials, and conveniences that may be taken by the said second party, shall be audited and certified by the architects, and the decision of the said second party thereon shall be final and conclusive. And this shall be construed to mean, not only the completion of the heating and ventilating system for the buildings, but the removal of all rubbish from the same, as well as from the grounds."

The Wright-Osborn Company entered upon the work, took materials and tools to the grounds, installed the boilers, and received the sum of $7,083 as partial payment on account, which was credited on the contract price. The company continued its work, under the contract, until on or about January 17, 1913, on which date, upon certificate of the architects in charge, the Board of Education terminated the employment because of various alleged breaches of the contractor, among which was the furnishing of material certified to be defective and not in accordance with specifications. The Board, under the provisions of the contract, completed the work at an alleged loss of $23,410.56, which included payments theretofore made to the contractor. It retained possession of and used some of the tools and materials which it took over upon assuming the completion of the work. On or about August 24, 1914, it brought suit in the state court within and for Salt Lake county, Utah, against the Wright-Osborn Company and its surety to recover its loss aforesaid. October 23, 1915, judgment, in the sum of $17,041.55, was entered in its favor. The Board, at all times since January 17, 1913, had retained in its possession certain materials and tools which had been placed upon its property by the contractor, and upon which it claimed a lien under its contract and in equity for the partial satisfaction of the contractor's indebtedness to it. Respecting such materials and tools the state court made the following provision in the judgment entered:

"And it further appearing to the court that upon the payment to the plaintiff by the defendant, Fidelity & Deposit Company of Maryland, of said judgment, and interest thereon and costs, that it should be subrogated to the rights of the plaintiff in and to said materials and tools. Now, therefore, it is hereby ordered, adjudged, and decreed that upon the payment to the plaintiff by the defendant, Fidelity & Deposit Company of Maryland, of the amount of said judgment and interest and costs, that it shall be subrogated to all the rights of the plaintiff under said contract for the repayment by the said Wright-Osborn Company of the moneys so paid, and as security for said payment, it is entitled to the said materials and tools and that said

defendant shall thereupon be entitled to the possession thereof, and that the plaintiff shall thereupon deliver to said defendant, Fidelity & Deposit Company of Maryland, the possession thereof."

This judgment still remains unsatisfied. Meantime, on April 5, 1913, a petition in bankruptcy was filed against the Wright-Osborn Company, and an adjudication followed on June 12, 1913. On July 20, 1915, more than two years after the adjudication, and during the pendency of the proceeding in the state court, William H. Leary, trustee, filed in the District Court of the United States at Salt Lake City a petition praying a summary order upon the Board of Education requiring it to deliver to said trustee the materials and tools retained and held by the Board as aforesaid. The Board answered, claiming a lien upon and title to said property, and denying the summary jurisdiction of the bankruptcy court. Issues were framed upon which, on the 6th day of January, 1916, the referee made an order retaining jurisdiction in the premises, holding that the Board had neither title to nor lien upon the property in question, and directing the trustee to take the same into his possession. Upon petition for review, this order of the referee was confirmed by the District Court.

Two specifications of error are presented: (1) The court erred in holding that the bankruptcy court had summary jurisdiction. (2) The court erred in its decision on the merits. In our opinion it will be necessary to consider only the first of these assignments.

[1] Counsel for the Board of Education, being in doubt as to the method provided by the Bankruptcy Act to insure a review by this court, have adopted the expedient of bringing their case here by petition to revise, by appeal, and by writ of error. In the view we take, it is unnecessary to determine whether appeal will lie, and a writ of error cannot be entertained. Both are accordingly dismissed. It is conclusively established that where, in a case like this, the District Court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review. Shea et al. v. Lewis et al., 206 Fed. 877, 880, 124 C. C. A. 537, and cases cited; Courtney v. Shea et al., 225 Fed. 358, 140 C. C. A. 382.

[2] It will be remembered that the petitioner, Board of Education, had possession of the property in question long prior to the filing of the petition in bankruptcy, and claimed a lien upon and title to it, under contract and otherwise, to recoup itself for any losses that might accrue from alleged breaches on the part of the contractor. That property had never been reduced to possession by the trustee, or any other officer of the bankruptcy court, as the property of the bankrupt. When the trustee filed his reclamation petition, on the 28th of July, 1915, upon which the order here complained of is based, the Board of Education promptly filed answer asserting its adverse claim of lien and title and challenging the summary jurisdiction of the bankruptcy court. Under such circumstances, it seems unnecessary to do more than to cite respondent to the repeated decisions of this court in which the rule, and the reasoning upon which it is founded, have been stated with elaboration. In re Rathman, 183 Fed. 913, 106 C. C. A. 253;

Shea et al. v. Lewis et al., 206 Fed. 877, 880, 124 C. C. A. 537. In the latter case it was said:

"The bankruptcy court, however, has jurisdiction under an order to show cause to investigate and determine whether or not it had at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property involved in the order, and whether those asserting lien or title have a substantial, or only a frivolous and baseless, adverse claim. In re Rathman, 183 Fed. 913, 918, 106 C. C. A. 253; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. If it had no such possession, and if the claim asserted is actual and substantial, as distinguished from one merely colorable and fictitious, it may proceed no further, but should decline to adjudicate on the merits without consent. If it errs in its ruling either way, its action is subject to review. Mueller v. Nugent, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405. Such a claim may be adverse and substantial, even though in fact fraudulent and voidable. Johnston v. Spencer, 195 Fed. 215, 115 C. C. A. 167; Cooney v. Collins, 176 Fed. 189, 192, 99 C. C. A. 543; Mueller v. Nugent, 184 U. S. 15, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Michie (D. C.) 116 Fed. 749."

It is apparent from the statement of the case that the contention of the petitioner discloses a contested matter of right, involving some fair doubt and reasonable room for controversy, as distinguished from a claim merely colorable or fictitious. It asserts an adverse claim to the property in controversy which entitles it to a trial in due course rather than in a summary proceeding. Shea et al. v. Lewis et al., supra; Johnston v. Spencer, 195 Fed. 215, 220, 115 C. C. A. 167; In re Rathman, 183 Fed. 913, 929, 106 C. C. A. 253.

[3] The claim, however, is made that under the right of subrogation adjudged to it in the state court the Surety Company and not the Board of Education is the real party in interest; that the former company voluntarily appeared in this proceeding and submitted to the jurisdiction of the bankruptcy court; but the judgment of the state court conferred this right upon the Surety Company only upon the condition that it should pay to the Board of Education the amount of that judgment with interest and costs. This condition has not yet been performed, and the interest of the Board of Education is substantial and subsisting. Furthermore, counsel for the Surety Company, in entering its appearance, announced that:

"The interests of the school board and of my clients are the same so far as defeating the claim of the trustee in this action. Counsel for the board will represent our interests."

Thus the Surety Company adopted all the defenses interposed by the Board of Education, including its challenge to the jurisdiction of the bankruptcy court.

Counsel for respondent urge that, upon the evidence adduced, the finding upon the merits should be in its favor. But this, if true, does not meet the situation presented. The question is one of jurisdiction. The petitioners are asserting in good faith a superior lien upon, and title to, property in their possession, and never at any time in the possession of the trustee, or other officer of the bankruptcy court. They are entitled to have their rights adjudicated in a plenary action, unless

they voluntarily submit to the summary jurisdiction sought to be exercised. This they have consistently declined to do. If this right, guaranteed by the law and uniformly recognized by the courts, can be extinguished by an ultimate adverse decision on the merits, it becomes at once unsubstantial and valueless.

The petition to revise is sustained, and the order of the District Court is vacated and set aside, with directions to dismiss the summary proceeding as to the property embraced within the order of the referee, without prejudice, however, to the right of the trustee, if so advised, to institute suit in a court of competent jurisdiction for the recovery of the property in question.

It is so ordered.

HANNETT v. VICTOR-AMERICAN FUEL CO.

(Circuit Court of Appeals, Eighth Circuit. October 5, 1916.)

No. 4703.

1. MASTER AND SERVANT ⟸219(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant, by entering or continuing in the employment of the master without complaint, assumes the risks and dangers of the service which he knows and appreciates, including those incident to the employment and contemplated in the contract of hiring, and those arising from the failure of the master to discharge his duty to exercise ordinary care to furnish a reasonably safe place of work and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 611; Dec. Dig. ⟸219(2).]

2. MASTER AND SERVANT ⟸217(7)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

While a servant is not required to investigate to ascertain whether the duty of the master has been performed, he is charged with notice of those risks which are so patent as to be readily observed by him by the reasonable use of his senses.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 581; Dec. Dig. ⟸217(7).]

3. MASTER AND SERVANT ⟸217(23)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A coal miner, familiar with the danger of the falling of the roof of a mine, though he did little of the actual excavating himself, was called, with others, by the foreman to remove rocks which had fallen when props supporting the roof had been knocked down. While at work, more of the roof fell. The foreman then tested the roof, as did the miner himself. Upon hearing a cracking noise, another of the employés fled, and shortly thereafter a section of the roof fell, killing the miner. *Held*, that he assumed the risk of the injury, having made an independent investigation himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 591; Dec. Dig. ⟸217(23).]

4. MASTER AND SERVANT ⟸222(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

In such case, where there was no evidence of any disinclination on the part of the miner to incur the danger, or showing that a refusal would have resulted in discharge, his assumption of the risk cannot be denied,

on the ground that his failure to continue the work would have caused his discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. ⊂=222(2).]

In Error to the District Court of the United States for the District of New Mexico; John C. Pollock, Judge.

Action by A. T. Hannett, administrator of the estate of Nick Livaich, against the Victor-American Fuel Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Jamison, of Albuquerque, N. M. (A. T. Hannett, of Gallup, N. M., on the brief), for plaintiff in error.

Kenaz Huffman, of Denver, Colo. (Caldwell Yeaman and Frank E. Gove, both of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

VAN VALKENBURGH, District Judge. This is a suit brought by plaintiff in error, as administrator, to recover for the death of one Nick Livaich, who was employed by defendant in error in one of its mines in the county of McKinley, state of New Mexico. The deceased was a mule driver, whose regular duties consisted in hauling coal from the interior of the mine and in returning empty cars to be refilled. In this capacity he was what is known in this business as a "company man," by which is meant that class of employé who, when not actively engaged in the discharge of his regular duties, is subject to the call of the foreman for any general work about the mines. This included the cleaning up and clearing of slopes and passages wherever they became obstructed by a fall of coal or otherwise. At the time of his death Livaich had been working in this same mine, in the capacity stated, for a considerable period. From the statement of his brother, it appears that he had worked a long time in coal mines, although not always, nor perhaps generally, employed in the actual digging of coal. Nevertheless he is shown to have been familiar with all the varied activities of coal mining, and with this mine in particular. The slope in which the accident occurred was driven for a long distance through sandstone rock; above the rock, forming its roof, were deposits of coal. The formation, generally, was such that supports were deemed unnecessary, but at some points, for greater safety, the roof had been strengthened by crossbars, supported on legs or props at either end. These crossbars were placed 3 or 4 feet apart, and on the day in question some empty cars, passing through the slope, had left the track, had collided with a number of these props or legs, and had caused four of these supporting bars to be displaced. By the shock of this impact, and the removal of these supports, the roof of the slope was disturbed and weakened, and a large quantity of rock fell from it upon the floor of the slope. It then became necessary to clear this passageway, and the foreman summoned a number of company men, including the deceased, to assist in this work. They found the four timbers referred to out of place, and about 15 or 20 feet of the roof unsupported at the points where these timbers, with crossbars, had formerly stood.

They set to work to clear the slope, and had the fallen rock nearly removed, when another fall of about the same proportions occurred. The pit boss caused a timber to be replaced, and after that sounded the roof to test its safety. Livaich himself then took the pick and sounded for himself. Both he and the foreman pronounced the roof safe, and work was resumed. Shortly afterwards an ominous crack was heard in the roof, and one of the most experienced of the miners ran in fear from the place, but later returned. The work was continued, and a few minutes later more rock fell, and Livaich was killed. Upon this evidence the trial court directed a verdict in favor of defendant, and of this action plaintiff in error complains to this court.

In the District Court, as here, the main defenses relied upon were: (1) That the negligence, if any, was that of the pit boss; that at this time and place he was a fellow servant of the deceased, and not the representative of the master, in the discharge of nondelegable duties. (2) That Livaich was aware of his danger, and voluntarily assumed the risks of his employment, and by his own negligence contributed to his injury and death.

[1, 2] Under the undisputed facts presented by the record, it will be necessary to consider only the second of these defenses. This court has repeatedly held that a servant, by entering or continuing in the employment of a master without complaint, assumes the risks and dangers of the service which he knows and appreciates, including those which are incident to the employment and are contemplated in the contract of hiring, and those which arise from the failure of a master fully to discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances to use. Owl Creek Coal Co. v. Goleb, 127 C. C. A. 27, 210 Fed. 209–215, and cases cited. While he is not required to make an investigation or inspection to ascertain whether or not the duty of the master has been performed, he must have due regard for what he actually knows and for what is so patent as to be readily observed by him, by the reasonable use of his senses, having in view his age, intelligence, and experience. United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 407.

[3, 4] Under the law, as thus declared, the conclusion is irresistible that the judgment of the lower court must be affirmed. The deceased knew, and was chargeable with knowledge of, the danger incurred, and voluntarily assumed the risk of exposing himself to it. His acts were such that fair-minded men could not draw different conclusions therefrom, and if the case had been submitted to the jury, the court would have been compelled to set aside the verdict, if one had been returned in favor of the plaintiff. That this was a place of grave danger should have been apparent to all there present. It was obvious to the deceased himself, and was communicated to him by the acts and conduct of his associates. He, as well as the foreman, knew that the usual timbers were absent. A fall had already occurred. The roof was in a shaky condition. Another fall of rock came down while they were there at work and prior to the fatal accident, thus indicating that the condition of the roof was unstable. The foreman then again tested

the roof, and not satisfied with that, the deceased took the pick and tested it for himself. He did not rely upon the foreman, but made an independent investigation, thus indicating an appreciation and knowledge of the danger. Still later, the roof was heard to crack, and one, at least, of his coworkers fled in apprehension. Independently of past experience, whatever may be deemed to have been obvious to the pit boss was equally obvious to the workmen, and there were present many physical evidences of danger. The deceased had been about mines long enough to know and appreciate that danger, and his conduct, and the testimony generally, shows that he had the intelligence and experience to appreciate it. Voluntarily, and without complaint, he assumed the risk of proceeding with the work.

Counsel seek to take this case out of the rule by suggesting a presumed fear of discharge if Livaich had refused to continue; but this suggestion cannot be indulged, in the absence of testimony which justifies it. We should expect to find either some conduct on the part of the superior which would warrant such a presumption, or some disinclination on the part of the employé to incur the danger, even though his reluctance be not carried to the point of absolute refusal. Neither is disclosed by the record.

For the reasons stated, the action of the trial court in directing a verdict in favor of defendant was right, and the judgment is accordingly affirmed.

KIEF v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2351.

1. MASTER AND SERVANT ⟸265(5)—INJURIES TO SERVANT.
   Where the evidence showed that an injury to a servant might have resulted from several causes, for some of which the master was not responsible, the matter cannot be submitted to the jury; there being no doctrine of res ipsa loquitur in such cases.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955; Dec. Dig. ⟸265(5).]

2. MASTER AND SERVANT ⟸124(3)—INJURIES TO SERVANT—DUTY OF INSPECTION.
   Where a traveling crane in a machine shop was used by servants who were under no duty as to its inspection or maintenance, the master is bound to exercise a high degree of care to keep the crane in proper order to prevent injury to those servants.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 235; Dec. Dig. ⟸124(3).]

3. MASTER AND SERVANT ⟸285(6)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—JURY QUESTION.
   In an action by a machinist in a locomotive machine shop, injured by the falling of a traveling crane, the question whether the injury was the result of defendant's failure to exercise proper care in supervising and inspecting the crane *held* for the jury.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. ⟸285(6).]

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4. MASTER AND SERVANT ⊜285(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—JURY QUESTION.

In an action by a machinist, injured by the falling of a traveling crane used in a locomotive repair shop, the question whether an inspection just after the accident showed that it did not occur from faults in the crane *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. ⊜285(5).]

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by Joseph A. Kief against the Chicago, Milwaukee & St. Paul Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed, with directions to grant new trial.

At defendant in error company's locomotive machine shop at Milwaukee plaintiff in error Kief, an experienced machinist, was engaged, with a helper, making repairs on one of the company's locomotives employed in interstate commerce. The shop was equipped with traveling cranes for handling heavy weights. They moved on metal tracks about 18 feet above the floor level of the shop, extending the length of the shop (about 700 feet) along each side, about 40 feet apart, riveted or bolted to the superstructure of the building, supported on uprights or posts set at intervals of about 30 feet. There were no braces between the tracks, the space between being free to permit handling engines at any point. The traveling crane consisted of a heavy I-beam supported at either end on wheels resting on each track. Hanging below the I-beam, and supported by a series of wheels engaging it, was a block and tackle for lifting the desired object. By means of these wheels, the block and tackle could be moved to any point along the I-beam, and a cog mechanism at one end of the I-beam controlled the movement of the crane.

To steady the crane, there was an arm or trailer of angle iron connected with one end of the I-beam, extending diagonally to the opposite track, where its end rested on another such wheel on the track. This formed a V-shaped contrivance, resting on the three wheels upon the tracks—one wheel on one track, and two on the opposite track. The crane was moved to any desired place by means of chains from the cog mechanism, which hung down for manipulation by a man below. The wheels on the track were kept in place by means of a groove or channel in the face of each wheel fitting over the top of the rail.

Work had been done on one side of the engine, and the crane was to be moved for working on the other side. Kief who was on the cab, had thrown the chain over to the other side, and was on his hands and knees getting off the cab, and the helper was manipulating the chain, moving the crane to the position desired, when suddenly the grooved wheel of the trailer left the track, and the trailer, dropping down from its place struck and injured Kief. It is claimed the company was negligent in defectively and insufficiently constructing the crane and tracks, and failing to provide proper safeguards and safety devices, and in failing to do those things reasonably necessary to protect the plaintiff, including proper examination and inspection of the appliance.

At the close of the evidence the District Court directed a verdict for defendant in error. The opinion will state further facts.

H. B. Walmsley and William L. Tibbs, both of Milwaukee, Wis., for plaintiff in error.

R. M. Trump, of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] The direction of the District Court to find for defendant in error

was upon the assumption that the evidence failed to show what caused the trailer to fall, and the authority of Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and other cases which have followed it, holding generally that res ipsa loquitur has no application in the federal courts as between employer and employé. The teaching of the Patton Case, so far as it has bearing here, may be summed up in these words, quoted from the opinion therein:

"Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause."

The transcript here can hardly be said to suggest a variety of causes for the accident, some of which might, and others might not, be attributable to the company's negligence. In passing upon the matter the District Court said:

"It may be that the falling of the crane could be accounted for by the want of proper alignment in the track, or by the fact that the crane was out of order, or by the manner in which it was operated."

[2-4] If the track was out of alignment, or the crane was out of order, we find evidence, to which reference will be made, which in our judgment raised a jury question as to whether the company was negligent in this respect; and there was no evidence to warrant the conclusion that negligent operation of the crane caused the accident. In the brief for the company a further possible cause is suggested in some defect which was *perfectly apparent*, meaning thereby to imply that, hazard from such defect being assumed by Kief, no liability could accrue. But the evidence clearly excludes assumption of risk as a possible defense. Kief had absolutely no duty with reference to the crane, except himself or his helper to manipulate the chains for moving it and attaching and handling the load. The duty of inspection, maintenance, and repair rested on others, and the uncontradicted evidence is that Kief had never examined the crane or its mechanism, and had not often used it.

A blueprint, which the company offered in evidence, of the detailed drawings for the cranes in this shop, bears date February, 1885. Foreman Knuller testified that this crane was installed approximately 25 years before the accident; and during all this time it was used for moving these heavy weights. The crane itself is a ponderous affair. The grooves of the three small metal wheels, on which it rests are shown to be 1⅛ inches wide and about ⅝ of an inch deep, fitting quite snugly onto the tracks, which the drawing shows to be rectangular metal bars 1 inch across and 5 inches high, extending on each side the length of the shop. The tracks being about 40 feet apart, and held in place quite independently of each other, cannot be held in relative position as firmly and certainly as where they are spiked or bolted to ties or the like, and it is apparent that slight variation of their relative alignment, less than half an inch, might seriously disturb the movement of the crane, and cause a wheel to leave the track, particularly the wheel

of the trailer, which does not, like the other wheels, have the advantage of the weight of the body of the structure itself to keep it on the track.

So also of the wheels. Slight wearing or unevenness of the flanges, which are constituted by the sides of the grooves, might easily cause the wheel to mount the track and leave it. It requires no evidence or argument to show the deteriorating effect of time and use upon such structures. It is plain that the older they become the greater the needed care and circumspection to keep them in reasonably safe condition. One of the company's witnesses testified that "some of the tracks have a tendency to bend in some places; the timbers are liable to loosen up." Another said, "I find that the bearings on the cranes and the rollers or wheels wear down the quickest and need repair first." It is plain that with such a structure, upon whose practical perfection of condition and operation depends the safety of those beneath who must use it, but who have no duty as to its inspection or maintenance, ordinary care on the part of the employer requires a high degree of vigilance to keep it in proper working order and from being a menace to those working below. The requirement of frequent and thorough inspection of such a structure is plainly not a mere formality, but an important and necessary duty.

General Foreman Knuller's conception of duty in this regard is probably reflected in his testimony when he said, "We make an inspection of these cranes every month." He did not make the inspection himself, and the actual practice did not seem to accord with his statement. Foreman Scholtz, who had worked there about 13 years and had special charge of this work of inspection, said:

"We did not make an inspection of the cranes unless we were ordered to do so. I do not recollect exactly the time when we were ordered to make an inspection of this crane before the date of the accident. I do not remember receiving an order to repair this particular crane before the date of the accident."

Witness Hausner testified it was his duty since 1904 to make repairs on those cranes, and said:

"I have charge of the stationary gang that repairs these cranes. Whenever anything is reported wrong with them, I go and repair them. I also have charge of repairing the track, if it is out of alignment. Sometimes, when some party says there is something wrong with the crane, or the crane works hard, I send some man up there to inspect it, and sometimes as a rule I get orders from the master mechanic to inspect all those cranes. I do not know the date when I inspected this crane the last time before August 26, 1913."

From this testimony the jury might have inferred that inspection was not made until after it was reported that there was something wrong with the crane, and this might well have been regarded by the jury as falling short of compliance with the duty to examine and inspect. One witness testified that if an inspection was made, and showed a need of repairs, a record was made of it; but there was no evidence from which it appeared that any inspection of this crane or track was made, or any repairs thereon, except the testimony of witness Cyzmanski, who said that in June, two months before the accident, they lined up the tracks and left them and the wheels in first-class condi-

tion, but that he made no examination between that time and the accident, and no other witness testified to the making even of the monthly inspection after that time. The jury might thus have concluded that the duty of inspection, even if reasonably complied with when performed as often as once a month, was in practice an intermittent and neglected function.

It appears that the same wheel left the track, causing the trailer to come down in the same manner, at least once, within a few months before this accident, although there is no evidence of its causing an injury. Several of the company's witnesses testified to such an occurrence, fixing it at different times, so it is not certain from the evidence whether there was one or several of such occurrences within those months. Kief knew nothing of this. Wiedell, his foreman, knew it, but said nothing to Kief about it. Under this state of the evidence we believe that it was fairly a question for the jury whether or not a lack of proper supervision and inspection on the part of the company was the proximate cause of the injury, unless it may be said that the testimony of certain witnesses as to the condition of the crane and the tracks immediately after the injury occurred required the conclusion that all was in proper condition just before, and that no negligence is therefore attributable to the company.

Witness Pettigrew testified that he assisted taking down the crane after the accident, and inspecting every part of it, and finding it, as well as the track, in good condition. But the testimony on that subject of his foreman, Scholtz, might have justified the jury in casting some doubt upon that conclusion. Scholtz, under whose supervision it was taken down, as he says, "to see if everything was O. K.," speaking of the very important subject of the flanges of the wheels, said, "The flanges were in *fair* shape and not worn *to amount to anything;*" and of the tracks he said, "We sighted down the track to see if it was straight, and found it to be in *fair* condition; that included both tracks."

Considering how easily a slight variation of the tracks, and how small an imperfection in the small snugly fitting wheels, might cause the trailer wheel to mount the track and fall from it, the "fair" condition testified to by this foreman, in the judgment of the jury might materially have neutralized the condition of perfection to which his assistant testified; and indeed under the circumstances might have afforded the jury evidence of a lack of that reasonably safe condition which it was appellee's duty to maintain. At any rate, it was for the jury to pass upon the weight of the evidence so given on the condition and operation of the crane and the tracks subsequent to the injury, as bearing on their condition at the time of the accident. This evidence did not as a matter of law preclude recovery, if without it the evidence in this record presents, as we hold it does, a question of fact for the jury whether negligence of the company was the proximate cause of the accident.

The judgment is reversed, with direction to grant a new trial.

CODMAN et al. v. LLOYD et al.

(Circuit Court of Appeals, Third Circuit. November 8, 1916.)

No. 2085.

CORPORATIONS ⊂=579(2)—INSOLVENCY PROCEEDINGS—PROVABLE CLAIMS.

Creditors of a defunct corporation, whose property and assets had been informally taken over by a new corporation having to a large extent the same stockholders, by entering into an agreement by which they accepted stock of the new company for the amount of their debts, thereby by ratification waived the right to avoid the transfer of the property of the old corporation as fraudulent, and also the right to claim that the new company had assumed their debts, and cannot prove as creditors in insolvency proceedings against the new company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313, 2316; Dec. Dig. ⊂=579(2).]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by John E. Codman, George A. Sagendorph, and another, executors of the estate of L. Lewis Sagendorph, deceased, against William S. Lloyd and another, receivers of the American Metal Stamping Company. From a decree dismissing exceptions to, and confirming, the master's report, denying the claim of the first-named complainant (227 Fed. 942), he appeals. Affirmed.

Winfield W. Crawford, of Philadelphia, Pa., for appellant.

John Blakeley, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by John E. Codman, an alleged creditor of the American Metal Stamping Company, an insolvent corporation of Pennsylvania, from a decree dismissing his exceptions to, and confirming a master's report, which denied his claim and awarded the balance in the receiver's hands to creditors.

The findings of the master, and the court below, show the insolvent company was chartered by the state of Pennsylvania, in 1905, under the name of the Enamel Metal Arts Company. Its stockholders, with four exceptions, were members of two family connections, Codman and Sagendorph. All the Codmans and Sagendorphs had been stockholders of the American Metal Stamping Company, a corporation of the state of Delaware. Without any formal transfer thereof, the Pennsylvania corporation, on its incorporation, assumed control of the business and property of the Delaware corporation, and operated the same under the trade name of the American Metal Stamping Company. This anomalous state of affairs continued until 1911, when steps were taken to adjust the affairs of the two companies:

First, the name of the Pennsylvania corporation, viz. the Enamel Art Metal Stamping Company, was changed to the American Metal Stamping Company. Second, a valuation of $32,600 was placed on the

assets of the Delaware corporation which the Pennsylvania corporation had taken over and used as its own. Third, by two written contracts dated June 7, 1911, between all of the stockholders of the Delaware corporation of the one part and the Pennsylvania corporation of the other, it was stipulated that the charter of the Delaware corporation had been forfeited by the state of Delaware in 1907 for nonpayment of taxes; that since then the assets of that company had been held and used by the Pennsylvania company without consideration; that the stockholders of the Delaware Company now transferred such assets, of an agreed value of $32,600, to the Pennsylvania company, and that the Pennsylvania company was to pay to the stockholders of the Delaware company for such assets the sum of $32,600 in its paid-up stock, which was to be delivered to John Blakeley, trustee; and that "the delivery of the certificate for said shares to the abovenamed party and his (Blakeley's) receipt for the sum shall be a full discharge of each of the parties hereto." This contract, which was signed, amongst others, by John E. Codman, was carried out, and the purchase money in stock paid by the Pennsylvania corporation in stock certificates issued to Blakeley as trustee.

It further appears that at this time the only outstanding indebtedness and obligations of the Delaware corporation were to some of its stockholders who signed this agreement. Among these was the indebtedness which John E. Codman, in the present proceeding, now seeks to assert against the Pennsylvania corporation. To his claim objection is made, because the latter company's liability for this indebtedness of the Delaware company to Codman and other stockholder creditors of that company was once and for all settled adversely when the foregoing agreements were made. The proofs show that the question of the Pennsylvania company's liability for these debts was raised when it agreed to purchase the Delaware company's stock, and by one of the contracts then made it was agreed by the Pennsylvania company that, in relief of Codman and other creditors of the Delaware corporation, it would, with the consent of the stockholders of the Pennsylvania company entitled to the Blakeley stock, undertake to apply all dividends on such stock to the payment of the claims Codman and other stockholders held against the Delaware corporation.

By this contract, which was signed by Codman and his fellow creditors of the Delaware corporation, it was agreed that an entry be made on the stock certificates stating that ownership thereof was subject to the terms of this agreement that the Pennsylvania corporation apply their dividends as above stated. The writing further provided that "nothing herein contained shall be taken as an admission by the party of the second part (the Pennsylvania corporation) of any liability whatsoever for the obligations hereinbefore mentioned, *such liability* being *denied by the party of the second part,*" and also that Codman and the other creditors of the Delaware company waive "any right to claim payment from the party of the second part (the Pennsylvania corporation) in connection with said obligations in any other manner than as hereinbefore set forth."

The proofs show that these contracts were carried into effect and remained in force until the filing of the bill. The assets of the Delaware company were absorbed by the Pennsylvania company, the stock of the latter company, in payment for such assets, was issued to Blakeley, and out of the dividends declared on such trusteed stock some $5,200 were paid on account of principal or interest on the indebtedness of the Delaware company which Codman and other creditor stockholders held or were liable for as indorsers. In the meanwhile, the Pennsylvania corporation had done business and incurred liabilities to the liquidation of which the court, by the decree here challenged, has distributed the fund in the hands of the receivers.

From these facts it will be seen that Codman has no present claim against the Pennsylvania company, and that he is estopped by his own course and contract from now asserting any claim he might originally have had against it by reason of its taking possession of the Delaware corporation's assets without right. Such claim he waived by the agreements referred to; he vested the title of those assets in the Pennsylvania corporation; he agreed to look to another and specified procedure for the payment of his claim; he accredited the Pennsylvania company with valid ownership of the Delaware company's assets, and thus enabled that company to thereafter incur indebtedness to others. Inquiry by such latter creditors would have shown that Codman was not a creditor of the Pennsylvania company, that his name did not appear on its books, and that it had paid the Delaware company stockholders for its assets.

Having by his action aided in creating such a situation, and the Pennsylvania company having incurred debts on the basis of such situation, the contracts Codman entered into, as well as the equitable principles of estoppel, stand as a barrier to his now asserting his claim against the funds in the hands of the receiver.

The decree below is therefore affirmed.

NEW YORK & PHILADELPHIA COAL & COKE CO. v. MEYERSDALE COAL CO.

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

No. 2122.

1. CONTRACTS ⟸176(6)—CONSTRUCTION—JURY QUESTION—WRITINGS.
The meaning of correspondence through which a contract was consummated should not be submitted to the jury.
[Ed. Note.—For other cases, see Contracts, Dec. Dig. ⟸176(6); Trial, Cent. Dig. § 326.]

2. SALES ⟸418(3)—BREACH BY SELLER—DAMAGES.
Where defendant, which agreed to make monthly shipments of coal, agreed to spread the shipments over the entire month, the measure of

damages for breach would be the difference between the contract price and the average price of coal during the month.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1181; Dec. Dig. ⊜418(3).]

3. APPEAL AND ERROR ⊜1067—REVIEW—HARMLESS ERROR.

In an action for breach of a contract to deliver coal monthly, which defendant denied, the damages on defendant's theory, if the contract were established, amounted to more than were allowed, while plaintiff's claim exceeded the amount admitted by defendant. Instead of charging as to the result of the written agreement that deliveries should be spread over the whole month, and its effect on the measure of damages, whereby recovery would be limited to the difference between the contract and the average monthly price, the court submitted that matter to the jury. *Held*, that the submission of the question, and the failure of the court to charge on the question of damages, was prejudicial error, in view of the verdict, for the jury evidently could not have computed the damages on the proper theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⊜1067; Trial, Cent. Dig. § 475.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the New York & Philadelphia Coal & Coke Company against the Meyersdale Cole Company. There was judgment for part of the relief claimed, and plaintiff brings error. Reversed and remanded.

Henry W. Hardon, of New York City (Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., of counsel), for plaintiff in error.

Roger Knox, of Pittsburgh, Pa., and Sterling, Higbee & Matthews, of Uniontown, Pa. (E. C. Higbee, of Uniontown, Pa., of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. When this controversy was here before (217 Fed. 747, 133 C. C. A. 441), we held that the case should have gone to the jury on the question whether Hoblitzell, who had carried on the correspondence for the Meyersdale Coal Company, was authorized to bind his company by such a contract as had been sued upon. We also said:

"As we read the letters, they show a complete meeting of minds upon all terms of the contract, and we regard the signing of the suggested form merely as a desirable convenience and not as a condition precedent."

[1] At that time we had no occasion to take special notice of the letter dated August 13, but we may say now that we think it entitled to consideration as a part of the contract. It was therefore properly received in evidence, but we think its meaning should not have been submitted to the jury. In connection with the other writings, the trial judge should have construed it, especially the following sentence, which has given rise to the only important question now before us:

"You understand that we wish the monthly shipment spread over each month, and by that we mean not to ship any large amount on one day and then not ship any more for a long time."

[2] The bearing of this sentence upon the measure of damages is obvious. If it is not part of the contract, the parties agreed upon the delivery of 2,500 tons "monthly," and such an obligation would be fulfilled by delivery on the last day of the month. As no coal was ever delivered, the measure of damages would be the difference between the contract price and the market price at the end of each month. Since, however, the letter justifies the conclusion that the parties intended, and contracted with sufficient clearness, that deliveries should be spread over each month, the best measure available for a complete failure to deliver would be the average price during the month.

[3] The verdict necessarily implies that Hoblitzell had authority to make the contract, but it does not inform us what construction the jury placed upon the letter. They may have disregarded it, or they may have accepted it as controlling; but in either event we think the error in submitting the matter to them needs no further consideration—the reason being that from no aspect can the verdict be justified. In brief, the situation was this: If believed, the uncontradicted evidence on the one side and the other established that, if a contract existed at all, the New York Company had suffered damage amounting on its theory to about $6,000, exclusive of interest, and amounting, even on the defendant's theory, to more than $4,000, exclusive of interest. The verdict, however, is for $2,671.50, and for this sum there is no evidence whatever. No doubt the verdict was reached by what is known as a "compromise"; but none the less it is for a wholly arbitrary sum, and does a manifest injustice that should be remedied. We are not criticizing such verdicts as a class; often they are right enough on the whole, although it might not be easy to support them by a syllogism, and sometimes they are a practical necessity. We are concerned simply with this particular verdict in this particular case, and we cannot avoid the conclusion that it could, and we also think it should, have been prevented by proper instructions. The court should have construed the letter, and should have told the jury distinctly that, if the plaintiff was entitled to recover at all (and this is a hazard that will have to be faced before another jury), the verdict should be for the difference between the contract price and the average price during each month; that, while the evidence upon the subject was not wholly in harmony, the market ranged between the maximum and minimum sums testified to by the witnesses; and therefore that the verdict must be within this range. Such an instruction was not given, and for this and the other error we think the judgment must be reversed. The situation was as definite as if the plaintiff had sued on a bond for $1,000, and the defendant had denied the bond, and (as an alternative defense) had proved a payment of $500. In that event, a verdict for the plaintiff in less than $500 would be plainly arbitrary, and could not be justified on the ground that the jury might have found for the defendant. The plaintiff, if entitled to anything, would be entitled to his legal right, and could not be justly put off with a

mere gratuity. We regret to come to this conclusion, for in nearly every respect we have found nothing that needs correction. This matter, however, is vital, for the result has been a wrong to the plaintiff, and we feel bound to correct it.

The judgment is reversed, and a new trial is awarded.

In re AMBROSE MATTHEWS & CO.

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

No. 2133.

1. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

A corporation executed an instrument appointing two persons as agents, attorneys, and trustees for the corporation, its stockholders and directors, for the purpose of winding up its affairs, and empowered them to collect outstanding accounts, pay debts, prosecute and defend suits, convey and dispose of property, and after payment of debts divide the assets among the stockholders, and to prepare the necessary papers for the dissolution of the corporation after the settlement of its accounts, and in general terms sought to confer upon them all the powers and liabilities of a board of directors in winding up the corporation's affairs. It contained no words of conveyance, assignment, or transfer, and no intent to confer title upon the trustees appeared. *Held* that, as there was no assignment by the instrument, it was not a general assignment for the benefit of creditors, within the Bankruptcy Act, or state statutes, constituting an act of bankruptcy.

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

2. BANKRUPTCY ⟸81(4)—PETITION—GROUNDS OF BANKRUPTCY.

Where the petition of creditors alleged that a corporation was insolvent, and had committed an act of bankruptcy by conveying to trustees all of its property, empowering them to collect outstanding accounts, pay debts, and wind up its affairs, the petitioning creditors cannot, on the ground that the instrument constituted a conveyance of corporate property to injure, delay, or defraud creditors, complain that their petition was denied.

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

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

In the matter of Ambrose Matthews & Co., an alleged bankrupt. From a decree dismissing their petition in bankruptcy (229 Fed. 309), the petitioning creditors appeal. Affirmed.

Irving W. Teeple, of Newark, N. J. (Howard A. Sperry, of New York City, of counsel), for appellants.

Charles R. Snyder, of Atlantic Highlands, N. J. (S. C. Sugarman, of New York City, of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] This is an appeal by the petitioning creditors from a decree dismissing their petition in bankruptcy.

The reasons of the district judge will be found in 229 Fed. 309; and we agree with so much of his opinion as upholds the view that the writing in question is not an assignment for the benefit of creditors, either under the federal law or the law of New Jersey. The instrument in full is as follows:

"We, the undersigned, shareholders and directors of the Ambrose Matthews & Company (body corporate), do hereby nominate, constitute and appoint Mary Wooster Sutton, of Red Bank, N. J., and Charles R. Snyder, of Atlantic Highlands, N. J., agents, attorneys and trustees for us and said company for the purpose of winding up the affairs of the said corporation, and to have full power and authority as follows, hereby ratifying and confirming all our said agents and trustees do in the premises, viz.:

"1. To collect all outstanding accounts and debts due or growing due to said corporation and to pay and settle all indebtedness of said corporation, using where necessary their best judgment in compromising both bills receivable and bills payable, and to give acquittance therefor.

"2. To prosecute and defend suits by or against the corporation to enable the trustees aforesaid to settle and close its affairs, and to convey and dispose of its property, and to divide its moneys and other property among the stockholders after payment of its debts and liabilities.

"3. To open a bank account in the First National Bank of Red Bank, N. J., in the name of Ambrose Matthews & Co., Mary Wooster Sutton and Charles R. Snyder, Trustees.

"4. To ascertain the assets and liabilities of said corporation by any lawful means said trustees shall deem best suited to obtain a just estimate of same, whether by appraisal, by the corporation books, or by any other method they may elect.

"5. To prepare the necessary papers for dissolving said corporation immediately after the corporation accounts are settled and the record thereof is delivered to the directors by said trustees, which dissolution papers all the stockholders of record, viz., Ambrose Matthews, Philip Rosenblum, and Bendet Rosenblum, hereby agree to sign and formally execute whenever the papers for so doing are presented to said directors and stockholders for their signatures.

"6. To fulfill the contract made between the corporation and one John Fox, or to make such settlement with said Fox as he and said trustees or attorneys may agree upon.

"7. To have and exercise all the power and liabilities which would devolve upon said corporation's board of directors as trustees for dissolution of said corporation for the winding up of the corporate business of said company.

"8. And it is further stipulated, understood and agreed that said agents, attorneys and trustees shall receive for their services a reasonable fee as compensation and also the costs and expenses of the administration of their trust, to be paid to said trustees first out of the assets of said corporation.

"In witness whereof the said stockholders and directors of said company (body corporate) have hereunto set their hands and seals this third day of April, A. D. 1914.

"Ambrose Matthews, Director. [L. S.]
"Philip Rosenblum, Director. [L. S.]
"Bendet Rosenblum, Director. [L. S.]
"Ambrose Matthews & Co.,
"By Ambrose Matthews, President. [L. S.]
"Philip Rosenblum, Secretary. [L. S.]
"Stockholders { Ambrose Matthews. [L. S.]
Bendet Rosenblum. [L. S.]
Philip Rosenblum. [L. S.]"

[2] With regard to the other contention on behalf of the appellants —that the foregoing instrument conveyed or transferred the bankrupt's property with intent to injure, delay, or defraud its creditors—it is only necessary to say that no such charge is made by the petition, as

will appear by the following paragraph, in which the act of bankruptcy complained of is described:

"And your petitioner further represents that the said Ambrose Matthews & Company is insolvent and that within four months next preceding the date of this petition, the said Ambrose Matthews & Company committed an act of bankruptcy in that it did heretofore to wit, on the third day of April, 1914, convey and deliver to Mary Wooster Sutton, of Red Bank, N. J., and Charles R. Snyder, of Atlantic Highlands, N. J., all the property and effects of said corporation, and appointing them trustees for the said company to collect the outstanding accounts and to exercise all the power of the board of directors of the said corporation and to wind up its affairs and to divide assets among the creditors."

Finding no error, the decree is affirmed at the costs of the appellants.

SALAZAR v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

No. 4643.

CRIMINAL LAW ⟸1184—APPEAL—MODIFICATION OF SENTENCE.

In a prosecution under Act Cong. July 23, 1892, c. 234, 27 Stat. 260 (Comp. St. 1913, § 4140), as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, § 4137), fixing as the maximum penalty for selling liquor to Indian wards of the United States imprisonment for not more than two years and a fine not exceeding $300, a sentence which imposed a fine of $500 and imprisonment for six months need not be reversed and remanded by the Circuit Court of Appeals, but the sentence may be modified, so as to strike out the excessive fine, and the judgment be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. ⟸1184.]

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

Juan J. Salazar was convicted of selling intoxicating liquor to an Indian who was a ward of the United States, in violation of Act July 23, 1892, as amended by Act Jan. 30, 1897, and he brings error. Modified and affirmed.

C. C. Catron, of Santa Fé, N. M., for plaintiff in error.

Summers Burkhart, U. S. Atty., of Albuquerque, N. M.

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

VAN VALKENBURGH, District Judge. The plaintiff in error was convicted of selling intoxicating liquor to an Indian who was a ward of the United States under the charge of an Indian superintendent or agent. The prosecution was brought under the act of Congress of July 23, 1892 (27 Statutes at Large, 260), as amended by the act of January 30, 1897 (29 Statutes at Large, 506). Morgan v. Ward et al., 224 Fed. 698, 140 C. C. A. 238; United States v. Wright, 229 U. S. 230, 231, 33 Sup. Ct. 630, 57 L. Ed. 1160. Under these statutes the maximum penalty for the offense charged is imprisonment for not more than

two years and a fine of not more than $300. The minimum punishment is imprisonment for not less than 60 days and a fine of not less than $100 for the first offense, and not less than $200 for each offense thereafter. It is further provided that the person convicted shall be committed until fine and costs are paid. The sentence in this case was imprisonment in the United States jail, located at the New Mexico state penitentiary at Santa Fé, N. M., for a period of six months, and a fine of $500 with costs.

The only error urged in this court is that the punishment was excessive, in that the fine imposed exceeds, by $200, the maximum provided by law in such cases. It is contended on behalf of plaintiff in error that the sentence is therefore void, or at the very least that the case must be remanded to the District Court for resentence within the limits prescribed by statute. Under the decided cases the determination of the question presented is not attended with difficulty. Where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of that which the law permits does not render void the legal or authorized portion of that sentence. United States v. Pridgeon, 153 U. S. 48, 62, 14 Sup. Ct. 746, 38 L. Ed. 631; In re Coy, 127 U. S. 731, 757, 8 Sup. Ct. 1263, 32 L. Ed. 274.

"Where error is discovered in the proceedings in a criminal case properly presented to a Circuit Court of Appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require." Whitworth v. United States, 114 Fed. 302 305, 52 C. C. A. 214, 217; Hanley v. United States, 123 Fed. 849, 59 C. C. A. 153; Gardes v. United States, 87 Fed. 172, 30 C. C. A. 596; Haynes et al. v. United States, 101 Fed. 817, 42 C. C. A. 34; Ballew v. United States, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388.

In the case at bar the imprisonment imposed is well within the terms of the statute, and the fine alone is excessive. To correct the error it is necessary only to remit the excess, without otherwise disturbing either conviction or sentence.

The judgment below will be modified, by reducing the fine imposed from $500 to $300, and, with this modification, is affirmed. Upon the coming in of the mandate, the District Court is directed to enter judgment in conformity with this opinion.

TUCKER et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. October 5, 1916.)

No. 4665.

INDIANS ⇐38(5)—INTRODUCING LIQUOR INTO TERRITORY.

In a prosecution for violating Act March 1, 1895, c. 145, § 8, 28 Stat. 697, by introducing into territory which formerly was the Indian Territory intoxicating liquor, a conviction cannot be supported on mere suspicious circumstances indicating that defendant was cognizant of the introduction of the liquor by his codefendant.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 66; Dec. Dig. ⇐38(5).]

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

*Rehearing denied December 15, 1916.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Bert Tucker and Bob Terrell were convicted of violating Act March 1, 1895, § 8, denouncing the offense of introducing intoxicating liquor within limits of what was the Indian Territory before the admission of Oklahoma to statehood, and they bring error. Affirmed as to defendant Terrell, and reversed as to defendant Tucker.

William Pfeiffer, of Oklahoma City, Okl. (Pruiett & Sniggs, of Oklahoma City, Okl., on the brief), for plaintiff in error Tucker.

William S. Rogers, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for the United States.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

PER CURIAM. The plaintiffs in error, who will be referred to as defendants, were indicted for a violation of the provisions of section 8 of the Act of March 1, 1895 (28 Stat. 693, 697), the charge being that they had unlawfully introduced liquor from without the state of Oklahoma into that portion of the county of Carter in the state of Oklahoma which was within the limits of the Indian Territory prior to the admission of the state of Oklahoma into the Union as one of the United States of America.

Upon a trial to a jury both defendants were found guilty and sentenced to imprisonment, from which judgment this writ of error was prosecuted. The defendant Terrell did not file a brief, nor did he appear by counsel at this hearing. In view of the fact that his liberty is at stake, we have carefully examined the record and find no prejudicial error, which would warrant a reversal.

The defendant Tucker at the close of the evidence asked the court for a peremptory instruction to acquit, which was denied, properly excepted to, and assigned as error in the assignment of errors.

As the gist of the offense is the introduction of liquor from another state, the court erred in refusing to direct a verdict of not guilty. There is no evidence whatever to show that this defendant had any connection whatever with the introduction of the liquor from the state of Texas. There are some suspicious circumstances which indicate that he knew of the introduction of the liquor by his codefendant Terrell, but when a man's liberty is involved it requires more than a mere suspicion. The material allegations must be proved beyond a reasonable doubt. The evidence wholly fails to do that, and therefore it was error to refuse his request to direct the jury to return a verdict of not guilty.

The judgment as to the defendant Terrell is affirmed, and as to the defendant Tucker reversed, with directions to grant a new trial.

TAGGART v. BREMNER et al.

(Circuit Court of Appeals, Seventh Circuit. July 6, 1916.)

No. 2306.

PATENTS ⊜285—SUIT FOR INFRINGEMENT—JOINDER OF DEFENDANTS—DISCRETION OF COURT.

It was within the discretion of a District Court under equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv) to dismiss, except as to one defendant, a bill against several hundred dentists, charging each separately with infringement of one or more of four patents, where no joint infringement was alleged.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 445; Dec. Dig. ⊜285.]

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

Suit in equity by William H. Taggart against M. D. K. Bremner and others. From an order dismissing the bill, except as to one defendant, complainant appeals. Affirmed.

The bill in this case sets up the ownership of complainant, as patentee, of four patents, viz., patent No. 865,823, granted September 10, 1907, for apparatus for making molds for the casting of dental fillings and the like; patent No. 872,978, granted December 3, 1907, for method for making molds for dental inlays and the like; patent No. 983,579, granted February 7, 1911, for making dental inlay fillings and the like; and patent No. 983,580, granted February 7, 1911, for apparatus for making castings. It charges certain individuals by name, and several hundred others, members of a dentists' mutual protective alliance, an organization of dentists and others formed to protect each other against complainant—some residents and others nonresidents of the Northern district of Illinois, whose names are in said proceedings afterwards set out—with infringement of some one or more claims of one or more of said patents, in the following language:

"Your orator further shows that each of the contributors to said fund is an infringer of your orator's patents, this charge being based, first, upon the fact that from widespread investigation your orator is convinced that all dentists not licensed under said patents are infringing them, and, second, upon the fact that contributions to such fund are wholly useless and of no personal benefit to the contributor, unless he is infringing. Your orator further shows that the infringement of all dentists is of the following character, to wit:

"All dentists make the pattern for casting the inlay as set forth in patent No. 872,978, in identically the same way. They all make the molds in the same way, excepting that in many cases the investment is not placed about the pattern in two layers. Therefore your orator says that all unlicensed dentists infringe claims 1, 2, 3, 4, 8, 9, 10, 11, and 12 of said patent No. 872,978, while a considerable percentage infringe the remaining claims thereof. In making the mold all dentists employ a flask cover and sprue-former generally like those of patent 865,823. In some cases the sprue-former is not removable from the cover, but in nearly all cases it is. All dentists, therefore, infringe claims 1, 3, and 7 of patent No. 865,823, and nearly all dentists infringe claims 1, 2, 3, 4, 7, and 9 of said patent, while a relatively small number infringe the remaining claims thereof. The mold when complete is identical with that shown and claimed in patent 983,580 in all cases, and all dentists, therefore, infringe claims 13 to 17, inclusive, of said patent. All dentists employ the mold when made for casting dental inlay fillings which are cast entire from molten metal, and when complete are throughout of the same composition, and all dentists infringe claims 4 to 13, inclusive, of patent 983,579, covering broadly the method of making fillings, which consists in

casting them entire from molten metal and the complete inlay filling, and also claims 17 and 18 of patent 983,580, covering broadly the apparatus used.

"The principal difference between the infringing acts of the various dentists lies in variations of procedure for forcing the molten metal into the mold when complete. The several methods commonly employed for this purpose divide the dentists into a relatively small number of classes, some of whom infringe more extensively than others. There is a relatively small proportion of dentists who employ centrifugal force for causing the metal to enter the mold cavity. It is not charged that these dentists infringe other claims than those hereinbefore specified. It is, however, far more common to employ some form of gaseous pressure for forcing the molten metal into the mold cavity, and all the dentists who use such pressure infringe, in addition to the claims hereinbefore specified, claims 1 and 2 of patent 983.579.

"A considerable percentage of those who use gaseous pressure use what are known as 'suction' machines, the gaseous pressure used being that of the atmosphere, which is brought into operation by exhausting the air from the interior of the mold by suction applied from below. The use of such machines is not charged to infringe any further claims than those hereinabove enumerated. The majority of dentists, however, employ one of several forms of pressure devices in which gas-pressure above that of the atmosphere is applied to the top of the mold. This gas pressure is secured in some cases by substantially the means shown in your orator's machine patent No. 983,580, and, in others, by applying to the top of the mold a pad of wet asbestos, wet clay, or clay moistened with glycerine, the heat of the molten metal generating vapor which produces the desired pressure. All of these pressure machines or devices when used, in addition to the claims hereinabove enumerated, infringe claim 3 of patent 983,579, and claims 19 and 20 of patent 983,580. A relatively small number of dentists infringe one or another of the remaining claims of your orator's machine patent 983,580."

The bill alleges, further, that all four of said patents were sustained by the trial court in the Northern district of Illinois, in Taggart v. Moll, case No. 30,850 (no opinion filed). It further alleges that by reason of the great number of infringements it would be physically impossible to bring and try infringement suits against each infringer separately before the patents would expire; that the cost of individual suits would be practically prohibitive; that complainant's prima facie case was presented in the Moll Case within 15 minutes' time; that the infringers can be readily divided into a small number of groups, which can be considered together much more easily than if the suits were tried separately, and that, unless the suits can be consolidated, complainant cannot obtain justice; that defendants, by forming said alliance, interfere with the making of settlements, because the several defendants were thereby led to believe that the claims could be defeated or the infringement negatived. The bill therefore asks to be allowed to combine defendants in one suit.

The answers deny validity and infringement, charge that the Moll suit was not well conducted, set out that patent No. 872,978, for the process of making patterns and molds, etc., was held invalid by the Court of Appeals for the District of Columbia, February 25, 1912, in the case of Boynton v. Taggart, 40 App. D. C. 82, deny that any of the persons constituting the Dental Mutual Protective Alliance is an infringer, and deny that all dentists are infringers of any of the claims of patents Nos. 872,978, 865,823, 983,580, or 983,579. The answers also deny all knowledge of the method of forcing the metal into the mold cavity, and aver that the bill is multifarious, since the bill sets up no joint use of the patents in suit, nor concert of action between the several defendants with regard to the patents, and no conspiracy between them. The answers further set up the pendency of eight suits upon said patents in said District Court, and claim that said patents are null and void because of reasons there stated, including public use, abandonment, licenses, etc., etc.

The District Court issued a preliminary injunction, subject to certain exceptions. Thereafter, the cause coming on to be heard before another judge upon the objection pleaded in the answer, viz., that there was a misjoinder of parties defendant and of separate and independent causes of action, the

court ordered the bill to be dismissed as being multifarious for the reasons stated, at complainant's cost as to all parties save one. The decree further finds that the "plaintiff and, the court consenting, the following named defendants, to wit, M. D. K. Bremner, T. B. S. Wallace, J. C. Mackinson, J. J. Bing, M. A. Casill, W. F. Stone, D. G. Marks, D. S. Johnson, Henry Baumgarth, E. W. Applegate, Geo. C. Brady, E. L. Heyne, and C. L. Lind, elect to waive their privilege to be dismissed from this suit under the order of the court herein, consenting that the several separate causes of action against them stated and set forth in the bill of complaint herein may be consolidated and tried in the above-entitled suit upon the answers and other proceedings and pleadings heretofore filed and had in said suit." Exceptions were duly taken, and this appeal perfected.

The errors assigned are that the court erred (1) in dismissing the bill of complaint as to the defendants designated in said order; (2) in dissolving and discontinuing, as to certain defendants, the injunction which had theretofore been granted against those defendants; and (3) in denying the perpetual injunction as prayed in the bill.

Russell Wiles, of Chicago, Ill., for appellant.

Lynn A. Williams, Robert M. See, and Charles C. Linthicum, all of Chicago, Ill., for appellee.

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

KOHLSAAT, Circuit Judge (after stating the facts as above). The subject-matter of the present suit is one within the jurisdiction of the federal courts and subject to the provisions of federal equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv). By reference to the rule it appears that the main object thereof is to promote the convenient administration of justice. "If it appear," the rule concludes, "that any such causes of action cannot be conveniently disposed of together, the court may order separate trials." We are therefore called upon to hold that the trial judge abused his discretion in denying to appellant the right to join the whole dental profession in one suit. Whatever may have been the practice prior to the adoption of the rule, the latter must and does control so far as it is applicable.

The grounds upon which the appellant seeks to justify the joinder of several hundred defendants, with varying defenses, in one bill, are (1) that the patents in suit have been sustained (Taggart v. Moll, suit No. 30,850) in the District Court from which this cause is appealed; (2) that the issues affecting validity of the patents in suit are identical in the cases of all the defendants and would require but little time in presentation; (3) that these, together with answers to interrogatories presented in accordance with equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) would make out a prima facie case of infringement; (4) that defendants have banded together and contributed funds to defeat appellant's claim of infringement; (5) that it will be physically impossible for the court to try all the cases where infringement is charged before the expiration of the patent; (6) that appellant is financially unable to undertake to try said causes separately; and (7) that unless he can proceed to join the multitude of infringers in one suit he will not be able to obtain justice.

These matters were considered by the court. On the other hand, no attempt is made to claim joint infringement by the defendants, ap-

pellees herein. They are charged with being separate, independent tort-feasors, all trespassing on the same property, but without any consort, confederation, or joint share in the proceeds. One of the patents in suit has been defeated in another jurisdiction, where the patent for making patterns and molds as aforesaid was held invalid. While the issues affecting validity of the patents in suit are substantially identical with regard to each of the defendants, no defendant is charged with any particular infringement for which such party is in said bill sought to be held; the defenses are concededly distinct, and some of the defendants are not even dentists, so that the general charge that all dentists infringe cannot apply to them. The mere joining in the Dental Mutual Protective Alliance and paying dues did not constitute the members of said alliance infringers. It may well be doubted whether the joining of these defendants, appellees, in one suit, would in any way expedite the hearing upon each of said alleged infringements. A complete record would be required in each. The fact that the profits and damages in each case, if successful, would be small, while a large expense would be incurred in each case, if tried separately, cannot be deemed controlling. There are and have been in the past many cases in like situation.

Courts are instituted for the purpose of establishing rights. Once these are settled, the rest, it may be assumed, will follow. But the most startling result of appellant's proposed course would be the opening of the courts to a scheme for dragging a multitude of alleged infringers into threatened expensive litigation in a single proceeding, whereby settlements would be submitted to rather than endure the worry and costs of litigation. It is difficult to see how anything but confusion and injustice to the many could result. Having these matters in mind, was it an unreasonable exercise of the discretion conferred upon the court by statute to order said bill to be dismissed, at appellant's costs, as to all of the defendants save one? We think not.

Thus giving to equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv) the most liberal construction possible, we fail to find any abuse of the discretion therein conferred upon the trial judge. We are of the opinion that the rule was adopted in the interest of simplified procedure, but that, as in the prior adjudications upon multifariousness, misjoinder, and those of like nature, the application must depend largely upon the circumstances of each particular case, and rest in the sound discretion of the judge.

We find no error in the action of the court upon any of the matters assigned for error. The decree of the District Court is therefore affirmed.

STANDARD OPTICAL CO. v. COOK.

(Circuit Court of Appeals, Seventh Circuit. June 19, 1916. Rehearing Denied August 28, 1916.)

No. 2353.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—SHOOTING GLASSES.

The Cook reissue patent, No. 13,231 (original No. 946,596), for shooting glasses, conceding its validity, occupies a very narrow field, and, as so limited, *held* not infringed.

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

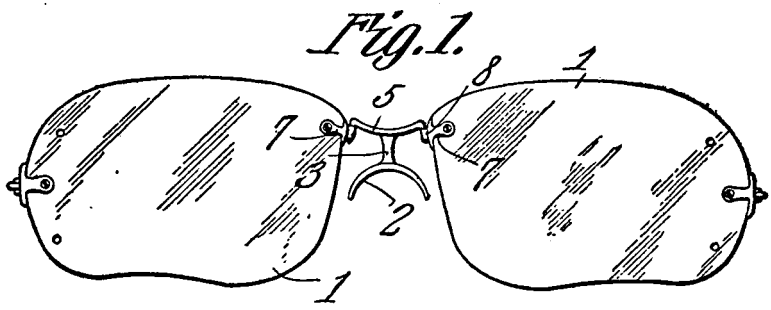
Suit in equity by Carroll Eugene Cook against the Standard Optical Company. Decree for complainant, and defendant appeals. Reversed.

On January 18, 1910, appellee was granted a patent, No. 946,596, for an improvement in shooting glasses. The specification makes references to two former patents issued to him for shooting glasses, dated March 23, 1909, and October 12, 1909, respectively, and severally numbered 916,109 and 936,987. The object of the invention of patent No. 946,596, it is said in the specification, is "to provide an improved hinge by which the lenses are connected and also to combine with the said hinge a nose piece of such a form that the lenses will be held in the proper position in front of the eyes." Two claims were allowed, which read as follows, viz.:

"1. The combination with shooting glass lenses, of a nose piece, a supporting post rising therefrom and arranged between the inner edges of the lenses, and hinged members mounted on the post and secured to the lenses, said hinged members being constructed with stops to limit the movement of the lenses toward each other.

"2. The combination of a nose piece, a post rising therefrom, a cross bar at the end of the said post, hinge members mounted on the ends of said cross bar and provided with projections adapted to impinge against said cross bar, and lenses carried by said hinge members."

These claims relate, it will be seen, to lenses mounted pivotally, each one at its inner end, to a connecting cross bar mounted on the upper end of the supporting post rising from the nose piece, the hinged members having stops or projections adapted to limit the movement of the lenses. Fig. 1 of the drawings, showing this arrangement, is as follows, viz.:



These claims, appellee insists, failed to present his whole invention as set out in the drawings and specification.

Fig. 4 seems to describe a device not covered by the said claims, as do also Figs. 5 and 6. Fig. 4 is as follows, and sufficiently illustrates the device claimed to have been overlooked:

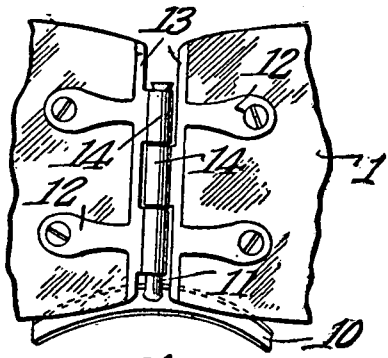


Fig. 4.

To remedy this defect, as appellee alleges it to be, he filed his application in the Patent Office for a reissue, stating that he "verily believes that the letters patent referred to in the before mentioned petition and specification for reissue patent, and surrendered at the time of the filing thereof, are inoperative for the reason that the specification thereof is defective, and that such defect consists particularly in the restriction of the scope of the invention by the specification and in the claims of said letters patent to the employment therewith of stops to limit the movement of the lenses towards each other; and deponent further says that the errors which render such patent so inoperative arose from inadvertence, and without any fraudulent or deceptive intention on the part of deponent; that the following is a true specification of the errors which constitute such inadvertence, relied upon, viz.: The particular specification of stops to limit the movement of the lenses towards each other as a necessary part of the combination which constitute his said invention—and that such errors, so particularly specified, arose as follows: Because your deponent was entirely ignorant of the patent laws and practice, and employed counsel who were not fully instructed as to the nature of the invention and its important uses; that your deponent acted wholly under the advice of his said patent lawyers, and that he has but recently ascertained from others more experienced that his patent was defective in the particular mentioned." No change in the specification and drawings was made.

Original application for letters patent No. 946,596, wherein the reissue was sought, contained three claims, which read as follows, viz.:

"1. A connection for the lenses of shooting glasses comprising a bridge, a post rising from the bridge, and means supported on the said post for securing the lenses.

"2. The combination with the lenses of shooting glasses, of hinge members secured to the said lenses and a connection between the said hinge members arranged to limit the movement of the said members.

"3. The combination of a nose piece, a post rising therefrom, a cross bar at the end of the said post, hinge members mounted on the ends of said cross bar and provided with projections adapted to impinge against said cross bar, and lenses carried by said hinge members."

In response to rejection of claims 1 and 2 by the examiner, this applicant canceled both of them, mainly on reference to Lançon patent (French) No. 381,553. Claim 1 was then rewritten, with two limitations, viz.: (1) The use of hinged members mounted on the post carrying the nose piece; and (2) stops in connection with the hinged member adapted to limit the movement of the lenses toward each other—and then was allowed as claim 1. After reconsideration, claim 3, which was at first rejected by the examiner, was allowed as claim 2.

The reissue was granted, numbered 13,231, on May 2, 1911, claims 1 and 2 of patent No. 946,596 became claims 1 and 2 of the reissue, and claims 3, 4 and 5 were added. These latter read as follows, viz.:

"3. The combination with shooting glass lenses of a nose piece, a supporting post rising therefrom and arranged between the inner edges of the lenses,

members movably mounted upon said post, and means for securing said lenses carried by said members.

"4. In an eye protector, the combination of a nose piece, a post rising therefrom, and lens-carrying members pivotally mounted on said post.

"5. In an eye protector, the combination of a nose piece, a post rising therefrom, and lens-carrying members pivotally mounted on said post so as to bring the opposite edges of the lenses closely adjacent to said post"

—and constitute the matters here involved.

The alleged infringing device is constructed under patent to Brennecke for goggles, dated November 24, 1914, and numbered 1,118,631, the four claims of which read as follows, viz.:

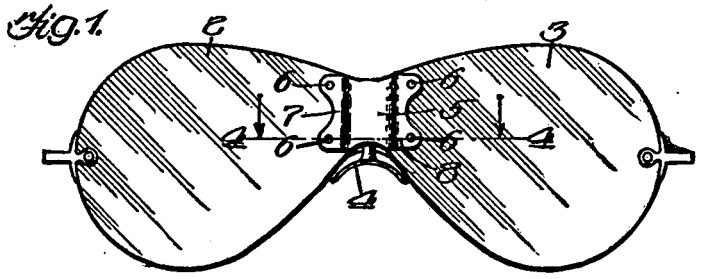
"1. The combination with a pair of glasses of the class described, of a readily flexible connection supporting a nose-bow and which yields to bending and twisting strains and returns the glasses to their normal relative positions.

"2. The combination with a pair of glasses of the class described, and with the nose-bow for same, of a flexible connection joining said glasses and supporting said nose-bow, said connection supporting said glasses in a definite normal position and yet serving to permit the relative angular movement of the glasses that a hinged connection for same would permit.

"3. The combination with a pair of lenses of the class described and the nose-bow for same, of a flexible connection extending uninterruptedly from lens to lens as a support for same and said nose-bow, said flexible connection having greater flexibility than said lenses.

"4. The combination with a pair of lenses of the class described and the nose-bow for same, of a flexible connection on which said nose-bow is mounted and which supports said lenses in a normal relative position to each other, said connection having greater flexibility than said lenses and permitting movement of each lens relative to the other lens in planes vertical to each other."

Fig. 1, here reproduced, will serve to illustrate the device.



Appellant denies both validity of the reissue and infringement thereof. The District Court sustained the patent and the charge of infringement and awarded an accounting.

Appellant introduced in evidence Cook's prior patents, Nos. 916,109, 936,987, 946,596, Brennecke subsequent patent, No. 1,118,631, French prior patent to Lançon, No. 381,553, and Wienrich's German patent, No. 135,062, of November 30, 1901, and others, all for eyeglasses.

The assignment of errors goes to the action of the court in sustaining the invention, upholding the validity of the reissue and decreeing infringement.

Florence King, of Chicago, Ill., for appellant.

Charles C. Linthicum and Benjamin T. Roodhouse, both of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). While we deem the validity of the reissue patent as being a close question under the statute and the authorities, by reason, among other matters, of the proceedings had in the Patent Office in connection with the canceling of original claims 1 and 2 of patent No. 946,596, we do not consider it necessary, for the disposition of the questions here presented, to decide that point. We assume, for the purposes of this proceeding, that the reissued patent is valid.

The field in which the patentee was working was very narrow. The French patent to Lançon, published in 1908, showed the pintle rising from the nose piece and having a vertical sliding movement upon the cross piece for purposes of adjustment to the eyes, and also the revoluble movement of the cross piece and lenses upon the pintle as a pivot. Wienrich, 1901, discloses glasses which may be folded, one lens upon the other, each being swung on a pivot indirectly connecting it with its particular end of the nose piece. Cook's patent, No. 936,987, shows glasses differing in no substantial respect from his patent upon which the reissue is based, and the reissue patent, except in the fact that in the former the boss rising from the nose piece fits "between the lower ends of the hinges or the lower portions of the meeting edges of the lenses." "The bridge," says the patentee, "is thereby held in proper position to aid in supporting the lenses and to cushion the same on the wearer's nose," whereas in the latter the boss is prolonged upwardly to form a vertical pintle upon which the sleeves of the hinges are pivoted, thus eliminating the pivot pin *8* connecting the hinge members of that device, and making the lenses partially adjustable. The device of patent No. 946,596 makes provision for such adjustment to the eyes as may be obtained by hinged movement, said movement being perpendicular, or at right angles to the post. This latter is the subject-matter described in the reissue, appellee insisting that the claims of patent No. 946,596 were by mistake limited to the improved hinge, including stops to limit the movement of the lenses toward each other, but making no claim to means for holding the lenses in proper position in front of the eyes.

It is apparent that claims 1 and 2 cover only the matters disclosed in figures 1, 2 and 3 of the patent No. 946,596 aforesaid.

Assuming, as above stated, that appellee was entitled to the reissue claims, the most that can be said is that he has secured a monopoly to glasses which may be adjusted to the eyes in any manner which may be attained through lenses moving perpendicularly or at right angles to the pintle. On the other hand, appellant's device is capable of indefinite relative movement with respect to the eyes by reason of the resilient means for connecting the lenses. The latter may be moved at right angles, or in any arc of a circle, or of an ellipse, or even angularly. It has no pintle, and no hinged movement. Its nose piece is almost as flexible as that of the old rubber cover patent, No. 12,924. It has the same, if not a greater, presumption of validity arising from the grant as has the reissue patent, in that it was granted after, and presumably was distinguished from, Cook; and instead of being an im-

provement of the invention defined in the patent in suit, the Brennecke patent, in our judgment, was for an independent invention in the old common field. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

All things in evidence considered, we are of the opinion that the decree of the District Court should be and it is reversed, with costs, with direction to vacate the decree and dismiss the bill for want of equity.

Ex parte WINFIELD.

(District Court, E. D. Virginia. October 19, 1916.)

1. ARMY AND NAVY ⊂⊃19—ENLISTMENT—EFFECT OF.

Rev. St. § 1117,[1] declares that no person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has parents or guardians entitled to his custody and control. *Held*, that a minor who enlists, misrepresenting his age, is legally amenable to military jurisdiction, and bound to remain in the service unless his parents or guardians obtain his release; the statute being for the interest of parents and guardians only.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45–50; Dec. Dig. ⊂⊃19.]

2. ARMY AND NAVY ⊂⊃19—NATIONAL GUARD—ENLISTMENT THEREIN—APPLICABILITY OF FEDERAL STATUTE.

A boy under 18 years of age, by misrepresenting his age, enlisted in the National Guard for the District of Columbia, without the consent of his mother, who was his only surviving parent and guardian. Very shortly after his enlistment the boy was mustered into the service of the United States. Rev. St. § 1117, declares that no person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the consent of his parents or guardians, while Act June 3, 1916, c. 134, § 27, 39 Stat. 185, reduced the age limit to 18 years. *Held*, that these statutes apply only to the national military forces regularly maintained under the authority of Congress, and there being no statutory authority enabling a parent to annul an enlistment in the National Guard of the District of Columbia because of the child's misrepresentations of his age, the mother could not secure the release of her son, though by reason of his enlistment in the National Guard he was temporarily mustered into the service of the United States, for at common law an enlistment by a minor under misrepresentations as to his age is not voidable by the minor or his parents.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45–50; Dec. Dig. ⊂⊃19.]

Habeas Corpus. In the matter of the petition of Ida V. Winfield for a writ of habeas corpus to secure the release of Richard Andrew Winfield from military service. Petition dismissed.

Frederic R. Whippler, of Washington, D. C., for petitioner.

S. T. Ansell, Assistant Judge Advocate General, of Washington, D. C., for the United States.

WADDILL, District Judge. The petition for habeas corpus filed in this case by Ida V. Winfield sets forth that she is the mother of Richard

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

[1] Comp. St. 1913, § 1885.

Andrew Winfield, who was born on the 1st day of August, 1898, and enlisted in Company G, Third Infantry, District of Columbia National Guard, on the 8th day of June, 1914; that at the time of his enlistment the minor's father was dead; that since his father's death he has lived with and been under her care, custody, and control; that his enlistment in the National Guard of the District of Columbia, as aforesaid, was without her knowledge or consent, and that she never, in writing or otherwise, assented to his entering the military service of the District of Columbia, or of the United States, or to his remaining therein; that the National Guard of the District of Columbia, particularly Company G of the Third Infantry, pursuant to the call of the President, issued on the 18th day of June, 1916, was on the 19th day of June, 1916, mustered into the service of the United States; and that, at the time of the filing of the petition, on the 15th day of July, 1916, the said Richard Andrew Winfield, and the company and regiment to which he belonged, were stationed at Ft. Myer, Va., and within the jurisdiction of this court; and the petition prayed for the release of the said Richard Andrew Winfield from the military service aforesaid.

The facts in the case were conceded—that at the time of entering the National Guard of the District of Columbia the minor was under 18 years of age; that at his enlistment he falsely represented himself to be over the age of 18 years; that he was admitted to the service without the assent of his parents or guardian; and that, at the time of the trial, on the 27th day of July, 1916, he lacked a few days of being 18.

[1, 2] The real question to be decided is whether the petitioner is entitled to the discharge of her son, under the provisions of section 1117 of the Revised Statutes, which reads as follows:

"Sec. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control."

Under section 27 of an act approved June 3, 1916, entitled "An act for making further and more effectual provision for the national defense," etc., the age limit for enlistment in the regular army was changed from 21 to 18 years.

Confessedly, the minor himself is not entitled to a discharge, as the contract between himself and the District of Columbia for military service is valid. In re Grimley, 137 U. S. 147, 150, 153, 11 Sup. Ct. 54, 34 L. Ed. 636. And as against the petitioner, the mother of the minor, the contract is likewise binding, if good against him, in the absence of some statutory provision in her favor. At common law an enlistment was not voidable by either an infant or its parents or guardians. In re Morrissey, 137 U. S. 157, 159, 11 Sup. Ct. 57, 34 L. Ed. 644, and cases cited. And hence the statute must be looked to, to ascertain whether relief thereunder is afforded.

Section 1117, supra, was enacted in the interest of the parents, and the contract of enlistment, the parent not interfering, is valid as against the infant. He is not only a de facto, but a de jure, soldier,

amenable to military jurisdiction, and bound to remain in the service. What is the effect of the statute referred to, as respects the status of the minor in this case, in the service of the United States, by reason of his membership in the National Guard of the District of Columbia? Does it enable the mother to intervene in behalf of the son, in the absence of legislative enactment affecting his relationship to the National Guard of the District of Columbia? The section referred to has reference to the national military forces raised and maintained by Congress, under its power to raise and support armies, and not to the National Guard, called as such, by the President, into the service of the United States, for constitutional purposes. No provision will be found in the statutes relating to National Guard of the District of Columbia enabling the parent to annul a lawful enlistment entered into by a member of the National Guard; and, in the absence of such statute, the court's conclusion is that the petitioner cannot avail herself of the provision of the federal statute, section 1117, supra, although her son may be temporarily in the military service of the United States. He is in such service by virtue of his enlistment as a member of the National Guard of the District of Columbia, and it is his eligibility in the last-named service that determines his liability to be mustered into and retained in the military service of the United States. If he is lawfully an integral part of the National Guard of the District of Columbia, and such guard is lawfully called, as it was in the present case, into the service of the United States, he is liable to service therein, and entitled to discharge therefrom, as respects matters inhering in the legality of his enlistment in such National Guard, when, and not until, the National Guard has been mustered out of the service of the United States.

The petition for writ of habeas corpus will be dismissed.

THE CATALONIA.

(District Court, E. D. Virginia. September 28, 1916.)

1. SEAMEN ⊂=16—SHIPPING ARTICLES—CONSTRUCTION.

Shipping articles for a voyage from the port of New York to a port in Chile and such other ports and places in any other part of the world as the master might direct, and back to New York, the final port of discharge in the United States, for a term not exceeding 12 months, do not bind seamen to take as many voyages from the United States as the master of the ship may wish to make to any place or places in the world, provided he return to New York, the final port of discharge, within 12 months, but merely bind the seamen to make one voyage to Chile and to such other ports as the master on that voyage may direct, and where the master construed the articles as allowing him, on returning to the United States, to select as a port of discharge some port other than New York, it being understood that the term "port of discharge" covered a wide radius, the seamen are, on return to a port of discharge in the United States, entitled to their wages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 56–65; Dec. Dig. ⊂=16.]

2. SEAMEN ⊂⊃7—SHIPPING ARTICLES—CONSTRUCTION.
Shipping articles, being prepared by a master, should be construed liberally in favor of seamen.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 19–24; Dec. Dig. ⊂⊃7.]

In Admiralty. Libel by Eric Shafer and others against the steamship Catalonia. Decree for libelants.

Bowden & Heard, of Norfolk, Va., for libelants.
Thomas H. Willcox, of Norfolk, Va., for respondent.

WADDILL, District Judge. [1] The conclusion of the court is that the shipping articles involved in this litigation contemplate a single voyage from New York, and back to a port of discharge in the United States, not to cover a longer period than 12 months; that the language "from the port of New York to Iquique, Chile, and such other ports and places, in any other part of the world, as the master may direct, and back to New York, a final port of discharge in the United States, for a term of time not exceeding 12 calendar months," does not mean that the seamen bound themselves to take as many voyages from this country as the master of the ship might wish to make to any place or places in the world, provided he returned to New York, a final port of discharge, within 12 calendar months. The words "such other ports or places in any part of the world" are used in connection with the specific trip contracted for; that is to say, that the master might make such journey in connection with the special voyage from New York to Iquique, and back to New York, a final port of discharge in the United States, or such trip or trips as might be made within the calendar year, before returning to a port in this country, and if the master chose, upon coming to this country, as a port of final discharge, to go to some other place than New York, namely, Norfolk, he would not be thereby relieved from liability for the seamen's wages, nor would they be deprived of their right of discharge.

This view is borne out by the master's understanding of the ending of the voyage, as testified to by him. In answer to the question of whether he expected to discharge at New York, on entering upon the voyage, he said:

"We never know where we are to discharge; we have a radius from New Orleans to Boston."

This clearly shows that Norfolk was within the spirit and contemplation of the undertaking, if not within the strict letter of the articles; and if, during the period of 12 months, the ship came back to any port of this country within the radius as described by the master, and there finally discharged, the seamen became entitled to their wages.

[2] The master's contention would make the articles too indefinite as to the extent of the voyage; and the same could be avoided for uncertainty and ambiguity, if such an interpretation should be placed

upon them. Such view might operate unfairly to the seamen, who belong to a class who are ever entitled to the consideration of a court of admiralty; and, moreover, as between themselves and the master, the articles should be construed liberally in their favor, since the same were the product of the master, and not of themselves.

A decree will be entered on presentation, in favor of the libelants, with costs.

McCURRY v. HARTWELL BANK.

(District Court, N. D. Georgia. October 31, 1916.)

No. 21.

1. USURY ⇐45—USURIOUS RATE OF INTEREST—WHAT CONSTITUTES.

Where a bank made loans at 8 per cent., the highest legal rate of interest, and then deducted the amount of the interest in advance at the time the loans were made, the transactions were usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 98; Dec. Dig. ⇐45.]

2. USURY ⇐80—MORTGAGES—VALIDITY.

Where a debtor conveyed land to a bank to secure enumerated notes, the deed declaring that upon payment it should be null and void and would be canceled, the conveyance was a mortgage, and not a deed, despite the provisions that the bank should cancel the instrument, and hence, though the notes secured bore a usurious rate of interest, the lien of the mortgage is not defeated under Park's Ann. Civ. Code Ga., § 3442, declaring that all titles to property made as part of a usurious contract or to evade the laws against usury are void.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 158–160; Dec. Dig. ⇐80.]

In Equity. Suit by W. E. McCurry, as trustee in bankruptcy of the estate of E. B. Benson and P. E. Benson, bankrupts, doing business as E. B. Benson & Son, against the Hartwell Bank. Decree for defendant.

Green & Michael and Horace M. Holden, all of Athens, Ga., for trustee.

J. H. & Parke Skelton, of Hartwell, Ga., and Cobb, Erwin & Rucker, of Athens, Ga., for defendant.

NEWMAN, District Judge. The trustee in bankruptcy above named brings his petition against the Hartwell Bank on the equity side of the District Court, and shows: That the Hartwell Bank, the defendant, is a banking corporation organized and existing under the laws of the state of Georgia, doing business in Hartwell, Hart county, in said district. That the firm of E. B. Benson, composed of E. B. Benson and Paul E. Benson, was adjudged bankrupt, and the said E. B. Benson and Paul E. Benson, individually, were adjudged bankrupts, on the 1st day of December, 1915, and thereafter, on the 17th day of December, 1916, at the first meeting of creditors, the plaintiff herein was duly appointed and qualified as trustee in each of said estates.

A petition was filed by said trustee against the Hartwell Bank, among other creditors, praying for leave to sell certain property free of liens. On this petition and the answer of the Hartwell Bank the question is made as follows: On May 14, 1912, E. B. Benson, a member of the bankrupt firm, and one of the individual bankrupts, executed an instrument by which he conveyed to the Hartwell Bank certain real estate in the town of Hartwell described in the instrument, which, after the description of the real estate, has in it this clause:

"The above real estate hereby deeded by said E. B. Benson to the said Hartwell Bank for the purpose of securing the payment of the following notes of the firm of E. B. Benson & Son, of even date with this deed, to wit: One for $2,000.00 due October 20, 1912, one for $2,000.00 due November 1, 1912, one for $2,500.00 due November 15, 1912, with interest from maturity at eight per cent. per annum. Also to secure any further indebtedness of said E. B. Benson & Son or renewals of the notes here mentioned. When these notes and the indebtedness of the said bankrupts to the said Hartwell Bank shall have been fully paid then this deed shall be null and void and shall be canceled by the said Hartwell Bank its heirs and assigns. This deed made expressly for the purpose stated and none other."

On the 19th of February, 1913, E. B. Benson executed another instrument conveying to the Hartwell Bank real estate in the town of Hartwell, to secure a note for $3,500, subject to a prior conveyance to secure a debt of $5,000 to one McMullan, and provided that upon the payment of the note for $3,500 the deed was to be null and void, and was to be canceled by the said Hartwell Bank, and that the deed was given for the purpose of securing the note and none other, with the usual habendum and tenendum clauses.

A third instrument was executed July 28, 1914, by E. B. Benson to the Hartwell Bank, which conveyed certain real estate also in the town of Hartwell, and contained this clause:

"All of the above lots deeded to the Hartwell Bank to further secure the payment of the notes of E. B. Benson & Son to the said bank. When the said E. B. Benson & Son shall have fully paid the said bank then this deed shall be null and void and shall be canceled it having been given for the purpose stated and none other."

Contemporaneously with the execution of these instruments, the Hartwell Bank executed to E. B. Benson certain papers, one dated May 14, 1912, as follows:

"Know all men by these presents: That E. B. Benson has this day made a deed to the Hartwell Bank to the following property, to secure payment of the notes of E. B. Benson & Son, hereinafter described, to wit: In the town of Hartwell, Georgia. (1) The lot whereon P. E. Benson now resides as described in said deed containing one-third (⅓) acres. (2) One lot or tract of land adjoining the lot whereon Jas. Land now resides, fronting Howell street, containing four and $^{40}/_{100}$ (4.40) acres as per deed. (3) One lot No. 4 south of and fronting Benson street adjoining L. L. Stapleton and D. C. Alford, containing two and a half (2½) acres as per deed. (4) Lot B east of lot occupied by P. E. Benson, a part of E. B. Benson's residence lands, containing one-third (⅓) acre, to secure the following notes as above stated: One for $2,000.00 due October 20, 1912, one for $2,000.00 due November 1, 1912, one for $2,500.00 due November 15, 1912, with interest from maturity at 8 per cent. per annum. Upon payment of same said deed to the Hartwell Bank will be null and void by terms of the deed, and said deed is to be canceled by the said Hartwell Bank."

On February 19, 1913, the Hartwell Bank executed the following indorsement upon the above instrument:

"E. B. Benson & Son having paid interest and renewed notes described within due same days of months but in this year, 1913, instead of those within taken up, the deed made May 14, 1912, is to secure the renewals, and upon payment of these new notes or renewals the deed referred to, for property described within is to be canceled."

On February 19, 1913, this paper was executed by the bank:

"Know all men by these presents: That E. B. Benson has this day made a deed to the Hartwell Bank, a second deed, the first and prior one having been made to P. S. McMullan Jan. 4, 1911, to secure him in payment of a note for $5,000.00 from E. B. Benson to him, to the store lot now occupied by E. B. Benson & Son 70x125 feet corner of Elbert and Howell streets, Hartwell, Ga., as described in said deed to the Hartwell Bank securing said bank in the payment of note of E. B. Benson & Son of even date with this (Feb. 19, 1913) due Dec., 1913, for $3,500.00 upon payment of which note the said deed to the Hartwell Bank is to be null and void and shall be canceled by said Bank.

"In addition to said deed E. B. Benson & Son have placed with said bank notes as collateral as per list attached amounting to $1,511.94 all of which shall be returned to said E. B. Benson & Son when their note as above shall have been fully paid."

On July 28, 1914, the bank made the following paper to Benson:

"This is to show that Enoch B. Benson has this day deeded to the Hartwell Bank nine lots Nos. 12, 13, 14, 15, 16, 22, 23, 24 and 27, being the ones deeded to him by Grace Benson Teasley, also a two and $^{15}/_{100}$ (2.15) acre lot east of Cleveland avenue (in lieu of the 2½-acre lot No. 4 Benson St. land released this day by said bank) to further secure payment of the notes of E. B. Benson & Son dated April 14, 1914, and any and all renewals of same or other indebtedness as stated in said deed by him to the said Hartwell bank of this date. It is hereby agreed by the Hartwell Bank that upon payment of said indebtedness by E. B. Benson and Son their heirs or assigns, that said deed together with the others held by the said bank are to be void and shall be canceled by said bank of record."

All the real estate mentioned in these instruments was in the possession of E. B. Benson up to and at the time of the bankruptcy.

[1] The first contention made by the trustee in bankruptcy in this case is that the contract between Benson and the bank was usurious. It seems that it is conceded that the bank, at the time these transactions occurred, charged 8 per cent. interest, and took it out in advance, at the time the loans were made and the notes given. This contention is based on the decision of the Supreme Court of Georgia in Loganville Banking Co. v. Forrester, 143 Ga. 302, 84 S. E. 961, L. R. A. 1915D, 1195. It is there held that the receiving of interest in advance by a bank, at the highest legal rate of interest on a loan, whether it be a short or long term loan, is usurious, and a deed to land given to secure a promissory note for the loan is void on account of the usury. In the opinion of the court, by Judge Evans, the matter is thoroughly discussed and previous decisions of the court referred to. This, among other things, is said:

"It has been stated, in the course of the argument in several of the opinions of this court, that the taking of interest in advance on short term loans in the usual and ordinary course of business is not usurious. Mackenzie v.

Flannery, 90 Ga. 591 [16 S. E. 710]; Union Savings Bank v. Dottenheim, 107 Ga. 606, 614, 34 S. E. 217; McCall v. Herring, 116 Ga. 235, 243 [42 S. E. 468]. On the other hand, it has been strongly intimated that the statutes respecting interest and usury apply alike to short and long term loans. Howell v. Pennington, 118 Ga. 494 [45 S. E. 272]. But the observations in those cases are obiter dicta, and the proposition is res integra in this state. Patton v. Bank of Lafayette, 124 Ga. 965 [53 S. E. 664, 5 L. R. A. (N. S.) 592, 4 Ann. Cas. 639]."

In closing the opinion this is said:

"To constitute usury it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. Bellerby v. Goodwyn, 112 Ga. 306 [37 S. E. 376]. If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. Rushing v. Willingham, 105 Ga. 166 [31 S. E. 154]. But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is an usurious one, and a deed to land given to secure the debt is void by virtue of the statute (Civil Code 1910, § 3442) which declares: 'All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void.' Beach v. Lattner, 101 Ga. 357 [28 S. E. 110]."

The rate of interest charged Benson by the bank was 8 per cent. and the highest rate allowed even by contract in writing in Georgia, and as conceded. That amount was reserved and taken out at the time the loan was made.

Very clearly these transactions between Benson and the bank were usurious; that is conceded by both parties.

[2] We come then to the question, which is the real question in this case, as to whether these instruments were deeds conveying title to the bank, or should be held to have been merely mortgages creating a lien.

Upon this subject the Supreme Court of Georgia decisions at different periods are not in entire accord. In the case of Frost v. Allen, 57 Ga. 326, the instrument in question was held to be a mortgage, although it provided in terms that the title was conveyed and that if the debt was paid the party to whom the conveyance was made should reconvey by a quitclaim deed. Perhaps what was there decided would be better understood from the head note of the case, which is as follows:

"An instrument, after reciting that the makers were indebted to F. in an amount named, for which a note had been given, conveyed to him certain personalty, specifying that it was intended that the title should pass. It provided further that, if the note was not paid when due, F. should take possession of said property, and, after advertising, sell it, and apply the proceeds to the debt; that, if the note was met at maturity, he should reconvey by quitclaim deed. Held, that the instrument was a mortgage, and might be foreclosed as such."

In Pirkle v. Equitable Mortgage Co., 99 Ga. 524, 28 S. E. 34, the court held as follows:

"An instrument purporting on its face to secure a described debt, though in the form of a deed to land, and itself declaring that it was 'given under and by virtue of section [1969] of the Code of Georgia,' does not fall within the provisions of that section unless there was a bond to reconvey the land upon payment of the debt.

"Where such an instrument contains nothing to indicate that there was no bond for a reconveyance, it will be presumed that such a bond was given. If, however, the instrument recites that, upon payment of the debt thereby secured, 'this deed shall be canceled and surrendered in accordance with the act of the General Assembly of Georgia, approved November 12, 1889' (Acts of 1889, p. 118), the presumption would be that there was no bond; but this presumption could be rebutted by proving that, in point of fact, a bond was given.

"It not affirmatively appearing in the present case that there was a bond to reconvey, and the presumption because of a recital in the alleged deed in the words above quoted being to the contrary, and the condition expressed in the recital above indicated to the effect that the instrument shall be void on payment of the debt being equivalent to the defeasance clause usually inserted in mortgages, the court erred in treating the instrument in question as a conveyance passing title and not as a mere mortgage, and consequently erred further in dismissing the plaintiff's petition."

These cases both came before the Supreme Court of Georgia for review in Pitts v. Maier, 115 Ga. 281, 41 S. E. 570, and it was held:

"An instrument, in all respects in the form of a deed passing title, and executed for the purpose of securing the payment of a described debt, is not because containing the clause 'reconveyance of said property to be made upon fulfillment of all the conditions of this instrument,' properly to be treated as a mere mortgage. In so far as the decisions of this court in Frost v. Allen, 57 Ga. 326, and Pirkle v. Mortgage Co., 99 Ga. 524 [28 S. E. 34], conflict with what is here laid down, they are, upon review thereof, overruled."

In Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453, the Supreme Court of Georgia made a decision, in an opinion by Judge Cobb, which is strongly relied upon by counsel for the bank. So much of that decision as is pertinent here is shown by the first headnote, which is as follows:

"A paper in the usual form of a warranty deed, but containing a clause providing that, should the grantor pay to the grantee a stated sum of money by a given date, the instrument 'shall be void, otherwise in full force,' is a mortgage, and not a deed."

Emphasis is given this case because of the importance said to be attached to the use of the words "shall be null and void." It is urged that the use of these words in two of the papers given Benson by the bank and "void" in the other relieves them, as I understand the contention, of the effect that might be otherwise given the agreement to cancel.

It is true that according to the doctrine of all the cases decided by the Supreme Court of the state, especially Buckhalter v. Planters Loan & Savings Banks, 100 Ga. 428, 28 S. E. 236, and Pitts v. Maier, supra, while the title is conveyed by the instrument, or while the instrument has that effect, of placing the title in the grantee, a reconveyance of the property by deed from the vendee in the instrument, or compliance with section 2774 of the Code of 1910 (§ 3309 Park's Code), is necessary. The section of the Code just referred to (3309, Park's Code) is as follows:

"In all cases where property is conveyed to secure a debt, the surrender and cancellation of such deed in the same manner that mortgages are now canceled, on payment of such debt to any person legally authorized to receive the same, shall operate to reconvey the title of said property to the grantor, his heirs, executors, administrators, or assigns, and such cancellation may be en-

tered of record by the clerk of the superior court in the same manner that cancellations of mortgages are now entered."

Compliance with this section, as stated, will have the same legal effect as a reconveyance of the property.

It having been declared in these deeds from Benson to the bank that upon payment of the debt "this deed shall be null and void," this made the instrument simply a mortgage, so that upon the payment of the debt in full all rights of the Hartwell Bank in and to the property would be extinguished, without further action as between the parties. And that "cancellation" would only be what would be necessary in case of a mortgage to have it properly canceled on the records, makes it a very interesting question and probably a somewhat doubtful one, considering all of the decisions of the Supreme Court of the state.

There is a decision by the Georgia Court of Appeals (Owens v. Bridges, 13 Ga. App. 419, 79 S. E. 225), simply a headnote decision, the first headnote of which is as follows:

"A paper stipulating that the maker conveys certain described personalty to secure a debt, and that upon payment of the debt the creditor will reconvey the property to the debtor, is a bill of sale to secure a debt, and not a mortgage. The stipulation for a reconveyance of the property is not a defeasance clause, such as a provision that the instrument would be void upon payment of the debt. Upon payment of the debt a reconveyance can be compelled, but until this is done the instrument remains operative as a bill of sale, even though the debt is paid."

As will be seen, it is held that "the stipulation for a reconveyance of property is not a defeasance clause, such as a provision that the instrument would be void upon the payment of the debt." In the instruments now before the court we have the language that the instruments "shall be null and void" upon the payment of the debt in full, and that the instrument "shall be canceled."

My conclusion, after a thorough examination and consideration of the authorities, is that a provision that the payment of the debt shall render the instrument "null and void" ends the matter so far as the question now before the court is concerned. The additional requirement for the cancellation of the instrument would be no more than might be inserted in an ordinary mortgage without changing its character. That is to say, where a paper is clearly a mortgage and is to be rendered null and void by the payment of the debt, the adding of words providing for its cancellation would be no more than would be necessary to relieve it from its effects against the mortgagor on the records of the county.

The further language used in this paper, although it is called a deed, that it is "made expressly for the purpose stated and none other," viz., to secure Benson's debt to the bank, adds strength to the view that this paper was simply intended to create a lien on the property and no more.

My conclusion is that these papers from Benson to the bank are mortgages in legal effect, and create only a lien on the property in favor of the bank, and not a conveyance of title.

Having this view of the matter, it becomes unnecessary to con-

sider the further contention made here by the bank. It is urged that, even if the papers made by Benson to the bank be considered as conveyances of title, the act of the Legislature of Georgia of August 18, 1916, passed before this case is determined, would relieve the transaction of its usurious effect under the law in existence when the contracts were made. This recent act of the Legislature repeals what was known as section 2892, Code of 1910 (section 3442, Park's Code). That section provides that:

"All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void."

The act repealing this substitutes a provision providing for the forfeiture of the entire interest charged or taken in an usurious contract. It is claimed, on the authority of Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, even as understood and interpreted by the Supreme Court of Georgia in Maynard v. Marshall, 91 Ga. 840, 18 S. E. 403, that these transactions would not now be held to be void on account of the usury. But, as stated, it is unnecessary to discuss this latter feature.

A decree may be taken in accordance with what has been stated.

NEW YORK CENT. & H. R. R. CO. v. BANK OF HOLLY SPRINGS.

(Circuit Court, N. D. Mississippi, W. D. August 28, 1911.)

No. 457.

1. CARRIERS ⇐56—CARRIAGE OF GOODS—BILL OF LADING—TRANSFERS.

Where bills of lading to shipper's order for cotton were transferred to a bank, which had a lien on the cotton, the transfer, though the bills of lading were unindorsed, was a legal transfer of the cotton; that being the intention of the parties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 168; Dec. Dig. ⇐56.]

2. CARRIERS ⇐57—BILLS OF LADING—RIGHTS ACQUIRED—CLEARANCE.

A firm engaged in buying and shipping cotton delivered cotton to a compress company, which issued receipts to the sellers. The receipts were attached to checks on a bank payable to the sellers, and the bank paid the checks and received the receipts as security. The bank surrendered receipts for cotton which the firm shipped, and received bills of lading to which drafts drawn on the firm were attached, and the bank gave the firm credit therefor. The firm forged bills of lading, and on faith of their validity a third person honored drafts drawn on him by the firm. The compress company operated on the block system, so that it was impossible to identify the cotton shipped as the exact bales for which receipts had been issued. *Held* that, as the bank was always careful to retain sufficient receipts to cover its claims, though allowing the firm's agent to take the receipts to the compress company and obtain a clearance, or notice to the carrier that a given number of bales were ready for shipment, the bank had as against the carrier the superior right to the cotton, which cannot be defeated because the carrier delivered it to the third person pursuant to the forged bills of lading, for a bank receiving genuine bills of lading is not responsible for the frauds of shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 307; Dec. Dig. ⇐57.]

3. CARRIERS ⟸59—BILLS OF LADING—NEGOTIABILITY.
While the holder of a negotiable instrument circulating as money need not look beyond the instrument, and his right to enforce it will not be defeated by anything short of bad faith, a bill of lading, which is regarded as representing articles of merchandise in the possession of the carrier, stands on a different basis, though by transfer of the bill of lading there is a symbolic transfer of the property in the possession of the carrier.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 170–190; Dec. Dig. ⟸59.]

4. CARRIERS ⟸59—BILLS OF LADING—EFFECT OF SALE—FORGED BILL OF LADING.
Where a shipper, who delivered to a bank a genuine bill of lading with the draft attached, receiving credit therefor, uttered a forged bill of lading, which he transferred to a third person, the fact that the forged bill of lading with draft attached evidenced a sale, and as between the shipper and a third person might operate to pass title, will not defeat the bank's paramount title.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 170–190; Dec. Dig. ⟸59.]

5. CARRIERS ⟸57—BILLS OF LADING—CONVERSION—WHAT CONSTITUTES.
Where a railroad company delivered cotton to a holder of a forged bill of lading, refusing to make delivery to a bank, the holder of the genuine bill of lading with drafts annexed, the company was guilty of conversion, rendering it liable to the bank for the value of the cotton.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 307; Dec. Dig. ⟸57.]

In Equity. Suit by the New York Central & Hudson River Railroad Company against the Bank of Holly Springs, in which defendant filed a cross-bill. Decree for defendant.

On complainant's appeal, the decree was modified and affirmed. See 195 Fed. 456, 115 C. C. A. 358.

Henry Craft, of Memphis, Tenn., for complainant.
L. G. Fant, of Holly Springs, Miss., for defendant.

NILES, District Judge. Complainant's bill filed in this cause alleges that defendant, the Bank of Holly Springs, had heretofore sued the New York Central & Hudson River Railroad Company (hereinafter called the Railroad Company) in the circuit court of Marshall county, Miss., for the value of 200 bales of cotton, alleged to have been taken and carried by the Illinois Central Railroad Company from Holly Springs, Miss., to the point at which it was delivered to the complainant for carriage to New York City, its destination, where it was alleged complainant refused to deliver said cotton to the Bank of Holly Springs (hereinafter called the bank), notwithstanding the Bank presented bills of lading covering the said cotton and demanded delivery; that the value of the said cotton was $15,000; that the Bank was the holder for value and in due course of trade of said bills of lading covering the said cotton. The bill further alleges that this said suit was removed from the said circuit court of Marshall county, on petition of the Railroad Company, upon the ground of diverse citizenship, to the United States Circuit Court for the Western Division of the Northern District of Mississippi, on the law side thereof.

Subsequently the bill in this cause was filed as an original bill to enjoin the prosecution of the said suit at law, and to require the bank to come into this cause, and by cross-bill set up its claim to the said cotton, in order that the Railroad Company might, by answer to such cross-bill, set up its defenses, not pleadable at law. A writ of injunction was issued, restraining the Bank from any further prosecution of its suit at law, and requiring it to set up its claims by cross-bill in this cause. Whereupon the bank filed its answer and a cross-bill, and the Railroad Company answered the Bank's cross-bill, denying liability.

From this record in this cause, it appears: That Steel, Miller & Co., of Corinth, Miss., were engaged in buying and shipping cotton on a large scale, and had been so for some years, maintaining an office at Holly Springs, Miss., and in the years 1909 and 1910 in charge of one E. E. Hughes as their agent. That the bank agreed to finance their purchases of cotton at Holly Springs and vicinity during the cotton season of 1909-10, under the following arrangement:

The agent of Steele, Miller & Co. at Holly Springs, was to buy cotton brought in by wagon and have it placed in the warehouse of the Grenada Compress Company at Holly Springs, upon which compress warehouse receipts were to be issued to the sellers. These compress receipts were to be attached to a check drawn in the name of Steele, Miller & Co., by their agent, on the Bank of Holly Springs, payable to the sellers, and when presented to the Bank, if the number of bales of cotton was covered by receipts, the Bank would pay the check so drawn and hold the receipts as collateral security for the amount of the check. The said agent of Steele, Miller & Co. was also to buy cotton in neighboring towns and have it shipped to Holly Springs and delivered to the compress. Upon such cotton coming in by rail, bills of lading were issued at the shipping point to shipper's order, and these were attached to drafts drawn by the sellers of such cotton on Steele, Miller & Co. at Holly Springs. To pay these drafts, the said agent at Holly Springs would draw his check on the Bank, attaching thereto the said bills of lading which had accompanied the draft. The bank would then pay the checks, at the same time delivering the said bills of lading to the said agent, who would immediately take same to the compress and exchange them for warehouse compress receipts. These receipts were then turned over to the Bank, to be held by it as security for the money paid on the checks to which the bills of lading were attached. By this system the Bank always held compress warehouse receipts covering cotton regarded by the Bank as of ample value to protect it in its advances to Steele, Miller & Co.

Pursuant to this arrangement, and never deviated from in the entire course of business relations between the parties, on April 11, 1910, the agent of Steele, Miller & Co. notified the Bank that, upon instructions from his firm, he wished to ship out 200 bales of cotton, and requested the Bank to deliver him compress receipts covering a like number of bales, in order that he might surrender same to the compress company and obtain therefrom what is called a "clearance" for such 200 bales as he desired to ship. A clearance is understood to be a

notice in writing from the compress company to the railroad company, to the effect that the cotton therein described was in the compress warehouse in the name of Steele, Miller & Co., and would be shipped in accordance with statements therein as to shipper, consignee, marks, routing, destination, etc. Thereupon the Bank, in response to this request of Steele, Miller & Co.'s agent, on April 11, 1910, delivered to their said agent, for the purpose heretofore mentioned, compress receipts covering 200 bales of cotton, taking the receipt of the said agent therefor, who then surrendered the receipts to the compress company and received from it the clearance. This compress clearance was then taken to the office of the Illinois Central Railroad Company at Holly Springs, whose agent, upon the faith of the compress clearance, issued two bills of lading under date of April 11, 1910, to shipper's order, each covering 100 bales of cotton. The marks of the cotton in one were "A S T U" and in the other "A S O N," branded "STEELE," with the notation on the face of each, "Notify S. M. Weld & Co., 82 Beaver street, N. Y."

On the same day, April 11, 1910, Steele, Miller & Co.'s agent delivered to the Bank two drafts drawn by Steele, Miller & Co. on Steele, Miller & Co., at Corinth, Miss., respectively for $7,920.63 and $7,622.18, to which were attached the two bills of lading heretofore mentioned as issued by the Illinois Central Railroad Company, under date of April 11, 1910. As stated, the said bills of lading had been obtained in exchange for the compress warehouse receipts covering 200 bales of cotton which the Bank had surrendered to Steele, Miller & Co.'s agent, at his request, and for the express purpose of enabling him to make a shipment of the said cotton. It may be stated that the Grenada Compress Company operated its business under what is known as the "block system," under which it is impossible to know with any degree of certainty whether or not the compress receipts surrendered to obtain the said bills of lading were the identical receipts covering the cotton mentioned in the said bills of lading.

The Bank immediately credited on its books the account of Steele, Miller & Co. with these drafts and forwarded same for collection with the said bills of lading attached. On presentation of the drafts at the main office of Steele, Miller & Co. at Corinth, payment of same was refused, and the drafts, with the attached bills of lading, were returned to the Bank. As stated, the said bills of lading were drawn to shipper's order—that is, to the order of Steele, Miller & Co.—and were not indorsed by Steele, Miller & Co., nor their agent at Holly Springs, when delivered to the Bank, nor did they bear indorsement until after the dishonored drafts of Steele, Miller & Co., to which said bills of lading were attached, had been returned from Corinth, when the said bills of lading were indorsed: "Steele, Miller & Co., by E. E. Hughes, Agent."

Meanwhile the cotton had gone forward and reached New York over the line of the New York Central & Hudson River Railroad. Thereupon the bank presented the bills of lading held by it to the Railroad Company, and was advised by it that other bills of lading had been presented by S. M. Weld & Co., covering the 200 bales, and de-

clined to deliver the cotton on the Bank's bills of lading, but delivered the cotton to Weld & Co. on the bills of lading presented by Weld & Co. It is admitted that the bills of lading upon which Weld & Co. secured the cotton are fraudulent and fictitious, and that those held by the Bank are the genuine original bills of lading covering the cotton involved in this suit.

Steele, Miller & Co., about this time, were discovered to be hopelessly insolvent, to the extent that their liabilities over assets ran into the millions; that they were in fact guilty of such criminal practices in the conduct of their business that the entire membership of the firm were convicted of such, and are now inmates of the federal penitentiary at Atlanta, Ga.

The Bank contends for its right to recover the value of the cotton from the Railroad Company, and that its refusal to deliver the cotton is a conversion, and that it is a bona fide holder, for valuable consideration, of the two original and genuine bills of lading issued by the Illinois Central Railroad for the said cotton. The Bank, by its cross-bill, prays that complainant pay it the value of said cotton, to wit, $15,000, with interest at 6 per cent. per annum from date of conversion, and that out of the value of the said cotton and the interest thereon it be allowed the balance of its debt, together with a reasonable attorney's fee, and all the expenses and court costs of this litigation; the balance, if any, to be paid over to the trustee in bankruptcy of Steele, Miller & Co., to be applied to the debts of said Steele, Miller & Co.

[1, 2] The Railroad Company denies conversion of the cotton in question, and relies upon its delivery to S. M. Weld & Co. as being the lawful owner of same, and therefore a good delivery, and a sufficient answer to the claim of the Bank. The Railroad Company claims the right to set up in its own defense any and all rights and equities which S. M. Weld & Co. had in and to said cotton, contending that if Weld & Co. were entitled to the cotton, legally or equitably, the delivery to them was not wrongful, and for this reason the bank could not be heard to complain.

S. M. Weld & Co. is a partnership, the members of which are residents of the state of New York, and had been engaged in business in that city as cotton buyers and brokers for several years prior to 1910, during which time they had transacted business with Steele, Miller & Co. On March 21, 1910, Steele, Miller & Co. drew its draft for $38,572.70, from Corinth, Miss., upon the firm of Weld & Co., and attached thereto several alleged railroad bills of lading covering cotton. Among said bills of lading there were two bills of lading professing upon their face to have been issued by the Illinois Central Railroad Company, through its agent, J. H. Pinkston, at Holly Springs, Miss., dated March 18, 1910, each being a shipment order bill of lading, acknowledging receipt from Steele, Miller & Co. as shippers of cotton therein described. One of said bills of lading covered 100 bales of cotton marked "A S O N," and the other 100 bales of cotton marked "A S T U." Each 100 bales of cotton, according to the description contained in the bill of lading, were also branded "STEELE." Each

bill of lading also contained the following: "Notify S. M. Weld & Co., 83 Beaver street, New York, New York." The indorsement of Steele, Miller & Co. upon each of said bills of lading is the genuine indorsement of that firm.

S. M. Weld & Co., upon the faith and security of the two said bills of lading and the other bills of lading attached to said draft, did in good faith and without any notice whatever of any irregularity in the transaction on March 23, 1910, pay the draft of Steele, Miller & Co. for $38,673.70, of which amount $15,308.20 was paid upon the faith and security of the 200 bales of cotton professed to be covered by the said two bills of lading, marked "A S O N" and "A S T U." The said 200 bales of cotton, so marked and branded, were carried to the city of New York and placed with the German-American Stores in that city about April 25, 1910, that being a storage warehouse wherein the New York Central & Hudson Railroad Company was in the habit of storing its cotton shipments. S. M. Weld & Co. were notified by the Railroad Company of the arrival of the cotton as described in the bills of lading, and on April 29, 1910, Weld & Co. presented the said bills of lading to the Railroad Company and demanded the delivery of the said cotton before the presentation to it of any other bills of lading covering cotton of like mark and description. Between April 29 and May 3, 1910, the said 200 bales of cotton were delivered by the Railroad Company to Weld & Co.

Before the delivery of the said cotton Weld & Co. knew that trouble had arisen over Steele, Miller & Co.'s cotton shipments, and that it was claimed that there were duplicate bills of lading outstanding covering some of their shipments, and that the Bank of Holly Springs claimed to hold bills of lading covering this 200 bales in question; the Bank claiming to hold the genuine bills of lading, and that those which had been presented by Weld & Co. were forgeries. Attached to the said drafts which were paid by Weld & Co. was an invoice describing the cotton. The amount paid by Weld & Co. on said drafts upon the security of the 200 bales of cotton marked "A S T U" and "A S O N" was $15,308.20, or 15.21 cents per pound on 100,648 pounds. S. M. Weld & Co. had no other security for the money paid on said draft, other than the cotton supposed to be covered by the bills of lading, and the said draft was paid on March 23, 1910, in the regular and usual course of business, and Weld & Co. have been repaid no part of said money on said draft, or any interest thereon.

The Railroad Company delivered the 200 bales of cotton marked "A S T U" and "A S O N" to Weld & Co. at New York upon the surrender of the alleged bills of lading heretofore referred to, and the said bills of lading were then stamped canceled by said railroad; 182 bales of cotton had been delivered before any bills of lading were presented by the Bank of Holly Springs, but were still in the German-American Stores, as the property of Weld & Co., when the bills of lading held by the Bank were presented. The Railroad Company instituted replevin proceedings to recover these 182 bales, so that the respective claimants could intervene in such suit and settle the question of ownership; but subsequently Weld & Co. gave to

the Railroad an indemnifying bond to hold it harmless as between it and the Bank of Holly Springs, and said cotton was abandoned. After such bond was given, the other 18 bales of cotton were delivered to Weld & Co.

Complainant, having admitted the bills of lading upon which it delivered the cotton to Weld & Co. were fraudulent and fictitious and have no effect because they were forgeries, nevertheless contends they were valid and enforceable contracts, as between Steele, Miller & Co. and Weld & Co., to deliver the cotton to Weld & Co., thereby rendering Weld & Co. the true and lawful owners, unless the Bank have a superior title thereto, and the Bank must prove such superior title, and only as it proves its superior title to that of Weld & Co. can it complain of the delivery to Weld & Co. In support of complainant's contentions that Weld & Co. had a superior title to the cotton it is urged that the Bank is unable to identify a single bale of cotton covered by the bills of lading which it holds, and therefore its securities, by such loose methods of business pursued by the Bank, were so "swapped about and exchanged" as to place the record title and ownership of the 200 bales of cotton in Steele, Miller & Co., subject to the equities of Weld & Co. and of the Bank, and that the question resolves itself as to which party had the better equitable claim or lien.

In discussing this question, counsel for complainant starts out with the proposition that Steele, Miller & Co. were originally vested with the title to all the cotton stored in the compress warehouse for which compress receipts had been issued, because the Bank never claimed any interest in any of the cotton except as pledgee of the compress receipts. Therefore if the Bank was pledgee, Steele, Miller & Co. were the pledgors, and a pledge presupposes ownership and title. Continuing, if Steele, Miller & Co. owned the 200 bales of cotton to start with, they continued to own it, subject to the right of the Bank as pledgee of the compress receipts, and just when the receipts were pledged to the Bank does not appear, and further it was not shown that one bale of the 200 bales of cotton covered by the bills of lading was ever covered by a compress receipt. We do not think, even as the proposition is thus stated, the premises justify the conclusion; but under the proof the premises are not correct, as Steele, Miller & Co. were not vested with any title to the cotton, except that charged with the purchase money advanced by the Bank.

As to the charge of the "looseness" and unbusinesslike methods of the Bank in the conduct of its business with Steele, Miller & Co., the proof is conclusive that it was the reverse, as will be recalled from the testimony, nowhere contradicted, of the Bank's president, who states that during the cotton season of 1909–10 not a dollar was advanced to purchase cotton without receiving compress receipts therefor, that 5,975 bales were bought that season by Steele, Miller & Co., and that he received compress receipts calling for 5,975 bales. The most careful surveillance was maintained in all the transactions with the firm of Steele, Miller & Co., amounting to such a high degree of care as to indicate a certain uneasiness, if the ex-

treme limit of watchfulness was not constantly adhered to. Especially was this extreme care exercised when a shipment of cotton was to be made. As to the compress receipts covering the identical cotton called for in the bills of lading held by the Bank for the cotton in question, involving the use of the "block system," there is no merit in complainant's attack upon it.

It is clear even at this point of the discussion that the Bank had the better equitable claim to the cotton. In addition, however, the Bank received genuine bills of lading procured by Steele, Miller & Co.'s agent, who transferred same to the Bank (it matters not whether indorsed or unindorsed, as the intention was patent) in due course of business, in an open and above-board manner, which operated effectually as a legal transfer of the cotton, and vested the Bank with full title thereto. Where does the equity of Weld & Co. appear? Upon what basis can they come into court as against the Bank? They come with forged and fictitious bills of lading covering cotton which had been paid for by the Bank under time-honored and established methods of business, under all the safeguards known to successful banking and compress methods, with all the indicia and ownership of the cotton, and so recognized by Steele, Miller & Co. Can it be imagined that a forgery of title to something not in being can pass a superior title to that of a genuine transfer of a thing itself? Weld & Co. were simply swindled by this trio of criminal bankrupts composing the membership of the firm of Steele, Miller & Co., and induced, by artful means, to part with their money. Can there be any semblance of justice in protecting the parties swindled in this transaction at the expense of those who knew nothing, nor suspected anything, of the agreements and contracts between their customers and others thousands of miles away? Would it not be still a greater hardship to compel the Bank to carry the burden when such contracts were bald forgeries? Banks have neither the time nor facilities to investigate the genuineness of bills of lading, or the contracts between their customers residing in other states, and to hold them (the Bank) for fraud and mistakes of shippers would utterly destroy the negotiability of drafts and bills of lading attached. Lewis v. W. H. Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 890, 891, 119 Am. St. Rep. 994.

[3] Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential to enable them to perform the particular functions that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover. Friedlander v. T. & P. R. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991.

[4] Complainant's counsel, admitting the bills of lading held by Weld & Co. to be forgeries, nevertheless insists that they must be

treated, as between Steele, Miller & Co. and Weld & Co., as genuine, and must be governed by the same rule of law. Upon this basis an elaborate argument is advanced, supported by authorities, the weight of which is unquestioned. It can be readily admitted that, treating the forged bills of lading as genuine as between Steele, Miller & Co. and Weld & Co., they might be treated as a sale. The question of fact as to whether in any given case the title to the goods themselves was intended to pass by this symbolic delivery, the language of the written instrument and the nature and character of the contract would be considered, together with an accompanying invoice, and where the title is thus made evident no particular forms or formalities are called for.

Counsel deduces from the foregoing that, if the bills of lading originally forwarded to Weld & Co. by Steele, Miller & Co. had been genuine, and backed by cotton already delivered to the Railroad Company, payment of the drafts accompanying them by Weld & Co. would, as against Steele, Miller & Co. and all the world, excepting only persons having a title paramount to that of Steele, Miller & Co., have vested in Weld & Co. the title to the cotton, and an enforceable right to have the cotton delivered to them or their order by the transporting railroad company. Does a proper determination of the rights of the Bank against the Railroad Company in behalf of Weld & Co. depend upon the hypothetical proposition of what might be, or not be, had Steele, Miller & Co. been honorable traders, instead of commercial bushwhackers?

Neither does it assist in the consideration of this case that the federal courts have declared that bills of lading have a twofold character: (1) A receipt; and (2) contract to carry—and upon this to predicate that Steele, Miller & Co. appropriated, under the false bill of lading, the ownership of the cotton to Weld & Co. Complainant's counsel, proceeding in his argument, states that it has been held by the federal courts that when a bill of lading is issued by a railroad company's agent, without the receipt of the goods described, and the goods are thereafter delivered to the railroad company under circumstances evincing an intention to appropriate them to the bill of lading formerly issued, the title to the goods passes to the lawful holder of such bill of lading immediately upon the delivery of the goods to the carrier, so that the holder of the bill of lading can compel their delivery by the carrier; and, bearing upon the intention to subject and appropriate the goods thus subsequently delivered to the bill of lading, the court will consider invoices issued by the shipper, marks placed upon the cotton by the shipper, and other similar circumstances.

Counsel cites, among other authorities in support of the proposition preceding, the case of Hentz v. The Idaho, 93 U. S. 575, 23 L. Ed. 978, which he regards as so applicable to the facts of this case as to quote in extenso. We have carefully read this authority and fail to see wherein the facts resemble those of the case at bar. The principle of law is compelling, but fortified by the fact that genuine bills of lading are treated of, and bills signed by the carrier's agent. In

the case at bar the rights of Weld & Co. are based upon false, fraudulent, and fictitious bills of lading, and, in our opinion, counsel has builded his house upon the sands.

We do not deem it necessary to follow counsel further in the argument, in view of the court's position as advanced. Aside from those fraudulent and fictitious, the law as to the negotiability and transfer of genuine bills of lading has been the subject of endless discussion; but we think it well established that, for many purposes, bills of lading are representatives of the goods shipped, and the title to the goods, while they are in the possession of the carrier as bailee, may be transferred by the owner by means of transfer to a third person. This is the sense in which a bill of lading is said to be a negotiable instrument, but not in the same sense negotiable as promissory notes or bills of exchange; for the latter stand for money, which passes by delivery, by which the person receiving it gets a good title if acting in good faith, while the delivery of goods in general passes to the person receiving them no better title than that of the one from whom they are received. Shaw v. St. Louis Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892. It follows, then, that the transferee of a bill of lading has no higher title to the goods represented by it than the person by whom the transfer is made. National Commercial Bank v. Lackawanna Transp. Co., 59 App. Div. 270, 69 N. Y. Supp. 396; Shaw v. St. Louis Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892.

It is thus seen that in a general sense a bill of lading is negotiable, in that it may be transferred as representing goods. Moore v. Robinson, 62 Ala. 537; Nicholson v. Conner, 9 Daly (N. Y.) 275; Shaw v. St. Louis Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892; Munroe v. Philadelphia Warehouse Co. (C. C.) 75 Fed. 545; United States v. Delaware Ins. Co., 4 Wash. 418, Fed. Cas. No. 14,942. And the transfer of the bill of lading is not a transfer of the contract itself, but it is only a transfer of the goods represented by it. Cox v. Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97; Falkenburg v. Clark, 11 R. I. 278. The foregoing applies to genuine bills of lading, and from these principles it follows that, if the bill of lading is fictitious—that is to say, it does not represent any goods —then the transferee acquires no right under the transfer. Southern Express Co. v. Tupelo Bank, 108 Ala. 517, 18 South. 664; Jasper Trust Co. v. K. C. R. R. Co., 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75; Maybee v. Tregent, 47 Mich. 495, 11 N. W. 287; Tupelo Bank v. K. C. R. R. Co. (Miss.) 16 South. 572.

[5] In the case at bar, Weld & Co. parted with their money on the faith of fictitious bills of lading, representing no cotton, and consequently acquired no rights; on the other hand, the Bank held the genuine bills of lading representing the actual cotton, lawfully possessed by it, coming into its hands for a valuable consideration in due course of business, without the slightest suspicion of irregularity, and its claim to ownership firmly established. Weld & Co. in consequence, have no sort of claim, legal or equitable, to the cotton in controversy. This being so, the refusal of the Railroad Company

to deliver the cotton to the Bank was a conversion, and it became liable to the Bank for the value of the cotton, to wit, $15,000, to which is to be added 6 per cent. interest per annum from the date of conversion, together with the costs herein.

We come now to the question of attorney's fees. Being of the opinion, as herein expressed, that the Railroad Company is liable for the conversion of the cotton in question by its refusal to deliver same on the genuine bills of lading held by the Bank, to the full value of the cotton, with interest from date of conversion, the matter of attorney's fees can in no wise affect the Railroad Company, as the Bank could not, nor does it, ask the Railroad Company to pay its attorney's fee. Certainly it is well established by the federal decisions that attorney's fees are not recoverable as part of the damage for conversion or of trover; but, as stated, the Bank neither asks nor expects the losing litigants to pay the attorney's fees in this cause, but that it may be allowed out of the surplus of the recovery remaining after its debt is paid, the balance in its hands to be subject to the general creditors of Steele, Miller & Co.

The authorities sustain the Bank in this contention. "The pledgee has a lien on the property for every expense, including the attorney's fee, reasonably incurred by him in keeping and caring for the property pledged, protecting it against liens, taxes, and assessments, or otherwise protecting the pledgor's rights, in making sale for the enforcement of the pledge, in collecting choses in action, and other expenses incurred in rendering the pledged property available for the payment of his debt, although not for any expenses incurred by reason of his own wrongful act." 34 Cyc. 826, with authorities cited. By long-established mercantile usage, certain classes of bailees, such as banks and factors, have a general lien on the balance of the account for all property of the debtor pledged to them for the particular obligation. 31 Cyc. 821, with authorities cited. Under the facts and the law controlling in this case, the Bank should be allowed an attorney's fee, to be paid out of the value of the said cotton, and interest thereon. In this case, an attorney's fee of $1,125 would seem to be a reasonable one.

A decree should be entered directing the New York Central & Hudson River Railroad Company to pay the Bank of Holly Springs the value of said cotton, $15,000, with interest at the rate of 6 per cent. per annum from the date of its conversion; that the injunction heretofore granted in this cause be dissolved, and that out of the value of said cotton and the interest thereon the Bank of Holly Springs be allowed the balance of its debt, to wit, $11,025.97, with interest from August 1, 1910, at 8 per cent., together with an attorney's fee of $1,125; the balance, if any there be, to be paid over to the trustee in bankruptcy of Steele, Miller & Co. to be applied to the claims of the general creditors of the said Steele, Miller & Co.

M. C. KISER CO. et al. v. CENTRAL OF GEORGIA RY. CO. et al.

(District Court, S. D. Georgia. September 22, 1916.)

COMMERCE ⇐89—INCREASE OF RATES BY INTERSTATE CARRIERS—INJUNCTION.

Aside from the question of power, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, since its amendment by Act June 18, 1910, c. 309, § 12, 36 Stat. 551 (Comp. St. 1913, § 8583 [2]), authorizing the Interstate Commerce Commission to suspend a proposed new rate pending a hearing as to its reasonableness, a court will not interfere by injunction to restrain the enforcement of such a new rate, where the Commission, on application and after being fully advised, has refused to suspend it.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⇐89.]

In Equity. Suit by the M. C. Kiser Company and others against the Central of Georgia Railway Company and another. On motion for interlocutory injunction. Denied.

See, also, 158 Fed. 193.

The M. C. Kiser Company, the J. K. Orr Shoe Company, the Rice & Hutchins Atlanta Company, and the Gramling-Spalding Company, all corporations of Atlanta, Ga., on September 12, 1916, presented their petition in equity against the Central of Georgia Railway Company and the Ocean Steamship Company, to the District Court of the United States for the Eastern Division of the Southern District of Georgia, in which they alleged, in brief, that they were wholesale dealers in boots and shoes, doing business in Atlanta, Ga., and that the defendants were common carriers engaged, among other things, in the transportation of boots and shoes from Boston, Providence, and New York to Atlanta by water and rail, and that the defendants, along with other interstate carriers, under date of August 1, 1916, had issued and filed certain supplements to existing tariffs, whereby the then existing commodity rate of 95 cents per 100 pounds on boots and shoes from said Eastern cities to Atlanta would be withdrawn, and the first-class rate of $1.19 from Boston and Providence, and $1.14 from New York to Atlanta, ocean and rail, would become effective on September 15, 1916; that complainants, upon receipt of notice of the proposed advance, promptly filed their protest with the Interstate Commerce Commission, and prayed the Commission to suspend the operation of the new schedule of advanced rates until the reasonableness of the proposed rates could be determined by the Commission, as provided by law; that complainants were given an informal hearing on their protest before the suspension board of the Interstate Commerce Commission at Washington on August 31, 1916, in which hearing counsel for the carriers also participated; that thereafter, on September 7, 1916, the secretary of the Commission gave notice that the Commission had declined to suspend the proposed new rates protested against, but that its refusal to suspend carried with it no expression of approval, and was without prejudice to the right of any one to challenge in a formal proceeding the reasonableness of the proposed new schedules.

Complainants further alleged that the existing rate of 95 cents per 100 pounds had previously been passed upon and approved by the Interstate Commerce Commission at two or three different hearings, and that said rate had been in existence from April 1, 1910, and that complainants, in reliance upon the continuance of the existing rates, had made extensive investments in Atlanta, and had made contracts for the purchase of shoes to be shipped to Atlanta over the lines of defendants from Boston, New York, and Providence, and had also made contracts for the sale of these goods during the coming season, and that the proposed increase in rates would impose an additional freight burden of approximately $15,000 upon complainants, and that they would thereby, as well as in other respects, suffer irreparable injury and

damage. They alleged that the new rates were unreasonable, and that they had no adequate remedy at law, and they prayed that the defendants should be enjoined from putting in effect the proposed advanced rates, or altering the present status, until a full hearing and determination concerning the reasonableness of the rates should be had by the Interstate Commerce Commission.

A temporary restraining order was granted, and a rule was issued against the defendants to show cause on the 22d of September, 1916, why an interlocutory injunction should not issue against the defendants as prayed. At the hearing the defendants appeared and filed their response to the rule so served upon them, and also filed a motion to dismiss, and their answer to the petition.

Wm. A. Wimbish, of Atlanta, Ga., for complainants.

Lawton & Cunningham, of Savannah, Ga., and Charles D. Drayton, of Washington, D. C., for defendants.

LAMBDIN, District Judge (after stating the facts as above). The questions involved are of great importance, both to the complainants and to the common carriers. This is a petition brought by four wholesale boot and shoe dealers in the city of Atlanta against the Central of Georgia Railway Company and the Ocean Steamship Company, asking that the court shall enjoin the collection of the excess of the new rates which have recently been published by the defendants over the rates which have heretofore existed between Boston, New York, and other Eastern ports and Atlanta, pending a full hearing of the reasonableness or unreasonableness of the new rates by the Interstate Commerce Commission.

The Constitution of the United States vests the power to regulate interstate commerce in Congress. In 1887 Congress in pursuance of this power created the Interstate Commerce Commission, and the power to determine the reasonableness or unreasonableness of the rates of interstate carriers, and to decide whether they were discriminatory or not, is vested exclusively in this Commission. The particular rates involved here have been the subject-matter of litigation in court and of contests before the Interstate Commerce Commission for a period of something like ten years. The records in this and other similar controversies between the parties show that prior to 1905 the rail and water rate in force between the Eastern ports and Atlanta was $1.14 per 100 pounds, but that for a short time in the early part of 1905, on account of reasons which are in dispute, the carriers reduced their rates between the Eastern ports and Atlanta to 85 cents. In April, 1905, the carriers endeavored to increase this rate to 93 cents on carload lots, and $1.05 on less quantities, and thereupon a bill was brought by the M. C. Kiser Company and the J. K. Orr Shoe Company against the defendants and other common carriers in the United States Circuit Court for the Northern District of Georgia to enjoin the increase, and Judge Newman, on April 29, 1905, granted a temporary restraining order, and thereupon the affected carriers after due notice withdrew the notice of the advance, thereby leaving the 85-cent any-quantity rate in effect. This status continued for nearly three years, and until December 31, 1907, when Judge Newman after a hearing handed down an opinion in the case, to be found in 158 Fed. 193, directing that the existing rate should remain in force for a rea-

sonable time thereafter, so that complainants might present the matter to the Interstate Commerce Commission, in order to obtain from that body a determination of the reasonableness of the proposed rates. The Interstate Commerce Commission, I understand, has passed on the matter twice, once in 1909, and again in 1914 (see 17 I. C. C. Rep. 43, and 31 I. C. C. Rep. 154), in both of which cases it held that a 95 cents per 100 pounds rate was a just and reasonable any-quantity rate between the points in question. A petition for a rehearing was filed in both instances, and the matter has been practically in the continuous view of the Interstate Commerce Commission for the last eight or ten years. The last application for a rehearing of the rates fixed in 1914, was not finally decided, I believe, until July of this year.

The reasonableness of the rates in question has, therefore, been practically under the view of the Interstate Commerce Commission for the last eight years. The Commission has kept in constant touch with the situation, and has been constantly advised, by reason of these hearings and rehearings and application for rehearings on the subject, up to the present time. The carriers gave notice on August 1, 1916, that the published new schedule of rates would become effective on September 15, 1916. At once the petitioners here filed a protest with the Interstate Commerce Commission, and in connection therewith made an application for the suspension of these rates pending a full hearing on the subject. In that petition, which was full and elaborate, petitioners urged practically all of the points made by their present bill. This application to the Commission for a suspension of the rates is expressly provided for by the amendment of June 18, 1910, to section 15 of the Interstate Commerce Act, which is in the following language:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, that if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate * * * is just and reasonable shall be upon the common

carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Prior to the passage of that amendment several bills in equity had been filed in the different courts of the United States in cases where the carriers of the country had attempted to increase their rates, praying for injunction against the collection of the newly published rates, pending a full hearing before the Commission. The courts differed upon the power of the United States courts to entertain these bills. Some courts of high repute held that a court of equity had the power to enjoin the collection of the new rates pending a hearing; and other courts held to the contrary. They all, of course, held that the question of the reasonableness or unreasonableness of the rates is purely a matter of determination by the Interstate Commerce Commission, and that the conclusion of the Commission is final. The only difference on the subject was whether the courts had a right to interfere and to enjoin the collection of the rates pending a determination of this matter by the Interstate Commerce Commission. For the affirmative on this subject, see M. C. Kiser Co. et al. v. Central of Georgia Ry. Co. et al. (Circuit Court, Northern District of Georgia) 158 Fed. 193; Jewett Bros. et al. v. Chicago, M. & St. P. Ry. Co. (Circuit Court, Dist. South Dakota) 156 Fed. 160; Northern Pacific Ry. Co. v. Pacific Coast Lumber Mfrs'. Ass'n et al. (C. C. A., 9th Circuit) 165 Fed. 1, 91 C. C. A. 39. For the negative, see Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. (C. C. A., 4th Circuit) 178 Fed. 261, 101 C. C. A. 621; Atlantic Coast Line R. Co. v. Macon Grocery Co. et al. (C. C. A., 5th Circuit), 166 Fed. 206, 92 C. C. A. 114.

In this situation, with the courts holding divergent views as to their power as to this matter, Congress passed this amendment of June 18, 1910, which I have quoted above, which confers upon the Interstate Commerce Commission the power to suspend such rates or the enforcement of such rates until a full investigation on the part of the Commission. The point here involved is whether this remedy is exclusive or not—whether it ousts the United States courts of their general equity jurisdiction on that particular subject. The court is inclined to think the intention of Congress was to make the remedy provided by the amendment exclusive. As stated by the Supreme Court of the United States in the case of B. & O. R. R. v. Pitcairn Coal Co., 215 U. S. 481, at page 494, 30 Sup. Ct. 164, at page 169 (54 L. Ed. 292):

"In considering section 15 in the case of Interstate Commerce Commission v. Illinois Central Railroad Co., just decided [215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280], it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments (of 1906) add to the cogency of the reasoning which led to the conclusion in the Abilene Case [204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075] that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce."

The court does not think it necessary at this time, however, to decide the question whether this power is exclusively vested in the Interstate Commerce Commission by the amendment of 1910, or not. The power, however, to temporarily suspend the operation of a new schedule, pending a full hearing as to its reasonableness by the Commission, is now lodged with the Interstate Commerce Commission. It was an act of wisdom on the part of Congress to vest such power in the Interstate Commerce Commission, because that body is the most competent of all tribunals to decide the question whether new rates should be so suspended or not. If it should be considered that the power of the Commission on the subject is not exclusive, and that the power still remains in a court of equity to suspend, pending a full hearing by the Interstate Commerce Commission, this case presents the following situation:

Something like two years ago the carriers gave notice of an advanced rate between the same points, and a similar protest was then filed with the Interstate Commerce Commission by these same shippers, asking that the new rate be suspended pending an investigation by the Commission, and thereupon the rate was suspended by the Commission pending an investigation; and after a full investigation a decision was rendered in behalf of the shippers against the proposed advance in rates. In the case now before me, following their previous course, the shippers filed a protest with the Commission, making practically all the points they make in this bill, and asked for a suspension of the new rates, pending a full investigation of the subject. They voluntarily, on their own motion, invoked a hearing on the question by the Commission, and they obtained such a hearing, as far as the evidence discloses here, as was satisfactory to them. If the hearing which they secured was not satisfactory to them, doubtless, they could have obtained a fuller and more complete hearing before the board, by asking for same. At any rate, in the customary way, they went before this tribunal, which is vested with the power of determining the reasonableness or unreasonableness of rates, and of temporarily suspending newly filed rates, and invoked a ruling as to the suspension of the proposed new rates. That ruling turned out to be unfavorable to them, and now they come before this court, making the same points, and ask this court to decide the same question.

Inasmuch as they have already had one tribunal and a very competent one—one fully conversant with the subject and recently fully advised on the subject—to decide this question, the court hardly thinks that they should be permitted to experiment and come before another tribunal on the same question and invoke a ruling here. There is no good reason given here why the ruling of the Interstate Commerce Commission was not correct on the question. Nearly the entire argument addressed to the court here has been as to the power of the court to suspend the newly filed rates, and the reasons brought to the attention of the court as to why the new rates should be suspended are the same reasons which were addressed to the Interstate Commerce Commission, and this court is not disposed to reverse the ruling of that body. The power to suspend a proposed advance in rates, vested

by the amendment of 1910 in the Commission, is an administrative function, and in this sphere the court is inclined to think that the Commission is supreme. At any rate, when the Commission has acted in such a matter, the court should not substitute its judgment for that of the Commission. The question as to whether the court should enjoin the rates pending a full hearing, or not, would necessarily to a great extent turn on the Commission's opinion as to the reasonableness or unreasonableness of the new rates. This court cannot decide that question. It is not within its power to decide it, but such power is vested in the Commission exclusively.

Another reason urged before the court is that these shippers have made large investments, and have made contracts for the purchase and sale of goods on the basis of existing rates, and that they will suffer serious loss if these new rates are put into effect. On that question the court is of the opinion that these shippers made such contracts with their eyes open; they knew that the old rates expired by limitation on September 1st; they knew that there was a chance of the rates being raised, and therefore they took the chances in the matter; and I do not see that the fact that a hardship may be imposed upon them. when they took the chances in this way, should be considered by the court, especially in view of the fact that, if the Interstate Commerce Commission should hereafter determine that the new rates are excessive, the shippers would have the right to obtain reparation. Besides, the courts have no right to suspend a rate which is reasonable and lawful so far as the carrier is concerned on the sole ground that it would be burdensome to the shipper.

The order that is proposed to the court by the complainants here is that the carrier shall only collect 95 cents, and shall charge these four shippers and any other shippers that may be made parties to the bill with the difference between that rate and the rate hereafter to be determined by the Commission. Complainants urge that this would only be a matter of bookkeeping between the parties, and at the end, when a decision on the question is made by the Commission, the matter could then be readily adjusted; the shippers paying to the carrier such difference. The court is of the opinion that the rule can just as well be worked the other way; that is, that these shippers can do the bookkeeping. They can pay the new rates when put in effect, and charge the carriers with the excess of the new rates over the existing rates on all their shipments over the route involved, and if the decision of the Interstate Commerce Commission is favorable to them, they can then collect the difference from the carriers, just as well as the carriers could collect the difference from them. Under the allegations of the bill, the court is of the opinion, therefore, that they have an adequate remedy at law on the subject.

Viewing the case in its entirety, and in consideration of the fact that the Interstate Commerce Commission, under the power which was wisely given it by the amendment of June 18, 1910, has refused to suspend the rate, and in view of the rule that all doubts in the mind of the court shall be resolved in favor of the constitutionality of an act of Congress, and also that due effect should be given to the expression of

the legislative will, so as not to render same meaningless or ineffective, the court is compelled to decline the injunction, and to dissolve the restraining order heretofore granted.

Ex parte CHAN SHEE.

(District Court, N. D. California, First Division. October 27, 1916.)

No. 16094.

1. ALIENS ⊜25—CHINESE PERSONS—RIGHT TO ENTRANCE.
The wife of a Chinese merchant, domiciled in the United States, is on proof of that fact entitled to enter herself.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⊜25.]

2. HABEAS CORPUS ⊜120—DEPORTATION OF ALIENS—PROCEEDINGS.
Petitioner, a native of China, who sought admission as the wife of a Chinese merchant, was denied admission by the Immigration Bureau on the ground that the marriage was not satisfactorily established. Demurrer to her petition for habeas corpus being sustained, she appealed, and was admitted to bail pending appeal. While liberated, petitioner was again married to the Chinese merchant, her alleged husband, according to the laws of one of the United States. Thereupon a newly engaged attorney applied for a reopening of the case, that new proof of the marriage might be introduced. The bureau advised the local commissioner of immigration that it would not consent to reopening the case for additional evidence so long as the appeal was pending, but that petitioner might dismiss the appeal and take her chance on being able to show that a reconsideration of the case should be had. Subsequently the bureau notified the commissioner that it would consider the second solemnization of the marriage as warranting an inference that petitioner and the merchant were not husband and wife at the time of her arrival, that it would prefer that she should prosecute her appeal, and that a reopening of the case would not be granted. *Held* that, where the determination of the bureau not to reopen the case was not communicated to petitioner and she dismissed her appeal, the appeal being a valuable right, and petitioner being entitled to enter if she was the lawful wife of the Chinese merchant, her petition for a second writ of habeas corpus is not subject to demurrer, particularly as petitioner, if deported, might re-enter the United States.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 121; Dec. Dig. ⊜120.]

In the matter of the petition of Chan Shee for writ of habeas corpus. On demurrer to petition for writ. Demurrer overruled.

Francis H. Boland, of San Francisco, Cal., for petitioner.
John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The applicant, Chan Shee, came here from China in December, 1914, and sought admission to this country as the wife of Louie On, a resident Chinese merchant. She presented as evidence of her marriage the certificate (in Latin) of a Catholic missionary, at Canton. Having been denied admission for the sole reason that the Immigration Department was not satisfied that the marriage

relation existed, she petitioned this court for a writ of habeas corpus, and upon a hearing had a demurrer to the petition was sustained, and the petition denied. She was accompanied on her trip here by one Louie Sing, an alleged son of Louie On. He also was denied admission, and likewise applied to this court for a writ of habeas corpus, which application was denied. During the pendency of these proceedings on habeas corpus the court received the impression that Louie Sing was the infant son of the applicant, Chan Shee, and was a babe in arms. Though denying the petitions for the writs of habeas corpus, the court acting on the belief that this was the case of a young mother with an infant babe, admitted both Chan Shee and Louie Sing to bail pending an appeal from the order of denial. It having later been called to the attention of the court that Louie Sing was 19 years of age, and the alleged son of Louie On by a former marriage, the order admitting him to bail was set aside, and he has since been deported. The order admitting applicant, Chan Shee, to bail, however, was permitted to stand pending her appeal. An appeal was taken by her to the Supreme Court, which was later dismissed under circumstances hereinafter detailed. After her appeal was taken, applicant, having changed her attorney, was advised by her present attorney that she and Louie On might be married according to the laws of the state of California, and such a marriage was in fact solemnized, both before a justice of the peace and a Catholic clergyman. Armed with certificates showing these facts, applicant applied to the Immigration Bureau for a reopening of her case, in order that new proofs of her marriage might be introduced and considered. To this application the Bureau replied as follows:

"Of course, the Bureau will not consent to reopen this case for the purpose of receiving and considering additional evidence, with a view to showing that this woman is the lawful wife of Louie On, so long as the matter is pending in the courts. If counsel desire to terminate the court proceedings and take their chance (with no positive assurance that the matter will be reopened before this service) on being able to convince the department that a reopening and reconsideration of the case should be had, they are at liberty to do so. You may advise Attorney Boland, therefore, that the Bureau considers that the case, in its present stage, is in no respect within its jurisdiction, and it will give no consideration to a request for a reopening so long as it is pending before the courts; and it can only promise him, if it is withdrawn from the courts, it will give earnest consideration to any evidence he may have to offer in support of an application for a reopening and reconsideration of the case on its merits."

Subsequently, but before the appeal was dismissed, and while applicant was seeking to learn from the Bureau if she might be permitted to remain on bail pending the hearing of her application to reopen the case, the Bureau in a communication to the local commissioner of immigration made the following statements:

"Inasmuch as an attempt seems to have been made to alter the status of the woman by having her marry, while conditionally enlarged, the party claimed as her husband at the time she was an applicant for admission, from which fact it may be justly inferred these parties did not sustain the relationship of wife and husband at the time of her arrival, as claimed, the department would prefer that she prosecute the action which she has instituted (or which has been instituted in her behalf) before the courts to a final conclusion in the

event she is desirous of further contesting the authority of the department to deport her. Accordingly, action looking to a reopening of the case will not be taken."

Of this communication the following portion only was conveyed to the applicant in a letter from the commissioner to her attorney:

"The department would prefer that she prosecute the action which she has instituted (or which has been instituted in her behalf) before the courts to a final conclusion in the event she is desirous of further contesting the authority of the department to deport her."

The fact that the Bureau would regard the marriage ceremonies performed in this state in such a light that "it might justly infer from them that the parties did not sustain the relationship of wife and husband at the time of her arrival," although made known to the local commissioner, was not disclosed to the applicant, nor was the concluding statement of the Bureau's communication that, "accordingly, action looking to a reopening of the case will not be taken."

The only information that she received was that the department would prefer that she prosecute her action before the courts to a final conclusion. But she had been informed by a previous letter that:

The "Bureau will give no consideration to a request for a reopening of the case so long as it is pending before the courts; it can only promise, if it is withdrawn from the courts, it will give earnest consideration to any evidence he may have to offer in support of an application for a reopening and reconsideration of the case on its merits."

The statements as to the light in which her marriage in this state would be regarded, and the declaration that "action looking to a reopening of the case will not be taken," were not made in response to an application for a reopening of the case, but in response to a proposal by applicant's attorney that, if the court proceedings were dismissed (under which she was at liberty on bail by order of the court), she might be permitted by the Bureau to remain at large under bond pending the consideration of the application for reopening. If, as appears, the Bureau had made up its mind not to reopen the case for the reasons disclosed in its letter to the commissioner, the applicant should have been advised of that fact before her appeal was dismissed, instead of being advised simply that the Bureau would prefer that she prosecute her action in the courts to a conclusion. The local commissioner had the views of the Bureau before him clearly expressed. He communicated to the applicant the least material of them, withholding from her the Bureau's views as to the effect of her marriage in this state, and the Bureau's declaration that "action will not be taken looking to a reopening of the case." Notwithstanding the declaration that the Bureau would prefer that she prosecute her case to a conclusion, but relying on its promise that it would, if the case were withdrawn from the courts, "give earnest consideration to any evidence offered in support of an application for a reopening and reconsideration of the case on its merits," the applicant dismissed her appeal to the Supreme Court, and renewed her application to the Bureau for "a reopening and reconsideration of the case on its merits." This applica-

tion was denied, and in a memorandum for the Secretary, signed by the Commissioner General are found the following statements:

"The woman had arrived at San Francisco destined to her alleged husband, a Chinese merchant, and accompanied by an alleged son of said merchant by a former wife. Both applicants were rejected, and on considering their appeal the department affirmed the decision of the commissioner at San Francisco. Petition was then submitted to the District Court for a writ of habeas corpus, but was denied. The case was then taken up by an attorney different from the one that had handled it before the department, in an effort to have the matter reopened, in so far as the woman was concerned; but the Bureau advised the San Francisco office that, of course, it would not consent to a reopening of the case for the purpose of receiving and considering additional evidence, as long as the matter was pending in the court (an appeal having been noted by counsel from the decision of the District Court), but that, if counsel desired to terminate the court proceedings and take his chance, with no positive assurance that the matter would be reopened, he was, of course, at liberty to do so. Then the attorney proceeded to have a marriage ceremony performed between the woman and her alleged husband, whereupon the department advised the San Francisco office that 'inasmuch as an attempt seems to have been made to alter the status of the woman by having her marry, while conditionally enlarged, the party claimed as her husband at the time she was an applicant for admission before your office, from which fact it may justly be inferred these parties did not sustain the relationship of wife and husband at the time of her arrival, as claimed, the department would prefer that she prosecute the action * * * before the courts to a final conclusion, in the event she is desirous of further contesting the authority of the department to deport her. Accordingly, action looking to reopening of the case will not be taken.'

"Notwithstanding this plain intimation that the case would not be reopened, the attorney has discontinued the court proceedings and resubmitted his application for reopening and reconsideration of the case. He alleges that he did not have the marriage contracted with any ulterior motive, but 'on account of the proprieties.' The Bureau does not take any stock in this attempted explanation, and of course recommends that the application for reopening be denied, and that the San Francisco office be instructed to proceed with the alien's deportation. She has had ample opportunity before this department to establish her claims, and has failed; she has resorted to the courts, and failed again."

This memorandum is inaccurate, so far as it suggests that the marriage ceremony was performed after the application to reopen the case was made. As a matter of fact it antedated the application, and was the real reason upon which the application was based. But the memorandum does the applicant a greater injustice in its assumption that she was informed of the Bureau's attitude in regard to her marriage in this state, and was also informed of what the memorandum calls "a plain intimation that the case would not be reopened"; this being the construction placed by the memorandum upon the declaration that "action looking to a reopening of the case will not be taken." This memorandum was approved by the Secretary of Labor, and upon it the application to reopen the case was denied.

About to be deported, the applicant, in view of these later proceedings, was permitted by the court to file here another petition for a writ of habeas corpus, to which a demurrer has been interposed.

[1, 2] The case thus presented is an unusual one. The only reason why applicant was denied admission was because she was unable to satisfy the Immigration Bureau that the marriage relation really ex-

isted between her and the resident merchant, Louie On. If this relation were established, her right to enter this country would be beyond question. She was admitted to the soil of the country by the order of the court admitting her to bail, although the order excluding her still remained in force. During the period that she has been on bail—that is, from September 16, 1915, she has lived with Louie On as his wife, and has at all times claimed to be such. The gravest doubt about the integrity of their relations is the one cast thereon by the Immigration Department by its refusal to accept as sufficient her proofs of their marriage. For the purpose, as her attorney declares, of removing this cloud, she has placed their relations beyond question. That by so doing she violated any law, or any of the conditions of her bail, cannot be contended, although the order admitting her to bail was not made in contemplation of any such action on her part. Her case is not the case of one who has entered the country surreptitiously, or in defiance of law, and it may well be that, as the doubt as to her marriage was the only thing that excluded her, when that doubt was removed, she would be entitled to remain, if such doubt were removed without violating any law, or any of the conditions upon which she was permitted temporarily to land. Still the court is not prepared to say that the Bureau was not entitled to take the view that her marriage in this state was a "fact from which it may justly be inferred these parties did not sustain the relationship of wife and husband at the time of her arrival," although it might, with at least equal propriety, have placed upon this marriage the other construction that it was consummated for the purpose of setting at rest any doubt as to the fact that she and Louie On were, as they constantly insisted, husband and wife. The fact that the Bureau took the above view of the marriage ceremonies performed in this state is most material when we consider that in the final denial of the application to reopen her case it was, no doubt inadvertently, assumed that this view, together with the Bureau's statement that "action looking to reopening of the case will not be taken" was communicated to applicant before she procured her appeal to the Supreme Court to be dismissed. The right to appeal is a valuable right, and no one is in a position to say what would have been the result if applicant had prosecuted her appeal to a conclusion. It cannot be said that the Bureau encouraged applicant to dismiss her appeal. On the contrary she was advised:

"That the department would prefer that she prosecute the action before the courts to a final conclusion in the event she is desirous of further contesting the authority of the department to deport her."

If this were all, applicant might not be in a position to complain of the action of the department in refusing to reopen her case after the dismissal of her appeal. But when this refusal is based upon the unwarranted assumption, as is evident from the records of the department itself, that before her appeal was dismissed she was informed that the evidence of her marriage in this state, which she desired to offer as proof of her right to enter, was regarded by the department as proof that she had no such right, and that the department had declared that "action looking to a reopening of the case will not be taken," I

cannot but feel that she has not been accorded that fair hearing upon her application, to which she is entitled under the law.

The demurrer to the petition must therefore be overruled. I have less hesitancy in entering this order, because I am convinced that, if applicant were at once deported under the original order, she could return upon the same boat, with full right to enter as the unquestionable wife of a domiciled merchant. The facts as stated herein are gathered from the petition itself, and the records of the Immigration Department, which, by stipulation, have been made a part thereof.

The demurrer to the petition is therefore overruled, and the writ will issue as prayed for, returnable October 30, 1916, at 10 o'clock a. m.

JONES v. SOUTHERN RY. CO.

(District Court, N. D. Georgia. October 24, 1916.)

No. 245.

REMOVAL OF CAUSES ⟸3—JOINDER OF CAUSES—ACTION UNDER EMPLOYERS' LIABILITY ACT.

Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (Comp. St. 1913, §§ 8657–8665), providing that no cause of action arising under this act and brought in a state court shall be removed to a federal court, applies where, under the facts alleged, such act must control in the case, though in addition to the count in terms under such act is one concluding that the cause of action is based on and brought under the laws of the state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸3.]

At Law. Action by Harvey Jones against the Southern Railway Company. Case remanded to state court.

Reuben R. Arnold, Hal Lindsay, and Troutman & Troutman, all of Atlanta, Ga., for plaintiff.

McDaniel & Black and Edgar A. Neely, all of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a motion to remand. The case was removed from the superior court of Fulton county, Ga., by the defendant, the Southern Railway Company. The suit is brought by an employé for personal injuries alleged to have been received by him while in the discharge of his duties as switchman in the defendant's yards in this state and county.

There are two counts in the declaration. The first count concludes by saying:

"This cause of action is based upon and brought under the laws of the state of Georgia in such cases provided."

In this first count, however, which is brought under the state law, it is alleged that the defendant is—

"a common carrier by rail, doing business and operating within and through said state and county, and engaged in interstate commerce in said business."

It is further alleged in this count that:

"At the time said injuries were inflicted upon petitioner by defendant, as hereinafter set out, said car with the defective pin lifter was being used by defendant in connection with its business, and on its railroad tracks which are a part of its highway of interstate commerce, over which defendant hauls and carries commodities and passengers to and from one state and another."

The second count in the declaration is brought clearly and in terms under the Employers' Liability Act of Congress. It is therein alleged that:

"Defendant is a common carrier by rail, doing business and operating within and through said state and county, and engaged in interstate commerce in said business."

And further that:

"At the time petitioner was in the performance of his duties about said cars as aforesaid, said cars were being used and handled by defendant on its tracks and lines which are a part of its highway of interstate commerce, over which defendant hauls and carries commodities and passengers to and from one state and another, as a common carrier by rail."

There are other allegations to the same effect, but undoubtedly the cause of action stated in the second count in the declaration is under the Employers' Liability Act of April 22, 1908 (35 Stat. 66), as amended April 5, 1910 (36 Stat. 291).

Cases brought in the state courts under this Employers' Liability Act are not removable. The amendment of April 5, 1910 (Comp. St. 1913, § 8662), supra, provides that:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no [cause of action] arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

There is a motion to remand on the ground that this case is brought under the Employers' Liability Act of Congress and consequently is not removable.

The question involved here has been before the District Courts several times. The first case directly and squarely in point was the case of Ullrich v. New York, N. H. & H. R. Co., 193 Fed. 768. The opinion in this case is by District Judge Hand, of the Southern District of New York, and at the end of the opinion it is stated that:

"District Judges Holt and Hough have both read the foregoing opinion and agree with the conclusion reached."

Perhaps the headnotes will state in sufficient detail what was decided in the opinion. They are as follows:

"Employers' Liability Act, § 6, provides that an action may be brought for injuries to, or death of, employés within such act in a Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action, but that the jurisdiction of the courts of the United States shall be concurrent with those of the several states, and no case arising under the act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. Held that, where an action under such statute is brought in a state court, it is not removable in spite of the diversity of citizenship of the parties.

"Where the facts pleaded in the complaint in an action for death of a servant showed a cause of action under Employers' Liability Act, § 6, and also a cause of action under Labor Law N. Y. (Consol. Laws 1909, c. 31) § 200 et seq., and a cause of action at common law, it was nevertheless a 'cause arising' under the Employers' Liability Act, and, having been brought in the state court, was not removable as provided by Employers' Liability Act, § 6, notwithstanding the existence of diversity of citizenship, and the fact that, if it had stated a cause of action at common law or under the New York statute, it would have been removable."

The second case is decided by Judge Ray of the Northern District of New York. His ruling agrees with that of Judge Hand, and after stating his reasons, which appear in the opinion, he granted a motion to remand. Rice v. Boston & M. R. R., 203 Fed. 580. Though there were no definite counts in the case before him, it was one which stated, as I understand it, three causes of action, one under the federal act, one under the common law, and one under a Massachusetts statute.

Another case was decided by Judge Ray in the Northern District of New York. Peek v. Boston & M. R. R., 223 Fed. 448. In the decision in this later case Judge Ray says:

"If this complaint contains two causes of action, one under the federal Employers' Liability Act and one under the state law, the federal Employers' Liability Act controls, as both plaintiff and defendant were engaged in interstate commerce, and, Congress having legislated on the subject, the federal statute is paramount. The federal statute controls the liability and right of recovery"—referring to several authorities, among them Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

The cases taking the contrary view of this law are, first, the case of Strother v. Union Pac. R. Co. (D. C.) 220 Fed. 731, decided by District Judge Van Valkenburgh of the Western District of Missouri. The ruling in this case, quoting the headnotes, is:

"Within Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (Comp. St. 1913, § 8662), providing that no case arising under that act and brought in any state court shall be removed to any court of the United States, 'case' means cause of action; and this is true, though the petition in the same count states facts disclosing a good cause of action under a state statute or at common law.

"Under Employers' Liability Act, § 6, where a petition contained two counts stating causes of action under that act and under the state law for the death of an employé, and the necessary diversity of citizenship existed to make the cause of action under the state law removable, defendant could remove such cause of action, without waiting until plaintiff elected at the trial to rely on the cause of action under the state law, and such removal carried the entire case with it, as the provision against removal of causes under the Employers' Liability Act is a privilege which plaintiff may waive, and defendant could not be deprived of its right to remove the cause of action under the state law by the joinder of the irremovable cause of action.

"Where the right to remove a case which has been removed to the federal court is doubtful, the federal court will retain jurisdiction."

Judge Van Valkenburgh says in his opinion:

"It rests with the plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of

being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it. Sharkey v. Port Blakely Mill Co. (C. C.) 92 Fed. 425."

Judge Munger, of the District Court of Nebraska, in Flas v. Illinois Cent. R. Co. (D. C.) 229 Fed. 319, takes the same view as Judge Van Valkenburgh in the case last cited. He says this:

"The 'case' referred to is what plaintiff makes it, in good faith, by his petition. Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608. Because his good faith is presumed, it has been held that a single count, which states facts sufficient to make a case either under the act of Congress or under the state statutes and common law, states a case arising under the act of Congress. Ullrich v. New York, N. H. & H. R. Co. (D. C.) 193 Fed. 768; Rice v. Boston & M. R. R. Co. (D. C.) 203 Fed. 580.

"In the pending case, the plaintiff's petition announces his intention to proceed either under the act of Congress or independently of it, as he elects. The action, therefore, cannot be said to arise under the Employers' Liability Act, for but a portion of it so arises. This would be entirely clear, had plaintiff joined in his petition, as he is permitted to do by the Nebraska statute, causes of action against the same defendant for personal injury arising under the Employers' Liability Act of Congress, for trespass upon plaintiff's property and for other injuries to plaintiff at another time and place, and not arising under the act of Congress; but it is not less clear that this plaintiff has presented two distinct and separate causes of action, upon either of which he may elect to proceed, and but one of which arises under the act of Congress.

"The prohibition of removal mentioned in section 6 of the Employers' Liability Act is limited to cases which purport, by the plaintiff's petition, to arise under that act; and when, to a cause of action arising under that act, there is joined one which does not purport to arise under that act, the prohibition does not apply. Strother v. Union Pac. R. Co. (D. C.) 220 Fed. 731; Patterson v. Bucknall S. S. Lines (D. C.) 203 Fed. 1021."

There are other cases somewhat in point, but not so directly upon the precise question presented here as those to which I have referred. These are Van Brimmer v. Texas & P. Ry. Co. (C. C.) 190 Fed. 394, decided by District Judge Russell, in the Eastern District of Texas; Symonds v. St. Louis & S. E. Ry. Co. (C. C.) 192 Fed. 353, decided by Judge Youmans in the Western District of Arkansas; Lee v. Toledo, St. L. & W. Ry. Co. (D. C.) 193 Fed. 685, decided by Judge Wright of the Eastern District of Illinois.

In the Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, in the opinion by Mr. Justice Van Devanter this is said, in speaking of this law:

"And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

And in Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 493, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, in the opinion Mr. Justice Pitney says:

"But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases, supra."

It would seem that the Employers' Liability Act is the law which must control in this case, when tried in either the state or federal court, under the facts alleged; and, that being so, the same is not removable.

Counsel for defendant has urged that the fact that here there are two separate counts in the declaration differentiates this case from the New York cases. I cannot agree with this contention. In the New York cases there were, as stated there, different "causes of action" in the same case. So that the difference in the way the cases are brought would not be material so far as this question is concerned.

I think, without going further with the reasoning, that this is clearly a nonremovable case. Consequently an order may be taken remanding the same.

THE NATCHEZ.

(District Court, E. D. Louisiana. July 12, 1916.)

No. 15221.

1. MARITIME LIENS ⊜31—REPAIRS—ADVANCES BY STOCKHOLDERS OF CORPORATION OWNER.

The stockholders of a corporation which is the owner of a vessel are not entitled to a maritime lien for money advanced to the corporation to make repairs as against third persons who furnish work and material in making the repairs.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 40; Dec. Dig. ⊜31.]

2. COMMERCE ⊜80—STATUTORY LIENS—FOREIGN VESSELS.

A state law cannot give a maritime lien on a foreign vessel.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⊜80.]

In Admiralty. Suit by the Alex Dussel Iron Works and others against the steamer Natchez. On exceptions to report of commissioner. Sustained in part.

Andrew M. Buchmann, of New Orleans, La., for libelant Dussel Iron Works.

Carsten Torjusen, of New Orleans, La., for intervener Estate of John Laskey.

Carsten E. Torjusen, of New Orleans, La., for intervener Estate of Morris Waller.

Rice & Montgomery, of New Orleans, La., for intervener Ahrens & Ott Mfg. Co.

Farrar, Jonas, Goldsborough & Goldberg, of New Orleans, La., for claimant Natchez Transp. Co.

Rice & Montgomery, of New Orleans, La., for intervener Frerichs Lumber Co.

Rice & Montgomery, of New Orleans, La., for intervener Monongahela River Consol. Coal & Coke Co.

H. W. Robinson, of New Orleans, La., and Frederick B. Freeland, for intervener Widmer Electrical Engineering & Const. Co.

James E. Zunts, of New Orleans, La., for intervener Dibert, Bancroft & Ross Co., Limited.

Burt W. Henry, of New Orleans, La., for intervener Woodward-Wight Co.

James E. Zunts, of New Orleans, La., for intervener H. W. Johns-Manville Co.

Alfred C. Kammer, of New Orleans, La., for intervener Chas. E. Levy.

John D. Grace, of New Orleans, La., for intervener Wm. A. Duke.

Alfred C. Kammer, of New Orleans, La., for intervener M. Levy & Sons

FOSTER, District Judge. This is a libel in rem by the Alex Dussel Iron Works against the steamer Natchez for repairs. Various other persons have intervened, asserting similar liens. The boat was seized by admiralty process, and, the owners failing to bond, she was sold by the marshal under a writ of venditioni exponas, and the proceeds deposited in the registry of the court. The matter was then referred to a commissioner to take the proof on the various claims, amongst which appear the following: W. A. Duke, $1,347; Charles E. Levy, as assignee of Henri Bernard, $335; and M. Levy & Sons, $500. In due course the commissioner reported, finding in favor of libelant and other materialmen, reducing the claims of Duke and Charles E. Levy to $1,118.50 and $269.50, respectively, and rejecting the claim of M. Levy & Sons entirely. The commissioner's report as to the other claims is not excepted to, but libelants and other interveners object to the allowance of anything to Duke, Charles E. Levy, or M. Levy & Sons. M. Levy & Sons except to the rejection of their claim, but Duke and Charles E. Levy are satisfied with the amounts awarded them.

The material facts are these: The steamer Natchez was bought in 1902 for $14,500 at a marshal's sale by the Natchez Transportation Company, a Mississippi corporation, of which W. A. Duke, Jonas H. Levy, and the estate of W. G. Coyle are the sole stockholders. Duke was captain of the boat and president of the company, Levy, a director. The capital stock was divided into 400 shares. Of these Duke owned 114, Levy, 133, and the estate of Coyle, 153. The Natchez ran between New Orleans and various other points on the Mississippi river, but from November, 1911, was laid up for about two years. The stockholders of the company then concluded to repair her and put her in commission. The corporation had not a cent in the treasury, and no assets except the Natchez. A meeting of the board of directors, at which Duke, Jonas Levy, and representatives of the Coyle estate were

present, was held, and Duke was authorized to spend approximately $9,000 to $10,000 on the repairs, and it was agreed that the stockholders would each contribute his proportion of the expense. The work was proceeded with, but the only amounts contributed by the stockholders towards paying for it were $940.95 by the estate of Coyle, $500 by Jonas Levy, and $1,347 by Duke. At the sale under the proceeding in this court, the Natchez sold for $6,500, which, after deducting costs, leaves $5,986.05 available for the payment of debts. Against this there are claims amounting to $9,957.25. Deducting the claims herein in controversy, the total claims filed amount to $8,068.75, which would give the materialmen about 75 per cent. of their claims. When sold in this case the Natchez was bought in by the Merchants' Transportation Company, a corporation of which M. Levy & Sons and W. A. Duke are stockholders. Duke is again captain under the new ownership. The estate of Coyle makes no claim for the money advanced by it.

Claim of Duke.

[1] It must be conceded that the amount advanced by Duke was properly used for necessary repairs, and, had it been loaned by a third person on the credit of the vessel, would have entitled him to a lien equal in rank with those of the materialmen. It is contended by the opponents, however, that as an individual owning the boat and advancing money for her repairs would have no lien, Duke, as president of the company and a stockholder, is in no better position, as he is virtually a part owner. In support of this they rely on the cases of The Murphy Tugs (D. C.) 28 Fed. 429; The Queen of St. Johns (C. C.) 31 Fed. 24; The Cimbria (D. C.) 214 Fed. 131. Counsel for Duke, however, cites to the contrary the case of The City of Camden (D. C.) 147 Fed. 847, and various cases dealing with loans to corporations by stockholders and officers, but none of which involve maritime or other secret liens. Doubtless in some situations a stockholder or an officer of a corporation may equitably acquire a lien on the corporate property superior to creditors. And perhaps the part owner of a vessel may be sometimes equitably preferred as against his co-owners, or others not having maritime liens; but as to this no opinion is called for by the facts in this case, and I express none.

In this case the corporation was organized merely for the purpose of owning and operating the boat. The corporation was dormant and the boat laid up. It had no other assets and presumably no debts. If it had been liquidated and the boat sold, Duke would have received his proportion of the purchase price. If, on the other hand, they elected to run the boat, it was incumbent on the stockholders to furnish the money to pay for the repairs. The informal agreement for each stockholder to stand his proportion of the expense was tantamount to an assessment on the stock, and any money advanced could be hardly considered a loan to the corporation. But beyond this the stockholders were the real owners of the boat, though the legal title was in the corporation. When the materialmen were requested to furnish supplies and repairs, they had the right to expect payment from the own-

ers, and not be forced to seize and sell the boat, except as a last resort. Courts of admiralty administer the broadest equity, and in these circumstances it would be inequitable to the last degree to grant a secret lien to the virtual owners of the vessel to the prejudice of the materialmen because of the legal fiction of her ownership by a corporation. These conclusions are supported by the cases of The Murphy Tugs, The Queen of St. Johns, and The Cimbria, supra, which I prefer to follow rather than the decision in The City of Camden. The other decisions relied on by the commissioner I do not consider applicable to the facts of this case.

Claim of M. Levy & Sons.

The commissioner was clearly right in rejecting the claim of M. Levy & Sons for want of evidence to support it. All of the facts in the record tend to show that the money was advanced by Jonas Levy, a member of the firm, who makes no claim, and is a stockholder of record in the same position as Duke. Furthermore, there is much to indicate that M. Levy & Sons are the real owners of the stock standing in the name of Jonas Levy. It was so stated in argument, and not denied, though claimant has been afforded the opportunity to adduce additional proof on the subject.

Claim of Charles Levy.

[2] Charles Levy is a member of the firm of M. Levy & Sons, and if the firm is the real owner of the Jonas Levy stock, of course the same objection would apply to his claim as to that of Duke. But in addition he claims as the subrogee of a watchman employed while the boat was laid up. It may be considered settled that a watchman under such circumstances has no lien under the general maritime law, or the act of June 23, 1910 (Act June 23, 1910, c. 373, 36 Stat. 604). The Sinaloa (D. C.) 209 Fed. 287; The John T. Moore, Fed. Cas. No. 7,430. Innumerable other cases to the same effect might be cited. Claimant, however, relies on article 3237 of the Civil Code of Louisiana as giving a lien for such services, and not superseded in this particular by the act of June 23, 1910. But state laws do not create maritime liens on foreign ships. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770.

For these reasons, the exceptions of M. Levy & Sons to the commissioner's report will be overruled, and the exceptions to allowance of the claims of Duke and Charles Levy will be maintained and the said claims rejected.

There will be a decree accordingly.

SCLARENCO v. CHICAGO BONDING CO.

(District Court, W. D. Kentucky. November 1, 1916.)

1. COURTS ⟸366(25)—UNITED STATES COURT—STATE DECISIONS—BONDS—LIABILITY.

The decisions of the state court establish the liability of sureties on a constable's bond executed under a local statute; such decisions being binding on the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. ⟸366(25).]

2. SHERIFFS AND CONSTABLES ⟸170—BONDS—SURETIES—LIABILITY OF.

The surety on the official bond of a Kentucky sheriff or constable is liable only for compensatory, and not punitive, damages for the officer's breach of duty.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 409–413; Dec. Dig. ⟸170.]

3. COURTS ⟸280—JURISDICTION—RIGHT TO RAISE QUESTION.

Under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), providing that, if any suit commenced in a District Court or removed thereto, shall appear to the satisfaction of the court, at any time after suit has been brought, not to substantially involve a dispute or controversy properly within the jurisdiction of the District Court, or the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable or removable, the District Court shall dismiss the suit or remand it to the court from which it was removed, as justice may require, the federal District Court may, when led to believe or suspect that it has not jurisdiction of the action, itself raise the question of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⟸280.]

4. COURTS ⟸280—JURISDICTION—DETERMINATION.

Under such act the court, after hearing testimony on the question, may itself find the specific facts relating thereto, or may in its discretion submit the testimony to the decision of the jury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⟸280.]

5. COURTS ⟸328(2)—FEDERAL COURTS—JURISDICTION.

A constable wrongfully levied execution on a stock of groceries owned by plaintiff, retaining possession for about 40 hours. The stock was of the value of $600, and the demand for which execution was levied was less than $30. Plaintiff sued on the constable's bond in the federal District Court, claiming $4,000 damages. *Held* that, as only compensatory damages are allowed in suits on constables' bonds, the action should, under Judicial Code, § 37, be dismissed, for plaintiff could have had no reasonable expectation that she had the right to recover, or could recover any amount within the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⟸328(2).]

At Law. Action by Clara Sclarenco against the Chicago Bonding Company. There was a verdict for defendant. On motion for new trial. Motion granted.

W. C. Madden and Ben Chapeze, both of Louisville, Ky., for plaintiff.

Furlong, Woodbury & Furlong and Dallam, Farnsley & Means, all of Louisville, Ky., for defendant.

EVANS, District Judge. In this action the plaintiff, a citizen of Kentucky, sued the defendant, a citizen of Illinois, to recover upon a liability alleged to have been incurred by it as surety on the official bond of L. H. Roberts, a constable of Jefferson county, Ky. The provisions of the bond conform to the statutes of the state, and particularly in the stipulation that the constable "shall faithfully and truly execute and perform all the duties of said office," the only stipulation in the bond which is important in this case. Roberts, the principal, was not sued, as he is a citizen of Kentucky, and making him a defendant would, of itself, have ousted the court's jurisdiction.

The basis of the action, as stated in the petition, is that Roberts, the constable, had in his hands for service an execution against Herman Sclarenco, husband of the plaintiff, which was issued by a justice of the peace of Jefferson county, and that the constable, through his deputy, levied the execution upon plaintiff's stock of groceries at 5:30 p. m. on Saturday, October 9, 1915, took possession of the property so levied upon, and closed the storehouse containing it, but that on the following Monday at 9:30 a. m. the property was restored to the plaintiff.

Plaintiff claims that the property levied on was hers, and not her husband's, and has upon that ground brought this action, laying her damages at $4,000, which, of course, prima facie gave the court jurisdiction, and no question was raised on that subject by the defendant in the answer. The plaintiff, in her petition, however, significantly omitted to show the quantity, character, or value of the property, or to make the statement that the execution issued by the justice of the peace and levied on her property was upon a judgment for $28.95, besides interest and costs.

At the trial before the jury, after hearing the plaintiff's own testimony to the explicit effect that the entire stock of groceries levied on was worth no more than $600, that some parts of it were perishable, while others were not, that the perishable parts were greatly injured, perhaps to the extent of $200 or $300, and that all of them were out of her possession for only about 40 hours, including one holiday, the court, on its own motion, raised the question of jurisdiction.

[1, 2] The action is against the surety, and not against the constable. In such cases the law of Kentucky must govern us as to the criterion of recovery, inasmuch as the bond sued upon is one executed by a Kentucky officer under a Kentucky statute, and any contract features of it were created under the statute of that state. Sheriff's bonds in Kentucky, so far as this case presents the question, are altogether analogous to those of a constable, and the construction of such contracts or bonds by the Court of Appeals of Kentucky furnishes the rule by which we must be governed. That court has clearly established the proposition that only compensatory damages, and not punitive damages, can be recovered from a surety on a sheriff's bond. Johnson v. Williams, Adm'r, 111 Ky. 289, 63 S. W. 759, 23 Ky. Law Rep. 658, 661, same case, 54 L. R. A. 220. While we, as we have seen, are to be governed by the construction put upon such bonds by the Court

of Appeals of Kentucky, and by the rule it has established, it may not be improper to remember that the general rule seems to be in harmony with that announced in the case referred to.

[3-5] As we have stated, the court itself raised the question of jurisdiction. As this was an action by a citizen of Kentucky against a citizen of Illinois doing business in this state, the jurisdictional amount is fixed by the statute of the United States at a sum exceeding $3,000, exclusive of interest and costs. While, of course, the court knows, and must take judicial notice of, the law of Kentucky (Ky. Stats. § 1086) limiting the jurisdiction of a justice of the peace to a sum greatly less than $3,000, namely, $100, nevertheless there was nothing said in plaintiff's petition indicating the amount of the judgment upon which the execution was issued. The plaintiff did use the word "malicious"; but, taking the allegations of the petition as a whole, this was a mere epithet, and in no way indicated any state of facts upon which the epithet could be justified. Indeed, the action is altogether ex contractu, and it is obvious from the testimony that, if the entire stock of groceries had been taken and permanently kept, a proper ruling as to the measure of damages would not have entitled plaintiff to recover over $600, the full value, as she testified, of the stock itself in its entirety. It thus became manifest that there could not possibly have been any reasonable or intelligent expectation by the plaintiff that she could recover an amount in excess of $3,000, exclusive of interest and costs, nor, indeed, in excess of $600, giving her the most extreme latitude.

This situation brought into view section 37 of the Judicial Code, which is but a re-enactment of a similar provision that has been in the statutes of the United States since the Judiciary Act of 1875. That section reads as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This statutory provision has been the subject of consideration in many cases, and especially by the Supreme Court of the United States. The following general propositions have been clearly settled:

1. When the court, during the progress of a trial, is led to believe or to suspect that it has not jurisdiction of the action because it does not really involve a jurisdictional controversy, it may itself raise the question of jurisdiction.

2. After hearing the testimony on the question, it may itself find the specific facts relating to it, or in its discretion it may submit the testimony to the decision of the jury; and

3. If the unmistakable fact and legal certainty be that the plaintiff

could not have had any reasonable expectation that he had a right to recover, or that he could recover an amount within the jurisdiction of the court, the action should be dismissed for want of jurisdiction, inasmuch as it was then made to appear that the amount of damages laid in the plaintiff's petition was merely colorable, and that the jurisdictional amount was not really involved.

They have been distinctly ruled, in the following among many cases: Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Wetmore v. Rymer, 169 U. S. 115, 120, 121, 18 Sup. Ct. 293, 42 L. Ed. 682; Deputron v. Young, 134 U. S. 241, 252, 10 Sup. Ct. 539, 33 L. Ed. 923; Put-in-Bay v. Ryan, 181 U. S. 409, 430, 431, 21 Sup. Ct. 709, 45 L. Ed. 927; Holden v. Utah, etc., Co. (C. C.) 82 Fed. 209.

Finding the facts to be as stated, and the criterion of damages applicable to such facts to be as established by the Court of Appeals of Kentucky, the court was clearly of opinion, not only that it was legally impossible that any recovery for over $600, besides interest and costs, could have been had, but also that the plaintiff could not, when the suit was brought, have had any reasonable expectation of recovering a greater amount. It may be obvious, as the debt was only $28.95, with interest and costs to be added, that the levy would have been excessive, even if the property had belonged to Herman Sclarenco; nevertheless it cannot be forgotten that only part of it was damaged, and all of it was restored to plaintiff within 40 hours—a holiday included.

While the courts of the United States must take jurisdiction and enforce the rights of all litigants where the law so requires, it is not open to them to exercise power not given by law, and it is as much their duty to refuse jurisdiction when they have it not as it is to exercise it when the law gives it. It is also their duty, under section 37 of the Judicial Code, to exercise care to prevent impositions upon their jurisdiction whenever, intentionally or unintentionally, that is attempted or likely to result. This is a wise and wholesome rule.

In view of all these facts as found by the court, it was of opinion that it had not jurisdiction, and, having discharged the jury, it dismissed the action without prejudice and without costs. The plaintiff has moved for a new trial, and the motion has been attempted to be supported by citation of many authorities. Of themselves those authorities are very sound, but no one of them has any real bearing upon the merits of the motion.

The motion speaks of exceptions, but none was taken to the final action of the court, and the court recalls none taken to any part of the testimony; but inasmuch as the plaintiff's case may not have been prepared during the trial in such way as to be available for appellate proceedings, while we have no idea that any change in our own view of the law is probable, nevertheless we have concluded to grant the motion for a new trial, so that, if plaintiff desires to have the questions

involved decided upon appellate proceedings, her case may be so prepared as to enable her to do so.

The defendant may, if so advised, by pleading raise the question of jurisdiction.

UNITED STATES SMELTING CO. v. AMERICAN GALVANIZING CO.

(District Court, E. D. Pennsylvania. November 3, 1916.)

No. 4244.

SALES ⊜83—CONTRACT TO DELIVER "F. O. B. CARS ST. L."—DUTY AS TO SHIPPING DIRECTIONS.

Plaintiff merely averring a contract to deliver "f. o. b. cars St. L.," and demand for and refusal to give shipping directions, and defendant admitting such refusal, but denying refusal to accept, plaintiff cannot have judgment on the pleadings, as, if the shipment is to be made from another place to St. L., no directions from the buyer are required; otherwise, they are.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 224–227; Dec. Dig. ⊜83.]

At Law. Action by the United States Smelting Company against the American Galvanizing Company. Rule for judgment discharged.

R. Stuart Smith and Morgan, Lewis & Bockius, all of Philadelphia, Pa., for plaintiff.

Alfred Aarons, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The principles of law which control in this case may be thus formulated:

Where either party to a contract gives notice of his refusal to perform, the other may treat this as an anticipated breach, and bring his action, without awaiting the time of performance stipulated.

Delivery contracts, like all others, are to be performed in accordance with their found meaning.

Nondelivery under a contract to deliver and accept may constitute a breach by vendor or vendee. In a case of mere nondelivery, the breach is on the part of the party whose duty it was under the contract to first act.

In contracts to deliver f. o. b. vessel, with or without a designated port of shipment, the vendee is the first actor, and must provide and designate the vessel by proper shipping directions. In a like contract, where the vendor is given optional ports of shipment, the vendor is the first actor, and must name the port before he can require the vendee to provide the vessel.

Where the delivery is f. o. b. cars at the place of shipment, the vendee is the first actor, and must provide the car and give the necessary directions. Where, however, the delivery is to be by carrier at the port or point of destination of the shipment f. o. b. vessel or car, the contract gives the vendor the right, and requires him to select and engage the carrier, and he is thereby made the first actor.

Where the contract itself gives to the party required to act all necessary information to enable him to perform, he cannot excuse performance by proof of the fact that he asked for and was not given, or was refused, further directions.

The following cases were ruled upon some one or more of these propositions and give sanction to them as the law: Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Kunkle v. Mitchell, 56 Pa. 100; Dwight v. Eckert, 117 Pa. 490, 12 Atl. 32; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Railway Co. v. Steel Co., 123 Fed. 655, 59 C. C. A. 419; Evanston Co. v. Castner (C. C.) 133 Fed. 409. This observation does not in terms apply to the last two propositions, but we think them to be logical corollaries to the others.

When we turn from these general principles to their application to the facts of the instant case, we find this situation and this state of facts: The question is presented as in substance a demurrer question. The plaintiff avers a contract to deliver "f. o. b. cars East St. Louis," or "f. o. b. cars East St. Louis basis." We have stated the place of delivery in the alternative, because there are four suits on four different contracts, three of which follow the one phraseology and one the other, and we wish to dispose of all of them by one opinion. The further averment is made that the plaintiff asked the defendant to designate the place to which the spelter purchased was to be shipped. It affirmatively appears that no shipping instructions were given, and it does not appear that any reply was made by the defendant to the request for them. The position of the plaintiff is that this failure of the defendant was the equivalent of a refusal, and this refusal was in legal intendment a refusal to accept, and a consequent breach of the contract. The position of the defendant is that it was not bound to give shipping directions, and that no inference could be drawn from its refusal to so do, other than one of notice to plaintiff that defendant stood upon the contract and that plaintiff would be held to strict compliance. It should further, perhaps, be stated that nothing appears of the relations of the parties to the contract, except that the plaintiff is a citizen of Maine and the defendant of Pennsylvania.

There is a recognized atmosphere in which the two sides of this case were presented distinctly favorable to the plaintiff. The impression, whether justified or not, could not be resisted that the defendant was seeking to escape the consequences of the bargain into which it had entered. There is a like favorable predisposition in favor of the position of the plaintiff, born of the very clear and forceful argument addressed to us by its counsel and the clear-cut and helpful brief submitted. Counsel for defendant, however, must be freely and fully conceded the right, which may expand into a duty, to protect the defendant in the assertion of every legal right.

To compress the argument for plaintiff into a sentence is to inadequately present it, but the argument essentially is this: The relations of the parties to each other and to the subject-matter of the contract were such that the reference to the place of delivery meant nothing more than a mode of expressing the price. To what place the actual

shipment was to be made was determined by the instructions to be given; but, wherever it was, the reference to cars f. o. b. East St. Louis fixed the price, and makes it clear that it was a price term only. The word "basis" in some of the contracts emphasized this.

The fact that there is nothing to show East St. Louis to be the place of manufacture or of final destination—the end of a contemplated carriage—all confirms the view of the contract taken. We are therefore not only justified, but required, to give to the quoted expression its ordinary and recognized meaning. The ordinary meaning of delivery f. o. b. cars is that the vendor is to be at the expense of hauling, loading, etc., or is to pay the freight to the named place, and that no responsibility rests upon the vendee until such delivery is made. It will be seen that this meaning, while clear and unambiguous, may nevertheless apply in whole or in part according to the conditions to which it applies. A contract to deliver f. o. b. vessel at the port of departure would be held to mean that the shipper is to be at the expense of loading. It just as clearly would not be held to mean that he had the right to select or was bound to supply the vessel. If, however, the port is the port of destination of the vessel (which possibly is reached by many vessels), then it would be equally clear that the shipper did have the right to choose the vessel and was bound to provide it. This case really resolves itself into this suggested very narrow question of fact.

The exact bearing point of the controversy can be best found by presenting three supposititious cases: (1) A broker, or other middleman, who buys to sell again, buys for delivery to an unknown consignee at an unknown place. To get a price basis, East St. Louis is named as the place of delivery. It is not in the contemplation of either party that the goods shall be there shipped or received, but they are to go to any place named by the vendee. (2) A vendor has a manufactory in East St. Louis from which he ships. A rate is made for delivery f. o. b. cars East St. Louis, with the expectation of being shipped elsewhere. (3) A vendee buys goods for delivery to himself at East St. Louis, to be there used. The goods are to be shipped in cars to East St. Louis, where the consignee is to receive them. The common-sense as well as legal meaning of these respective contracts is that in the first and second cases the vendee is bound to give shipping instructions. In the third case the vendor has them.

The final question is to which of these three classes does this contract belong? The position of the plaintiff is that it belongs to the first class. The present and real question is not whether it belongs to that class, but whether on the face of the record it is shown to so belong. This must be determined from an inspection of the record alone. The statement of claim avers simply a contract for St. Louis delivery. If this were the real contract, and the vendor was to ship from another place to St. Louis, it would be clear that it was the meaning of the parties that the shipment was to be made by rail to St. Louis and there received. It would be the place of the vendor to pay the freight, and the shipment would belong to him (with all the

consequences of this), until delivery at St. Louis. One consequence would be that it would be his right to select the carrier and make his bargain for the shipment. Nothing would be required of the vendee beyond acceptance and payment. A right of action in the vendor could therefore only be based upon a refusal to accept. This refusal is averred, and the case of the plaintiff made out.

The affidavit of defense, however, denies the refusal to accept, although admitting a refusal to give shipping directions. The question then resolves itself into this: Was the defendant bound to give them, or did the plaintiff already have them? On the averments of the pleadings, we cannot find whether the sale called for a delivery f. o. b. cars for shipment from St. Louis, or a shipment by car to St. Louis. Without this finding we cannot determine which of the parties had the right to select, and upon whom was the consequent duty of supplying the car. To find this fact we must go outside the pleadings, and it follows that plaintiff is not presently entitled to judgment. This conclusion eliminates all other questions raised.

Rule discharged.

FIELD et al. v. HAFNIA S. S. CO.

(District Court, E. D. Pennsylvania. September 12, 1916.)

On motion for reargument. Denied.

For former opinion, see 234 Fed. 187.

Howard M. Long, of Philadelphia, Pa., for libelant.

H. Alan Dawson, of Philadelphia, Pa., and Burlingham, Montgomery & Beecher, of New York City, for respondents.

DICKINSON, District Judge. The motion is confined to the one feature of the claim for hire as affected by the suspending provision of the charter party. The cross-libelant has successfully maintained that the fire casualty which befell the vessel suspended all its obligations under the charter party. It has been found in favor of the claimant that the suspension of the obligations of the contract continued throughout the life of the charter party. It was further found that the claim made for hire was not justified. We have been asked to review this latter ruling, and, in doing so, to make a fuller statement of the findings of fact, and incidentally make a correction in the statement of dates.

The vessel arrived in the outer harbor of the port of Buenos Ayres on October 6, 1911. The captain went ashore to arrange for the discharge of the cargo. To effect this the vessel was required to be moved up into the inner harbor. Had no fire occurred, the discharging, so far as could be anticipated, would have been begun on October 9th, and would have been completed about November 9th. The fire occurred on the morning of October 8th. The vessel was filled to subdue the fire. She was not raised until October 15th. The port authorities would not permit the damaged vessel to discharge at the wharf first designated. The wharf required under the customs regula-

tions was not and could not be secured until October 27th. The discharging proceeded without delay, but was not completed until December 4th. The vessel was then surveyed and taken in charge by her owners. She sailed on December 16th for the port at which she was afterwards repaired. Her owners refused to return her to the charterers, because the term of her hiring had ended by the time she was in condition to be restored to service. The charterers paid the hire up to the then next time of payment, after deducting 18 days. They inadvertently stated the deduction as made from October 6th, instead of from October 8th, the true date of the fire. If, however, the sum deducted was not excessive, the misstatement of the date of the fire is not important. The cross-libelant apparently does not dispute the correctness of the deduction affecting the time measured by the dates of October 8th and October 15th. The controversy is over the deduction made in excess of $1,623.23, or $2,029.04.

The claim is based upon the propositions of law that the question involved is whether the vessel was in a state of efficiency for the service required of her, and the further proposition that such service was the discharge of her cargo, and the proposition of fact that she was in a condition to perform and did in fact perform this service. The claimants are at the outstart confronted with this at least seeming dilemma. The obligations of each of the parties alike grow out of the charter party. These obligations, if not strictly reciprocal and interdependent, respectively each support and is in consideration of the other. The owners were bound to give the charterers the use of the vessel and to maintain her in a state of efficiency. The charterers were bound to pay the hire. It is unthinkable that either could, without performing, demand performance. The owners have successfully asserted the suspension of their obligation to give the charterers the use of the vessel. How, then, can they in the same breath demand the hire?

The claimants seek to escape the consequences of the answer which the form of the question suggests by the limitation of the demand to the time during which the charterers did have the use of the vessel in unloading. This enables them to retort with the question in a different form. The charterers had the control and use of the vessel; why should they not pay the hire? The point of the conflict between the parties thus clearly has its bearings upon the fact of use. The charterers aver loss of the use of the vessel for which they had agreed to pay the hire. The owners retort with the averment of some, although a limited, service. The obligation of payment, it is true, is contractual, and is not based upon a quantum meruit; but the fact of efficiency is a fact of substance, and is present, if real, and need not be formally complete. Fitness is a relative term. When, therefore, all that is called for is fitness to meet harbor uses, fitness for an extended voyage cannot be demanded. This is the principle underlying the rulings (so far as this feature was involved) in the cases of Hogarth v. Muller, App. Cas. 48, Lake Co. v. Bacon (D. C.) 129 Fed. 819, and 137 Fed. 961, and 145 Fed. 1022, 74 C. C. A. 476, and the case of Clyde Co. v. West India Co., 169 Fed. 275, 94 C. C. A. 551.

The question, as already observed, is one of contract. The obligation sought to be enforced, or relief from it, must be sought in the charter party. In the instant case, there are two pertinent provisions. One suspends the obligations of the contract in the event of fire. The other is that "damage preventing the working of the vessel" relieves the charterers from the obligation to pay hire "until she be again in an efficient state to resume her service." Under the first provision there was constructively no contract. This condition related back to the time of the fire, and as it continued up to the expiration of the term of hiring, the contract constructively ended on October 8th. Under the second provision, no hire was payable, owing to the damaged condition of the vessel, until she was restored to a state of efficiency. As she was not restored within the life of this contract, she was never restored, and the obligation to pay hire was at an end. This leaves the question of when it ended, and the answer turns upon what is meant by fitness.

We think the fair meaning of the contract to be this: The expectation, of course, was that the vessel would earn for its charterers the amount of her hire. The forced idleness of the ship and consequent loss of earning power might result from damage to the ship; inefficient equipment; unskillful handling; damage to the cargo or stress of weather. The dividing line for apportioning the loss is clearly indicated. If the loss was due to damage to the cargo, the charterers must bear it; if to the ship, the owners. This might, under a different state of facts, require the drawing of rather fine lines. Under the facts of this case we find there "was a loss of time" of not less than 19 days "from damage preventing the working of the vessel," and that in consequence "the payment of hire ceased" for that length of time.

We are further of opinion that the owners can justify withdrawing the vessel from the charterers on the ground that the fire ended their obligation to continue her in service only at the cost of foregoing any demand for hire. The suggestion of the equity of a demand for hire as compensation for the use made of the vessel in unloading is met by the thought that the charterers agreed to pay the stipulated hire, not for partial, but complete, service, and that the agreement was that hire should cease as long as the vessel was incapable of service. Certainly while she, as a consequence of the fire, was lying at the bottom of the harbor, she was not in an efficient state of service, and the duration of inefficiency was, as we have found, at least 19 days.

We therefore adhere to the conclusion before reached, and because of this the reargument is refused.

A decree embodying the findings made may be submitted.

WALLERSTEIN v. GALLAGHER.

(District Court, E. D. Pennsylvania. November 6, 1916.)

No. 3934.

BANKRUPTCY ⊂=164—PREFERENCES—WHAT CONSTITUTES.

Defendant agreed to make a loan, provided she should receive a mortgage on given property, and delivered her check for the amount of the loan to her daughter. The daughter, who was affiliated with an insolvent corporation, delivered the money to the corporation; but the corporation could not give the required mortgage, and defendant demanded return of her money, which was made a few days thereafter. *Held* that, as defendant had delivered the money to her daughter, not as agent of the corporation, and as she promptly demanded return of her money claiming that no right to it had passed to the corporation, repayment did not constitute a preference, which could be set aside by the trustee on the corporation's bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⊂=164.]

At Law. Assumpsit by David Wallerstein, trustee, against Honora Gallagher. There was verdict for defendant. Sur rule for new trial. Rule overruled.

James McMullan and J. B. Colahan, 3d, both of Philadelphia, Pa., for plaintiff.

Arthur S. Minster, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. All questions before involved in this case have been razeed to one. This one question arises out of the special fact features of this case and does not readily lend itself to a statement in the form of an abstract principle. The question is raised by the fourth of the reasons for a new trial.

The action was to recover an alleged preferential payment made to defendant by the bankrupt within the prohibited period. One thing upon which the case was submitted by the trial judge rested upon a finding of this state of facts: The defendant was asked to make a loan or advancement of $10,000 to some one for some purpose. To whom or for what purpose the money was to be furnished does not appear with sufficient clearness to permit of its accurate statement in short compass. It is unimportant, because what the defendant consented to do is clear. She consented to part with the money on condition that she received a mortgage for a like sum on a designated property. She drew a check for the sum and confided it to her daughter, delivering it upon the like condition. Her daughter was connected with the bankrupt corporation as an officer or otherwise. She deposited the check in bank to the account and credit of the company. The mortgage was not given, and it developed that it would not, because it could not, be given. Thereupon the defendant demanded the return of her money and received back $9,000. It does not appear to whose order the check was drawn. It was drawn February 10, 1915. The deposit was made February 11th, and it was returned February 14th. The acts were

really closer together than the calendar indicates, because a Sunday and a bank holiday intervened. The prohibited transfer must of necessity (as well as by the language of the statute) have been a transfer of the property of the bankrupt. This suggested the question of whether this $10,000 ever was the money of the bankrupt. This, so far as a question of fact, was submitted to the jury to find, with instructions that if this money had never been the money of the company the verdict should be for the defendant. There were alternative findings submitted, but if it was error to submit this one, or the instruction was wrong, the plaintiff should have a new trial. Was there in this error? If there was, the error was fatal to the plaintiff, because the lay mind would not hesitate over the conclusion to be reached. Is this conclusion, however, in accord with legal principles?

It may be based arguendo upon the right of rescission. A conditional delivery may, at least under some circumstances, be revoked if the condition is not complied with. Let it be remembered that the instruction was coupled with the thought that the delivery of the check was to the daughter, not to the bankrupt, and that the selection of the company as the depositary was not the act of the defendant. It was not, therefore, a loan made to the company, on its credit, followed by a tardy change of heart and an attempt to undo what had been done. It was a stoppage in transitu. The expectation that a bank creditor of the company would have taken the money, had it not been withdrawn, we do not see affects the question, otherwise than to speed the withdrawal. No rights of this creditor had attached. To say that the rights of other creditors had attached is to beg the whole question. If the money remained the money of the defendant, the rights of no creditor had attached. It did so remain if she had the right to recall the handing of the check to her daughter. Nothing more is called for than the statement of our conclusion that she did have this right.

The other reasons for a new trial are not pressed. We have considered them, however. The other questions submitted to the jury were submitted under instructions more favorable to the plaintiff than an accurate statement of the law warranted. This was because, although one of the points submitted by plaintiff embraced an overstatement of the legal principle invoked, it was affirmed in the belief that an attempt to qualify it as applied to the facts of the case on trial would have probably only served to confuse the jury, and the qualification was not deemed to be of practical importance. The verdict has rendered it wholly so.

The rule for a new trial is discharged.

ROBERTS v. LOWE, Collector of Internal Revenue.

(District Court, S. D. New York. March 18, 1916.)

1. INTERNAL REVENUE ⟸38—ILLEGAL EXACTIONS—RECOVERY.

As Rev. St. § 989 (Comp. St. 1913, § 1635), providing that when recovery is had against an internal revenue collector for money exacted by him, and by him paid into the treasury, no execution shall issue against such collector, provided the court certifies there was probable cause for his act, is only applicable to the collector who received and turned over the tax to the Treasury Department, a subsequent collector of internal revenue, sued for illegal exactions by his predecessor, if liable, is individually liable; there being no provision for restitution by the government to him.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

2. INTERNAL REVENUE ⟸38—ILLEGAL EXACTIONS—LIABILITY.

As the section is applicable only to the collector making the illegal exaction, and as an action against such collector may be revived against his representatives on his death, his successor in office is not liable to suit for the illegal exaction.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

3. INTERNAL REVENUE ⟸38—ACTIONS—RIGHTS OF ACTION.

Under Act Feb. 8, 1899, c. 121, 30 Stat. 822 (Comp. St. 1913, § 1594), providing that no action or other proceeding lawfully commenced against any officer of the United States in his official capacity, or in relation to discharge of his official duties, shall abate by reason of the expiration of his term, but in such event the court, within 12 months thereafter, on motion or supplemental petition showing a necessity for survival to obtain a settlement of the questions involved, may allow the same to be maintained against his successor in office, one who paid corporation excise taxes illegally exacted by a collector of internal revenue cannot, no action having been instituted against such collector, maintain an action against his successor.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

At Law. Action by Duncan I. Roberts, individually and as a member and as president of the United States Express Company, an unincorporated joint-stock association, against John Z. Lowe, Jr., Collector of Internal Revenue of the United States of America for the Second District of the State of New York. On demurrer to the complaint. Demurrer sustained, and complaint dismissed.

Frederick G. Curry, of New York City, for plaintiff.

H. Snowden Marshall, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. [1, 2] This is a demurrer to the complaint in an action brought against the defendant, John Z. Lowe, Jr., who is described as "collector of internal revenue," to recover corporation excise taxes collected from the United States Express Company by Charles W. Anderson, who was at the time col-

lector of internal revenue. The only theory of recovery, in my opinion, is against Mr. Lowe individually, and I know of no provision of law which would enable him to obtain restitution from the government if he were held liable.

Section 989 of the Revised Statutes, providing that when recovery is had against a collector for money exacted by him, and by him paid into the treasury, no execution shall issue against such collector, provided the court certifies there was probable cause for the act, only in terms is in aid of the collector who received and turned over the tax to the Treasury Department. I can see no theory upon which this action can be brought against the succeeding collector. The remedy either lies in an action against Mr. Anderson or in an action against the United States. The latter remedy is apparently authorized by the case of United States v. Emery, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825. If any authority were needed, the case of Patton v. Brady, Executrix, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, would seem to involve the conclusion that the only action which can be brought against any individual is an action of assumpsit against the collector who actually exacted the tax, and it was held in the case of Patton v. Brady, supra, that such an action could be revived against the personal representative of the deceased collector. This position is wholly inconsistent with the theory that the action is against the collector as such. The theory is a recovery for money illegally obtained by the collector as an individual, and no subsequent collector can be subjected to his liability.

[3] I do not think that the plaintiff can sue the defendant as successor to Collector Anderson under the Act of February 8, 1899 (30 Stat. L. 822, c. 121), which provides that no action or other proceeding lawfully commenced against any officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of the expiration of his term, but in such event the court at any time within 12 months thereafter, on motion or supplemental petition showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained against his successor in office. This remedial act was to enable pending proceedings against public officials in their official capacity to be continued when necessary to obtain settlement of the questions involved. In this case there was no pending action against the former collector, Anderson; this action is not necessary to recover the money, for the plaintiff has a remedy against the United States, as appears from the decision in the case of United States v. Emery, supra, as well as against Anderson; and, finally, this cause of action is not in theory against the collector in his official capacity.

If recovery were had against the present collector, for reasons stated in the earlier part of this opinion, I do not see that any existing legal machinery exists by which he could obtain restitution from the government. Judge McPherson, in his opinion in the case of Armour v. Roberts (C. C). 151 Fed. 846, apparently held that a succeeding collector could be sued as such for restitution of sums paid to a former collector; but he did not discuss any of the difficulties which I have

alluded to in reaching such a result, and I can find no sufficient basis for the conclusion he reached. He evidently misconceived the nature of the action, which is an action against the collector personally. If this were not so, it would not have been held by the Supreme Court in the case of Patton v. Brady, Executrix, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, to have survived against the executrix of the deceased collector.

For the foregoing reasons, the demurrer should be sustained, and the complaint dismissed.

In re POHLIG.

(District Court, E. D. Pennsylvania. November 6, 1916.)

No. 5807.

BANKRUPTCY ⟸400(1)—EXEMPTIONS—CLAIM OF EXEMPTIONS—RESTRAINING EXECUTION.

After levy of execution upon his household goods, the bankrupt filed a voluntary petition in bankruptcy, and upon adjudication claimed the goods as exempt under the state laws. Upon petition of the bankrupt, the sheriff was restrained from proceeding with the execution, and the property was set off to him as exempt. Bankruptcy Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (Comp. St. 1913, § 9631), makes it the duty of the trustees under the direction of the court, to set aside the bankrupt's exemptions. *Held* that, as the bankrupt had prayed for the property to be set aside to him as exempt, he could not complain of the vacation of the restraining order, for, the property having been set aside, the bankruptcy court had no further concern therewith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673; Dec. Dig. ⟸400(1).]

In Bankruptcy. In the matter of the bankruptcy of George William Edgar Pohlig. Upon petition by Warren Stirling, judgment creditor, to vacate an order restraining proceeding with execution. Restraining order vacated.

Harry L. Stirling, of Philadelphia, Pa., for judgment creditor.
Cascaden & Spangler, of Philadelphia, Pa., for bankrupt.

THOMPSON, District Judge. The petitioner, Warren Stirling, obtained a judgment against the bankrupt in the sum of $12.50 in the municipal court, Philadelphia county, April 17, 1916, upon which execution was issued the same day and a levy made upon the household goods and furniture at the bankrupt's home. A voluntary petition in bankruptcy was filed, and the bankrupt was adjudged a voluntary bankrupt on May 15, 1916. The schedules filed by him showed liabilities of about $800. The schedules showed but one item of assets, as follows:

"Invested as part payment of household goods about six years ago, $200.00."

This item is claimed by the bankrupt in his schedules as property exempted by state laws. On June 12, 1916, upon petition of the bank-

rupt, the court granted an order restraining the sheriff from proceeding with the execution. This restraining order the court is now asked to vacate, upon the ground that the levy is made upon property which the bankrupt claims is exempt. The jurisdiction of the court over exempt property is confined to the proceedings necessary on the part of the trustee to "set apart the bankrupt's exemption and report the items and estimated value thereof to the court as soon as practicable after their appointment." Bankruptcy Act, § 47; Woodruff v. Cheeves (C. C. A., 5th Cir.) 5 Am. Bankr. Rep. 296, 105 Fed. 601, 44 C. C. A. 631; In re Jackson (D. C., Pa.) 8 Am. Bankr. Rep. 594, 116 Fed. 46.

If the present application were opposed by a trustee on behalf of the creditors, the court would, in a proper case, continue the restraining order to permit the trustee to set aside the exempt poperty. The answer to the petition to vacate, however, is filed by the bankrupt. He has set out in his schedule the item above referred to as his only asset, and claims it entirely under his right to exemption. He now seeks to continue to delay his judgment creditor by the restraining order, upon the ground that what he has claimed as exempt is part of the bankrupt estate. Surely he cannot shift his position in that manner. Having made his claim that the equity in the household furniture levied upon at the instance of the judgment creditor is exempt, he is estopped from denying the effect of what he set out in his schedules. By his own act he has claimed that his assets are beyond the reach of his trustee in bankruptcy and are therefore out of the jurisdiction of this court. He cannot be permitted to use the court of bankruptcy as a means to delay indefinitely the enforcement of the lien acquired by the sheriff's levy.

It is ordered that the restraining order be vacated.

THE DIXIE.

(District Court, E. D. Louisiana. July 25, 1916.)

No. 15401.

MARITIME LIENS ⊂=64—SUIT TO ENFORCE—SUFFICIENCY OF LIBEL.

Allegations in a libel that the owner of a dredge hired another dredge and a barge from libelant to assist such dredge in its work and failed to pay the hire, and that through the negligence of such charterer the barge was sunk, do not establish a maritime lien which will support a suit in rem against the dredge.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 102; Dec. Dig. ⊂=64.]

In Admiralty. Suit by the River Sand & Gravel Company against the dredge Dixie. On exception to libel. Exception sustained.

John D. Grace, of New Orleans, La., for libelant.

James Wilkinson, of New Orleans, La., for claimant.

FOSTER, District Judge. This is a libel in rem by the River Sand & Gravel Company against the dredge Dixie. The libel alleges, in sub-

stance: That the dredge, while owned by the Louisiana Construction Company, was engaged in dredging in the Mississippi river at New Orleans and depositing the earth on the bank for the double purpose of deepening the river and building up a site for a wharf on shore. That the said owner hired the dredge Katharine, belonging to libelant, to aid and assist in the said work, agreeing to pay the necessary expense of taking her from Angola, La., to New Orleans, and of returning her to said place, in addition to a hire of $1,000 per month, and she was so employed. That the owner of the Dixie also hired the barge Texas, belonging to libelant, to aid the Dixie in said work at a stipulated price, and so used her. That the officers and crew of the Dixie permitted the Texas to sink. On further allegations of nonpayment of the hire and expenses, aggregating $5,061.23, etc., libelant prayed for admiralty process against the Dixie and that she in due course be condemned and sold.

The board of commissioners of the port of New Orleans appeared and claimed the dredge as owner, and subsequently filed an exception to the jurisdiction of the court, on the ground that the libel shows no admiralty lien.

The libel is in rem, and it is not alleged the then owner specifically pledged the Dixie in any way. It is not alleged the barge Texas was sunk by a collision with the Dixie. It is not even alleged she was lost by the negligence of the officers and crew of the Dixie. Therefore there is no lien arising from the tort of the Dixie. There were no services rendered to the Dixie, such, for instance, as towage or repairs, or salvage, and, of course, it is not contended any supplies were furnished. The lien seems to be claimed on the theory the vessels were engaged in a joint enterprise, and the aid given the Dixie by the others was maritime, and entitled their owners to a lien.

Admiralty liens are stricti juris, and not to be extended by construction or implication. Conceding, for the sake of argument, the very doubtful proposition that the Dixie was engaged in a maritime venture, it does not follow the contract between libelant and her owner created an implied lien on her. In this case the allegations of the libel are inconsistent with the lien claimed. If there is no lien, necessarily there is no jurisdiction in rem. Vandewater v. Mills, 19 How. 82, 15 L. Ed. 554; The Alligator, 161 Fed. 37, 88 C. C. A. 201; Bouker Contracting Co. v. Proceeds, etc. (D. C.) 168 Fed. 428.

The libel will be dismissed.

DURAND v. BROWN.

In re TILDEN SAW & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2832.

1. CORPORATIONS ⊜230—STOCK—PAYMENT OF SUBSCRIPTIONS.
Stock issued as paid-up and nonassessable cannot be assessed, in the absence of fraud.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 877; Dec. Dig. ⊜230.]

2. CORPORATIONS ⊜232(2)—STOCK SUBSCRIPTION—PAYMENT.
Under Pub. Acts Mich. 1903, No. 232, § 2, providing that capital stock subscribed may be paid in, either in cash or in other property, real or personal, and in view of Pub. Acts Mich. 1907, No. 146, § 2, limiting the property so appropriable to such as can be sold and transferred by the corporation, and as shall be subject to levy and sale on execution, a secret process, though intangible, was, prior to the latter act, property which was appropriable for the payment of capital stock of a corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 883; Dec. Dig. ⊜232(2).]

3. PROPERTY ⊜2—WHAT IS.
Secret processes and formulas are "property," and rights in them are recognized and entitled to protection as property rights.
[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. ⊜2.
For other definitions, see Words and Phrases, First and Second Series, Property.]

4. CORPORATIONS ⊜269(3)—STOCK SUBSCRIPTIONS—PAYMENT.
Where it was contended that stock of a corporation was not paid in, evidence *held* to show that a secret process, listed as property and given in payment of the stock, was delivered to the corporation, and that it had the benefit thereof.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 1154–1159, 2277; Dec. Dig. ⊜269(3).]

5. GOOD WILL ⊜5—"PROPERTY RIGHT"—TRANSFER.
Good will is a "property right" which can be conveyed with the business to which it is incident.
[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2; Dec. Dig. ⊜5.
For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

6. CORPORATIONS ⊜232(1)—STOCKHOLDERS—TRANSFEREES.
A transferee, with full knowledge that stock, though purporting to be fully paid in, is not actually paid for, is liable to corporate creditors for the amount unpaid.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 987; Dec. Dig. ⊜232(1).]

7. CORPORATIONS ⊜76—STOCK SUBSCRIPTIONS—PAYMENT THEREOF.
Money paid toward the purchase of corporate stock cannot be converted into a loan to the detriment of other interested parties.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 197–209, 213–218; Dec. Dig. ⊜76.]

8. CORPORATIONS ⊜232(3)—STOCK SUBSCRIPTION—LIABILITY FOR.
Where corporate stock was, on the formation of a corporation, delivered in return for property, and it was contended that a creditor, who

once owned part of the stock, was liable because the stock had not been fully paid for, the property contributed having been overvalued, *held*, inequitable to charge against such stock more of the deficiency than the ratio it bears to the whole stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 884; Dec. Dig. ⊂⊃232(3).]

9. CORPORATIONS ⊂⊃479—STOCK SUBSCRIPTION—PAYMENT—UNPAID SUBSCRIPTION.

Members of a partnership engaged in manufacturing and leasing butchers' saws, being in the need of working capital, organized a corporation and received practically the entire stock, paying therefor by transferring to corporation property, patents, and a secret process for manufacturing saw blades; such process being valued at a large sum of money. Thereupon members of the firm entered into an agreement to transfer one-half of the stock to a trustee, on his paying to the corporation a sum of money equal to one-half of the par value of the stock; the agreement providing that dividends thereon should be paid to the corporation until they aggregated the other half of the par value of the stock. The trustee was given an option to withdraw from the corporation and demand back his advances, repayment of the same to be secured. The trustee, after making most of the advances provided, gave notice of intention to withdraw, and the appellee who had succeeded to the trustee's rights, was given a mortgage to secure the amounts due. The mortgage was of record when credit was advanced to the corporation. The formal requisites of Pub. Acts Mich. 1903, No. 232, providing for payment of corporate stock in property, were complied with. *Held* that, though the members of the firm obviously did not deem the secret formula to have the present market value listed, yet, as they in good faith expected the corporation to prosper, and that, when developed, the net corporate assets contributed would, as a whole, be worth the amount at which they were taken, it would be inequitable, under all the circumstances presented, to deny to appellee the enforcement of his mortgage as against the other creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⊂⊃479.]

10. CORPORATIONS ⊂⊃479—STOCK SUBSCRIPTIONS—RIGHT OF CREDITORS.

Though ordinarily unpaid stock subscriptions inure to the benefit of future as well as existing creditors, under the facts of this case, creditors giving credit with the mortgage on file are not entitled to complain that the stock held by appellee's predecessor had not been fully paid for.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⊂⊃479.]

11. BANKRUPTCY ⊂⊃262(3)—JURISDICTION—DISPOSITION OF FUNDS.

Where property of a bankrupt corporation subject to a mortgage was sold free from the mortgage, the parties agreeing to abide by the final determination of the court as to ownership, the court had jurisdiction to award the fund to the mortgagee, notwithstanding it was contended that the mortgagee, by reason of his predecessor's ownership of corporate stock which it was asserted had not been fully paid in, was not entitled to enforce the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 365; Dec. Dig. ⊂⊃262(3).]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the bankruptcy of the Tilden Saw & Manufacturing Company. The claim of Cullen Brown was contested by Harvey S. Durand, as trustee in bankruptcy. From a judgment of the Dis-

trict Court, reversing the order of the referee, and awarding a fund to claimant, the trustee appeals. Affirmed.

H. B. Graves, of Detroit, Mich., for appellant.

Charles Wright, Jr., and J. W. Beaumont, both of Detroit, Mich., for appellee.

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

KNAPPEN, Circuit Judge. Appellee is the owner of the unpaid balance (about $5,175) of the bankrupt's bonded indebtedness, secured by mortgage on its plant and other property. The mortgaged property was sold by the trustee in bankruptcy, under the order of the bankruptcy court, and by agreement between the interested parties the balance of the mortgage debt was paid over to a third person (who was in fact the trustee in bankruptcy) as trustee, to abide the final determination of the court as to right and ownership. The trustee and appellee each presented claims to the fund. The referee found appellee indebted to the bankrupt on account of certain subscriptions to its capital stock, in amount sufficient to wipe out the mortgage debt, and awarded the fund to the trustee in bankruptcy for distribution among creditors. The District Judge reversed the referee and awarded the fund to appellee; hence this appeal.

The case, so far as now material, is this: George M. and William E. Tilden were members of a copartnership engaged at Detroit in manufacturing and leasing butchers' saws. At least one of the Tildens had been in that business 22 years. They were in need of working capital. As a result of negotiations with appellee and one MacCallum, a corporation called the Tilden Saw Company was formed November 5, 1904, under the laws of Michigan, for the manufacture and sale of butchers' saws and the leasing of the same, and for other purposes. The capital stock was divided into 600 shares, of $100 each, of which one of the Tildens subscribed for 300 shares, the other 299 shares, one Crandall taking the remaining share, presumably to furnish the required number of incorporators. According to the articles of association, the stock was fully paid for in property, according to these valuations: The shop equipment of the late copartnership, together with saw frames and blades under lease, or manufactured, or in process of manufacture, as well as materials for the same, together with a horse, wagon, and harness, at amounts aggregating $9,500; two United States patents to the Tildens for improvements in saws at a valuation of $30,000; and this further item:

"The secret process for the manufacture of saw blades devised by George M. and William E. Tilden and heretofore used in the business of Tilden Bros. & Noble and duly assigned in writing to said Tilden Saw Company, $21,900."

These various items totaled $61,400 and were taken subject to an indebtedness of $1,400, which the corporation assumed. A written contract between the Tildens and MacCallum, trustee, bearing date the 15th day of the same month of November (and ratified on the same

date by the corporate directors and stockholders), recited the organization of the company with full-paid capital stock of $60,000, and the Tildens' ownership of the larger part of it; their wish to procure additional capital for "promoting the interests and business" of the corporation; the desire of MacCallum, as trustee for himself and others, to investigate the business, and his willingness to furnish "additional cash" upon the conditions thereafter named—and provided for the sale and transfer to MacCallum, as trustee, of 300 shares, or one-half the capital stock; for the election as directors of MacCallum, appellee, George Tilden, and William Tilden, to hold respectively the offices of president, treasurer, secretary, and vice president; for the payment by the trustee of $8,000 in three installments on or before three months, to be used in discharging certain debts of the corporation, the cost of its organization, and current expenses in the manufacture of about 5,000 frames and 40,000 saw blades; for the further payment of $3,000 on or before 90 days after the receipt of a certain shipment of saw frame and blade steel, and $4,000 more, in two items, within 60 days later, all of the payments to be made to the Tildens and by them paid over to the corporation as its property; for the turning over of the 300 shares of stock mentioned (except a qualifying share each to MacCallum and appellee) to a third party in escrow, to pass to the trustee on full payment of the $15,000 stated—the dividends, however, on one-half of that amount (until aggregating $15,000) to go to the corporation, and only afterwards to go to the trustee, provision being made for meanwhile protecting the rights of the corporation in that half of the stock. The trustee was given express power to withdraw at any time after the making of the first three payments (aggregating $8,000), if dissatisfied with the business of the corporation; or if, at the time of the last payment, there should not have been placed upon the market and in the hands of butchers 5,000 frames with accompanying blades, the trustee could postpone his decision to withdraw until such amount of frames and blades should be in good faith so placed, with the right, in the event of such decision, to sever connection with the corporation, cancel the stock purchase, and be relieved from further payments, whereupon the corporation should repay to the trustee the entire amount so invested by him at the rate of $600 per month, with interest, the repayment to be secured by bill of sale of 5,000 saw frames and 40,000 blades, etc.—the trustee to contemporaneously give the corporation contract authority to lease such property in the usual course of its business. During the period of experimentation the trustee and appellee, as well as the two Tildens, were to be employed by the corporation at salaries of $15 per week each, George Tilden meanwhile to have charge (subject to appellee's supervision, control and possession) of the financial and business management, as well as of manufacturing. The corporate articles of association and the contract between the Tildens and the trustee were in effect parts of one transaction.

The contract was proceeded with, the trustee and his beneficiaries advancing under it $13,600 (or $14,100), which was paid to the Tildens and by them turned over to the corporation, on whose books it

was carried as "surplus account." Appellee acted in effect as general manager during the probationary period. About March 1, 1906, Mr. Beaumont (who had meanwhile succeeded MacCallum as trustee) gave notice of withdrawal from the corporation under the terms of the written contract, the stock so contingently purchased was reassigned to the Tildens, and on March 1, 1906, the Saw Company gave to Beaumont, as trustee, a bill of sale to secure the repayment of the sums so advanced according to the original agreement, except that the times of payment were slightly postponed—the trustee thereupon giving the corporation the lease provided for by the contract. Payments were made to appellee (who had succeeded to the rights of the trustee and his cobeneficiaries) until June 1, 1909, at which time $10,000 remained unpaid, whereupon the trust mortgage in question was given (securing a $10,000 bond issue delivered) covering all the corporation's assets. At the time of the adjudication in bankruptcy, more than three years later (viz., October 31, 1912), about $5,000 and interest remained unpaid.

[1-3] The trustee in bankruptcy contends that the capital stock of the corporation was unpaid for to the extent of the valuation put in the articles of association upon the so-called "secret process" (the valuation of the other items of property contributed not being directly challenged), and that appellee's relations to the transaction were such as to make him liable for its full payment. The statute in force when the corporation was organized (P. A. Mich. 1903, Act 232, § 2) provided that the capital stock subscribed may be paid either in cash or in other property, real or personal, with the proviso that:

"Where payment is made otherwise than in cash there shall be included in the articles an itemized description of the property in which such payment is made, with the valuation at which each item is taken, which valuation shall be conclusive in the absence of actual fraud."

So far as form goes the statute was unquestionably complied with. It is the settled rule in Michigan that stock issued as paid-up and nonassessable cannot be assessed in the absence of fraud. Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814; Graves v. Brooks, 117 Mich. 424, 426, 75 N. W. 932.

The trustee in bankruptcy contends, first, that the so-called secret process was not property capable under the statute of being appropriated in payment of capital stock; and, second, that it was fraudulently overvalued. We entertain no doubt that the secret process, as described in the articles of association, was appropriable under the statute to the payment of capital stock. The fact that it was intangible does not make it any the less "property," for the then existing statute contains no limitation of appropriable property, such as found in the later statute of 1907.[1]

[1] P. A. Mich. 1907, Act No. 146, § 2; 4 Howell's Mich. Stat. (2d Ed.) § 9533, limits the property so appropriable to such as "can be sold and transferred by the corporation, and as shall be subject to levy and sale on execution, or other process issued out of any court having competent jurisdiction, for the satisfaction of any judgment or decree against such corporation."

We find nothing to the contrary of this view in the decision in Savings Bank v. Stove Polish Co., 105 Mich. 535, 539, 63 N. W. 514, which does not in terms declare that no intangible property having actual value can be taken by the corporation at such value in payment for its capital stock—the holding being only that the "gift for influence" there involved was "not a tangible asset, such as the law contemplates as a part of the capital stock of a corporation." However, the statute of 1885 there involved (P. A. Mich. 1885, Act No. 232) contained no express provision for payment for capital stock in property.

Secret processes and formulas are property, and rights in them are by the Supreme Court of Michigan recognized as entitled to protection as property rights. O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132, 115 N. W. 714. It is of course true that a purely fictitious item of property would not satisfy the statute, as, for example, the formula involved in Wood v. Sloman, 150 Mich. 177, 193, 194, 114 N. W. 317, whose valuation was held merely a form to enable a sale of stock for a fraction of its proper value, or the gift for influence involved in Savings Bank v. Stove Polish Co., supra, or the fictitious schedule condemned in Nichols v. Buell, 157 Mich. 609, 615, 122 N. W. 217.

[4-9] The trustee in bankruptcy contends, however, that the so-called secret process was not for the manufacture of saw blades, but simply for "the method or manner of running or operating the business," and so not property within the meaning of the statute. This proposition and the contention of fraudulent overvaluation may be considered together. The referee agreed with the trustee's contention as to the nature of the secret process, and held that the stock issued for it had not been paid for, because the process had not been written out and was not disclosed by the Tildens to the corporation, nor "turned over to it in such manner as to be of any value to it, if it had any value." The question of fraudulent overvaluation was not otherwise passed upon. The District Court expressly held that the charge of fraudulent overvaluation of assets contributed (apparently treated by the court as a whole) was not sustained.

We see no merit in the suggestion that the process, whatever it was, was not turned over to the corporation. True, it was not written out, but it does not appear to have been a mere formula; there was testimony that the whole process was in effect turned over to the corporation (it was expressly included in the bill of sale from the Tildens to the corporation as "a certain secret process known to us and used by us in the manufacture of saw blades"), and that, had the Tildens left the company, the latter could have continued the business. So far as the process related to mechanical work, it would have to be "illustrated and shown." The corporation must have had whatever benefit there was in the process, for both Tildens remained with the corporation throughout the eight years intervening between the corporate organization and the bankruptcy.

There was testimony that the secret process was "just our knowledge of how to conduct the saw business," "simply our knowledge of the business, which of course we kept secret to ourselves"; that "nothing

but the system was secret." But there was also testimony, not only that it was "simply the knowledge of how to set and file saws"; that it was "a system of manufacturing blades and sharpening them"; but that it consisted in the "handling of the machines as well as the method of getting the work out, and somewhat the method of placing it on the market also." Brown testified that the secret process "referred to certain filing machines that they [the Tildens] did not care to place patents upon."

There was also testimony that the $21,900 valuation was put in by agreement between the Tildens, MacCallum, and appellee, to enable the Tildens to get "our half of the stock," and tending to show that no attempt was made to place a specific valuation upon the secret process, except to adopt such amount as would bring the valuation up to $60,000.

Considering all the testimony, we think the parties understood that the property furnished by the Tildens had no such present market value as was put upon it in the articles, and that it had no intrinsic value to that amount, unless for use in connection with a going, reorganized and profitable business. We think, however, that the Tildens believed that, with the cash to be advanced by MacCallum and his associates for developing the business, it would be successful to the extent of earning net dividends upon the full capitalization of $60,000, and thus that when so developed the net corporate assets contributed would, as a whole, be worth that amount. The fact that one-fourth of the stock was to be entirely paid for by the application of such dividends tends strongly to evidence such belief. It is not unnatural that the Tildens, having such belief and expectation, but lacking the capital or the ability to obtain it by ordinary commercial loan, should be willing to put in one-half of their outfit, including patents, processes, and all incidents of their business, including good will, so far as it existed (and good will is a property right which can be conveyed with the business to which it is incident, Prame v. Ferrell [C. C. A. 6] 166 Fed. 702, 92 C. C. A. 374), against the cash contributed by MacCallum and Brown into the treasury of the corporation for the purposes stated.

We also think that MacCallum and Brown *expected* that, given such working capital and the proposed co-operation, the business would be profitable to the extent stated, and would pay reasonable dividends upon the full capitalization of $60,000; otherwise, they could hope to get, for a very long period of years at least, earnings (scant at that) upon but one-fourth of the stock, for which they would pay par. With dividends at 6 per cent. it would take nearly 17 years to pay for the other one-fourth. The fact that in the corporate reports for 1907 and later years patents and formulas were carried at much less than the aggregate valuations put in the articles of association upon patents and "secret process" does not strongly tend to show fraud in the original valuations. In 1906 one-half the total original stock had been turned into the treasury.

But MacCallum and his associates were furnishing money for a business new to them, and they did not *know* that this expectation would be realized. It was natural that during such period of experimentation they should retain, for their protection against disappointment, the option of determining their ultimate status, whether as creditors or stock-

holders. The fact, if it be a fact, that they refrained from participating in the original incorporation in order to avoid the question of stockholding liability, does not strongly make against the existence of such expectation, especially in view of the probationary nature of their relation. We should hesitate to say that a fraudulent overvaluation of the assets, as a whole, contributed by the Tildens, was made out, especially having in mind the fact that all of the permissible capital stock was placed at the outset, and that there is nothing to indicate that either of the four parties concerned had any intention of selling their holdings in whole or in part. In fact, although other stock issues were made during the operating life of the corporation, there is no evidence that any of its stock, old or new, was ever sold at less than par.

But whether or not, under other circumstances, and as against creditors otherwise related, the valuation in question would be deemed fraudulent, we think it would be inequitable to so hold, and to deny to appellee the repayment of his advances, under the circumstances presented and in favor of the beneficiaries here concerned. True, it is the general rule that a transferee with full notice that stock, though purporting to be fully paid for, is not really paid for, is liable to corporate creditors for unpaid subscriptions. It is also the general rule that "money paid towards the purchase of stock cannot be converted into a loan to the detriment of other interested parties." Clark v. Clark Mach. Co., 151 Mich. 421, 423, 424, 115 N. W. 416, 418; Allen v. Commercial Bank (C. C. A. 6) 191 Fed. 97, 99, 111 C. C. A. 577, and cases cited. But the facts of this case, we think, distinguish it from the cases last cited, and from all the other decisions chiefly relied on by appellant.

Although the contract took the form of a sale with option to convert into a loan, we think, upon a review of all the evidence, oral and written, that in equitable contemplation the dominant nature of appellee's primary relation to the corporation should be regarded as that of a loaner of money, with option of stock purchase, rather than that of a purchaser endeavoring to turn the transaction into a loan. The relations of MacCallum and appellee as officers and stockholders, not only were not greatly different than frequently given creditors, but were reasonably necessary to the experimental operation required to enable an intelligent exercise of the option.

Appellee is not attempting to get anything but his advances and reasonable interest. The corporation has apparently had the actual benefit of every dollar of his advances, and has been able to operate about eight years, presumably, at least in large measure, as a result initially of the advances made by appellee and his associates. The corporation is shown to have been solvent when appellee retired, and apparently made a little profit for a time thereafter. It is fairly inferable from the testimony of one of the Tildens that the later losses were largely due to going into experiments and the manufacturing of "side lines." The witness also says there was no need of going into bankruptcy—"there was just a quarrel between my father and brother and the preferred stockholders."

Moreover, as already said, the stock returned by appellee and his associates to the Tildens was not kept by them, but was turned into the corporation treasury. Later new issues of stock, both common and preferred, were made, and such sales of new and old stock have been had that the corporation has in effect received from the $30,000 stock in question at least one-half the $21,900 alleged overvaluation of property contributed by the Tildens. It would, we think, be inequitable to charge against this stock more than the ratio it bears to the whole stock. Clark v. Clark Mach. Co., supra, 151 Mich. at page 421, 115 N. W. 416.

No creditors could reasonably have given credit, actually or constructively, on the supposition that the stock in question was not paid for. The stock was issued in the name of the Tildens as paid for; the corporate records showed the making of the contract and the subsequent acts and conveyances, including not only the bill of sale from the Tildens to the corporation, but the bill of sale to secure the repayment of advances, given by the corporation to the trustee, upon the exercise of the option to receive back the money—this bill of sale being entered at large upon the corporate records upon March 9, 1906. The contract itself (a copy of which was also attached to the bill of sale last referred to) was, on July 26, 1905, recorded in full in the record of articles of association kept by the county clerk. The fact of the making of the bond issue of 1909, and the trust mortgage securing it, were entered upon the corporate records May 19, 1909, the mortgage was duly recorded in August following, and an item of secured indebtedness (apparently represented by the debt to appellee, although not so designated) is shown in the report of the corporation for each year from 1907 to 1912, both inclusive. The existing creditors became such since May 1, 1911. The alleged overvaluation was thus not "to the detriment of other interested parties."

[10] Although it is the general rule that unpaid stock subscriptions inure to the benefit of future as well as existing creditors (Clark v. Clark Mach. Co., supra, 151 Mich. at page 424, 115 N. W. 416), we think the facts of this case bring it within the rule that creditors giving credit with a mortgage on file in the proper office are not entitled to complain (Clark v. Clark Mach. Co., supra, 151 Mich. at page 421, 115 N. W. 416).

[11] We have no doubt of the jurisdiction of the District Court, under the consent submission, to make the order complained of. Whether, in case a contrary result had been reached, it would have had jurisdiction, except by bill in equity, to decree and enforce assessment for unpaid subscriptions, is a question not calling for decision.

The judgment of the District Court should be affirmed.

FIREMAN'S FUND INS. CO. v. GLOBE NAV. CO. et al.

THE NOTTINGHAM.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1916.)

No. 2631.

1. INSURANCE ⟸646(6)—CAUSES OF LOSS—MARINE INSURANCE—UNSEAWORTHINESS—BURDEN OF PROOF.
As between owner and insurer, the burden of proving that a vessel is unseaworthy rests upon the insurer.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1659–1662, 1664; Dec. Dig. ⟸646(6).]

2. INSURANCE ⟸665(4)—CAUSE OF LOSS—MARINE INSURANCE—PROOF OF UNSEAWORTHINESS.
Where, on an authorized survey of a vessel before commencing a voyage, she was reported seaworthy and in good condition for the intended voyage, evidence of a very clear and convincing character is required to overcome such proofs and establish that her loss during the voyage was due to her unseaworthiness at its commencement.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1722; Dec. Dig. ⟸665(4).]

3. INSURANCE ⟸388(3)—WAIVER OF FORFEITURE—MARINE INSURANCE.
It is a rule of the marine law of insurance that any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer, if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1027; Dec. Dig. ⟸388(3).]

4. INSURANCE ⟸646(8)—CAUSE AND AMOUNT OF LOSS—BURDEN OF PROOF.
The burden of proving a loss, for a cause and to an amount for which the insurer is liable, is upon the insured.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1665; Dec. Dig. ⟸646(8).]

5. INSURANCE ⟸468—EXTENT OF LOSS—MARINE INSURANCE—ACTUAL TOTAL LOSS.
Where the hull and some parts of the apparel and equipment of a vessel, which became water-logged in a storm and was abandoned by her crew, were saved and brought into a port by salvors in a condition capable of being repaired at some cost, the vessel, as a vessel, was not destroyed, and there was not an actual total loss within the terms of an insurance policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1188–1191, 1246; Dec. Dig. ⟸468.]

6. INSURANCE ⟸149—CONSTRUCTION OF CONTRACT—INCONSISTENCY BETWEEN WRITTEN AND PRINTED PROVISIONS.
If there be any inconsistency between a written provision of a policy and the printed portions thereof, the written language must prevail.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 301–304; Dec. Dig. ⟸149.]

7. INSURANCE ⟸146(3)—CONSTRUCTION OF CONTRACT—AMBIGUOUS LANGUAGE.
If a policy will fairly admit of two constructions, the one should be adopted which will indemnify the insured.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. ⟸146(3).]

8. INSURANCE ⊂⊃150—MARINE INSURANCE—CONSTRUCTION OF CONTRACT.
A provision, written on the margin of a marine policy on a ship, that "This insurance is against total and/or constructive total loss of vessel, including general average and/or salvage charges, * * * *" construed, and *held* not inconsistent with or to abrogate a clause of the policy providing that "the insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 305–307; Dec. Dig. ⊂⊃150.]

9. INSURANCE ⊂⊃469—MARINE INSURANCE—RIGHT OF ABANDONMENT.
An insured is not entitled to abandon a vessel as for a constructive total loss, under the "high probability" rule, where the policies contain a provision fixing the right to abandon on certain specified terms.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1192–1227; Dec. Dig. ⊂⊃469.]

10. INSURANCE ⊂⊃469—MARINE INSURANCE—RIGHT OF ABANDONMENT.
The right of an insured to abandon a vessel as for a constructive total loss must be determined by the situation of the vessel and the conditions existing at the time notice of abandonment is given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1192–1227; Dec. Dig. ⊂⊃469.]

11. WORDS AND PHRASES—"COLLISION CLAUSE"—"RUNNING DOWN CLAUSE."
An additional provision for insurance, on the margin of the policy, covering the contingency of a collision of the insured vessel with another vessel and the liability of the insured for the injury to such other vessel, is known as the "collision clause," or the "running down," clause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collision.]

Rudkin, District Judge, dissenting.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Libel in personam by the Globe Navigation Company, appellee herein, and S. P. Weston, its trustee in bankruptcy, against the Fireman's Fund Insurance Company, appellant, to recover the amounts of two policies of marine insurance issued by the latter on April 17, 1911, for $6,000 and $24,000, respectively, upon the schooner Wm. Nottingham, owned by appellee, and which it is alleged was totally lost by perils of the sea and perils insured against in said policies. Decree for libelant for $30,000, with interest and costs, less $8,500 deducted in accordance with agreement of the parties. The insurance relates to the same disaster stated in Fireman's Fund Insurance Co. v. Globe Navigation Co. and S. P. Weston, as Trustee in Bankruptcy, No. 2630, 234 Fed. 273, — C. C. A. —. Respondent appeals. Reversed.

The schooner Wm. Nottingham, with Capt. A. W. Swenson as master, sailed from Westport, Or., on September 26, 1911, laden with a cargo of lumber, bound on a voyage to the port of Callao, Peru. The vessel had been insured by the appellant company on April 17, 1911, for the period of one year, in two policies of insurance, one for $6,000, and the other for $24,000—total of $30,000. The vessel was valued at $45,000 in the policies. Her actual value was $30,000. On August 25, 1911, while the schooner was at Astoria, Or.,

she was surveyed for the appellant by one Albert Crowe, a marine surveyor, who certified that he had examined the vessel and found her in good condition and suitable for the intended voyage and cargo. The vessel was loaded at Westport, Or. On the afternoon of September 26th, in attempting to pass out of Westport slough into the Columbia river at high tide, the vessel grounded, and remained aground until high tide next day, when she was pulled off by two tugs. She then proceeded on her voyage down the Columbia river to Astoria, where she was again surveyed by one Cherry, who appears to have been acting for surveyor Crowe, whose name was attached to the report. The surveyor reported that he had "held a final survey on the vessel and found her well laden and the deck load thoroughly secured. Consider vessel in good trim for making the intended voyage." After this survey, the vessel proceeded to sea on October 2d.

The Columbia river bar was rough, but Capt. Swenson testified that in his opinion it was not rougher than was safe for crossing. The captain testified further: After crossing the bar the vessel stood offshore on a port tack. After everything had been straightened up on deck, the captain directed the mate to sound the pumps, which he did, and found 15 inches of water in the well. This was the normal amount of water to be in the vessel after she had been lying in port for a time without being pumped out. The captain did not feel uneasy. Four hours afterward he sent down to try the pumps again, and it took a little longer than usual to pump her out; but he testified that sometimes there is a lot of drain from different parts of the ship, which probably caused the water to drain through the wells, and the men might not have pumped as hard as others, so he did not feel uneasy. The vessel stood on the port tack to about 128° west, or until October 4th. It then took the men about an hour in every four before they could free the ship from water; but this fact did not cause the captain to feel uneasy, for the reason that they had quite a breeze blowing, about 35 miles an hour or so. But the wind shifted to the southwest and increased, and the captain was compelled to put the vessel on the starboard tack. As he was well offshore, he could stay on this tack down the coast. When the vessel was put on the starboard tack, the sea was pretty rough, and she took an unusually heavy lurch to port, and the deck load shifted about four inches. The vessel then commenced to make water freely. Upon examination it was found that water was coming into the storeroom at the break of the poop—what was called the half deck. The water was pouring in there on the port side. The captain went forward and found the galley was flooded, the water coming in somewhere through the shifting of the deck load. The sea at that time was rough—very rough. The vessel lay over considerably. Most of the water was on the lee or port side. The vessel lying over on the port side caused this part of the vessel to get under water. This was sufficient to take in the water found in the vessel. It was at this time the captain sent the men down, and they worked for four hours without being able to get her free of water. Then the captain ordered the mate to start the steam pump, and something happened to be wrong with it; the captain did not know what it was. It happens sometimes that a piece of wood or something gets into the valve and clappers and prevents the pump from doing its work. The steam pump was last used at Astoria before leaving. The pump was then apparently in good condition, but it was not then used for the purpose of pumping out the vessel. At that time an additional section of hose was placed on the pump and was let over the side and the valve leading down into the hold was closed. Apparently the pump was in good condition, pumping the water over the side of the ship for washing down the vessel. When the captain found that the hand pump did not handle the water and the steam pump failed to work, he tried to get to port; he was trying to run for Cape Flattery, but the sea was rough and windy. On October 8th the steam pump was working. Had southeast wind from October 2d to October 8th. On the afternoon of October 8th, and some time after the steam pump had got to work, the vessel was struck by a heavy gale from the northwest. It came so suddenly that it carried away one of the boats hanging in the davits and lashed with double lashing. It tore the boat from the lashing and threw it out on the water, and, although the vessel was on the right tack for the wind to strike the sails, she almost went on her beam

ends. The force of the wind at that time was 100 miles an hour. The captain tried to get the vessel before the wind, but she was slow in getting there. For some time she was throwing herself on her beam ends. After the first heavy wind she righted herself somewhat, but during that heavy lurch she shifted her deck load considerably, and then she did not answer her helm. She went over so much that the water came up in the donkey room and put out the fire, and they were unable to keep up steam. The captain then tried to get her on the other tack, so as to straighten her up and pump her out, but he was unable to do so; she did not answer her helm. The vessel continued to fill. Early on the morning of the 9th the situation was serious. The captain concluded to try and jettison the deck load and preparations were made for that purpose, but before the preparations were completed the vessel laid over so much that the deck lashings parted, the deck load took a slide to port and up against the rigging, carrying away three masts—the main, mizzen and spanker—and the masts and deck load even with the rail went over the side. The wreckage was held by the forespring stay. To get rid of the wreckage it was necessary to cut this forespring stay. Volunteers were called for, and one man came forward and cut away the stay, and that released the vessel of the wreckage. When this was done they started to pump her out, but found that the water was coming in through the holes in the side caused by the chain plates tearing out. They then rigged a raft and went over the sides and plugged up the holes. They set the foresail and forestaysail, and hand-rigged some of it on a jury mast which had been set up in the meantime. Then a heavy gale set in from the southeast. When the deck load went overboard, something forward caused the connections between the donkey boiler and the fresh water tanks to break, and all the fresh water was lost. The donkey engine was then operated on salt water, and the vessel was nearly pumped out when a second gale from the southeast struck her and the vessel commenced to fill. This was on October 11th. The sea commenced to run over the vessel. The force of the wind was then about 50 miles an hour. The vessel was put before the wind, and they tried to steer for Cape Flattery. Sighted two vessels, but they failed to respond to the distress signals. On October 13th the schooner David Evans hove in sight, The crew insisted upon abandoning the vessel. They had been without fresh water for four days. The vessel was thereupon abandoned by the officers and crew, and they were carried to Astoria, Or., on the schooner David Evans, where they arrived on October 14th.

The tug Wallula picked up the vessel after her abandonment by her officers and crew and brought her into the port of Astoria on October 15th. On October 16th the manager of appellee, G. F. Thorndyke, served a written notice of abandonment of said vessel, and made claim for a total loss under policies of insurance, upon Frank G. Taylor, appellant's agent at Seattle, Wash. The abandonment was declined by appellant. Subsequently the vessel was libeled by the salvors for $34,000 salvage. There were no facilities at Astoria for repairing the vessel, nor could she be discharged, surveyed, or examined at that place. After the abandonment by the appellee, it was agreed by the appellant and appellee that the appellee should arrange to have the vessel taken up the Columbia river to St. Johns, near Portland, where she could be discharged and surveyed. The salvors would not surrender possession, nor take the boat to St. Johns, nor assume the expense nor the risk of towage from Astoria to St. Johns. The appellee thereupon, at the instance of appellant, applied to the United States District Court at Portland and obtained an order from that court in salvage proceedings permitting the towing of the vessel from Astoria to St. Johns and the discharging of the cargo, upon condition that the expense thereof should be paid by the appellee as against the salvors, and that the appellee would execute an indemnity bond to protect the salvors against the risks of the voyage. The bond was given by appellee, and the vessel was thereupon towed to St. Johns, the cargo discharged, and the vessel put in dry dock and surveyed. Subsequently representatives of the appellee arranged a settlement with the salvors upon the payment of $3,000 and for a release of the vessel from the custody of the marshal on account of the salvage claim and other expenses amounting in the aggregate to $8,433.52.

When the vessel had been surveyed, specifications for repairs were drawn up by representatives of the appellant and appellee, and bids invited from a number of firms on these specifications. These bids were as follows:

Oregon Dry Dock Company	$25,200.00
Vulcan Iron Works	24,600.00
St. Johns Ship Building Company	23,070.75
Albina Engine & Machine Works	20,950.00

Thereupon the insurance adjusters made a statement of the expenses incurred subsequent to the written abandonment of October 16th by the appellee, apportioning the expenses that were for the joint benefit of the vessel and cargo between those interests, and charging to the owners the expenses that were for the benefit of the vessel alone. The joint expenses of vessel and cargo, including the $3,000 salvage award, amounted by this adjustment to $8,780.01. This was the general average charge for both the vessel and cargo. Of this amount the vessel paid $5,637.46 and the cargo $3,142.55. Appellant's proportion of the amount paid by the vessel, namely, $5,637.46, was the proportion which the amount insured, $30,000, bore to the value of the vessel declared in the policies, $45,000, making appellant's proportion the $^{30000}/_{45000}$ part of $5,637.46, or $3,758.31. The additional expenses charged to the appellee alone, as found by the adjusters, amounted to $3,244.58. The appellant subsequently paid the appellee, through the adjusters, two-thirds of the vessel's proportion of the joint expenses of vessel and cargo as found by the adjusters, namely, $3,758.31.

Suit was brought on the policies on May 13, 1912, at Seattle, claiming a total loss. Appellant answered June 13, 1912, denying that the damages to the vessel amounted to total loss under the policies, but admitting its liability under the policies for its proportion of general average and salvage charges accruing from the preservation of the vessel and cargo. Subsequently, upon the completion of the average adjustment, it paid this proportion as a liability under the policies. On March 10, 1914, appellee filed an amended complaint, alleging a verbal abandonment of the vessel by the appellee to the appellant on October 14, 1911. On March 31, 1914, appellant filed an amended answer, denying the verbal abandonment of the vessel by the appellee on October 14, 1911, and setting up, for the first time, unseaworthiness as a defense to this action. The unseaworthiness of the vessel alleged in the answer consisted "in that she was leaky and her pumps were not in working order, so that the same could be used to keep said vessel free from water which entered her hull through said leaky condition, and that by reason thereof said vessel commenced to leak and became water-logged in fair weather immediately after starting upon said voyage; that all losses and damages suffered by said vessel upon said voyage were caused and occasioned by the aforesaid unseaworthiness of said vessel."

The policies in question were of the usual San Francisco hull time form insurance against total loss, and containing the following provision: "But no partial loss or particular average shall in any event be paid under this policy. This company not to be liable for any sums the insured may pay to another vessel, her cargo or freight, for or on account of collision." There was, however, written upon the margin of each policy the following clause: "This insurance is against total and/or constructive total loss of vessel, including general average and/or salvage charges and/or claims under three-fourths (¾) running down clause."

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.

H. R. Clise, C. K. Poe, W. H. Bogle, C. B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellees.

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

MORROW, Circuit Judge (after stating the facts as above). The appellant defends this action on the grounds: 1. The vessel was not seaworthy when she set out on the voyage in question. 2. The vessel did not become a total loss. 3. The vessel did not, under the terms of the policies, become a constructive total loss.

1. It is provided in the policies of insurance that:

"The adventures and perils which this insurance company is contented to bear, and takes upon itself, * * * are of the seas * * * and all other losses and misfortunes that shall come to the hurt or damage of the vessel, * * * or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, including * * * the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy."

Section 2682 of the Civil Code of California provides:

"A ship is seaworthy when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy."

Section 2683 of the Civil Code of California provides that:

"An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases:

"1. When the insurance is made for a specified length of time, the implied warranty is not complied with, unless the ship be seaworthy at the commencement of every voyage she may undertake during that time. * * *"

The defense that the vessel was unseaworthy had reference, therefore, to her condition when she commenced her voyage at Westport on September 26, 1911, for Callao, Peru.

[1] The burden of proving that a vessel is unseaworthy lies upon the insurance company. The presumption of law is that every vessel is seaworthy until the contrary is proved. Gow on Marine Insurance, p. 273; Arnould on Marine Insurance, par. 725; Adderly v. American Mut. Ins. Co., Fed. Cas. No. 75; Bullard v. Roger Williams Insurance Co., Fed. Cas. No. 2122; Lunt v. Boston Marine Insurance Co. (C. C.) 6 Fed. 562; Moores v. Louisville Underwriters (C. C.) 14 Fed. 226; Guy v. Citizens' Mutual Insurance Co. (D. C.) 30 Fed. 695; Earnmoor v. California Insurance Co. (D. C.) 40 Fed. 847; Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co. (C. C.) 123 Fed. 820, 824; Thames & Mersey M. Insurance Co. v. Pacific Creosoting Co., 223 Fed. 561, 570, 139 C. C. A. 101.

[2] In Arnould on Marine Insurance, par. 726, the author says:

"With regard to the means of proving that the ship was seaworthy or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel."

Capt. Swenson, in his testimony taken in August, 1913, testified that he had two surveys made of the vessel. The first was made before the cargo was stowed, and the second after the vessel was loaded for her voyage. He produced these reports of surveys. The first was a report dated August 25, 1911, and the second was a report dated September 27, 1911. Both reports are signed by Albert Crowe, surveyor for the appellant; but the last report appears to have been actually made by one Cherry, Lloyd's agent at Astoria, for Mr. Crowe. The

first examination was made before the vessel was loaded, and certifies that the surveyor had "examined the vessel and found her in good condition and suitable for the intended voyage and cargo." The second examination was made after the vessel was loaded, and the report certifies that the surveyor had "held a final survey on this vessel and found her well loaded and the deck load thoroughly secured." The report further certifies:

"Consider vessel in good trim for making the intended voyage."

When these reports were offered in evidence, it was mentioned that Surveyor Crowe, who signed the reports, had since died. An objection was thereupon made to the reports, but withdrawn upon the suggestion of some further arrangement concerning this evidence. We do not find any further objection made to these reports, but they were admissible upon the testimony of the captain that he had had the surveys made and that these were the reports. Here was evidence of a very direct and positive character tending to prove that the vessel was seaworthy when she started on her intended voyage. To overcome this proof, evidence of a very clear and convincing character was required. Mere conjecture or suspicion that the vessel was not seaworthy was not sufficient.

In the original answer of the insurance company in this case, filed June 13, 1912, it denied that the damages to the vessel amounted to a total loss, but it admitted its liability under the policies for its proportion of general average and salvage charges accruing from the preservation of the vessel and cargo. In its amended answer, filed March 31, 1914, it repeated its admission of liability for general average and salvage charges, with the allegation that an adjustment had since been made of such charges, including expenses, and it had paid the appellee its proportion of such charges, and had been discharged from all liability for general average and salvage losses under said policies. The defense that the vessel was not seaworthy was as much a defense to a liability for general average and salvage losses as it was to a liability for a total or constructive loss. If the vessel was unseaworthy, the policies were void, and no liability was chargeable upon the insurance company. Arnould on Marine Insurance, par. 688.

We must assume, therefore, that when appellant filed its original answer it had no information upon which to base the defense that the vessel was not seaworthy when it sailed on the voyage on October 2, 1911, or, having such information, it waived the defense. When it filed its amended answer on March 31, 1914, more than two years and five months after the disaster, it set up for the first time the defense that all losses and damages suffered by the vessel on the occasion mentioned were caused and occasioned by the unseaworthiness of the vessel, and, specifying the particulars in which the vessel was not seaworthy, it alleged that the vessel was leaky and her pumps not in working order, so that the same could be used to keep the vessel free from water which entered her hull through said leaky condition, and that by reason thereof said vessel commenced to leak and became water-logged in fair weather immediately after starting upon her voyage.

This last allegation is not supported by the evidence. A vessel is wa-

ter-logged when she becomes heavy and unmanageable on account of the leakage of water into the hold. Standard Dictionary, defining the word "water-logged." The Nottingham did not become heavy and unmanageable until October 8th, when she had been six days out, the last four days of which had been heavy weather, and during this time her deck load of lumber, which had been shifted to port by an unusually heavy lurch to port on October 4th, had caused her to take water freely. It was in this situation that the vessel was struck by a heavy gale from the northwest on October 8th. The gale came so suddenly that it carried away one of the boats hanging in the davits, lashed with double lashing. The force of the wind was at that time 100 miles an hour. She threw herself on her beam ends, and, taking a heavy lurch, again shifted her deck load, and then she did not answer her helm. She went over so much that the water came up in the donkey room and put out the fire, and they were unable to keep up steam. The vessel continued to fill, and on the morning of the next day the deck lashings parted, the deck load took a slide to port and up against the rigging, carrying away three masts and the chain plates. The water came in through the holes caused by the tearing out of the chain plates. When the deck load went overboard, it carried away the connections between the donkey boiler and the fresh water tanks, and all the fresh water was lost. Then the donkey engine was operated on salt water, and the vessel was nearly pumped out when a second gale from the southeast struck her and the vessel commenced to fill. The force of the wind was then about 50 miles an hour. The vessel had been water-logged since the day before, but this was not in fair weather and it was not immediately after starting upon the voyage; it was after the deck load of the vessel had shifted, and after a heavy wind had been blowing for four days, which rose to gales from different points of the compass.

With respect to the allegation that the vessel was leaky and the pumps not in working order, it appears that the failure of the steam pump to work was only temporary, and the appellant knew all the facts about that condition of the vessel from the statement of the master in his report of the wreck soon after coming ashore on October 14th. But it appears from the record that on July 31, 1913, while S. B. Gibbs, agent and surveyor for the San Francisco Board of Marine Underwriters, was giving his testimony for the defendant, a photograph showing a seam in the vessel under the stern post on the port side was offered in evidence. Counsel for plaintiff asked if the photograph was offered for the purpose of establishing the claim that the vessel was unseaworthy. Counsel for the defendant thereupon gave notice that, if the testimony produced developed an unseaworthiness of the vessel on sailing, he should ask leave of the court to amend the pleadings to conform to the proof. At this same examination the witness gave evidence concerning a crack in the flange of the water-closet waste pipe. Through both the seam and the flange, the witness testified, water would leak into the vessel; but there was no further development of unseaworthiness in the vessel by the testimony. There is in the record the copy of a night telegram from Albert Crowe, the marine surveyor

for the defendant, to the secretary of the Board of Marine Underwriters in San Francisco, dated December 21, 1911, referring to the specifications for the proposed repair of the vessel, in which it is stated that:

"Stern post seam on twenty-foot mark space six inches long no oakum whatever."

It is not stated that it was an open seam through which water would leak into the hold of the vessel. In the examination of this seam made for the defendant by Mr. Gibbs, the marine surveyor, on May 2, 1912, or six months after the disaster to which he referred in his testimony, he stated that it was three-sixteenths of an inch in width and one foot long, the draft of the vessel was 20 feet 6 inches, and the seam was at the 20-foot 4-inch mark, or 2 inches below water. The witness testified that the crack in the flange of the water-closet pipe was about one-sixteenth of an inch, and was about 1½ feet under water. The witness was unable to say whether the crack extended around the flange, and he could not say whether the supposed leaks at these two points would be sufficient to water-log the vessel.

But, whatever may have been the character of these two small cracks, the seam was known to the appellant as early as December 21, 1911, and the crack in the flange to the water-closet pipe as early as May 2, 1912, and there was no concealment of either on the part of the appellee, and yet the defense that the vessel was unseaworthy was not interposed until March 31, 1914. In the meantime, acting upon a mutual understanding to save as much of the vessel as possible for the insurer, as well as for the insured, the appellee had incurred and paid its proportion of the salvage and general average charges and the expense attending the adjustment of the same.

[3] There is a rule of marine law upon this subject that any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory. Barber's Principles of Insurance, p. 96; Titus v. Glen Falls Ins. Co., 81 N. Y. 419. In the latter case the court said:

"If, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

But, aside from this rule, we are of the opinion that the appellee should prevail on this issue. We prefer to consider the admissions of the appellant and its delay in setting up the defense of unseaworthiness as arising from the fact that the evidence of rough and heavy seas from October 8th to October 13th furnished a reasonable and sufficient explanation of the leaky condition of the vessel at that time, and that appellant was unable to obtain satisfactory evidence that the vessel was in fact unseaworthy. This is what we find after a careful reading of the testimony, and our conclusion is very clear that the testimony shows that the damage to the vessel was not caused by the unseaworthy

condition of the vessel, but by perils of the sea against which appellant undertook to insure the appellee.

[4] 2. With respect to the claim of appellee that the schooner was a total loss: The rule is that the burden of proving a loss for a cause and to an amount for which the insurers are liable is upon the assured. Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308, 314; Soelberg v. Western Assur. Co., 119 Fed. 23, 31, 55 C. C. A. 601.

[5] The evidence in support of the claim in this case is the testimony of George F. Thorndyke, the manager of appellee, who testified that the schooner, as she lay in the harbor of Astoria on October 16, 1911, was worth but little or nothing—no more than anywhere from $3,000 to $4,000, that would be speculation, and the testimony of Frank Walker, a marine surveyor acting for the appellee, who testified that he examined the schooner as she lay at anchor at Astoria about the 18th of October, and at that time he considered her value practically nothing.

The appellee cites the case of Insurance Co. v. Fogarty, 19 Wall. 640, 22 L. Ed. 216, as holding that, if the damage is such that the thing insured has no value for the use for which it was intended, and cannot be so repaired as to make it useful for that purpose, except at an expense exceeding its value, it is a total loss under the marine insurance law. The subject insured in that case consisted of the various parts necessary for a complete sugar-packing machine, warranted by the assured free from average unless general. The vessel on which this machine was being transported was driven on the rocks in a violent gale, was filled with water, and finally became a total wreck and was abandoned to the underwriters. A large number of the pieces composing the machine were recovered and tendered to the owner, which he refused to receive, on the ground that the insurance company was liable to him as for a total loss. The insurance company denied its liability. The articles composing the machine were all of iron. About half of them in weight was saved, and the remainder left at the bottom of the sea. *That which was saved was entirely useless as machinery, and was of no value except as old iron.* The question was whether, if no part of the machine was delivered in a condition capable of use, the loss would be a total loss, though more than half the parts had been delivered and were of some value as old iron. The lower court had instructed the jury, among other things:

> That "the meaning of the term 'free from particular average,' used in the policy, was that the defendant should be liable only for a total loss of the subject insured"; that "if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist."

The Supreme Court held that the trial court—

> "was right in holding that what was insured was machinery—pieces or parts of a machine—pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the

machine, had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use, connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck."

The Supreme Court said, further, that the Circuit Court—

"went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition."

The case does not quite support the claim of appellee as to the elements of a total loss. The court was dealing with the loss of parts of a machine, where the pieces or parts were so made and united at points with other pieces or parts that the whole constituted a complete operating machine. About half of these parts were absolutely lost; the other half were saved, but no part saved was of any use, or could be applied to any use connected with the machine of which it was a part without more expense on it than the original cost. The result was, no part of the machine was saved, and it became an absolute total loss. In the present case, the vessel was not totally lost; the hull and some parts of the apparel and equipment of the vessel were saved and brought back to the seaport of departure by salvors in a condition capable of being repaired, perhaps not at that port, but at a place some distance therefrom.

There is a manifest difficulty in stating any general rule that would be applicable to all cases, and no such rule appears to have been clearly stated by the courts; but analogous cases afford some light on the subject. In the case of Murray v. Hatch, 6 Mass. 465, the action was upon a policy of insurance upon a ship, her cargo and freight, against *total loss only*. The vessel was cast ashore, but afterward got off and carried into a port where repairs were practicable. The agent of the owner proceeded to strip the vessel, to sell the hull and cargo, and to abandon the voyage. The court, passing upon the question of total loss, said:

"Perhaps, upon the facts found, it is not perfectly clear what was the extent of the injury which the vessel insured had sustained; but if afloat, or if it was practicable to put her afloat, and if she was capable of being repaired at any expense, it was not a total loss within the meaning and intent of the policy relied on in this case. It is stated that the vessel was not worth repairing, and that it would have cost $1,500 to repair her; which proves that the subject-matter of the insurance was not specifically destroyed, and that the voyage was not entirely and inevitably defeated. Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value, and not worth pursuing, is not a question to be considered, where the policy is restricted to the case of a total loss. That case is only proved by showing the destruction of the thing specifically, and in that sense totally."

What constitutes an actual total loss of a vessel insured "against actual total loss only" was considered in the case of Burt v. Brewers' & Maltsters' Ins. Co., 9 Hun, 384, 385. The court said:

"When the ship, in the course of her voyage, and by the agency of the perils insured against, becomes an absolute wreck, when she has been broken

in pieces and dismembered, so that her planks and apparel are scattered on the sea, this is a case of absolute total loss on ship, though the whole or greater part of the fragments may reach the shore as wreck. In such a case, it is quite clear that the ship, *as a ship*, is totally destroyed; the ship has perished, only the wreck remains. * * * Where the liability of the underwriter is expressly restricted to an absolute or actual total loss, there must exist such a state of things as that the subject of insurance is wholly destroyed as that thing, in specie, which was insured, or, at all events, there must be left no spes recuperandi."

This case was affirmed by the New York Court of Appeals substantially upon the opinion of the Supreme Court cited. Burt v. Insurance Co., 78 N. Y. 400.

In the case of Bullard v. Roger Williams Ins. Co., 1 Curt. 148, Fed. Cas. No. 2122, the action was for a total loss on a policy of insurance for a vessel on the voyage described in the policy. The insurance was against a total and constructive total loss and for a partial loss if the damage to the vessel by the perils insured against amounted to 10 per cent. or over. The value of the vessel amounted to $3,000, and was insured for $2,000. On the voyage in question the vessel encountered cross-seas, sprung a leak, and was taken to port. Upon being surveyed, it was found that she could be repaired for $2,000, and that when repaired the vessel would not be worth the cost of repairs. The case was tried before the court and a jury. Mr. Justice Curtis instructed the jury that an abandonment of the vessel to the underwriters was necessary to enable the owner to recover for a constructive total loss, and that no sufficient abandonment had been proved in the case. The question for the jury, then, was whether the loss was an actual total loss or a partial loss amounting to 10 per cent. and over. The court instructed the jury as to what constituted an actual total loss as follows:

"It has been much discussed what constitutes a total loss, when the vessel remains in specie and still retains the form of a vessel, in a place of safety. I shall not trouble you with the different views which have been taken of this question, but I will state the rules which I deem proper for your guidance. It is manifest that the form of a vessel may remain and be in a place of safety, and yet, for all useful purposes, the vessel may have ceased to exist. If she be absolutely incapable of repair, so as to be fitted to encounter the seas, then she has ceased to exist as a vessel, though great part of her materials may remain, and they may still be in the form of a vessel. So, though capable of being repaired and restored to the condition of a sea-going vessel, yet if this can only be done at an expense exceeding the value of the vessel when repaired, it is an expense which no one is bound to incur, and therefore the case is the same as if absolutely irreparable; there being no practical difference, for this purpose, between what cannot be done at all, and what no prudent person would undertake to do. And therefore, if you should find, from the evidence in the case, that the injuries suffered by this brig from perils of the sea were so great that they could not be repaired, so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary."

Whether insurance on a vessel against "actual total loss only" covers the case of a *total loss of value*, although the ship remains in the form of a ship, capable of being repaired at some cost, and is not placed by sale or otherwise beyond the power of the insured to procure her arrival, was referred to and doubted, but not decided, by the New York

Court of Appeals, in Carr v. Providence Ins. Co., 109 N. Y. 504, 17 N. E. 369, 370.

We do not deem it necessary to discuss that question as an element in the claim for an actual total loss in this case, for the reason that the insurance against a constructive total loss provided for in the policies under consideration covers a total loss of *value* if it existed; and in our opinion that is where that question is placed by the terms of the policies, and there only is where it should be considered in this case. In view of the authorities cited, and others referred to in the cases cited, we are of the opinion that the total loss of the vessel as a vessel has not been proven. We therefore proceed to consider the terms of the policies providing insurance against a constructive total loss.

3. The first printed paragraph in each of the policies covers a loss, but expressly excludes partial loss and particular average; the following printed clause in the paragraph, "unless amounting to at least ——— per cent. net," being deleted. In paragraph 3 of the policies it is provided that:

"The adventures and perils which this insurance company is contented to bear, and takes upon itself in this policy, they are of the seas * * * and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, including the rules for adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy."

As a constructive total loss is not excluded by the policies, the provisions of the Civil Code of California upon this subject became terms of the policies, except as such terms are excluded by the policies. Chapter 2 of title 11 of the Civil Code of California relates to "Marine Insurance." Section 2703 of that chapter provides that "a total loss may be either actual or constructive." Section 2705 provides that:

"A constructive total loss is one which gives to a person insured a right to abandon, under section two thousand seven hundred and seventeen."

Section 2717 provides:

"A person insured by a contract of marine insurance may abandon the thing insured * * * and recover for a total loss thereof, when the cause of the loss is a peril insured against:

"1. If more than half thereof in value is actually lost, or would have to be expended to recover it from peril;

"2. If it is injured to such an extent as to reduce its value more than one-half;

"3. If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances."

Section 2744 provides that:

"A marine insurer is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him towards a *general average loss* called for by a peril insured against."

In chapter 3 of title 6 of the Civil Code, relating to "Service Without Employment," section 2079 provides that:

"Any person, other than the master, mate, or a seaman thereof, who rescues a ship * * * from danger, is entitled to a reasonable compensation there-

for, to be paid out of the property saved. He has a lien for such claim, which is regulated by the title on liens; * * * the actual costs at the time of the services rendered by one such vessel to another, when in distress, are payable through a general average contribution on the property saved."

[11] On the margin of the policies there was printed a further provision for insurance covering the contingency of a collision of the insured vessel with another vessel and the liability of the insured to pay for the injury to such other vessel. This special contract is known as the "collision" clause, or, as it is better named, the "running down" clause. Gow on Marine Insurance, p. 244.

The policies, by their own terms and by reference to provisions of the Civil Code of California, insured the appellee against actual total loss, constructive total loss, general average, salvage charges, and claims under the three-fourths running down clause. We have determined, as before stated, that an actual total loss was not established by the proof, and, as a partial loss is excluded by the policies and the three-fourths running down clause is not involved, we are limited to the inquiry as to the elements of a constructive total loss and whether, under the policies in suit, such a loss includes general average and salvage charges.

The vessel was valued in the policies at $45,000. The indisputable testimony is that the actual value of the vessel did not exceed $30,000, and she was insured for that amount. It appears that the vessel had been previously insured for $25,000 upon a valuation in the policy fixed by the underwriters at $55,000. Upon the appellee increasing the insurance to $30,000, the underwriters reduced the valuation in the policies to $45,000. The relation of the amount insured to the value fixed in the policy determines the percentage of the underwriters' contribution to a constructive total loss; the underwriter accordingly fixes the insurance value of the vessel in the policy, which the insured must accept if he wishes to obtain the insurance.

We will now consider the rules under which the amount of damage to the vessel is to be determined. In paragraph 8 of the policies it is provided:

"It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by the perils insured against (except on anchors, copper and calking under the copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage, and their proceeds deducted from the gross loss."

In paragraph 9 of the policies it is provided:

"That the insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), shall exceed half the amount hereby insured."

Turning to section 2717 of the Civil Code of California, we find that the insured may, under that statute, abandon the thing insured and recover for a total loss:

(1) "If more than half thereof in value is actually lost, or would have to be expended to recover it from peril;" (2) "if it is injured to such an extent as to reduce its value more than one-half;" or (3) "if the * * * contemplated voyage cannot be lawfully performed without incurring an expense to

the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances."

The measure of indemnity provided in paragraph 8 of the policies—that is to say, two-thirds of new for old in cost of repairs—is substantially the same as section 2746 of the Civil Code. But there is no provision in the Code requiring an adjustment as of partial loss, nor is there an exclusion of salvage or general average expenses, nor is it provided that the insured shall not have the right to abandon unless the liability of the company to pay, as thus determined, shall exceed half the amount insured. What, then, becomes of the provisions of the Civil Code with respect to the right of abandonment? Are they to be deemed as terms of the contract of insurance, or have they been superseded or modified by these provisions of the policies?

The fact that some of the provisions of the Code have been incorporated into the policies, while others have not and in their place other and different provisions have been inserted, appears to justify the latter conclusion. And we are of the opinion that they have been so superseded or modified in this particular by virtue of that clause of paragraph 3 which, after providing specifically for the risks which the appellant assumes, includes the liability provided by the Civil Code of California, *"excepting such losses and misfortunes as are excluded by this policy."*

In estimating for a constructive total loss, a loss that the insurance company would be liable to pay under the Civil Code, but not to be computed under paragraph 9 of the policies, as an adjustment of partial loss for labor and materials, would be a loss excluded by the clause in paragraph 3 "excepting such losses and misfortunes as are excluded by this policy." So, too, with respect to a computation for a constructive total loss which would include salvage or general average expenses. If this should be permissible under the Code, it must nevertheless be excluded from the computation under paragraph 9 of the policies. In other words, there might be a constructive total loss under the provisions of the Civil Code, but not under paragraph 9 of the policies. In such case, the latter must prevail, because it would be a loss excluded by paragraph 3 of the policies.

A further provision of the policies remains to be considered. On the margin of the policies there is a typewritten clause, as follows:

"This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths (¾) running down clause."

It will be observed that, with the running down clause also printed on the margin of the policies, this character of insurance described in the typewritten clause was fully provided for in the policies before that clause was placed on the margin of the policies. What, then, was the purpose of this clause?

The appellant contends that it was merely definitive of the character of the insurance, and does not initiate or provide any new term in the insurance contract, and was not so intended by the parties. The appellee, on the other hand, contends that it was intended to modify and does modify paragraph 9 of the policies; that it should be construed

as doing away with the clause in that paragraph excluding salvage and general average expenses in computing the amount of damages which, if amounting to half the amount insured, entitles the insured to recover for a constructive total loss; that, if that was not its purpose, it has no meaning and is without significance; that otherwise the clause is inconsistent with the provisions of paragraph 9, and, being in writing, supersedes the printed paragraph; that it was written in by the insurance company, and, if ambiguous and doubtful in its meaning, the court must lean in favor of the insured in its construction.

[6] Assuming that the meaning of the clause is ambiguous and doubtful, there is no question but that the appellee states the duty of the court correctly. "If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail." Hagan v. Scottish Union & National Ins. Co. (D. C.) 98 Fed. 129, 130; s. c., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229.

[7] The other rule is equally well established: That where the insurer has used terms in the policy that leave it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. National Bank v. Insurance Co., 95 U. S. 673, 678; London Assurance v. Companhia De Moagens, 167 U. S. 149, 159, 17 Sup. Ct. 785, 42 L. Ed. 113; Canton Ins. Office v. Woodside, 90 Fed. 301, 305, 33 C. C. A. 63; Thames & Mersey v. Pacific Creosoting Co., 223 Fed. 561, 567, 139 C. C. A. 101. In other words, if the policy will fairly admit of two constructions, the one should be adopted which will indemnify the insured. Grace v. American Central Ins. Co., 109 U. S. 278, 282, 3 Sup. Ct. 207, 27 L. Ed. 392; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; Burkheiser v. Mutual Accid. Ass'n, 61 Fed. 816, 818, 10 C. C. A. 94, 26 L. R. A. 112.

[8] But does the clause in question fairly admit of two constructions? It says, "This insurance" (referring to the insurance mentioned in the policies) "is against," and then it proceeds to enumerate the risks provided for in the policies, and stops there. It does not refer to paragraph 9 of the policies, either expressly or impliedly, nor does it refer to the right of abandonment or to the method of computing a constructive total loss under the policies. It does not say, expressly or impliedly, that the provision of paragraph 9 excluding general average and salvage charges and expenses from the computation shall be disregarded. It has a possible useful meaning in the brief summary it makes of the risks covered by the policies—a meaning doubtless of substantial value to the insured in his other and subsequent dealings with the business of the vessel—and there is no apparent inconsistency in the insurance enumerated in the clause against general average and salvage charges and expenses and the exclusion of such charges from the elements of a constructive total loss, as provided in paragraph 9 of the policies. If the insured is indemnified by the insurance company for its proportion of such losses, as in this case, there is no apparent inconsistency in excluding such proportion of the loss from the computation of a constructive total loss. How, then, can the court say

that the marginal clause is inconsistent with paragraph 9 of the policies, or that it was intended to so modify that paragraph, when it is not so written in the policies? The provisions of the contract are clearly stated, and "we know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else." Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 674, 22 Sup. Ct. 240, 46 L. Ed. 366.

As before stated, the amount insured by the policies was $30,000, and that was the actual value of the vessel. To entitle the insured to abandon the vessel as and for a constructive total loss, it devolved upon the insured to show by competent proof that the appellant was liable to pay, under an adjustment as for partial loss for labor and materials, expenses amounting to a sum in excess of $15,000. This we think has not been done. The computation most favorable to the appellee that we can make from the evidence as to the appellant's liability under paragraphs 8 and 9 of the policies is as follows:

Total of the particular average as shown by the evidence.....	$20,975.25
Deduct one-third off new for old, under paragraph 8 of the policies	6,991.75
Leaving net adjustment.....	$13,983.50
Loss of consumable stores.....	2,370.14
Add the proportion of cost of bottom painting chargeable to particular average	201.89
Total	$16,555.53

Insurance, $30,000 on actual value.
Policy valuation of $45,000.
Appellant's liability would be 30000/45000, or 2/3 of $16,555.53, making a total liability of..... $11,037.02

This total liability of $11,037.02 is $3,962.98 less than the amount required to give the appellee the right to abandon as and for a constructive total loss. The general average adjustment stated by the adjusters was the sum of $8,789.01. Deducting the sum of $3,000 paid in settlement of the salvage claims leaves $5,789.01 as the general average expenses. The appellee asks that the whole of this sum be added to the appellant's liability as the cost of repairs. This we cannot do, because we do not find that this sum was in fact expended for *repairs.* It was stated by the adjusters employed by the appellee as *general average expenses,* and, upon that adjustment, the appellee collected from the appellant the net sum of $3,539.38, or, including interest and a disbursing commission due the appellant, amounting to $218.93, the total sum of $3,758.31, as the appellant's proportion of the general average charges. We do not think that this sum already paid by the appellant as a general average loss can again be added here as a loss to be computed and included as an element of a constructive total loss: First, because, although an original general average loss, it has been paid by the appellant and is no longer a loss to the appellee; and, second, because it is excluded by paragraph 9 of the policies. If the balance of $2,030.70 be allowed, although excluded by paragraph 9 of the policies, the liability of the appellant would still be $1,932.28 less than the amount required to give the appellee the right to abandon as and for

a constructive total loss. In other words, we do not find in the record evidence that will justify us in finding that there was a constructive total loss under the terms of the policies.

[9] 4. But the appellee contends, further, for the right of abandonment under what is termed the "high probability rule." This rule is stated by Chancellor Kent in the following language:

"The right of abandonment does not depend upon the certainty, but upon the high probability, of a total loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense." 3 Kent's Comm. 321.

This rule was applied in Bradlie v. Md. Ins. Co., 12 Pet. 397, 9 L. Ed. 1123; Orient Ins. Co. v. Adams, 123 U. S. 67, 75, 8 Sup. Ct. 68, 31 L. Ed. 63; Royal Exch. Assur. v. Graham, etc., Co., 166 Fed. 32, 92 C. C. A. 66. But in these cases the policies did not contain, as the present policies do, the provision fixing the right to abandon upon certain specified terms. If paragraph 9 of the policies means what it says, there is no room for the "high probability rule." As said by Mr. Justice Matthews, in Wallace v. Thames & Mersey Ins. Co. (C. C.) 22 Fed. 66, 70:

"The right of abandonment is made to depend upon the result, and not upon a calculation of probabilities."

In Searles v. Western Assur. Co., 88 Miss. 260, 40 South. 866, 869, 117 Am. St. Rep. 741, the action was to recover on a policy of insurance upon a vessel for a constructive total loss. The vessel was valued at $3,000, and was insured for $2,000. The policy provided that there should be no abandonment as for a constructive total loss in consequence of any loss or damage unless the cost of necessary repair required solely by the disaster, exclusive of cost of raising or rescuing the vessel and taking her to the dock and any other general average charges, be equivalent to 75 per cent. of the agreed value as specified in the contract of insurance. The vessel was sunk and abandoned, but it appeared that it would have cost less than 25 per cent. of the agreed value to raise and repair her. The trial court gave the jury a peremptory instruction in favor of the defendant, which was sustained by the Supreme Court of the state. The latter court, discussing the question of abandonment, said:

"The clause in the insurance policy which enables him to make an abandonment in a proper case, and determining the conditions under which the abandonment may be made, is just as much a part of the insurance policy as any other stipulation or condition contained in the policy."

In the case of Soelberg v. Western Assur. Co., 119 Fed. 23, 30 (55 C. C. A. 601), this court in dealing with this question said:

"Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply only to other and different kinds of contracts."

[10] But, aside from the provisions of paragraph 9 of the policies, it does not appear that the appellee is in a position to avail itself of the rule if it should be deemed applicable to this case. The rule has re-

lation to the high probability of a total loss of the property existing at the time the notice of abandonment is given, and not to the time the vessel was abandoned by the officers and crew on October 13th. The high probability of a total loss here referred to is one that arises in a case of extreme hazard, where the probable expense for recovery at the time of the extreme hazard exceeds half the value of the ship. The vessel was rescued and towed into Astoria on Sunday, October 15th. The written notice of abandonment was given on Monday, October 16th. It is true that there is some testimony tending to show a verbal abandonment on Saturday, October 14th; but the testimony is conflicting, and, without going into detail concerning its character, we are of the opinion that it does not satisfactorily establish the fact of an abandonment at that time. The right of the appellee to abandon the vessel, if such right existed, must therefore be determined by the situation of the vessel and the conditions existing on Monday, October 16th, when the written notice of abandonment was given to the agent of appellant. At that time the vessel was afloat and riding safely at anchor in the harbor of Astoria, and its situation and condition had no other high probability than that disclosed by the evidence, which we have already considered and found insufficient to establish a constructive total loss.

Under the terms of the policies in this case, as agreed to by the parties, and the evidence in the record, we do not think a constructive total loss has been established. We conclude, therefore, that the vessel was seaworthy when she set out on her voyage; that she did not become a total loss, and, under the terms of the policies of insurance, did not become a constructive total loss.

It follows that the decree must be reversed, and the court below directed to dismiss the libel, with costs; and it is so ordered.

RUDKIN, District Judge (dissenting). The court below found that the insured vessel was seaworthy and that there was a constructive total loss under the terms of the policy. I am not prepared to say that these findings are without adequate support in the testimony, and therefore dissent.

MOLONEY v. CRESSLER.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2337.

1. LIMITATION OF ACTIONS ⟸24(2)—PARTICULAR ACTIONS—PAROL CONTRACTS. Where a written contract for the sale of all of the stock of a gas company referred to certain improvements to be made in the plant of the company as specified in plans and specifications already submitted, and each party attempted to supply the omission by incorporating into the contract a written statement, the contract was one in writing, to be governed by the 10-year statute of limitations (Hurd's Rev. St. Ill. 1915–16, c. 83).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 113; Dec. Dig. ⟸24(2).]

2. LIMITATION OF ACTIONS ⊂⊃134—RUNNING OF STATUTE—TOLLING OF STATUTE.

Before the running of limitations defendant filed in the state court a bill based on an Illinois contract, and within such time, and after removal of the cause to the federal court, complainant, defendant in the first suit, filed a cross-bill. After the period of limitation had expired, the cause was by order of the Circuit Court of Appeals remanded to the state court, and on the following day complainant filed his bill in the federal court on the same contract. Section 25 of the Illinois statute declares that if judgment shall have been given for plaintiff, and the same be reversed by writ of error or upon appeal, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff, his heirs, executors, or administrators, may commence a new action within one year after such judgment is reversed. *Held* that, though complainant in the first suit mistook his forum, nevertheless the filing of the cross-bill tolled the running of limitations, and after remand to the state court complainant might within the year institute a new action on the contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 570; Dec. Dig. ⊂⊃134.]

3. PRINCIPAL AND AGENT ⊂⊃156—REPRESENTATIONS BY AGENT—LIABILITY OF PRINCIPAL.

Where defendant, in negotiating for the purchase of the capital stock of a gas company, induced the superintendent in charge to make written misrepresentations as to its condition to assist him in securing financial backing for the project, and the owner did not know of his superintendent's misrepresentations, the owner is not bound thereby, and they cannot be considered in determining his liability on the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583–587; Dec. Dig. ⊂⊃156.]

4. CORPORATIONS ⊂⊃121(3)—SALES OF STOCK—ACTIONS—LACHES.

Where the owner of the capital stock of a gas company, who agreed in a contract of sale to make certain improvements, did not promptly complete the improvements, and did not demand payment as soon as they were completed, but the purchaser was in no way prejudiced, the owner cannot be held guilty of laches, precluding recovery.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⊂⊃121(3).]

5. SPECIFIC PERFORMANCE ⊂⊃70—SUBJECT OF SPECIFIC PERFORMANCE.

A contract for the sale of the entire capital stock of a gas company, which property was not to be obtained on the open market, is one which may be specifically performed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. ⊂⊃70.]

6. INTEREST ⊂⊃14—ALLOWANCE—RIGHT TO.

Where a contract for the sale of the capital stock of a gas company required the purchaser to deposit a fixed sum, to be paid over to the seller on his completion of certain improvements, and the amount was not deposited, the seller, having consummated the contract and made the improvements, is entitled under the Illinois statute to interest at 5 per cent. on the amount from the date it should have been paid over, as well as interest on the balance due from the time it was ascertained and liquidated.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 26, 27; Dec. Dig. ⊂⊃14.]

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

Bill by Alfred D. Cressler against Maurice T. Moloney. From a decree for complainant, defendant appeals. Affirmed.

On about December 27, 1898, appellee called upon appellant at the Leland Hotel, Chicago, in reference to the sale of the gas works at Ottawa, Ill., concerning which negotiations had been in progress between J. W. Murdock, superintendent of the plant, and appellant for several months, and which had been the subject of a conversation between appellant and appellee on one prior occasion at the residence of appellant in Ottawa. On the date of the Leland Hotel visit appellee handed to appellant a proposition for the sale of the Ottawa gas plant, which was as follows:

"In accordance with general conversations I had with you in reference to the Ottawa Gas Company, I herewith submit the following proposition, viz.:

"I will sell you four hundred and fifty (450) shares, the full issue of the capital stock of the Ottawa Gaslight & Coke Company, for the sum of one hundred thousand dollars ($100,000), I to receive all accounts and bills receivable due the company and including all tar and coke on hand at date of transfer. I to pay all bills and accounts payable, except mortgage bonds, which I guarantee shall not exceed ($25,000), and deliver the property and works to you free of all indebtedness to said date, except said mortgage and bonds of the par value of $25,000, being twenty-five (25) bonds, of $1,000 each, dated May 1, 1894, maturing 1904, bearing 6 per cent. interest. All coal on hand, either for gas or fuel purposes, at date of transfer, to be paid for at invoice price. The gas stoves now in the office are on consignment, and will be billed to the company on March 1, due and payable May 1, 1899.

"I agree to build on lots Nos. 65 and 66, or at such location on the property of the company as you may select, one brick water tank and inner section gas holder of a capacity of 100,000 cubic feet as follows: The brick tank will be 77 feet in diameter by 24 feet 6 inches deep, the gas holder 73 feet 6 inches in diameter by 24 feet deep. The external guide frame will consist of 8 steel lattice columns and girders. The inlet and outlet connections will be 12 inches diameter.

"We will connect the holder to and from the works throughout the yard with 10-inch pipe and to the main 8-inch pipe in the yard leading to the street. We will remove and reset the two lime purifying boxes into the northeast corner room of the purifying house, remove the 4 oxide exhaust purifying boxes about 12 to 14 feet north and reset and connect same in complete working order; put in and set up in working order a hydraulic elevator 5 feet by 7 feet by 13 feet lift for handling the purifying materials from the basement to the top of the boxes; build a brick partition across the south end of purifying rooms, enlarge the condenser room to 20 feet long, and reset and connect in position according to plans furnished the present condensers and rotary washer.

"We will furnish a new 10-inch rotary exhauster, set same in place, and connect with the water gas plant and the present 50-foot diameter gas holder, thereby converting the latter into a relief holder. We will furnish and put in place a suitable track and dumping coal wagon for properly unloading gas coals from the cars and delivering same into bins. I will make all necessary changes in doors and windows of purifying and condenser rooms and basement, changing the windows and doors to conform to the changed location of the apparatus and wall up the openings of old doors and windows.

"We will cement, point, and put in first-class condition the exterior walls of the purifying and condenser building, including the painting of the cornices, windows, doors, etc. All work will be done in a first-class manner, and under your own or the personal supervision of your superintendent.

"On the transfer of the stock, payment shall be made of eighty thousand dollars ($80,000) in cash; the balance shall be paid during the construction and upon the completion of the improvements in the works herein specified.

"This proposition shall be void unless accepted in writing within ten days from date hereof. If accepted, the transfer of stock and payment of said eighty thousand ($80,000) shall be made on or before February 1, 1899, I to pay running expenses until such transfer and payment.

"The improvements in the works shall be commenced immediately upon the acceptance of this proposition and those in the buildings finished on or before sixty days, and the tank and holder on or before four months, provided the building of the brick tank shall not be delayed by cold or severe weather."

Prior to that date appellant advised appellee that he had caused the plant

to be examined by one F. K. Lane, a mechanical engineer, and one C. W. Knisely, an accountant, both of whom made fairly favorable reports. The former, in his statement, said:

"I consider the gas works in good physical condition. The buildings are substantial. The arrangement of machinery could have been better, but it will answer every purpose. If an examination of the books proves the profits to be a satisfactory return to you for the investment made, I can only say that no further outlay will be necessary on the plant, except for mains, until the present output is doubled. No material increase in sales can reasonably be expected without further growth of the city."

The accountant's report disclosed an annual income averaging $10,000. Thereafter such dealings between the two were had that on March 22, 1899, they entered into the following written agreement prepared by appellant, viz.:

"Know all men by these presents, that whereas, A. D. Cressler, of the city of Ft. Wayne, in the state of Indiana, is now the owner of all the stock of the Ottawa Gaslight & Coke Company, a corporation existing under the laws of the state of Illinois, situated in the city of Ottawa and county of La Salle, in said state;

"And whereas, the said A. D. Cressler has agreed to sell and has sold all of said stock to M. T. Moloney, of the city of Ottawa, in said county and state, and the said Moloney agrees to purchase the same for and in consideration of one hundred and fifteen thousand dollars;

"And whereas, there is now outstanding twenty-five bonds of one thousand dollars each, issued by said corporation and which are to be paid out of the said sum of one hundred and fifteen thousand dollars aforesaid;

"And whereas, there are certain improvements to be made in the plant of said company, as specified in certain plans and specifications already submitted by the said Cressler to the said Moloney: These presents witnesseth, that the said Moloney has now paid to the said Cressler, and this instrument hereby acknowledges the receipt of the sum of twenty-eight thousand dollars as a part and parcel of the sum of one hundred and fifteen thousand dollars, the balance of the said sum to be paid to the said Cressler as follows:

"The aforesaid twenty-five bonds of one thousand dollars each are to be presented to N. W. Harris & Co., bankers and brokers of the city of Chicago, to be paid by them in accordance with the written direction of the said Cressler. When said twenty-five bonds are thus liquidated, then the sum of twenty thousand dollars in addition thereto is to be retained in the possession of the said N. W. Harris & Co. until the improvements hereinbefore referred to are completed in said plant by the said Cressler.

"In the meantime, after the payment of the said twenty-five bonds, in the manner aforesaid, the said Cressler shall receive what remains of said consideration, except the said sum of twenty thousand dollars, which is not to be paid until the improvement or improvements already mentioned are completed and when said improvements are completed, the said Cressler is to receive the said sum of twenty thousand dollars so retained as aforesaid.

"It is further agreed that the said Moloney shall then be entitled to receive the said stock and to have the said control and ownership of said company and its property as of the 1st day of January, 1899; that all outstanding indebtedness up to the 1st day of January, 1899, against the said corporation, if any, is to be liquidated; and all liabilities contracted by said corporation since then, as well as profits, if any, are to be borne on the one hand and received on the other by the said Moloney, that is to say: The said Moloney is to be considered as owning said company and the stock thereof since the 1st day of January, 1899, and all indebtedness of every kind up to that day, if any, owing by said company, must be liquidated by the said Cressler.

"Now, this instrument further witnesseth that the stock hereinbefore referred to is placed with this agreement in the vaults of the said N. W. Harris & Co. as an escrow, to be delivered to and the legal title of which pass to the said Moloney when the said Cressler receives all of the consideration hereinbefore mentioned, in manner and form as herein stated.

"It is further understood, inasmuch as all the indebtedness, floating and otherwise, of the said company is to be liquidated which existed up to and including the 31st day of December, 1898, as aforesaid, by the said Cressler,

it is agreed that any moneys owing said company at the date, and earned by it prior thereto, are to be paid to the said Cressler.

"This instrument is made out in three parts, one to be deposited with stock as aforesaid, the said Cressler and the said Moloney each retaining the two remaining parts."

The $20,000 required by the contract to be left with Harris & Co. was never in fact so deposited. Thereafter appellant, desiring, for purpose of making a loan of $100,000, to consolidate the old corporation with a new corporation organized by him, secured the consent of appellee to that end, and thereupon entered into a supplemental written agreement, which is in words and figures as follows, viz.:

"Know all men by these presents, that whereas, A. D. Cressler and M. T. Moloney, on the 22d day of March, 1899, entered into a written contract for the sale by the said Cressler of all the stock of the Ottawa Gaslight & Coke Company to the said M. T. Moloney, who thereby agreed to purchase the same for and in consideration of $15,000.00; and whereas, by the terms of said agreement, it was among other things provided and agreed that the stock of said company should be placed with the copy of said agreement in the vaults of N. W. Harris & Co. as an escrow to be delivered to, and the legal title thereto was to pass to said Moloney when said Cressler received all of said consideration therefor in the manner and form as provided in said agreement; and whereas, the said Moloney desires to consolidate and merge the said Ottawa Gaslight & Coke Company and the Ottawa City Gas Company into one corporation, to be hereafter known as the Ottawa Gaslight & Coke Company, and also desires that the said Cressler and the trustees of the said Ottawa Gaslight & Coke Company shall consent to said consolidation and merger;

"Now, therefore, it is hereby agreed that the consent and act of said Cressler and of said trustees shall in no way affect the liabilities of the said Moloney to purchase and pay for said stock in accordance with the terms of said agreement, bearing date of March 22, 1899; but that the same shall remain in full force and effect as if said consolidation and merger had not been made. It is further agreed that all of the stock and any bonds issued by said consolidated company shall be immediately delivered to and placed in the possession of said N. W. Harris & Co. to be by them held as collateral security for the performance of said written agreement on the part of said Moloney.

"This instrument is made out in three parts, one to be deposited with the said N. W. Harris & Co. as aforesaid, the said Cressler and the said Moloney each retaining the two remaining parts.

"In witness thereof, said parties have hereunto set their hands and seals this 26th day of May, 1899."

In his endeavors to see whether he could finance the transaction, appellant secured from Murdock, the superintendent of the old company, without the knowledge of appellee, a statement of the condition of the company, which, among other matters, set out that the plant had "21 miles of new mains laid within the past six years." This was not true. Appellant used this statement in securing a loan and left it with Harris & Co. and their successors until legal proceedings were begun. For deficiency of mains and for other discrepancies, appellant seeks in his answer an off-set in excess of $25,000. There were incorporated in Murdock's report items taken from the Lane and Knisely reports. Appellant seeks to identify this report with the "certain plans and specifications" referred to in the original contract of March 22, 1899; whereas appellee insists that by said clause reference is had to the proposition of December 26, 1898.

Promptly after the contract was signed, appellee proceeded to make the improvements referred to in the proposition of December 26, 1898. In the performance of this undertaking, and especially in the work attending the construction of a certain gas holder or tank, there was considerable difficulty, resulting in a delay beyond the time contemplated. Some delay was had in securing the retirement of the bonds of the old company. While some impatience is manifested on the part of appellant at the various delays, the business of the gas plant is not shown to have been interfered with. Appellee did not confine his improvements to the items contained in his proposition of December 26, 1898. He seems to have been active in business matters, which

fact, together with the fact that he was a nonresident, seems to have contributed somewhat to the difficulties experienced in constructing the gas holder. Appellant proceeded to have improvements made other than those covered by appellee's proposition, such as switch extensions, new barn, coke shed, coal house, coke crusher, scales, etc. Of these improvements, appellee had no knowledge until settlement was sought. Appellant on his part failed to comply with the terms of the contract of May 26, 1899, which required him to deposit "the stock and any bonds issued by said consolidated company" in the possession of Harris & Co., but, on the contrary, without appellee's knowledge or consent, sold both the bonds and the stock and appropriated the proceeds, amounting to about $150,000. Appellee has been paid in cash, or by payments on his account, the sum of $101,468.29. He is entitled to undisputed credits aggregating $125,049.17. Appellant seeks to charge appellee with further items based upon certain alleged misrepresentations made by Murdock and others, together with his failure to make improvements and complete the same, as it is claimed, the contracts between them required, which, if established, would leave appellee largely indebted to appellant. On June 12, 1906, appellant offered to pay appellee by way of compromise, $7,402.72. Failing to come to terms, appellant filed his bill in the circuit court of Cook county, Ill., on September 15, 1906, for specific performance and accounting against appellee and N. W. Harris & Co. This suit appellee removed to the United States Circuit Court for the Northern District of Illinois. Thereafter such further proceedings were had that that court entered a decree against appellant for the sum of $28,248.03. On appeal that judgment was reversed, and the cause ordered remanded to the state court, on the ground that the federal court was without jurisdiction. In pursuance of such remanding order the case was remanded to the state court on November 21, 1913.

On November 22, 1913, the present suit was instituted. Thereafter such proceedings were had that the District Court entered a decree against appellant for the sum of $38,748.73, being the said sum shown by the undisputed items, viz. $23,580.88, with accrued interest, after deducting costs of former suit amounting to $1,552.05 and accrued interest thereon, and also decreed that the shares of the stock of the old corporation held in escrow by Harris Trust & Savings Bank as successor to Harris & Co., and the four shares on deposit with the clerk of the court, be turned over to appellant when said decreed amount should be paid. The court further ordered that execution issue and that appellant pay the costs of the suit. From that decree appellant has brought this appeal. A large number of errors are assigned, the substance of which is as follows, viz.: The court failed to enforce the statute of limitations. The court failed to find appellee guilty of laches. The court erred in the amount of principal and interest decreed. The court erred in not receiving the Murdock statement as the one referred to in the contract. The court erred in not finding that the contract of March 22, 1899, failed to express the intention of the parties. The court failed to find that appellee recognized to make all improvements necessary to constitute the property a first-class plant and that he failed to comply with the contract in that respect. The court failed to find that appellant was led to enter into the contract through fraudulent representations, appellee knowing them to be false. The court failed to find that appellant performed the contract on his part and that appellee did not perform his part. The court erred in awarding interest to appellee. The court erred in not holding that the statute of limitations had run against this suit.

Further facts appear in the opinion.

James J. Conway, of Ottawa, Ill., for appellant.

William S. Oppenheim, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Initially, it is urged that this suit is barred by the statute of limitations of the state of Illinois (Hurd's Rev. Stat. 1915–16, c. 83).

The first ground of that claim rests upon the charge that the contract sued on was a parol contract. Although this is not specifically set out in the assignment of errors, it may properly be urged as affecting the bar of the statute of limitations. The contract of March 22, 1899, refers to "certain improvements to be made in the plant of said company as specified in certain plans and specifications already submitted by the said Cressler to the said Moloney," which clause requires proof aliunde the contract. This fact, it is claimed by appellant, makes the contract one by parol, or one having a life of five years, rather than ten years. It is appellee's contention that the clause just quoted refers to the proposition made by him to appellant in the letter of December 26, 1898, while appellant asserts that it refers to the statement made by the Ottawa Gaslight & Coke Company, per J. W. Murdock, dated January 4, 1898, by mistake for January 4, 1899. Thus it will be seen that it is attempted to incorporate into said contract a written statement, and not any parol matter, and the question is merely one of identity. Inasmuch as both parties rely on the supplying of the description of the improvements contemplated, this objection does not seem to be definitely urged in the assignment of errors, and we do not discuss it further than to say that appellant's contention cannot be successfully maintained as the law now stands. Jones v. Knights of Honor, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277; Nickerson v. Weld, 204 Mass. 346, 90 N. E. 589; Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Forst v. Leonard, 112 Ala. 296, 20 South. 587; and numerous other cases. We therefore hold that the contract of March 22, 1899, was a written contract, and that appellee's suit was governed by the ten-year clause of the Illinois statute of limitations.

[2] Appellant further insists that, even in that case, this action was not brought in time. Appellant filed his bill in the state court on September 15, 1906. The cause was removed to the United States Circuit Court November 3, 1906. Appellee filed his cross-bill, setting up substantially the same matters as those set up herein, on March 15, 1907. The cause was, by order of the Circuit Court of Appeals, remanded to the state court on November 21, 1913. On November 22, 1913, this suit was instituted under and by virtue of section 25 of the statute of Illinois, which reads in part as follows, viz.:

"In any of the actions specified in any of the sections of the said act, if judgment shall be given for the plaintiff and the same be reversed by writ of error or upon appeal * * * then if the time limited for bringing such action shall have expired during the pendency of such suit the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

This, we hold, was properly done under said clause of the statute. The facts of the case brought that suit within the provision of the act. Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986. In that case the suit was dismissed for want of jurisdiction. Another action being brought after the statute had run unless extended by the Tennessee statute as here, the court said:

"We are of opinion, therefore, * * * plaintiffs in error are entitled to the benefit of article 2755 of the Code of Tennessee, for their judgment in the first

suit was not upon any ground concluding their right of action, nor have they been guilty of such negligence or carelessness in the bringing of their first suit as should exclude them from the benefit of the said article."

See, also, Lamson v. Hutchings, 118 Fed. 321, 55 C. C. A. 245; McAndrews v. C. L. S. & E. Ry. Co., 162 Fed. 856, 89 C. C. A. 546; P. C. C. & St. L. Ry. Co. v. Bemis, 64 Ohio St. 26, 59 N. E. 745; Bennett v. Welch, 25 Ind. 140, 87 Am. Dec. 354; and many other cases cited in appellee's brief.

[3] It is evident that appellee removed this cause, seeking the aid of federal jurisdiction, in good faith, and not for delay or other ulterior cause. In Gaines v. City of New York, 215 N. Y. 533, 109 N. E. 594, Ann. Cas. 1916A, 259, where a similar statute prevails, it is said:

"A suitor who invokes in good faith the aid of a court of justice, and who initiates a proceeding by the service of process, must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum. We are asked what ought to be held, if a litigant sues on a promissory note in the Surrogate's Court, or files a bill in equity with a justice of the peace. It may be that a different rule should be applied where the earlier action has been brought with knowledge of the lack of jurisdiction, and in fraud of the statute."

We do not deem it necessary to pass upon the point raised as to whether a federal court of equity is bound by state statutes of limitations. We therefore hold the question of the statute of limitations to be not well taken.

It is our conclusion from the evidence that the reference to improvements in the contract of March 22, 1899, related to the proposition of sale contained in appellee's letter of December 26, 1898. We are satisfied that Murdock, in his capacity of superintendent, was not acting with the direction or consent of appellee; that the latter was not responsible for any statements he may have made, although he (Murdock) does not seem to have willfully misrepresented anything. His statement was made at appellant's suggestion, for use in procuring a loan from Harris & Co., and was not submitted or known to appellee until long afterwards. It was kept by Harris & Co. and not disclosed to appellee, though with no intention to keep it secret. It therefore could not have been in appellee's mind when he entered into the contract of March 22, 1899.

[4] We deem appellee's action a substantial compliance with the terms of the contract of sale. He placed the improvements called for in what seem to be competent hands. The gas holder appears to have been a difficult piece of work. Its leakings were obscure, and were finally located in the foundation. The record does not show that appellant suffered any loss from the delay. There seems to have been a misunderstanding as to the terms of the sale agreement. The correspondence shows some slackness on appellee's part in making his position clear upon that point, even to the extent of doing more than the contract required of him. We find, however, no justification for the withholding of the bulk of the money due appellee. Appellant was not entitled to the proceeds of the bonds and stock until appellee was paid up in full, nor was he entitled to the sums claimed by

him for services and damages. These almost entirely grew out of appellant's misconstruction of the provision in the contract with regard to improvements aforesaid. We are satisfied that the balance of $23,580.88, found by the trial court herein, and also in the former proceedings hereinbefore enumerated, to be due appellee upon the purchase price, was correct.

[5] There is no merit in the contention that appellee was guilty of laches in the premises. There was continual contention between the parties. It was appellant's duty to pay what he owed, and the mere fact that appellee was not continually hounding him for the balance due would not justify such a contention. Nor do we find merit in the claim that a suit for specific performance would not lie under the facts of this case. The transaction involved the whole capital stock of the corporation, which was property not to be obtained in the open market. The stock itself was to be held by the bank, until payment should be made to appellee in full, for the benefit of both parties.

[6] The $20,000, required by the contract of March 22, 1899, to be deposited by appellant with Harris & Co. to insure performance by appellee of his part of that contract, never having been so deposited, still remained in appellant's possession and enjoyment. Appellee's undertakings were completed by November 15, 1901. This sum should then have been paid over by appellant. For this sum appellee is entitled to interest at the rate of 5 per cent. under the statute of Illinois. It was a liquidated sum, and not affected by the existence of an unliquidated claim for damages because of the delay in completing the work. Appellee was also entitled to payment of the balance of the purchase price of the plant, at the latest on August 18, 1909. This balance, amounting to $3,580.88, should likewise bear interest at the rate of 5 per cent. from the last-named date.

There is no merit in the claim that appellee did not deliver all the stock to appellant. The latter was not entitled to it until full payment had been made. The remaining shares of stock are in the possession of and subject to the order of the court, and will undoubtedly be turned over when payment is shown.

As before stated, no substantial damages are shown to have been sustained by appellant by reason of the delay in perfecting the gas holder, nor is any basis established for ascertaining the same.

We find no error in the decree of the trial court, and it is therefore affirmed.

STATE OF MISSOURI et al. v. ANGLE.

In re SAGE.

(Circuit Court of Appeals, Eighth Circuit. October 4, 1916.)

No. 166.

1. BANKRUPTCY ⇐440—REVIEW—PETITION TO REVISE.

An order directing a receiver appointed by the state court to deliver the bankrupt's property to the trustee in bankruptcy may be reviewed by petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⇐440.]

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2. BANKS AND BANKING ⊂⊃94—REGULATION—PRIVATE BANKERS—"CORPORATION."

Rev. St. Mo. 1909, § 1116, defines private bankers as those who carry on the business of banking by receiving money on deposit with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money without being incorporated. Section 1117 provides for the creation of individual or private banks and forbids any person or company from engaging in the business of private banking without complying with its provisions. Sections 1118 and 1119 place the business of a private bank in the same situation as that of an ordinary incorporated bank, and provide that the general banking laws shall apply to private bankers, while section 1081 provides for the examination of banks, including private banks, and for the closing of such banks by the bank commissioner. Sections 1087, 1088, 1095, respectively limit the power of private bankers to make loans to the owners or partners, for the examination of such institutions, and the granting of certificates entitling them to do business. Const. Mo. art. 10, § 21, declares that no corporation, company, or association other than those formed for benevolent, religious, or scientific purposes shall be created unless the persons named as corporations pay a fee; and article 12, § 11, declares that the term "corporation" shall include stock companies or associations having powers or privileges not possessed by individuals or partnerships. *Held* that, though the business of private bankers is regulated, and individuals cannot engage therein without complying with the statutes, a private bank or banker is not a corporation or quasi corporation whose entity is distinct from that of the owner, and the assets of the bank belong to the owner.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 227; Dec. Dig. ⊂⊃94.

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

3. COURTS ⊂⊃366(1)—PRECEDENTS—FEDERAL COURTS.

Ordinarily a federal court accepts a construction of the statutes of a state by the highest court thereof, but if such decision is rendered after rights have accrued or liabilities have been incurred, which are the subject of determination by the federal court, the latter court is not bound by such decision, although it will lean to agreement with the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⊂⊃366(1).]

4. COURTS ⊂⊃366(1)—PRECEDENTS—DECISION—"CORPORATION."

A decision by the Supreme Court of Missouri that under the local laws the business of a private banker, who is given the powers of a corporation, is distinct from the business enterprises of the owner, and that creditors of the bank have priority over individual creditors, is not an adjudication that the private bank or banker is a corporation, or quasi corporation, and a distinct legal entity from the owner.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⊂⊃366(1).]

5. BANKRUPTCY ⊂⊃20(1)—FILING OF PETITION—ADJUDICATION—EFFECT.

The filing of a petition in bankruptcy and the adjudication in a court of bankruptcy brings the property of a bankrupt, wherever situated, into custodia legis; and as one of the purposes of the Bankruptcy Act is to place in the hands of one court the full administration of the bankrupt's assets, the bankruptcy court has jurisdiction over that property of the bankrupt used by him in his capacity as a private banker, though under the state laws creditors of the private banker as such had priority in the assets devoted to that business.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃20(1); Courts, Cent. Dig. § 1331.]

6. BANKRUPTCY ⟸20(1)—JURISDICTION OVER PROPERTY—AUTHORITY OF COURT.
That the agents of a state bank examiner took possession of the assets of a private bank does not confer jurisdiction on the state court, as against a court of bankruptcy in which a petition in bankruptcy against the owner was filed, prior to the application in the state court for a receiver to take over his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⟸20(1); Courts, Cent. Dig. § 1131.]

7. RECEIVERS ⟸199—ADMINISTRATION OF ASSETS—AUTHORITY OF STATE COURT TO ALLOW COMPENSATION.
Where a state court was without authority to administer any of the assets of a bankrupt, it has no authority to allow its receiver compensation for performing part of that labor.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 391; Dec. Dig. ⟸199.]

8. BANKRUPTCY ⟸317—COMPENSATION OF OFFICERS—RECEIVER OF STATE COURT.
Where a receiver appointed by the state court, which was without jurisdiction to administer the property of a bankrupt, performed valuable services in conserving the property, he may, on petition to the bankruptcy court be allowed compensation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493–495; Dec. Dig. ⟸317.]

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of the bankruptcy of David H. Sage. On petition of Johnson B. Angle, as trustee in bankruptcy, McDermott Turner, receiver, appointed by the state of Missouri, was directed to deliver property of the bankrupt in his possession (224 Fed. 525), and he appeals and petitions to revise. Affirmed.

James P. Gilmore, of Tulsa, Okl., and W. T. Rutherford, Asst. Atty. Gen. (John T. Barker, Atty. Gen., T. L. Montgomery, of Kahota, Mo., and W. M. Fitch, Asst. Atty. Gen., on the brief), for petitioners.

J. O. Boyd, of Keokuk, Iowa (Boyd & McKinley, of Keokuk, Iowa, on the brief), for respondent.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. [1] By an appeal, and also by a petition to revise (the latter being the proper procedure—In re Hecox, 164 Fed. 823, 90 C. C. A. 627), there is called in question a decision of the District Court of the Eastern District of Missouri, which directed a receiver appointed by a state court of Missouri to turn over certain property in his possession, to a trustee in bankruptcy. The bankrupt, David H. Sage, had been engaged in mercantile business at Keokuk, Iowa, and also in Missouri. On November 19, 1914, there was filed in the United States court at Keokuk, Iowa, a creditors' petition asking that Sage be declared a bankrupt, and he was so adjudged on November 27, 1914, and the respondent was chosen as trustee. Prior to 1911 the bankrupt, David H. Sage, and William N. Sage, had associated themselves together, furnished the capital, and established a bank at Alexandria, Mo. It is stipulated that on or about January 10, 1911,

D. H. Sage became the sole owner of the bank, having purchased the interest of his associate, by proceedings had under sections 1116 and 1117 of the Revised Statutes of Missouri of 1909, and signing a certificate as follows:

"Form for Establishing a Private Bank.

"Be it known that the undersigned D. H. Sage have associated themselves together for the purpose of establishing a bank under the provisions of sections 1116 and 1117; Revised Statutes of Missouri, 1909.

"1. The names and places of residence of all persons interested in the business are (who shall be residents of Missouri):

Names.	Residence.
D. H. Sage,	Alexandria, Mo.

"2. The amount of capital invested is $10,000.00.

"3. The name in which the business is to be conducted is Sage Banking Company.

"4. The business is to be conducted at Alexandria, Mo., county of Clark, in the state of Missouri.

"In witness whereof we hereunto set our hands this 31st day of December, A. D. 1910. D. H. Sage."

This certificate was verified and acknowledged by David H. Sage and filed with the recorder of deeds. The bank commissioner of Missouri then issued a certificate establishing the bank and authorizing it to do business as a bank of deposit and discount. The bank continued in business, making reports and being examined as provided by statute, until October 15, 1914. On that date Sage notified the bank commissioner of Missouri that the bank had closed its doors and requested the bank commissioner to take charge of its affairs, and on the same day he posted on the bank's doors a notice that it was in the hands of the bank commissioner.

On October 16, 1914, a bank examiner acting under the direction of the state bank commissioner, took charge of the bank, and instituted an examination of its affairs. On the following day, the bank commissioner appointed McDermott Turner as special agent to take charge of the bank, pending the appointment of a receiver. On November 21, 1914, the Attorney General of Missouri applied to the state court for the appointment of a receiver for the bank. McDermott Turner was appointed as such receiver, qualified, and at once took possession of the bank and its assets. The bank had a large amount of deposits and its assets had a face value in excess of the amount owing to depositors.

On February 3, 1915, the trustee made the application heretofore mentioned, requesting the United States Court for the Eastern District of Missouri to direct the receiver to surrender to the trustee in bankruptcy the property of the Sage Banking Company. The court denied the request without prejudice to a new application, and with leave to renew it after making an application to the state court for a similar order against the receiver. On May 8, 1915, the state circuit court, in compliance with the trustee's application, made an order directing the receiver to surrender possession of the assets, after deducting a sum it allowed as compensation to the receiver and his attorney. An appeal was taken to the Supreme Court of Missouri and a supersedeas bond was given. After the decision by the state circuit court, and before the case was heard on appeal by the Missouri Supreme Court, the

trustee, on May 24, 1915, renewed his application to the United States District Court for the Eastern District of Missouri, for an order directing the receiver to surrender the assets. Answers were filed to this application, and the issues were submitted to the court upon these pleadings and upon an agreed statement of facts. The court, on August 16, 1915, made an order that the receiver surrender to the trustee all assets in his possession or control belonging to the estate of David H. Sage, doing business as the Sage Banking Company, and it is of this order that complaint is now made.

[2] The principal question presented in the case is whether David H. Sage owned the property that was held by the receiver appointed by the state court. If that property did not belong to David H. Sage, the bankruptcy court was not entitled to administer it. The question of ownership involves a consideration of certain portions of the Constitution and statutes of Missouri. Section 11, art. 12, of the Constitution of 1875 provides:

"The term 'corporation,' as used in this article, shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

Section 21, art. 10, of that Constitution provides:

"No corporation, company or association, other than those formed for benevolent, religious, or scientific * * * purposes shall be created or organized under the laws of this state, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty ($50.00) dollars for the first fifty thousand ($50,000.00) dollars or less of capital stock."

Portions of the statutes of Missouri (1909 Revision) are as follows:

Section 1116. *Private Bankers Defined.*—Private bankers are declared to be those who carry on the business of banking by receiving money on deposit, with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money, without being incorporated.

Section 1117. *Requirements for Private Banker—Change of Ownership.* No person or company of persons shall engage in the business of banking as private bankers without a paid-up capital of not less than ten thousand dollars, and if said banking business is to be carried on in a city having a population of one hundred and fifty thousand inhabitants or more, then without a paid-up capital of not less than one hundred thousand dollars, nor until he or they shall have made a statement, subscribed and sworn to as correct and true before a notary public by each person connected with such business as owner or partner, setting forth: First, the names and places of residence of all persons interested in the business, all of whom shall be residents of this state, and the amount of capital invested; and second, the name in which the business is to be conducted and the place at which it is to be carried on; which statement shall be acknowledged, recorded in the office of the recorder of deeds of the county in which the bank is to be located, and a certified copy of such recorded instrument shall be filed in the office of the bank commissioner: Provided, however, that in order to accomplish a change in the ownership of a private bank, it shall be necessary for all the partners of the new bank to make, record and file in the office of the bank commissioner a statement in form and manner required by this section for establishing a new bank.

Section 1118. No private banker, who receives general deposits after the manner of banks of deposit and discount, shall employ any part of his capital, or any funds deposited with or borrowed by him, in dealing or trading in, buying or selling lands, goods, chattels, wares or merchandise, but he may sell and dispose of all kinds of property which may necessarily come into his pos-

session in the collection of his loans or discounts. Nor shall any such banker use or employ his capital or funds deposited with or borrowed by him in any other manner than banks of deposit and discount are by this article permitted, or loan a greater amount to any person or loan any sum whatever, except upon like security as is required to be taken by banks of deposit and discount. Neither shall the profits of such private bank be distributed to the owners thereof without first setting apart to surplus account at least twenty per cent. of the net profits each year until the surplus equals twenty per cent. of the capital, and said surplus shall not be diminished except for the payment of any losses which may occur: Provided, if there are undivided profits, these shall first be used in payment of such losses.

Section 1119. All the provisions of this article shall, so far as the same are applicable, apply to all private bankers doing business in this state.

Section 1081. If, from an examination made by the bank commissioner, or by one of his examiners, it shall be discovered that any bank, private banker, savings and safe deposit company or trust company is insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other indebtedness, and if the action is taken from an examination by an examiner and such examiner shall recommend the closing of the bank, then it shall be the duty of the bank commissioner, if he approve of such recommendation, by himself or one of his examiners, immediately to close said bank, private bank, savings and safe deposit company or trust company, and to take charge of all the property and effects thereof. Upon taking charge of any bank, private bank, savings and safe deposit company or trust company the bank commissioner shall, as soon as practicable, ascertain, by a thorough examination into its affairs, its actual financial condition, and whenever he shall become satisfied that any such bank, private banker, savings and safe deposit company or trust company cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall report the fact of its insolvency to the Attorney General, who shall immediately upon the receipt of such notice, institute proper proceedings in the proper court for the purpose of having a receiver appointed to take charge of such bank, private bank, savings and safe deposit company or trust company, and to wind up the affairs and business thereof, for the benefit of its depositors, creditors and stockholders; and it is made the duty of the court, or the judge thereof in vacation, summarily to appoint said receiver to take possession of the property and assets of said bank, private banker, savings and safe deposit company or trust company, for the purpose of winding up the business thereof; any complaints or opposition of the bank, the private banker, savings and safe deposit company or trust company or its officers subsequently to be heard in open court. The bank commissioner may appoint a special agent to take charge of the affairs of an insolvent bank, private banker, savings and safe deposit company or trust company temporarily, until a receiver is appointed; such agent to qualify, give bond and receive compensation the same as a regularly appointed examiner of the department of banking; such compensation to be paid by such bank, private banker, savings and safe deposit company or trust company, or allowed by the court, as costs in case of the appointment of a receiver: Provided, that in no case shall any bank, private banker, savings and safe deposit company or trust company continue in charge of such special agent for a longer period than sixty days. Any bank, private banker, savings and safe deposit company or trust company receiving deposits and doing business in this state under the laws cited in this chapter, may place its affairs and assets under the control of the bank commissioner by posting a notice on its front door as follows: "This bank [or trust company] is in the hands of the bank commissioner." The posting of this notice or of a notice by the bank commissioner that he has taken possession of any bank, private bank, savings and safe deposit company or trust company, shall be sufficent to place all its assets and property, of whatever nature, in the possession of the bank commissioner, and shall operate as a bar to any attachment proceedings whatever.

Section 1087. No private bank or banker in this state shall make any loan or discount on account of the personal security or obligation of the proprietor, owner or partner in such private bank in excess of ten per cent. of the paid-up capital and surplus of such private bank or banker. For any violation

of the provisions of this section, the bank commissioner shall have authority, in his discretion, to make application for the appointment of a receiver for such private bank or banker, as now provided by law in case of insolvent banks and trust companies.

Section 1088. Provided, however, that should any such corporation or private bank or banker not have any owners or directors, other than the officers thereof, that then, in such event, said examination and report may be made by such officers, and it is hereby made their duty so to do, under the same penalties as above provided.

Section 1095. In case the bank commissioner shall find that all the provisions of the law have been complied with by the institutions herein named, which desire * * * to do business, he shall grant them a certificate to that effect. Such certificate, or certified copies thereof, shall be taken in all the courts of this state as evidence of such incorporation.

The petitioners contend that under these provisions, the Sage Banking Company was either a corporate body, or a separate legal entity from the natural person of David H. Sage, while the respondent asserts that these provisions look only to the exercise of visitorial powers of the state, and did not create an ownership of the assets of the Sage Banking Company apart from that of David H. Sage. Viewing these provisions of the Constitution and statutes of Missouri as a whole, it does not appear that a corporation is created by the fact that one or more persons engage in the banking business and comply with these statutory requirements, by filing a certificate and submitting to the inspection of the state bank commissioner. Not only do the statutes constantly recognize, permit, and regulate the conduct of the banking business by private bankers as distinguished from incorporated banks, but they also refer to the individuals who so engage in that business as the "owners" and as "partners" and to the capital invested as "his capital." Private bankers are defined as those who carry on the business of banking "without being incorporated." An essential element of corporate existence is absent, as no provision is made for succession by transfer of capital stock, nor even for the existence of capital stock. Instead, section 1117, referring to a change of ownership in such a bank, states that:

"It shall be necessary for all the partners of the new bank to make, record and file in the office of the bank commissioner a statement in form and manner required by this section for establishing a new bank."

The portions of the statutes relating to the visitorial powers of the state, such as the making of reports and submission to examination, and the restriction of the right to employ more than a specified portion of the assets in the form of a loan to one of the proprietors, are consonant with a legislative purpose to restrict an individual owner in the conduct of a business of recognized peril. A similar conclusion was reached in the case of Gupton v. Carr, 147 Mo. App. 105, 125 S. W. 849, and seems to have been implied in the decision in Union Bank v. Oxford & C. L. R. Co., 143 Fed. 195, 74 C. C. A. 323, as well as in those of State v. Salmon, 216 Mo. 466, 115 S. W. 1106, and Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641. It is impossible to accept the contention that these legislative acts have created a new legal entity, having an existence apart from the individuality of the bankers, and not a corporation, nor partnership, nor any hereto-

fore recognized legal body. Such an extraordinary creature needs more definite delineation than these statutes disclose.

[3, 4] In support of the claims of petitioners, there is cited the decision by the Supreme Court of Missouri, State v. Sage, 184 S. W. 984, in determining the appeal of the receiver of the Sage Banking Company from the order of the state circuit court which directed him to surrender the assets to the trustee in bankruptcy. This decision was filed on February 25, 1916, and holds, in effect, that the Sage Banking Company was a separate entity, whose assets should be administered apart from those of David H. Sage. Ordinarily a court of the United States accepts a construction of the statutes of the state by the highest court thereof, but if such decision is rendered after rights had accrued or liabilities have been incurred, which are the subject of determination by a court of the United States, the latter court is not bound by such decision of the state court, but exercises its independent judgment, although it will lean toward an agreement with the state court. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Moore-Mansfield Co. v. Electrical Co., 234 U. S. 619, 34 Sup. Ct. 941, 58 L. Ed. 1503; Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; Hager v. American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Adelbert College of W. R. University v. Wabash R. Co., 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204.

It is to be observed that, by the interpretation placed on these statutes by the Supreme Court of Missouri, section 1117 forbids persons engaging in the banking business until they have complied with its terms, such as possessing a certain paid-up capital, and having filed a sworn preliminary statement and that, on compliance with that section, they become private bankers as defined in section 1116. As such private bankers they possess powers and privileges not possessed by other individuals or partnerships, and at one place in the opinion this is said to constitute such private bankers a corporation under section 11, art. 12, of the Constitution, which reads:

"The term 'corporation,' as used in this article, shall be construed to include all joint-stock companies or associations having any powers or privileges not possessed by individuals or partnerships."

This statement that such private bankers are thus constituted a corporation is modified in the following portion of the opinion, and it is said that the effect of these statutes was—

"to completely segregate the private banking business of the state from the solidarity of the owner's general business and make each rest upon its own bottom, and thereby make a private bank a separate and distinct entity from the general business of the owner and subject the assets thereof, first, to the payment of the bank's creditors, and, second, if thereafter any remains, they might go under the general laws to the payment of the general creditors, and yet not to disturb the ownership of the bank or its management or control by the owners, as provided by law. Such an entity, as before suggested, might more properly be designated as a quasi corporation when owned by more than one person, and a quasi corporation sole, when owned by but one person,

with their rights, powers, duties, and obligations conferred and defined by statute. This is the clear common-sense reading of the statutes, and they fully remedy the evils which led to their enactments."

And again it is said:

"There are other provisions of the statutes lending strength to the views herein expressed; but in my opinion those considered clearly establish the fact that all private banks in this state are separate entities from all other business enterprises of the owners or proprietors thereof, and therefore no good would flow from a further consideration of those statutes. I am therefore clearly of the opinion that the assets of the Sage Banking Company belong to that institution, and for that reason its creditors have a priority of right to them over the rights of the creditors of D. H. Sage, and that they should be, first, applied in payment of their claims, and, second, if any remains thereafter, then in payment of his individual creditors as provided by law."

[5, 6] Considering the opinion as a whole, this decision by the Supreme Court of Missouri did not declare a bank, such as that here in question, to be a corporation, but to be a separate "business enterprise of the owners" of the bank, and as such governed by certain statutes of Missouri which give a priority to creditors of the bank over other individual creditors of David H. Sage. There is no occasion to differ from the decision of that court as to this theory of its banking laws; but the conclusion does not follow that the trustee in bankruptcy was not entitled to the possession of the property which the receiver had held, nor is that conclusion a construction placed upon the laws of Missouri.

The effect of the filing of the petition and the adjudication in the bankruptcy court of Iowa was to bring the property of the bankrupt, wherever situated, into custodia legis, and it was thus held from the date of filing the petition, so that subsequent proceedings could not be had in other courts to reach the property; the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; In re Hecox, 164 Fed. 823, 90 C. C. A. 627.

One of the prime purposes of the Bankruptcy Act was to place in the hands of one court, and that the bankruptcy court of original jurisdiction, the full administration of the bankrupt's assets. United States Fidelity Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. Liens or priorities, if any exist, by reason of the laws of Missouri, of creditors who dealt with the Sage Banking Company, are a matter for the determination of the court of bankruptcy, which must distribute the estate.

The question here involved is not to whom these assets shall be distributed, but what court shall decide that question. As it is held that David H. Sage was the owner of the property possessed by the Sage Banking Company, it follows that the administration of those assets belongs to the court of bankruptcy. It is claimed that the possession of the bank examiner, of the agent of the bank commissioner, and then of the receiver was such as to place these assets in the custody of the circuit court of Missouri, and that its prior seizure of this property en-

titled it to continue to final administration. There are several answers to this contention. The possession by the examiner and by the special agent of the bank examiner were acts of administrative officers and not of judicial executives. The application to the state court of Missouri for the appointment of a receiver was not made until November 21, 1914, two days after the petition in bankruptcy was filed against David H. Sage in the United States court at Keokuk, Iowa, and after the exclusive jurisdiction of the bankruptcy court had attached.

[7, 8] A final contention is made that the court should not have ordered the surrender of all the assets which came into the hands of the receiver, but should have recognized the deduction of the compensation of the receiver and of his attorney, as made by the state court. As the state court was without authority to administer any portion of the assets of David H. Sage, it must be without power to award compensation to its officer for performing part of that labor. So far as those services were of value to the estate, in preserving and collecting it, an application to the court of bankruptcy will afford an avenue of relief. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.

No error is found in the order of the District Court, and it is approved and confirmed.

LYNCH, Collector of Internal Revenue, v. TURRISH.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4651.

1. INTERNAL REVENUE ⟸7—INCOME TAX—CUMULATIVE PROFITS OF STOCKHOLDER—"INCOME, GAINS, OR PROFITS"—"GAINS"—"PROFITS."

The amount in excess of the par value and of the actual value of his stock in 1903, derived by a stockholder of a domestic corporation, subject to Income Tax Law Oct. 3, 1913, c. 16, § II, A, subds. 1, 2, 38 Stat. 166 (Comp. St. 1913, §§ 6319, 6320), exclusively from the increase in value of his stock prior to March 1, 1913, the effective date of that act, on account of the gradual advance in the value of the property of the corporation prior to that date, but first realized by him in cash by the distribution in 1914 by a dividend to all the stockholders of the corporation of all the proceeds of the sale in 1914 of all the property of the corporation, is not "income, gains, or profits" of the stockholder, taxable under the statute for the year 1914, because (1) no income, gains, or profits accrued to the stockholder during the year 1914, or after March 1, 1913, and (2) the sale of the property of the corporation in 1914 and the distribution of its proceeds to the stockholders was a mere change in form without increase in value of the property he owned before the act took effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.

For other definitions, see Words and Phrases, First and Second Series, Gains; Income; Profits.]

2. CORPORATIONS ⟸182—INTEREST OF STOCKHOLDERS—INCREASED VALUE OF ASSETS.

While a corporation holds the legal title to, and the right to manage, control, and convey, its property, it holds the property for its stockholders, who are the equitable and beneficial owners, and have an immediate interest in its enhanced value and in the undivided income, gains, profits,

or surplus of the corporation, which go to increase the value of their stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686–690; Dec. Dig. ⊂⊃182.]

3. STATUTES ⊂⊃263—CONSTRUCTION—RETROSPECTIVE OPERATION.

Words in a statute ought not to be given a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. ⊂⊃263.]

4. INTERNAL REVENUE ⊂⊃7—INCOME TAX LAW—CONSTRUCTION AND OPERATION.

The enhanced value of property of a corporation, which accrues from the gradual increase in its value during a series of years prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become "income, gains, or profits" taxable under such an act, but is rather an "increase of capital assets."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⊂⊃7.]

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by Henry Turrish against E. J. Lynch, Collector of Internal Revenue for the District of Minnesota. Judgment for plaintiff, and defendant brings error. Affirmed.

This writ of error was sued out to reverse a judgment which the plaintiff below, Turrish, recovered against Lynch, the collector, for the return to him of $127.12, which the collector had assessed against him as an additional income tax under the Tariff Act of October 3, 1913, c. 16, § II, A, 38 Stat. 166, 3 U. S. Comp. Stat. 1913, §§ 6319, 6320, 6321, and which he had paid under protest. The facts were alleged in the plaintiff's complaint and admitted by demurrer. The Payette Lumber & Manufacturing Company was a corporation organized in 1903, with a capital stock of $1,500,000, divided into 15,000 shares, of the par value of $100 each, of which Turrish owned, in 1913 and 1914, 799¾ shares, of the par value of $79,975. The Payette Company began, immediately after its organization in 1903, to invest its capital in timber lands in the state of Idaho, and, prior to March 1, 1913, it had invested $1,375,000 thereof therein, and the remainder thereof in other assets, the ownership of which was incidental to the owning, holding, and preservation of the timber lands. During this time it did no business, except such as was incidental to the ownership and care of these lands, and it made no dividends or payments of any kind to its stockholders. On March 1, 1913, the Payette Company still owned all the property and assets it had invested its capital in, and the value of these assets was not less than $3,000,000. The increase in the value of its property was due entirely to the gradual increase in the value of its timber lands between 1903 and March 1, 1913, and the value of the stock of Mr. Turrish was then twice its par value, or $159,950. In March, 1913, Mr. Turrish and all the other stockholders of the Payette Company gave an option in writing to purchase their stock for twice its par value. The holders of this option formed another corporation, to which they transferred their option, and that company preferred to purchase the property of the Payette Company to purchasing its capital stock. Thereupon, in December, 1913, that company offered to sell all its property to the Boise-Payette Company, the new corporation which held the option to purchase its stock, for $3,000,000 in cash, on condition that the new company would assume its debts and liabilities. The offer was accepted, and in March, 1914, the trans-

action was consummated. The Payette Company then had no assets but the $3,000,000 in cash and no liabilities not assumed by the Boise-Payette Company. It then distributed the $3,000,000 among its stockholders, who surrendered their stock, and the corporation has since been dormant. In the distribution of the proceeds of the property of the company Mr. Turrish received $159,950, which was twice the par value of his stock. The Commissioner of Internal Revenue deemed one-half of this sum, or the par value, and the actual value in 1903, of the stock of Turrish, capital returned to him, and the other half, or the increase of the actual value of his stock between 1903 and March 1, 1913, by reason of the gradual advance during that time in the value of the timber lands of the Payette Company, income derived by him in 1914 from a dividend received from a domestic corporation subject to the income tax law. On this ground he assessed against Turrish an additional income tax of $127.12 on account of the second half of the $159,950. Turrish paid this tax under protest and brought this action for the return of the amount he paid. The court below was of the opinion that no part of this $159,950 was income taxable under the act of October 3, 1913, and it accordingly overruled the demurrer and rendered judgment for the plaintiff.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for plaintiff in error.

A. W. Clapp, of St. Paul, Minn. (N. H. Clapp, of St. Paul, Minn., H. Oldenburg, of Carlton, Minn., and Harold J. Richardson, of St. Paul, Minn., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). [1] Is the amount in excess of the par value, and of the actual value of his stock in 1903, derived by a stockholder of a domestic corporation subject to the Income Tax Law (38 Stat. 166, c. 16, § II, A, 3 U. S. Comp. Stat. 1913, §§ 6319, 6320, 6321), exclusively from the increase in the value of his stock prior to March 1, 1913, the effective date of that act, on account of the gradual advance in the value of the property of the corporation prior to that date, but first realized by him in cash by the distribution in 1914 by a dividend to all the stockholders of the corporation of all the proceeds of the sale in March, 1914, of all the property of the corporation, income, gains, or profits of the stockholder taxable under that law? The negative answer to this question seems at first to be reasonable: (1) Because no income, gains, or profits accrued to the stockholder during the year 1914, or after March 1, 1913; his property remained of the same value and gained nothing during that time; and (2) because the sale of the property of the corporation in 1914 and the distribution of its proceeds to the stockholders was a mere change of the form, without increase of the value, of the property he owned before the Income Tax Law took effect. Counsel for the United States, however, contend that the $79,975 which measures the increase in the value of the stock of the plaintiff between 1903 and March 1, 1913, derived from the gradual advance during that time of the value of the timber land of the corporation is taxable as his income: (1) Because he had no interest in the increased value of the property of the corporation until the dividend which distributed the proceeds of the sale of its property was declared in 1914; (2) because upon this distribution, and not before he first obtained an interest in this increased value, and thus in 1914 for the first time, it became income to him; and (3) because this $79,975 was derived from a dividend

received by him in 1914. To sustain the first two contentions counsel invokes the general rule that a stockholder has no legal title or right to the income, gains, or profits of his corporation until the dividends of that income, or of those gains or profits, have been declared, and cites Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449, and like cases in support of that rule. But the tax authorized by the act under consideration is an annual tax on the income, gains, or profits arising or accruing after March 1, 1913, in the calendar year preceding the levy, and neither the rule itself nor any rational application of it is determinative of the question in what year this alleged income accrued or arose, or of the question whether the proceeds of the dividend were income or capital. If it were, then the entire $159,950, would, by the same mark, have become his income, gains, and profits when the distribution was made in 1914, for it was all distributed to him by the same dividend, and until that dividend was declared he had no better legal title or right to any of the property of the corporation, or to the proceeds of any of it, than he had to the increased value of its timber land.

[2] It is true that a corporation holds the legal title of, and the right to manage, control, and convey, its property, and that a stockholder is without that title and right. But, after all, the corporation is nothing but the hand or tool of the stockholders, in which they hold its property for their benefit. They are the equitable and beneficial owners of all its property, and it is the mere holder and manager of it for them. The benefit of every increase in the value of its property is their benefit, and the injury of every decrease of the value of its property is their injury. They may by appropriate action at any time require and compel it to sell all its property and to distribute its proceeds among them, and may thus strip it of all its capital, all its income, surplus, gains, and profits, and leave it penniless. So in reality, as against its stockholders, a corporation has no and they have all the beneficial interest in its property. Every substantial increase in the value of its property immediately and proportionately increases the actual value of their stock, and every substantial decrease of its value immediately and proportionately decreases the actual value of their stock. Whether the value of the property of a corporation is increased by a gradual advance through a series of years of the value of the same real or personal property held throughout, or by undivided income, gains, or profits the actual value of its stock is immediately and proportionately increased, and the holders of that stock may at any time convey their respective beneficial interests in that enhanced value in those undivided profits and in all the other property of the corporation by sale, gift, or devise. The Collector v. Hubbard, 12 Wall. 1, 20 L. Ed. 272. The position that a stockholder in a corporation has no interest in the enhanced value of its property, or in its undivided income, gains, profits, or surplus, until a dividend thereof is declared, is untenable and may not prevail.

It is admitted by the demurrer that in this case the value of the property of the corporation increased solely by reason of the advance in the value of its timber lands from $1,500,000 in 1903 to $3,000,000 on March 1, 1913, that the value of the stock of the plaintiff from the same cause proportionately increased from $79,975 in 1903 to $159,950 on March 1, 1913, and that no further increase of value, gain, income,

or profit resulted before or by reason of the sale of all the property of the corporation in March, 1914, and the distribution of its proceeds among its stockholders. The Income Tax Law of 1913 provides:

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year * * * a tax of 1 per cent. per annum." Paragraph A, subd. 1.

"In addition to the income tax provided under this section [herein referred to as the normal income tax] there shall be levied, assessed, and collected upon the net income of every individual an additional income tax [herein referred to as the additional tax] of 1 per centum per annum. * * * All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section." Paragraph A, subd. 2.

"That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent." Paragraph B.

After specifying the exemptions and deductions allowed in the computation of the net income for the purpose of levying the normal tax the law declares that:

"The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive." Section II, D.

[3] All the value of the property of the corporation and all the value of the stock of the plaintiff, whether it was due to capital assets, or income, or gains, or profits, or all of these combined, had arisen and accrued and had become their property before March 1, 1913. Words in a statute ought not to be given a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. United States v. Burr, 159 U. S. 78, 15 Sup. Ct. 1002, 40 L. Ed. 82; United States v. American Sugar Co., 202 U. S. 563, 577, 26 Sup. Ct. 717, 50 L. Ed. 1149. The provisions of this law that the normal tax shall be levied annually upon the net income arising or accruing in the preceding calendar year, that so far as this case is concerned all the provisions relative to the levying of the normal tax shall apply to the levying of the additional tax, that the normal tax shall be computed on the remainder of the net income of each person accruing during each preceding calendar year ending December 31st, except that for the year ending December 31, 1913, it shall be computed on the net income accruing from March 1st to December 31st, leave no doubt that the Congress intended to and did exclude from the burdens of the

taxes it imposed by the Income Tax Act of October 3, 1913, all income, gains, and profits of every kind which had arisen or accrued prior to March 1, 1913. It clearly intended to leave, and surely did leave, all the income, gains, and profits which had accrued or arisen prior to that date, whether they were in the form of divided or undivided surplus, income, gains, or profits, as free from every income tax it imposed, and as absolutely the property of their respective legal and equitable owners, as was any of their original capital or property. Now the subsequent change, by sale, distribution, or otherwise, of the form of property held on March 1, 1913, without thereby enhancing its value, or causing any gain, profit, or income to its holders, as from real to personal property, or from stock to cash, does not subject it to the income tax, because it produces no gain, profit, or income; it leaves the value of the property the same after as before the change. And as the sale of the property of the Payette Company in 1914 and the distribution of its proceeds to its stockholders by the dividend did not enhance the value of the property of the corporation or of the stockholders, or produce any gain, profit, or income for them, but left the value of their property the same that it was before those transactions, and the same as it was when the Income Tax Law took effect, the declaration and payment in 1914 of the dividend by which the proceeds of the sale of the property of the corporation were distributed to its stockholders did not transform the increased value of the plaintiff's stock, which had accrued and arisen prior to March 1, 1913, into income, gains, or profits accruing or arising subsequent to that date and did not subject it to any income tax. Merchants' Ins. Co. v. McCartney, Fed. Cas. No. 9,443; Bailey v. Railroad Co., 22 Wall. 604, 22 L. Ed. 840; Id., 106 U. S. 109, 114, 1 Sup. Ct. 62, 27 L. Ed. 81; United States v. Smith, Fed. Cas. No. 16,341; Von Baumbach v. Sargent Land Co., 219 Fed. 31, 36, 37, 134 C. C. A. 649, 654, 655; Sargent Land Co. v. Von Baumbach (D. C.) 207 Fed. 423, 430, 432, 434; Mitchell Bros. Co. v. Doyle (D. C.) 225 Fed. 437, 439, 440; Doyle, Collector, v. Mitchell Bros. Co., 235 Fed. 686, —— C. C. A. —— (6th Circuit), filed June 30, 1916; Chicago, Bur. & Q. R. Co. v. Page, 1 Biss. 461, Fed. Cas. No. 2,668; Reynolds v. Williams, Fed. Cas. No. 11,734, 4 Biss. 108.

The third argument of counsel for the collector is that, because paragraph B provides that "the net income of a taxable person shall include gains, profits and income derived * * * from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever," all surplus or undivided profits included in any dividend received after March 1, 1913, although they accrued and arose years prior to that date, are by these terms of the law subjected to the additional tax; and he cites, in support of this conclusion, Van Dyke v. City of Milwaukee, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509. Conceding that this decision sustains this proposition of counsel for the government, it is not controlling and has not proved persuasive. In Van Dyke's Case Judge Barnes filed an able dissenting opinion, which has proved more convincing, and which is in accord with the decision

of the Supreme Court in Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, and with the weight of authority. It was, as we have seen, the general purpose of Congress and the general effect of the act of October 3, 1913, to impose an annual tax upon incomes, gains, and profits accruing subsequent to March 1, 1913, and to impose none upon those which accrued or arose before that date. The interpretation of the clause of the act under consideration which brings within its grasp all incomes, gains, and profits accrued before the effective date of the act which happen to form parts of dividends declared after that date flies in the teeth of the general purpose and policy of Congress in enacting the statute, creates an exception to the general effect of the statute which is not clearly made by the act itself and constitutes a strained and unnatural construction. Such a construction should not be adopted unless the terms of the act imperatively require it. The natural and legal presumption is that Congress intended to treat all income, gains, and profits accruing prior to March 1, 1913, alike, and as it excluded from the burden of the income taxes all such income, gains, and profits as accrued prior to March 1, 1913, that did not become parts of dividends declared after that date, the presumption is that it intended to exclude those also. Not only is there nothing in the act to negative or overcome this presumption, but the terms of the law when carefully read sustain it. By the terms of the clause on which counsel relies the taxable net income there specified does not include all dividends received after March 1, 1913, or all proceeds of such dividends, but "gains, profits, and income derived" from dividends. The clause is treating of the net income on which the additional tax is to be levied. By subdivision 2, par. A, all the provisions of the section relating to individuals who are chargeable with the normal income tax, so far as they are applicable and are not inconsistent with that subdivision, are made to apply to the levy, assessment, and collection of the additional tax. Two of the provisions of that section relating to individuals who are chargeable with the normal tax, which are applicable to the levy, assessment, and collection of the additional tax, and are not inconsistent with the provisions of subdivision 2, are: (1) That there shall be levied, assessed, collected, and paid annually "upon the entire net income accruing from all sources in the preceding year a tax of one per centum per annum"; and (2) that the tax shall be computed upon the remainder of net income "accruing during each preceding calendar year ending December 31st: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen." All these provisions of the act must be read and construed together, and when so read and interpreted there is no logical or rational way of escape from the conclusion that the "gains, profits and income derived" from dividends charged with the additional tax by paragraph B are the gains, profits, and income arising and accruing subsequent to March 1, 1913, derived from dividends and those only. And the conclusion is that the proceeds of the enhanced value of the stock of the plaintiff which accrued

and arose prior to March 1, 1913, from the gradual increase in the value of the timber land of the Payette Company, and which formed a part of the dividend made by that company in 1914, was not subject to the additional income tax under the act of October 3, 1913.

[4] This conclusion finds substantial support from another consideration. The words "income, gains, and profits" are used in common parlance and as legal terms in contradistinction to capital, property, and capital assets. The enhanced value of the land or property of a corporation, or of the stock of a corporation, which slowly accrues through a series of years from the natural and gradual increase of the value of the timber land or other property which the corporation holds without trading, is more analogous to property, capital, or capital assets than to income, gains, or profits. It is rather a growth, an increase of the property or capital assets, than income, gains, or profits produced by the property. Adverting to the oft-quoted analogy declared by the Supreme Court of Georgia in Waring v. Savannah, 60 Ga. 100, that "the fact is, property is the tree, income is the fruit; labor is the tree, income the fruit; capital the tree, income the fruit," the enhanced value of property from the slow and gradual increase of its value through a series of years is rather a growth of the tree than the production of its fruit. It is so inequitable, so unjust, so discriminatory to treat such an enhanced value, accruing through many years before the enactment of an income tax law, as the income, gains, or profits of the year in which it happens subsequently to be distributed, that the following rule, which is supported by the more forcible reasons and by the great preponderance of authority, has become the established law in the federal courts. The enhanced value of property which accrues from the gradual increase in its value during a series of years prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act. Such enhanced value, like the property of which it is an outgrowth and in which it inheres, becomes the absolute property of its legal and equitable owners before the effective date of the law, and as against such a law thereafter remains their capital assets. Gray v. Darlington, 15 Wall. 63, 65, 66, 67, 21 L. Ed. 45; Sargent Land Co. v. Von Baumbach (D. C.) 207 Fed. 423, 432; Von Baumbach v. Sargent Land Co., 219 Fed. 31, 36, 37, 134 C. C. A. 649, 654, 655; Gauley Mountain Coal Co. v. Hays, 230 Fed. 110, 144 C. C. A. 408; Industrial Trust Co. v. Walsh (D. C.) 222 Fed. 437; Mitchell Bros. Co. v. Doyle (D. C.) 225 Fed. 437, 439, 440; Doyle v. Mitchell Bros. Co., 235 Fed. 686, — C. C. A. — (6th Circuit), filed June 30, 1916; Hudson's Bay Co., Ltd., v. Stevens, 25 L. I. R. 709, 5 Tax Cases, 424, 436, 438, 439; Tebrau (Johore) Rubber Syndicate, Ltd., v. Farmer, 47 Scot. L. R. 816, 5 Tax Cases, 658.

Because no income, gains, or profits accrued to the plaintiff during the year 1914, or after March 1, 1913, but during that time his property remained of the same value, and because the sale of the property of the Payette Company in 1914 and the distribution of its proceeds by a dividend to its stockholders was but a change of the form, with-

out any increase of the value, of the property he owned before the Income Tax Law of 1913 took effect, there was no error in the judgment below, and it is affirmed.

LYNCH, Collector of Internal Revenue, v. HORNBY.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4652.

INTERNAL REVENUE ⊂=7—INCOME TAX—DIVIDENDS OF STOCKHOLDER—"INCOME."

Dividends received by a stockholder from the conversion into money and distribution in a subsequent year of property owned by the corporation on March 1, 1913, which was the effective date of Income Tax Law Oct. 3, 1913, c. 16, § II, A, et seq., 38 Stat. 166 (Comp. St. 1913, § 6319 et seq.), and which was on that date worth the amount subsequently realized therefor, is not "income" accruing during the year of the distribution, and is not taxable under the act. In such case the original cost of the property to the corporation is immaterial.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⊂=7.

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

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by H. C. Hornby against E. J. Lynch, Collector of Internal Revenue for the District of Minnesota. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 236 Fed. 653, —— C. C. A. ——.

Alfred Jaques, U. S. Atty., of Duluth, Minn., for plaintiff in error.

A. W. Clapp, of St. Paul, Minn. (N. H. Clapp, of St. Paul, Minn. H. Oldenburg, of Carlton, Minn., and Harold J. Richardson, of St. Paul, Minn., on the brief), for defendant in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case challenges a judgment which Hornby, the plaintiff below, recovered against Lynch, the collector, for the return to him of $171, which the collector had assessed against him as an additional income tax under the Tariff Act of October 3, 1913, c. 16, § II, A, 38 Stat. 166, 3 U. S. Comp. Stat. 1913, §§ 6319, 6320, 6321, and which he had paid under protest. The facts were alleged in the complaint of Hornby, and they were admitted by demurrer. They are set forth in detail and are numerous, but the result of them is that Hornby was the owner of 434 shares of the capital stock of the Cloquet Lumber Company from 1906 until 1915. That company was a corporation of Iowa, which for more than a quarter of a century has been engaged in purchasing timber lands, manufacturing the timber into lumber, and selling it. It had a capital stock of $1,000,000, divided into 10,000 shares, of the par value of $100 each. On March 1, 1913, by the increase of the value of its timber lands and

by its business operations, it had become possessed of property which was worth four times the par value of its stock, or $4,000,000, its timber had become worth $10 per thousand feet, and the stock of Mr. Hornby, the par value of which was $43,400, had become worth at least $150,000. In the year 1914 the Cloquet Company was engaged in converting its standing timber into money and distributing it among its stockholders, by cutting the timber, manufacturing it into lumber, and selling the lumber. In that year it distributed to its stockholders in dividends $650,000. Of these distributions $240,000, or 24 per cent. of the par value of its capital stock, was derived from the net earnings and profits of the company during the current period, and $410,000 was derived from moneys realized during the year 1914 by the Cloquet Company from the conversion into money by it of property which it owned, or in which it had an interest, on March 1, 1913. Hornby received during the year 1914 $10,416 from the distribution of these net earnings and profits of the company, and $17,794 out of the distribution of these moneys realized from the conversion into money of the property which the Cloquet Company owned or had an interest in on March 1, 1913. The property out of which the $410,000 was realized was of the value of $410,000 on March 1, 1913, and the conversion of it into money and the distribution thereof diminished the value of the company's property as it was on March 1, 1913, by that amount, and diminished the value of Mr. Hornby's stock as it was on March 1, 1913, and increased his cash $17,794. In his income tax return for the year 1914 Mr. Hornby included the $10,416 he received out of the income and profits of the Cloquet Company during that year, and he paid an income tax without protest upon a computation which included this amount; but he did not include the $17,794 which he received out of the moneys realized in 1914 by the Cloquet Company from the conversion into money of property which it owned or had an interest in on March 1, 1913. The Commissioner of Internal Revenue deemed this $17,794 taxable income to Mr. Hornby, and on account of it levied an additional tax of $171, which Mr. Hornby paid under protest and brought this action to recover.

Counsel for the United States complains that the complaint does not state facts sufficient to constitute a cause of action, because it does not state the original cost of the timber or other property which the Cloquet Company acquired before and owned on March 1, 1913. But that omission is immaterial, because it does state the value of the property which that company owned and was interested in on March 1, 1913, which was converted into money and distributed to its stockholders in 1914, and that this conversion and distribution diminished the value of its property as it was on March 1, 1913, and as it was just before the conversion and distribution, by $410,000, and diminished the value of Mr. Hornby's stock as it was on March 1, 1913, and as it was just before the sale and distribution, by $17,794. As none of the property which the Cloquet Company or Hornby held on March 1, 1913, whether it was original capital or previously earned surplus, income, gains, or profits, was intended to be made or was made taxable as income by the Income Tax Law of 1913, the complaint stated facts sufficient to show that this $17,794 was not so taxable.

This case was tried in the court below, and was argued and submitted to this court, with the case of Lynch v. Turrish, 236 Fed. 653, — C. C. A. —, the opinion in which is filed herewith. With the exception of the contention which has just been considered, it presents the same questions considered and determined in that case. For the reasons stated in the opinion in Lynch v. Turrish, supra, and because no income, gains, or profits accrued to Mr. Hornby during the year 1914, or at any time after March 1, 1913, by reason of the conversion into moneys and distribution in the year 1914 of that portion of the property which the Cloquet Company owned or owned an interest in on March 1, 1913, from which it realized the $410,000 in 1914, but the effect of that conversion and distribution was simply to change the form in 1914 of a part of the property which Mr. Hornby owned on March 1, 1913, while its value remained the same, the $17,794 which he received in dividends from that conversion and distribution was not subject to any income tax under the Income Tax Law of 1913, and the judgment below is affirmed.

MARSTERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 5, 1916.)

No. 2654.

WATERS AND WATER COURSES ⊜224—RIGHTS OF APPROPRIATORS OF WATER FOR IRRIGATION—IDAHO STATUTES.

Rev. Codes Idaho, § 3274 et seq., as amended in 1909 (Laws 1909, p. 327), providing for the creation of water districts, the election of water masters, etc., expressly provide that they shall not apply to streams or water supplies "whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof," and where the priorities of appropriators from a stream and the amounts to which they are severally entitled have not been so adjudicated by a court, there can be no legal organization of a water district, and no persons claiming to be officers of such a district have any authority to make such determination and to act on it by interfering with the irrigation works of any user.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 315, 316; Dec. Dig. ⊜224.]

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

Suit by the United States against Elias Marsters and E. F. Lakin. Decree for the United States, and defendants appeal. Affirmed.

Joseph H. Peterson, Atty. Gen., of Idaho, E. G. Davis, of Boise, Idaho, T. C. Coffin, of Pocatello, Idaho, and Herbert Wing, of Boise, Idaho, for appellants.

J. L. McClear, U. S. Atty., J. R. Smead, Asst. U. S. Atty., and B. E. Stoutemyer, Counsel U. S. Reclamation Service, all of Boise, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The Boise river is one of the streams of Idaho, the waters of which are used in part for the purpose of irriga-

tion in Ada and Canon counties of that state, and the United States is one of the appropriators, under an application filed by certain citizens and residents of the state with its state engineer for permit to divert and appropriate 5,200 cubic feet per second of the said waters for the irrigation of certain lands within the state, now known as the "Government Boise project." The application having been approved by the state engineer and a permit granted to the applicants, the latter was assigned to the Secretary of the Interior, who, under and in pursuance of the Act of Congress of June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1913, §§ 4700–4708), known as the Reclamation Act, caused surveys to be made and work to be done to the extent of appropriating and using 1,647 second feet of the waters of the river, with the approval of the state engineer, in pursuance of the project, the date of the government's appropriation being December 4, 1903. Prior to that date, however, there had been and then were in existence 134 prior appropriations of the waters of the river, for the purpose of adjudicating the rights and priorities of which an action had been commenced in the preceding year of 1902 in one of the courts of the state, to which action the United States therefore could not have been made a party, and has not since been made a party. The United States diverted the water so appropriated and claimed by it by means of headgates and a canal constructed on its own land, and was so using it in July, 1913, when the appellants, acting, respectively, as water commissioner and water master of water division No. 3 of the state of Idaho, and claiming that it was necessary to deprive the government of a part of the water which it was thus diverting, in order that prior appropriators might be supplied with the water to which they were entitled, first applied to the manager of the government project to turn into the river the amount so claimed to be so needed, which request being refused, the appellants, acting under the advice of the Attorney General of the state, on the 11th day of July, 1913, entered upon the property of the United States and cut the locks fastening the said gates, took a part of the water then being diverted and used by the government, and proceeded to regulate the flow of the water of the river as they claimed it should be. The next day, July 12, 1913, the United States commenced in the court below the present suit against the appellants as defendants, to recover damages for their action and an injunction restraining such acts. The court below gave the complainant judgment for $1,000 besides costs, from which judgment the present appeal was taken.

Sections 3274, 3275, and 3277 of the Revised Codes of Idaho as amended in 1909 (Session Laws 1909) are as follows:

"Sec. 3274. The board of irrigation shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district; provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts; and provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the waters therefrom does not affect or conflict with the rights to the use of the waters of the main stream; and provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the

extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district; and, provided, that this section shall not apply to streams or water supplies whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof.

"Sec. 3275. There shall be held on the first Monday of March of each year, commencing at 2 o'clock p. m., a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the water commissioner of the district, and he shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies, or corporations known by him to own or claim the use of the waters of such district, and should said water commissioner fail to file such designation by February first, the district judge of the district within which such water district or portion thereof, is situated, shall, upon application of some interested person, designate the place of holding such meeting, and in case the first Monday in March has passed, such district judge may also designate the time of holding such meeting. At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall, prior to the election of such water master and assistants, fix the compensation to be paid them, such compensation not to exceed four dollars ($4.00) per day, during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district shall be entitled to one (1) vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five (5) days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the water commissioner of the district; provided, that a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation; and provided, that each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district; and provided, that should said meeting not be held or not choose a water master, or not fix the compensation thereof, then the water commissioner of the district may appoint such water master, and fix his compensation, not exceeding four dollars ($4.00) per day. The water commissioner may, at any time, remove any water master within his division for failure to perform his duty as such water master, upon complaint in that respect being made to him in writing by any person owning or having the right to the use of an adjudicated right in such district, and the water commissioner may appoint a successor for the unexpired term. Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the state to administer oaths, to faithfully perform the duties of his office, and shall file with the clerk of the district court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars ($500.00), with not less than two (2) sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office."

"Sec. 3277. It shall be the duty of said water master to distribute the waters of the public stream, streams, or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the water commissioner of his district, the headgates of ditches heading from such stream,

streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; provided, that any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply."

The foregoing statutory provisions constitute what is claimed to be authority for the acts of the water commissioner and water master complained of. It is readily seen that it is expressly declared in the last proviso of section 3274 that the section "shall not apply to streams or water supplies whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof"; that by the provisions of section 3275 the election of the water master and his assistants therein authorized is only applicable to such districts as are authorized to be established by the preceding section 3274, and that such officers are authorized to be elected only at "a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district," that is to say, such district as is authorized by the preceding section 3274, and at which meeting only such persons as own or have "the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district" shall be entitled to vote, and such person shall be entitled to one vote only; there being a proviso in section 3275 to the effect that a corporation shall be considered a person for the purpose of that section and shall cast its vote by some one to be designated by the corporation, with a further proviso—

"that each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district."

It is plain, we think, from those express declarations, that the statutory provisions in question have no application to streams or water supplies whose priorities and use have not been adjudicated by a court having jurisdiction thereof; in other words, that such an adjudication is essential to the legal organization of any district embracing such waters, and therefore essential to any authority in any officer of such district. Not only is such the necessary effect, in our opinion, of the language of the statute, but the decision of the Supreme Court of Idaho in the case of Stethen v. Skinner, 11 Idaho, 374, 82 Pac. 451, proceeded upon that view and adjudged that in a district organized under the preceding but similar statute the water master's proper guide in the distribution of waters is the decree of the court and not its findings of fact.

To hold that the water master or water commissioner, or both combined, can determine how much water an appropriator is legally entitled to would obviously be to hold, in effect, that those executive officers can deprive an appropriator of his property without due process

of law; for there can be no doubt that the use of water for the purposes of irrigation is not only a property right, but, according to the decisions of the Supreme Court of Idaho, such right is real property appurtenant to the land so irrigated. Taylor v. Hulett, 15 Idaho, 265, 97 Pac. 37, 19 L. R. A. (N. S.) 535; Nielson v. Parker, 19 Idaho, 727, 115 Pac. 488; Gard v. Thompson, 21 Idaho, 485, 123 Pac. 497. In the case first cited the court held that a suit to ascertain and determine the extent and priority of a water right and appropriation partakes of the nature of an action to quiet title to real estate. From what has been said it is manifest that the proper disposition of the present appeal turns upon the true interpretation of the decisions of the Supreme Court of Idaho in the case entitled Farmers', etc., D. Co. v. Nampa, etc., Irr. Dist., 14 Idaho, 450, 94 Pac. 761, and Farmers', etc., Co. v. Riverside Irr. Dist., 16 Idaho, 525, 102 Pac. 481. The first of those cases was thus stated by the court in delivering its opinion:

"This action was instituted by the Farmers' Co-operative Ditch Company against numerous appropriators of water from the Boise river, for the purpose of adjudicating the priorities among the several appropriators. The complaint was filed on August 20, 1902. The defendants answered, and also filed cross-complaints, setting up their several rights, appropriations, and priorities, and asking for affirmative relief, decreeing their several appropriations and the times from which they should date. * * * On January 18, 1906, findings of fact and conclusions of law and judgment were made and entered. This appeal is from the judgment, and is prosecuted by the Nampa & Meridian irrigation district, which is the successor in interest and assignee of the Boise City Land & Water Company."

The first contention urged by the appellant in that case was that the trial court erred in not finding as to all the individual users of water under the various ditches and canals, and the amount of water used by each and necessarily required for the irrigation of his land, and the particular description of the land upon which he was using and entitled to use water. The court on that appeal decided against that contention. The next question presented on that appeal was whether section 38 of the act of March 11, 1903 (Laws 1903, p. 250) of the state of Idaho, was—

"applicable to water users who have no right by appropriation, but whose right is founded upon one of use, and is purely a rental right as distinguished from a right by appropriation and diversion."

The court in that case held that, in view of certain facts referred to in its opinion, the appellant could not "be heard for the first time on such objections in urging a reversal of the judgment." The Supreme Court then proceeded in its opinion as follows:

"In paragraph 3 of the findings of fact, the court made a general finding as to the quantity of water required for the successful irrigation of the lands irrigated from the Boise river. It found that 'for bench lands 1 inch per acre' is necessary, and that 'for bottom lands $1^1/_{10}$ inches per acre' is necessary. The appellant assigns this finding as error, on the ground that the court has not described the lands he terms 'bench lands' and those he terms 'bottom lands.' The appellant is in no position on this appeal to question the finding for the following reason: This finding No. 3 is merely a finding of the basis on which the court has concluded to apportion the water, the quantity of water per acre he intended to allow the several appropriators. When the

court came to making the specific findings as to the number of inches of water each appropriator was entitled to, he found the date from which such appropriator was entitled to take his water and the number of inches to which he was entitled for the lands described in his complaint or cross-complaint. The latter finding was presumably made upon the basis of one inch for bench lands and $1^1/_{10}$ inches for bottom lands. We assume the court followed that standard. If, in fact, he has not, the failure to do so must appear from the evidence, and would necessarily have to be reviewed on the motion for a new trial or appeal from an order denying the same. On this appeal, we must presume that the court made its decree to the various appropriators on this basis. No evidence has been brought here. If, on the contrary, the basis or standard laid down by the court as the one it intended to follow is not supported by the evidence, that too, must be determined from the evidence, and cannot be passed upon on this appeal from the judgment."

And, after referring to the question of the expense of making certain surveys and maps by the state engineer, the court affirmed the judgment appealed from. The foregoing makes plain what was before the Supreme Court of Idaho and what it decided in the case first cited, one of which things was that the finding of the trial court that 1 inch of water per acre was necessary for bench lands and $1^1/_{10}$ inches for bottom lands was merely a finding of the basis on which that court had concluded to apportion the water, and that whether or not the court had acted on that basis could only be reviewed on motion for a new trial or on appeal from an order denying the same. When the same case subsequently came before the same court, it was on an appeal by certain of the defendants from an order denying them a new trial. 16 Idaho, 525, 530, 102 Pac. 481. After disposing of a motion to dismiss the appeal and a certain stipulation entered into between the attorneys for the respective parties, the court then said:

"The decree in this case covers 135 appropriations of water from the Boise river, and those appropriations cover lands aggregating about 135,000 acres. The chief complaint made by appellants is directed against that part of the findings, and likewise of the decree, reading as follows: 'That the quantity of water required for the successful irrigation and cultivation of said lands, measured at the intake of the respective ditches under a 4-inch pressure, is as follows: For bench lands, 1 inch per acre. For bottom lands, $1^1/_{10}$ inches per acre.' Appellants contend that to award 1 inch per acre for bench lands and $1^1/_{10}$ inches per acre for bottom lands in the Boise Valley will invite and sanction waste in the use of water; whereas, the decrees of courts in water litigation should demand the highest possible duty for water. It must be remembered that this was not primarily a case determining the amount of water required to irrigate any particular tract of land; it was not an action between water users and consumers, but rather an action between the appropriators of water from the natural stream to determine the quantity of water to which each appropriator is entitled and the date from which his appropriation should run. The finding and decree as to the quantity of water per acre necessary for successful irrigation did not amount to an absolute decree of that quantity to each acre of land, but rather amounted to an ascertainment of the basis on which all the appropriations were decreed by the court. In other words, the court, after hearing all the evidence, concluded that he would divide the lands into two classes; one 'bench lands' and the other 'bottom lands.' For bench lands he would allow 1 inch per acre, measured at the intake, and for 'bottom lands' $1^1/_{10}$ inches per acre, measured at the intake. While this finding and decree as to the duty of water would not be binding upon any users or consumers not made parties to the action, still it becomes important in this case, for the reason that it is made the measure of each appropriator's right as to quantity of water under his appropriation and diversion. The appropriator is allowed to divert water from

the stream sufficient to cover the reclaimed acreage under his canal at the rate of 1 inch or $1^1/_{10}$ inches per acre, according as the lands may be bench or bottom lands. The evidence introduced in this case for the purpose of establishing the duty of water under these several canals and appropriations was practically all purely guesswork and of the most unsatisfactory character. One after another of these witnesses testified that he had been using 'about' a certain volume * * * of water on his land, and he 'thought' it was necessary to have 'about' so much for the irrigation of his land. In nearly every instance when the witness was asked if he had ever measured the water and made tests as to the actual quantity of water used on a given tract of land, he said that he had not. A fair example of the evidence given in this case is that of a witness who testified that he had lived in Boise for 40 years, and that he had been acquainted with the irrigation ditches that were built in the early 60's. He said: 'I don't know anything about inches of water. * * * I have made no investigation to determine how many inches of water it would take to irrigate an acre of land, either in vegetables or grass land.' The witness followed this testimony by saying he would judge it would take about an inch to the acre. This was true with practically all the witnesses in the case. The trouble with the whole line of evidence given on this subject is that it was, for all practical purposes, worthless, and was not founded on any actual measurements or tests, but was purely guesswork as to the volume of water that had been used by the several witnesses. What evidence was given from actual tests and measurements shows a less quantity of water necessary per acre, and consequently a higher duty for the water. Few of the witnesses appear to have ever seen water measured, or to know how large a stream of water and what grade or pressure it would take to measure a given number of inches. The first real and satisfactory tests or measurements that appear to have been made were made subsequent to the decree in this case in attempting to distribute the water in conformity therewith. Since the decree was entered, the water commissioner and water masters under him have made numerous tests and measurements, and a great number of affidavits have been filed on motion for a new trial. By these affidavits, made by the water commissioner and water masters and other expert witnesses, it appears that it will be impossible to actually irrigate anything like as large an acreage under the decree in this case as had been previously irrigated by the several appropriators of the waters from this stream. It also appears from the affidavits that it will not be necessary or essential to apply as much water to the lands as this decree calls for. A controversy has arisen as to whether these affidavits constitute newly discovered evidence within the meaning of the statute. Viewed from one standpoint, they may be so considered; from another viewpoint they could not be treated as newly discovered evidence. It was within the power of any of the litigants to have made measurements and tests and have produced the evidence thereof on the trial of this case. The water was in the stream, and the land was there for irrigation the same before the decree as afterward. On the contrary, these measurements and tests had never been made before, and, of course, did not exist at the time of the trial. Ordinarily, we should say that this does not constitute newly discovered evidence such as requires the granting of a new trial. We feel satisfied, however, from an examination of these affidavits and the whole record in this case, that a higher duty may be obtained from the water than that of an inch and an inch and one-tenth, respectively, per acre as provided for in this decree. The appellants are as guilty and blameworthy for the class of evidence that was introduced on the subject of the duty of water as are the respondents; they neither objected to the evidence produced by the respondents nor furnished a better class of evidence themselves on this subject; and there was, in fact, nothing left for the trial court to do but make its findings on such evidence as had been introduced. It is necessary, therefore, on this appeal to look to the affidavits presented on motion for a new trial in order to ascertain the real facts with reference to the duty of water on these lands. It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."

And after referring to certain of its preceding decisions, the court proceeded as follows:

"After a somewhat extended and very careful examination of the record in this case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of lands mentioned in this decree. For this purpose the court can hear the evidence of persons who are competent to testify on the subject and who can do so, not from guesswork or hearsay, but from actual measurements and tests and applications of the water to the lands irrigated under these appropriations. A new trial for this purpose can do no harm or injustice to any one, and, on the other hand, if it should be found that even a very slight increase in the duty of water per acre can be had, it will, in the aggregate, amount to several thousand additional acres of land that may be irrigated. In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water."

In reversing the order appealed from the court further said:

"A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of lands involved in this action, namely, bench and bottom lands. This order for a new trial will also cover and include the question of the duty of water under allotments numbered 2 and 30, being the appropriations for the Jacobs Canal Company, Limited, and the Joseph Perrault and R. Z. Johnson canal, dating from May 1, 1866. The question as to the duty of water under those ditches and appropriations will be retried. On a retrial the court will hear such competent evidence as may be produced, touching the duty of water to be applied to lands in Boise Valley and lying under the various canals taking water from the Boise river. The court in its decree should also determine and decree what lands are bench and what bottom lands. In the event the court, after hearing the evidence, should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the findings and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree."

The mere reading of the foregoing opinions makes clear, we think, that while the Supreme Court of Idaho affirmed the judgment of the lower court in so far as it fixed and adjudged the respective dates of the appropriations of the 134 prior appropriators of the waters of Boise river who were parties to the suit, it vacated the judgment of the court below in so far as it fixed and adjudged the amount of the water of the river which the respective prior appropriators are entitled to divert and use, and remanded the cause for a new trial of that question.

It being conceded that such new trial has not been had, and there being no decision of any court adjudging the amount of the waters in question which the respective prior appropriators are entitled to divert and use, we regard it as clear that the appellants were without authority to enter upon the property of the appellee, break the locks of its headgates, and undertake to determine the amount of the waters in question to which that appropriator was entitled, and that for the

damages resulting from those unlawful acts the learned judge of the court below rightly gave the appellee judgment, with costs.

The judgment is affirmed.

ABBOT v. CITY OF MILWAUKEE et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2277.

1. MUNICIPAL CORPORATIONS ⟸385(3)—STREETS—CHANGE OF GRADE.

Milwaukee City Charter, c. 7, § 8, declares that in all cases in which the grade of any street has been permanently established by ordinance since February 20, 1852, and the street actually graded, the owner of any lot injured by a change of grade shall be entitled to compensation. The grade of a street was established in 1873, and in the following year the street was ordered graded to the required level; the work done being accepted. Subsequently the level of the street, which had fallen below the required grade, was raised, and plaintiff's predecessor in title raised the floor of his building abutting on such street. Thereafter the street was ordered paved according to the grade originally established, which was above the then level of the street. *Held* that, though the work originally done did not bring the street up to the grade, nevertheless complainant was not entitled to any award of damages; the city not being estopped to deny that the work originally done was not according to ordinance, and complainant's predecessor having elevated the floor of his building when the street was raised.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 927; Dec. Dig. ⟸385(3).]

2. MUNICIPAL CORPORATIONS ⟸459—STREETS—PAVING—COST.

Milwaukee City Charter, c. 7, § 34, provides that no property fronting on any street or avenue in any city of the first, second, or third class shall be exempt from any assessment of benefits on account of the paving of the street with a permanent pavement having a concrete foundation, or the curbing or resurfacing of such street, until the property shall have paid in the aggregate in assessments for street pavements in front thereof the sum of $3 per square yard, and in cities of the first class the exemption shall extend only to and include one-half of the cost of such pavement in excess of $3 and only one-half of the cost of any subsequent pavement. *Held*, that the partial exemption from excess cost above $3 per square yard for permanent paving is granted only after an aggregate of $3 shall have been paid for street pavements, and does not limit the assessment for the original paving to $3 plus one-half of the excess cost.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1101; Dec. Dig. ⟸459.]

3. MUNICIPAL CORPORATIONS ⟸459—STREETS—PAVING—COST.

In such case the $3 must have been paid for paving, though not necessarily a permanent paving, but an early payment for the graveling of a Milwaukee street cannot be considered in determining the liability of abutting owners for subsequent improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1101; Dec. Dig. ⟸459.]

4. MUNICIPAL CORPORATIONS ⟸439—STREETS—ASSESSMENT OF BENEFITS—ARBITRARY ASSESSMENT.

That the commissioner of public works, in determining the benefits to abutting property from the paving of a street, assessed the benefits at

substantially the cost of the improvement, does not show that he acted arbitrarily.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1053; Dec. Dig. ⊂⊃439.]

5. MUNICIPAL CORPORATIONS ⊂⊃385(2)—STREETS—IMPROVEMENTS—DAMAGES.
Where, under Milwaukee City Charter, c. 7, damages from the paving of a street were limited to those due to any injury which in the opinion of the commissioner might result from such improvement, the commissioner of public works could disallow, as damnum absque injuria, damages for the paving of a street, where the only damages incurred resulted from the restoration of the street to the grade originally fixed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 926; Dec. Dig. ⊂⊃385(2).]

6. MUNICIPAL CORPORATIONS ⊂⊃456(2)—STREETS—IMPROVEMENT—ASSESSMENTS.
Under Milwaukee City Charter, c. 7, § 7, relating to the paving of streets, and providing that the commissioner of public works shall consider the benefits to the owners, and shall assess the same against the several lots or pieces of land which he may deem benefited, the commissioner may, where a subdivided piece of land, owned by one person and used by him as a single piece, abutted on the street, assess the benefits against the entire piece, instead of the several lots.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1095; Dec. Dig. ⊂⊃456(2).]

7. MUNICIPAL CORPORATIONS ⊂⊃456(2)—STREET IMPROVEMENTS—LEVY OF TAXES.
Where the benefits were assessed against the several lots as a whole, the assessment for the cost of the work may be levied in the same manner, notwithstanding the provision that a special assessment must not exceed the benefit to the piece assessed or the cost of the improvement upon which it abuts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1095; Dec. Dig. ⊂⊃456(2).]

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

Bill by Edwin H. Abbot, Jr., against the City of Milwaukee and others. From a decree dismissing the bill, complainant appeals. Affirmed.

This is an appeal from a decree dismissing, for want of equity, a bill to set aside a special assessment levied against plaintiff's property. The bill sets out, as alleged grounds of the invalidity of the assessment, the failure to assess damages arising from an alleged change in the street grade; arbitrary action of the commissioner of public works in the determination of the benefits and damages to the property; assessment of benefits to a number of lots owned by plaintiff in bulk, instead of separately, though the tax was levied on each lot separately; and a tax in excess of that allowed by law.

The property in question is improved dock property, consisting of a number of lots, some in block 167 and some in block 173, having a total frontage of 825 feet on Erie street in Milwaukee, Wis., and owned by the plaintiff since 1890. It has been used as dock property continuously by plaintiff and his predecessors in title since and prior to 1873. In that year the grade of Erie street was permanently established by the common council of Milwaukee. No ordinance has ever changed the grade. Subsequently, in the same year, a part of Erie street on which lots in block 167 abutted, was ordered by the council to be graded to the established grade, the roadway graveled, gutters paved, and sidewalks planked. The work performed under contract in 1874 was accepted by the city as properly done, and an assessment therefor, levied

against each lot of the abutting property, was paid. Subsequently the roadway was from time to time repaired, but without assessment. In 1912 the roadway was several feet below the grade established in 1873. Pursuant to a resolution of the common council, based upon the recommendation duly submitted, with estimates of cost and assessment of benefits and damages, by the commissioner of public works that a part of the roadway of Erie street, including plaintiff's entire frontage thereon, be paved with a permanent sandstone pavement, having a concrete foundation, the sidewalk curbed with stone, and the necessary grading done, this work was performed.

Benefits were assessed by the commissioner against plaintiff's property separately as to the land in block 167 and in block 173, but not separately as to each of the several lots in either block, although each lot abutted on the improvement. No damages were allowed. The benefits assessed were within 5 per cent. of the estimated cost of the paving and curbing. The actual cost exceeded the estimate, and exceeded by only a few dollars the assessed benefits. The taxes, equaling in the aggregate the benefits, were divided as between the lots and levied separately as to each lot.

The charter provisions affecting Milwaukee, a city of the first class, to be here considered are the following sections of chapter 7:

Section 2: "The grading, graveling, * * * or paving to the center of any street * * * and curbing of any sidewalk * * * shall be chargeable to and payable by the lots fronting or abutting upon such street, * * * or * * * sidewalk, to the amount which such grading, graveling, * * * paving, and curbing shall be adjudged by said commissioner to benefit such lots. * * * After a street * * * has been constructed to the grade established by the common council, and graveled, planked, paved or macadamized in compliance with the order of the proper city authorities, the expense of maintaining, renewing, repaving, keeping in repair and cleaning such street, * * * and the pavement or other surface thereof, and of any other subsequent improvement of such street, * * * shall be paid out of the fund of the ward in which such work is done or such improvement is made: Provided, however, that when a street * * * which has been graveled, planked or macadamized, is ordered to be paved, the expense of such paving shall be chargeable to and payable by the lots fronting or abutting upon such street or alley to the amount which such paving shall be adjudged by said commissioner to benefit such lots as hereinbefore provided for the improvement of a street; and further provided, that when a change in the grade of any street or alley shall be ordered, the expense of cutting or filling incurred by such change of grade shall be chargeable to and paid by the lots fronting or abutting on the street or alley of which the grade shall be so changed."

Section 7: "Before ordering any work to be done by the owners of lots or lands fronting on the same, said commissioner shall view the premises, and consider the amount proposed to be made chargeable against said several lots or pieces of land, and the benefits which, in his opinion, will actually accrue to the owner of the same in consequence of such improvement, and shall assess against the several lots or pieces of lands, or parts of lots or pieces of land, which he may deem benefited by the proposed improvement, the amount of such benefit which those lots or pieces of land will severally, in the opinion of said commissioner, derive from such improvement when completed in the manner contemplated in the estimate of the cost of such work, made as provided by section six of this chapter, taking into consideration in each case any injury which in the opinion of the commissioner may result to each lot or piece of land from such improvement; and in case the benefits, in their opinion, amount to less than the cost of the improvement, the balance shall be paid out of the ward fund of the ward or wards in which improvement is made."

Section 8: "In all cases in which the grade of any street has been permanently established by ordinance since February 20, 1852, or shall hereafter be so established, and, after such permanent establishment thereof, and after such street shall have been actually graded to such established grade, the grade so established has been or shall be altered by the city, the owner of any lot or parcel of land which may be affected or injured in consequence of such alteration of grade, shall be entitled to compensation therefor; and it shall be the duty of the commissioner of public works, before ordering to be done the

work of actually changing such established grade by excavating or filling such street to the new grade as so altered, and at the time of making his assessment of benefits, as provided in the next preceding section, to consider, determine and assess against the lots which he may deem benefited by the proposed improvement, to the amount of such benefits, the damages, costs, and charges, including the cost of such improvement, arising from such alteration of grade to the owner of any lot, parcel of land or tenement, which may be affected or injured in consequence thereof, taking into consideration in each case any advantages and benefits which may be conferred thereby upon such lot, parcel of land or tenement, in common with other property on the street affected by such grade; and the excess of the said damages, costs and charges over the benefits assessed, as provided in the next preceding section, shall be paid out of the ward funds of the ward or wards in which such improvement and alteration of grade shall be made."

Section 34: "No property fronting on any street or avenue in any city of the first, second or third class, shall be exempt from any assessment of benefits on account of the paving of said street or avenue with a permanent pavement, having a concrete foundation or the curbing or resurfacing of such street or avenue, until such property shall have paid in the aggregate in assessments for street pavements in front thereof the sum of three dollars per square yard; such assessments in each case to include all that part of the roadway lying directly in front of or abutting the property and lying between the curb line and the center of such roadway. In cities of the first and second class exemption shall extend only to and include one-half of the cost of such pavement, curbing, or resurfacing in excess of three dollars per square yard and only one-half the cost of any subsequent pavement, repavement, or resurfacing of such street or avenue. Whenever any property has paid less than the amount in this section required, it shall be held liable for any difference up to the full amount herein required."

Edwin H. Abbot, Jr., of Boston, Mass., in pro. per.
Clifton Williams, of Milwaukee, Wis., for appellees.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). [1] 1. Chapter 7, § 8, is entirely inapplicable to this case. The resolution of 1912 did not change the established grades. It expressly directed the paving to be done in accordance with the grade established in 1873. That the roadway was then below the established grade, and had been in that condition at least since 1879, is established by the evidence. But the evidence fails to establish that the work done in 1874 was not properly done; that the roadway was not then graveled up to grade. On the contrary, the only direct evidence is the certificate of the assistant city engineer that the contract had been complied with. The trial judge was justified under the evidence in concluding that in some way, not explained, this street had sunk between 1874 and 1879.

But even assuming that the work was improperly performed in 1874, so that the roadway was then lower than the legal grade and that the assessment was paid by the then owner in ignorance thereof, in our judgment, the acceptance of that work by the city engineer in no manner operated expressly or by estoppel to change the legally established grade and to fix it at the actual height of the roadway. No evidence of any affirmative act, in recognition of such a change, has been offered. Even such incidental repairs as were made from time to time are not shown to have been made by or pursuant to the orders of the city council or officials, or to have been based upon any recogni-

tion of any other grade than that specified in the ordinance of 1873 as the legally established grade of the street.

When plaintiff's predecessor extended his building in 1879 making the floor level with the street as it then was, and when, in the later '80's, in replacing the worn-out floor, he again raised it to the level of the street, which had theretofore been filled in some two feet, he did not act on any assertion of the city, either express or implied, that the street at either time was still at the established grade. The very change of two feet amply demonstrated that, either at one or the other time, or at both, the street no longer conformed thereto.

That the payment of the 1874 assessment does not estop plaintiff from asserting that the present pavement resulted in a change of grade may be conceded. A regrading, however, not to effectuate a change in the legal grade, but to re-establish it after the act of man or of nature has changed it in fact, gives no right to damages under chapter 7, § 8, of the charter.

[2] 2. Chapter 7, § 34, which in effect modifies and amends section 2, is likewise inapplicable. The partial exemption from the excess cost above $3 per square yard for a permanent paving is granted only after an aggregate of $3 shall have been paid for street pavements. Obviously this does not limit the assessment for the original paving to $3 plus one-half the excess cost. It clearly applies only to a later permanent paving.

[3] Furthermore, the $3 must have been paid for paving; not necessarily for a permanent paving (Weise v. Green Bay, 143 Wis. 198, 126 N. W. 681; Hoefer v. Milwaukee, 155 Wis. 83, 143 N. W. 1038), but nevertheless paving, in the sense in which this word is used in chapter 7, § 2, as distinguished from planking or graveling. Therefore the payment made in 1874 for graveling this street, the only payment for any improvement of Erie street so far as this record shows, cannot invalidate or in any manner affect the assessment for the 1912 improvement.

[4] 3. To prove that the commissioner acted arbitrarily in assessing the benefits, reliance is placed mainly upon the fact that the record shows substantial equality between the benefit and the cost of the work. This, however, by no means demonstrates either that the property was not fully benefited to the extent of the cost, or that the commissioner, disregarding all other considerations, arbitrarily regarded cost and benefits as synonymous.

Without detailing the evidence, we are of opinion that the trial judge, who heard the witnesses and viewed the property, was fully justified in his conclusion that the commissioner's action was within his jurisdiction and not arbitrary.

[5] As to damages, clearly none were caused by the permanent pavement as such. The only possible damages would be either the expense of conforming the building to the level of the re-established street grade or the capitalized loss in running the business with the building unchanged. In our judgment, the commissioner did not act arbitrarily in disregarding this loss and in assessing "no damages."

Under the charter, damages are limited to those due to "any injury which in the opinion of the commissioner may result from such improvement."

While damages due to the injuries caused by a change in the legal grade must be allowed to the abutting owner, the expense to which he may be put in bringing his building up to the level of the legally established street grade, necessitated, not by a change in the legal grade, but by its restoration after the street had fallen to the level of the building, may very properly have been deemed by the commissioner as damnum absque injuria.

[6] 4. Under section 7 of the charter, the benefits which will accrue to the owner of the several lots or pieces of land are to be considered by the commissioner; the amount of benefit, which the lots or pieces of land will severally derive from the improvement is to be assessed against them. Not only does this section provide for assessing either lots or pieces of land, but it specifically directs the commissioner to consider the benefits to the owner.

In our judgment, this direction to the commissioner to take into consideration the ownership of the property authorizes him to look to the unitary character of the several lots belonging to one owner and actually used by him as one piece of land, and if he deems it best, under all of the circumstances, to assess against the entire piece the benefits accruing to it as a unit. If a subdivided piece of land, owned by one person and used by him as a single piece, would be benefited by an improvement either to a greater or to a lesser extent than would the several lots, taken separately, no reason is apparent why the actual situation should be disregarded. Clearly the language of the Wisconsin statute permits of this just result. See, too, Schmidt v. City of Milwaukee, 149 Wis. 367, 135 N. W. 883.

[7] 5. If the benefits had been assessed separately against each lot, there would be much force in the contention that the taxes could not be levied against the entire piece of land as a unit, because of the provision that a special assessment must not exceed either the benefit to the piece assessed or the cost of so much of the improvement as it abuts. This is well illustrated by appellant's example of lot 1 benefited $800; lot 2, $200; tax of $1,000 levied against both lots jointly; cost of improvement in front of lot 1, $400; in front of lot 2, $600. The limit of the assessment would be $400 as to lot 1 and $200 as to lot 2. The $1,000 would be an illegal assessment.

The converse, however, as in this case, is not true. If, as we have just held, the benefits were properly assessed to the piece of land as a unit, because it belonged to and was used as such by one owner, the benefits, not to each lot, but to the piece as a whole, fixed the maximum assessment. But the cost of the work in front of each lot could be, and in this case was, determined. No possible harm can result to the owner by dividing the total tax, which was less than the benefits, between the several lots, apportioning, however, to each of them an amount in no case greater than the cost of the abutting section of the improvement.

In the absence of a specific statutory provision, requiring the tax to

be levied against the property exactly as described in the benefit assessment, the method here pursued cannot be declared illegal or arbitrary.

Decree affirmed.

RICHARDS v. H. K. MULFORD CO.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1916.)

No. 2773.

1. TRIAL ⟸139(1)—DIRECTED VERDICT—RIGHT TO DIRECT VERDICT.
Where plaintiff's case is supported by substantial evidence, verdict should not be directed for defendant, though the trial judge might rightly conceive it his duty to set aside a verdict for plaintiff, if rendered, and award a new trial, at least once.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⟸139(1).]

2. TRIAL ⟸139(1)—DIRECTION OF VERDICT—RIGHT TO DIRECT VERDICT.
A verdict cannot be directed for defendant, unless plaintiff's evidence is such that no reasonable man might deem it fit to induce conviction; but, in determining whether a verdict is against the weight of the evidence the court merely applies its own judgment to the problem.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⟸139(1).]

3. DRUGGISTS ⟸10—NEGLIGENCE—ACTIONS—EVIDENCE—SUFFICIENCY.
In an action for the death of mules from tetanus, which they contracted after being vaccinated with anthrax vaccine purchased from defendant, evidence that the anthrax vaccine contained tetanus germs, and therefore the defendant was liable, *held* insufficient to carry the case to the jury.
[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 9; Dec. Dig. ⟸10.]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Eugene T. Richards against the H. K. Mulford Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.

W. F. Murrah, of Memphis, Tenn., for defendant in error.

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

DENISON, Circuit Judge. Richards, a levee contractor, owning a number of mules and desiring to protect them from anthrax, purchased at a Memphis retail store ten bottles of anthrax vaccine, manufactured by the Mulford Company, which is engaged on a large scale in the manufacture of serums, vaccines, antitoxins, etc. Having had some experience in giving similar treatments, Richards proceeded himself to treat his mules by injecting this vaccine hypodermically. He poured two bottles into a cup, and, with the contents, filled his syringe and used it; he then emptied four bottles into the cup, and took therefrom two syringefuls, and then used the remaining four bottles in the same

way. Within a short time all of the mules which had been treated with vaccine from the second cupful died from tetanus; none of the others were affected. Richards brought this action against the Mulford Company on the theory that, in the course of manufacture, it had permitted the vaccine in one of these bottles to become infected with the tetanus germ, whereby it became unfit for its intended use, and by negligence and by implied warranty the Mulford Company became liable for the value of the mules thus killed. The District Court directed a verdict for defendant, upon the ground that there was no evidence which supported plaintiff's theory and which was of that character which justified submission to a jury. The plaintiff brings this writ of error.

The question is of very narrow compass. There is, for the purposes of this review, no dispute that the mules died because they were infected with tetanus at the time this vaccine was injected. There was no evidence whatever directly tending to show negligence in the manufacture or unfitness when sold. The defendant's evidence, undisputed and apparently not subject to doubt (unless inferentially), showed that the manufacture of this vaccine was carried on with the utmost skill and care, and with the most perfect precautions known to science. There was no reason to suspect the existence of tetanus germs anywhere around the Mulford factories, save that such germs were used in the manufacture of tetanus antitoxin; but this was at a place a mile distant from where the vaccine was made, and the employés were separate; and that the fatal germ may have come into the vaccine from this source is mere surmise; it is possible, but highly improbable. Counsel do not suggest any plausible explanation of how it could happen.

[1] On the other hand, the evidence that the trouble probably came from Richards' own carelessness in the operation of administering the remedy is very strong. It appears, without dispute, that stable manure and the surface soil around a stable form the favorite habitat of this germ, and that it is commonly carried therefrom by flies or blown around by the wind; that many thousands might be carried on a fly's foot or a speck of dust hardly visible to the naked eye; that Richards used this cup in a feed tent adjacent to his own corral, in which a hundred mules were kept on the levee bank, and where manure was scattered about and had accumulated; that the doors were open, it was a dry, hot day, the wind was blowing through, and the flies were thick; and the open cup from which he filled his syringe stood all the time exposed in this tent. It is manifest to us that the weight of the evidence is against the plaintiff's theory; nevertheless, and even though the trial judge might rightly think it was his duty to set aside a verdict for the plaintiff, if rendered, and award a new trial—at least once—the case should have been submitted to the jury if there was any substantial evidence tending to support each of the steps essential to a recovery.

[2, 3] Plaintiff does not question the general rule that a case should not be submitted if a verdict for plaintiff would rest on conjecture or surmise, as distinguished from evidence, or that the plaintiff must fail where the case shows merely a possibility that the foundation of the ac-

tion exists. Of course, the criterion is not whether the evidence, in the court's judgment, will equally support either conclusion; many disputed issues of fact respond to that definition; the critical test of this class of verdict, directed for defendant, must be whether the court can say that all reasonable men must agree in finding the evidence insufficient to raise the inference upon which plaintiff relies. This court has pointed out that in awarding a new trial because the verdict was against the weight of evidence, the trial judge is applying his own judgment to the problem; in directing a verdict, he is finding that no reasonable man can deem the plaintiff's evidence fit to induce conviction. Mt. Adams Co. v. Lowery, 74 Fed. 463, 476, 20 C. C. A. 596; Big Brushy Co. v. Williams, 176 Fed. 529, 532, 99 C. C. A. 102; Jenkins v. Alpena Co., 147 Fed. 641, 77 C. C. A. 625; Nelson v. Ohio Co., 188 Fed. 620, 628, 112 C. C. A. 394.

Upon either the theory of negligence or of breach of warranty, plaintiff's first step is to establish that the vaccine was infected when he bought it, and if he fails in that step, it becomes immaterial whether there is an implied warranty of fitness in the sale of such an article as this.

To put his case beyond the bounds of mere surmise, plaintiff relies upon several circumstances, of which we need mention only three: First, that tetanus germs were later found in an empty bottle; second, that all the mules inoculated from the second cup, and none of those inoculated from the others, were affected; third, that this poison in the vaccine would have been more virulent than germs from the stable, and that the extreme rapidity with which the disease developed indicated inoculation with poison of the highest potency.

1. Upon the first point, it appeared that, after emptying each bottle into the cup, Richards put back the cork and threw the bottle on the ground outside. Five or six days afterwards, all the bottles that could be found were picked up and put, unwrapped, on a shelf. A few days later they were taken away and examined. The evidence has some tendency to show that, when thus examined, the interior of one of them carried a large colony of these germs, and that the interiors of all the others were sterile. We think no substantial inference that the bottles were in the same relative condition before they were first opened can reasonably rest upon this testimony. The high probability that a bottle, so exposed and not tightly sealed, might have become infected in this way during the five days is conceded, and that one cork might have been put in loosely and the others more tightly, is one of several reasons, any one of which is enough to account for the difference in their later relative condition. Indeed, that only one bottle was infected, and others, filled at the factory at the same time from the same container, were not, goes far to disprove plaintiff's theory.

2. The second point is of similar character. If there were no other probable explanation, it might indicate that the contents of one of the second batch of bottles were infected when that bottle was emptied into the cup, and that, for this reason, the contents of the first and third cupfuls were not; but it may as well indicate several other things. The cup, when used the second time, had been standing there about 20 minutes. It was then merely rinsed in a carbolic solution, too weak

to be effective, and existing infection might have survived this rinsing, or there may have been a fresh infection in the cup during the few minutes before the next four bottles were all emptied, and the agitation by pouring the bottles into the cup or by filling the syringe would naturally have dissipated the germs throughout the cup, while the next rinsing may have left the cup clean. The danger from the exposed cup was constant and extreme. No inference of prior infection in the bottle can safely rest on this condition of the second cupful when finally used.

3. The third point has impressed us as more serious. The evidence shows that the disease and the symptoms which indicate the disease are not produced by the direct effect of the bacillus, or germ, but by the toxins which the germs throw off in the multiplying process which takes place when the germs have found a suitable location. If the vaccine had been infected at the time of manufacture, it might have been highly charged with these toxins at the time of use, and if these toxins were injected in the manner followed by plaintiff, symptoms of the poisoning would be expected to appear in three or four days, while, if the infection comes from the entry of the germs into an abrasion on the skin, symptoms are not expected within eight or ten days. The injection was Saturday morning; one of the mules had a stiff neck late Monday evening (during the third 24-hour period); two showed distinct symptoms on Tuesday; nearly all on Wednesday; and all 41 died within the week. It is strongly urged that the appearance of symptoms as early as the third day distinctly tends to show that there was an injection of developed toxins, and so to show that the vaccine was infected when bought.

This contention overlooks the undisputed testimony from every witness, whose attention was called to it, that if the bacilli were injected beneath the skin, instead of lodging in a surface abrasion, and if this injection were accompanied by the conditions of an anthrax vaccination, the development of toxins would begin promptly and symptoms would appear or should be expected in three or four days. It is obvious that the matter of development will vary considerably according to the condition of the subject, and the lodgment the germ happens to take, and the extent of the infection which happens to take place, and in view of such inevitable individual variations, there remains no substantial difference between the shortest possible time fixed by any witness with reference to the direct injection of toxins, viz., "two or three days," and the time fixed by all the witnesses as a natural time for development, if the injection was of the bacilli under all the conditions here existing, viz., "three or four days." In the balancing of these things, as applied to a case where there were some instances of development on the third day, many on the fourth, and others not until the fifth, we see nothing fairly and substantially tending to show that the vaccine contained developed toxins when it was used. As plaintiff's expert witness frankly said, when asked what conditions led to quickest symptoms, "Well, it's all speculation."

We must think that plaintiff's proof falls within the class pronounced insufficient by the Supreme Court in Patton v. Railway, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and by this court in Virginia Ry. v.

Hawk, 160 Fed. 348, 87 C. C. A. 300, for we have here not even a "quantitative probability." See, also, our discussions in Toledo R. R. v. Howe, 191 Fed. 776, 112 C. C. A. 262, and Cincinnati Ry. v. Jones, 192 Fed. 769, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483.

With the failure of this contention, plaintiff's case must wholly fail. Nothing remains to support it, save conjecture—and conjecture which, upon the whole, is essentially improbable. In our judgment, all reasonable men must agree that an inference of defendant's fault cannot safely rest on such premises. To permit a verdict for plaintiff would be to reward his negligence and penalize defendant's care.

The judgment is affirmed.

HOBBS v. KIZER.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1916.)

No. 4706.

1. TRIAL ⟸178—DIRECTED VERDICT—MOTION.
   On motion for directed verdict, the court must take the view of the evidence most favorable to the adverse party.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⟸178.]

2. TRIAL ⟸142—DIRECTED VERDICT—MOTION FOR.
   Only when reasonable men could not differ as to the conclusion to be drawn from the evidence is the court warranted in directing a verdict.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. ⟸142.]

3. PHYSICIANS AND SURGEONS ⟸18(9)—ACTIONS—EVIDENCE—SUFFICIENCY.
   In an action for damages for performing an abortion on plaintiff without her knowledge and consent, evidence *held* sufficient to go to the jury.
   [Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. ⟸18(9).]

4. COURTS ⟸356—FEDERAL COURTS—REVIEW—FINDINGS.
   Under Rev. St. § 1011 (Comp. St. 1913, § 1672), providing that there shall be no reversal for any error in fact, the jury's finding of facts on conflicting evidence is conclusive on the Circuit Court of Appeals.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⟸356.]

In Error to the District Court of the United States for the District of New Mexico; John C. Pollock, Judge.

Action by Pearl Kizer against J. L. Hobbs. There was a judgment for plaintiff, and defendant brings error. Affirmed.

E. C. Crampton, of Raton, N. M., and Charles A. Spiess, of East Las Vegas, N. M., for plaintiff in error.

A. C. Voorhees and H. L. Bickley, both of Raton, N. M., for defendant in error.

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

TRIEBER, District Judge. The defendant in error, plaintiff in the court below, instituted this action in the District Court against the

plaintiff in error, defendant in the court below, to recover damages for an abortion alleged to have been committed on her by the defendant without her knowledge and consent. There was a trial to a jury, which resulted in a verdict for the plaintiff. This writ of error was sued out by the defendant for the purpose of reversing the judgment entered upon the verdict of the jury.

The complaint charges that the defendant was a physician and surgeon in the city of Raton, state of New Mexico; that the plaintiff in April, 1914, was a patient of his, and while the relationship of physician and patient existed the defendant induced the plaintiff to have illicit sexual intercourse with him; that as a result of said illicit intercourse plaintiff became pregnant; that about the first week in August, 1914, plaintiff informed the defendant of the nature of her condition of pregnancy, and defendant assured plaintiff she was not pregnant, and induced her to submit to an examination by him to determine the cause of the condition which led the plaintiff to believe she was pregnant; that plaintiff submitted to said examination, and defendant, after making such examination, represented to her that her condition was due to an abscess in the vagina; that the defendant used instruments in making said examination, and fraudulently and deceitfully, and without the knowledge of the plaintiff, removed the fœtus from the womb of the said plaintiff, by reason whereof plaintiff became seriously ill and was removed to a hospital, where defendant performed an operation, as plaintiff believed, for the removal or treatment of said abscess, but which was in fact to remove the effect of said abortion; that she at no time consented to the performance of said abortion; that the acts of the defendant were wholly against her will. The defendant's answer was a general denial.

The only ground upon which the defendant seeks a reversal by his assignment of errors is that the court erred in refusing to instruct the jury to return a verdict for the defendant.

[1, 2] The well-established rule is that on a motion for a directed verdict the court must take the view of the evidence most favorable to the adverse party. Crookston Lumber Company v. Boutin, 149 Fed. 680, 79 C. C. A. 368; Southern Ry. Co. v. Gadd, 207 Fed. 277, 125 C. C. A. 21, affirmed 233 U. S. 572, 34 Sup. Ct. 696, 58 L. Ed. 1099. Another rule, equally well established, is that only when all reasonable men, in the honest exercise of a fair, impartial judgment, would draw the same conclusion from the facts which condition the issue, it is the duty of the court to withdraw that question from the jury. District of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283, 45 L. Ed. 440; Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 587, 31 Sup. Ct. 617, 55 L. Ed. 590; St. Louis, Iron Mountain & Southern Ry. Co. v. Leftwich, 117 Fed. 127, 54 C. C. A. 1; Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; Insurance Co v. Hoover Dist. Co., 182 Fed. 590, 598, 105 C. C. A. 128, 136, 31 L. R. A. (N. S.) 873; Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 Fed. 795, 800, 122 C. C. A. 113, 118.

[3] The evidence in this case is conflicting. A review of the evidence shows: The plaintiff testified:

That she was ill, and called on the defendant to treat her as her physician. While this relationship existed, he persuaded her to consent to sexual intercourse. About August 14, 1914, she realized that she had become pregnant, and went to the defendant and told him of her condition. He made an examination, and told her that she was mistaken, and then told her to come the next day for another examination. The second examination was made with instruments, and she suffered untold agony, and although she wanted him to stop he refused to do so. He then told her to go to her room and he would take care of her. He then sent her to the hospital, where he performed another operation. She also testified that she had explained to him her condition; that she had morning sickness, and such a feeling that she could not work, and wanted to know what her condition was, so that she might leave the place where she was living, as she did not want them to know her condition. She was then employed as maid at the residence of Mrs. Naylor. She told Dr. Hobbs that she had no money, and if she was pregnant she wanted to go some place where she could be taken care of, being penniless. "I told the doctor that my menstruation had stopped for over a month." In a few days after the operation had been performed, her breasts became very hard, caked, and were very painful. She asked the defendant what was the cause of this, and he told her he did not know. "He asked me if there was milk in my breasts." She told him, "I thought you said there was nothing wrong;" and he replied, "Well, milk and water together; there was nothing wrong with you." She testified that her breasts were very hard, very full, had milk in them, and were massaged. They were taken care of by different nurses, at different times during the day and night. Her breasts became in that condition a few days after the operation. "After the operation I was flowing, and continued flowing for two weeks after I left the hospital." Dr. Lyon and Miss Palmer, the head nurse of the hospital, and Mrs. Allen, "my own nurse," were present when the operation was performed by the defendant. Dr. Lyon gave her the ether. The defendant had told her he was going to operate for an abscess, but denied that she was pregnant. She denied that she ever consented to the abortion. Afterwards she was very weak, and her womb hurt her all the time, so she could hardly work. She then secured the services of Dr. Colehousen, but he left and sent her to Dr. White. Dr. White attended her for several months, and during most of the time she was unable to do any work, being confined to her bed. Dr. White has since left New Mexico, and is somewhere in Old Mexico, but his address is unknown to the plaintiff. Her bill at the hospital was $37, and was paid by some one; but she did not know of her own knowledge who paid it.

Dr. Whitcomb, a physician and surgeon residing at Raton, N. M., testified:

That he was the medical superintendent of the hospital at which the plaintiff stopped when the operation was performed by the defendant. The records of the hospital showed that the defendant performed an operation on the plaintiff on the 11th day of August, 1914. The record showed that when the plaintiff was operated on there was dilation, curettment, puncture, and drainage of the cul de sac Douglass. He explained that the dilation refers to the opening of the womb by the way of the cervix, curettment is scraping of the inside of the womb, a puncture is the opening of some cavity, and drainage is the opening up so that the contents can drain out; the records would come from the doctor who did the work, reporting to the nurse, so she could enter it in the "history book." The records show that she was an inmate of the hospital from August 10, 1914, to August 25, 1914; there is a complete record of everything that was done during that time. He has examined the orders given by the doctor, and also the chart as furnished by the nurse, and became acquainted with the treatment and nature of the case therefrom. Curettment may be used by the medical profession in abortion cases; it is resorted to in the early months or early weeks of pregnancy; its object is to clean out any retained particles which may have been lodged or may have remained in the womb, and prevent sepsis, or blood poisoning. "I have read the records referring to the breasts of the plaintiff. They may become hard and painful after an ordinary childbirth, and we may get the same effects from an abor-

tion, although not quite so pronounced. The records show that on the 16th the bandages were changed and the breasts massaged with camphorated oil; on the 17th and 18th the bandages were changed and the breasts massaged; on the 19th the breasts were very hard and swollen, and on the 20th the bandages were changed and the breasts massaged, and on the 21st the breasts were bandaged and massaged. This is the usual treatment for any trouble of the breasts. From some of the symptoms described in regard to the condition of the breasts, one might have thought, or might think, that pregnancy had been shortly before; but a menstruation might also cause changes to take place in the breasts." He also testified that curettment would not be the proper proceeding in treating just for abscess. The record showed that on August 17th there was paid to the hospital $25 in cash, and on August 28th, $12.65; but he did not know who paid that money.

On the part of the defense Dr. Lyon testified that he administered the ether at the time of the operation at the hospital; that the defendant scraped the womb and opened an abscess which was there. He found nothing among the scrapings that were taken from the womb indicating late pregnancy.

Miss Smith, another witness for defendant, testified that she was working at the Seaberg Hotel the early part of August when the plaintiff came there. She took care of the room occupied by the plaintiff. She was confined to her bed before she went to the hospital; saw her occasionally out of her room. There was nothing in the room indicating anything of an operation having been performed.

The defendant testified, denying the allegations in the complaint, and claiming that the operation he performed was for the purpose of removing an abscess, from which the plaintiff was suffering, and that he performed no abortion, as she was not pregnant.

Dr. Van Meter testified as an expert of great experience as a surgeon. He testified that from the condition of the plaintiff's womb at the time of the operation, as testified to by the witnesses, there had been no recent childbirth, or a delivery of anything through that opening; that hardness, tenderness, and soreness of the breasts of a female might result from a number of things other than pregnancy, childbirth, or abortion; might come from a bruise, injury, or as a reflex action from the menstruation. It may come from an operation on the female organs, or direct infection of the nipples, or from a curettment of the womb, or from an abscess in the region of the womb.

Mrs. Naylor, another witness on behalf of the defendant, testified that, the plaintiff lived at her house as a housemaid; she came there on April 20, 1914, and stayed with her until the 31st day of July, when she left, and returned on the 24th day of August; that until the 31st day of July she did her work without any complaint, and as near as she could remember the plaintiff had her menstruation during the month of June, 1914, but not during the month of July. As the plaintiff testified that she only ascertained her pregnancy in August, this testimony is, of course, immaterial.

We have set out the evidence thus fully, and we are of the opinion that it was of such a nature that it cannot be said all reasonable men would draw the same conclusions therefrom. If the testimony of the plaintiff is to be believed, and when taken in connection with the other circumstances—that she was taken to the hospital; that some one else

paid her bill while there, most likely the defendant, for no one else could have sufficient interest in her to do it; that the operation was performed there by the defendant without any charge, he employing Dr. Lyon to assist him—it was proper to submit the case to the jury. They were the triers of the facts, the judges of the credibility of the witnesses, and the weight to be given to their testimony. The jurors, as well as the trial judge, had the opportunity of seeing the witnesses while testifying, noting their demeanor on the witness stand, and were therefore better able to judge what weight to give to the testimony than an appellate court, reviewing the evidence from a printed record.

[4] It is not claimed that the trial judge committed any error in his charge to the jury, and the jury's finding of facts on conflicting evidence is conclusive. Section 1011, Rev. Stat. (Comp. St. 1913, § 1672).

The judgment is affirmed.

DENVER & I. RY. CO. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. October 11, 1916.)

No. 4594.

COMMERCE ⊜28—HOURS OF SERVICE ACT—TELEGRAPH OPERATOR—"INTERSTATE COMMERCE."

On a part of its line the defendant railroad company was engaged in the carriage of interstate passengers, and other of its trains ran over the tracks of a second railroad company engaged in interstate commerce. Defendant's telegraph operator, at a point where no interstate trains of defendant passed, occasionally took messages for the passing of its trains with the interstate trains of the second company, whose tracks defendant used. Such operator received his orders from the chief train dispatcher of the second company, which was largely engaged in interstate commerce. *Held* that, though such operator was not regularly engaged in receiving messages relating to interstate trains and traffic, he was engaged in interstate commerce within Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), and defendant, by requiring or permitting him to continue at labor for longer than authorized, is liable, for a railroad engaged in interstate commerce cannot evade the act by having its employés work excessive hours with respect to its intrastate traffic.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. ⊜28.

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

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United States against the Denver & Interurban Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error was sued to recover a penalty for the violation of the act of Congress known as the "Hours of Service Act," of March 4, 1907 (34 Stat. 1415, c. 2939; Comp. St. 1913, §§ 8677–8680). The allegations in the complaint are that the defendant, a common carrier engaged in interstate commerce by railroad in the state of Colorado, permitted a telegraph operator and employé at its office at Globeville, Colo., I. L. Ream, to be and remain on duty for a longer period than 9 hours in the 24 hours period, beginning with 3

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

*Rehearing denied January 10, 1917.

o'clock p. m. on July 4, 1914, and ending at the hour of 1:07 o'clock a. m. on July 5, 1914; that at the time said office was one continuously operated day and night, and said employé was one regularly required and permitted by the use of the telegraph and telephone, to dispatch, report, transmit, receive, and deliver orders pertaining to and affecting generally the movement of trains over a through highway of interstate commerce, and occasionally the movement of trains engaged in the transportation of interstate traffic over said highway.

A demurrer to this complaint was filed by the defendant, and by the court overruled. The defendant declining to plead further, a penalty of $200 was assessed by the court, which it is now sought by this writ of error to reverse. At the time the demurrer was filed a stipulation agreeing on the facts was filed, and a written agreement that it was to be considered by the court as if a part of the complaint, to be accepted by the trial court and the appellate court as the facts in the case, in the consideration of the demurrer. The agreed statement of facts is as follows:

"(1) Defendant is, and was on and about the time mentioned in plaintiff's amended complaint, a common carrier engaged in such commerce by railroad as is hereafter more fully described.

"(2) Attached hereto, marked Exhibit A, and made a part of this stipulation is a map showing in colored lines other than white the railroad over which defendant operated its cars and trains in 1914. The green line represents the track owned and operated exclusively by the Denver City Tramway Company. The part shown in red is owned and operated by defendant. The yellow line represents road owned by the Colorado & Southern Railway Company (hereafter called the C. & S.), but operated exclusively by defendant. The part shown in black represents the track owned by said C. & S. and operated jointly by said company and defendant. All of said line between Globeville and Boulder and Boulder Junction is single-tracked. The white line represents the track operated exclusively by said C. & S., and parallels the line operated by defendant the greater part of the distance between Louisville Junction and D. & I. Junction on the north and a point several miles north of the north boundary line of the city and county of Denver. The line between Marshall and Eldorado Springs and the red line between Boulder and Boulder Junction are owned and operated exclusively by defendant. Electric cars or trains of defendant moving from Denver to Boulder are operated over the lines and under the control of the Denver City Tramway Company to Globeville, at which point they are turned over to defendant's train crews, who operate them to Boulder. Special cars or trains for passengers exclusively are sometimes operated between Denver and Eldorado Springs, but the usual service to Eldorado Springs is a branch service from Marshall. The operation of defendant's cars and trains north of Globeville is entirely under the control and direction of the chief train dispatcher and superintendent of said C. & S., who are employed also to act as chief train dispatcher and superintendent, respectively, for defendant; and over that portion of the line (black) where the two companies operate jointly the defendant has trackage rights for its own cars and trains. The telegraph operators and agents at Globeville and Eldorado Springs are employés solely of defendant, while the operators and agents on that portion of the line north of Globeville are employed by said C. & S. to render a joint service for both companies. With the exception of the line between Marshall and Eldorado Springs, defendant at no time operated cars or trains for other than passengers moving solely in intrastate commerce. Between these stations, however, it carried interstate passengers, baggage, and express; the same being hauled into and out of Marshall by said C. & S. No part of said interstate traffic ever passes through Globeville, and on July 4, 1914, defendant moved no interstate traffic whatsoever on any part of its road. On said date defendant's entire business consisted solely of the transportation of passengers moving wholly intrastate.

"(3) Said C. & S. is, and was on and about the times mentioned in plaintiff's amended complaint, a common carrier engaged in interstate commerce by railroad in the state of Colorado, and its said line of railroad, commencing at the Union Depot in Denver, passing through Utah Junction and thence north to Louisville Junction, where it branches and proceeds by two different lines

(via Louisville Junction and Marshall, and via Webb and Louisville) to the city of Boulder, including that portion of the lines over which said joint trackage rights are maintained, forms part of a through highway of interstate commerce over which interstate trains of said C. & S. are regularly and generally operated, except that between 3 p. m. July 4, 1914, and 2 a. m. July 5, 1914, no trains moving interstate traffic of any character were operated by said C. & S. over any of the tracks shown on Exhibit A. Some cars and trains of defendant, while being operated over portions of said line in joint use, occasionally have meeting and passing points with interstate passenger and freight trains of said C. & S. (but no such meeting or passing points were had on July 4, 1914); at such times they must protect themselves against all trains having superior rights. The regular passenger trains of said C. & S. have rights superior to defendant's cars and trains, while the latter have superior rights over freight trains of the former. When a train order is transmitted to the crew of one of defendant's trains, which pertains to or affects the meeting or passing point of said car or train and a C. & S. train, a similar or corresponding order is delivered to the crew of the latter train affected by such order; but no C. & S. train ever passes through Globeville, and no such order is ever delivered to a C. & S. train by or through the Globeville operator.

"(4) On July 4, 1914, and during the entire time said Globeville operator is charged with being on duty over nine hours, said C. & S. operated no freight trains over any portion of its line between Denver and Boulder or Boulder Junction; and after 3 p. m. on said date, until 2 a. m. July 5, 1914, it operated no passenger trains between said points carrying either passengers, baggage, or express moving in interstate commerce; but during said last-named period the entire traffic moved over all lines of said C. & S. shown on Exhibit A was wholly intrastate in its character.

"(5) With particular reference to the allegations in said amended complaint with respect to the duties required by defendant of its said Globeville operator, the following facts may be considered: All train orders transmitted through said Globeville operator are delivered only to the trainmen of defendant's cars or trains. Said Globeville operator never received any orders relating to C. & S. regular passenger trains, or pertaining to or affecting the meeting or passing places of such trains and cars or trains of defendant when said C. & S. regular passenger trains were on time. If any of said regular passenger trains were late, any train orders relating thereto or pertaining to the meeting or passing places with defendant's cars or trains were generally issued and transmitted through operators at points north of Globeville, although occasionally such orders relating to passing or meeting points of said delayed trains and defendant's cars or trains were transmitted through the Globeville operator. When extra C. & S. passenger trains were run, orders relating to the meeting or passing places thereof and defendant's cars or trains were generally transmitted through operators at stations other than Globeville, although occasionally such orders were issued and transmitted through said Globeville operator. Defendant's regular passenger cars or trains had superior rights over all C. & S. freight trains, and no orders pertaining to the meeting or passing places of such trains and defendant's cars or trains were ever transmitted through said Globeville operator, except in case of an accident or other cause requiring the detouring of said freight train over defendant's rails. Such orders were sometimes transmitted through said Globeville operator, although generally through operators north of Globeville. On July 4, 1914, all train orders transmitted through said Globeville office and pertaining to or affecting train movements of both C. & S. trains and cars and trains of defendant related solely to movements of trains engaged only in intrastate commerce."

T. M. Stuart, Jr., of Denver, Colo. (E. E. Whitted, of Denver, Colo., on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (H. B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

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

TRIEBER, District Judge (after stating the facts as above). The contention of the plaintiff in error is that neither the defendant, nor its employé, I. L. Ream, were engaged in interstate commerce, and therefore not subject to the requirements of the act of Congress, for the violation of which the penalty sought to be recovered by this action was assessed. Another ground upon which the plaintiff in error relies is that even if the defendant was engaged in interstate commerce at times, and the telegrapher was also so engaged at times, neither of them was engaged in interstate commerce on the day that the statute is alleged to have been violated.

The plaintiff in error was engaged in interstate commerce by railroad between Marshall and Eldorado Springs, and between those stations it carried interstate passengers, baggage, and express, although it was hauled to Marshall by the Colorado & Southern Railroad, and none of that traffic ever passed through Globeville over the plaintiff in error's road. The operator, Ream, was in the employ of the plaintiff in error, and under the control of the chief train dispatcher of the Colorado & Southern Railway Company. As such operator he controlled the electric cars in trains of the plaintiff in error as they moved northward from Globeville toward Boulder. Some of these trains were special passenger trains of the plaintiff in error, which were sometimes operated between Denver and Eldorado Springs. Trains passing north from Globeville before reaching Boulder, or Eldorado Springs, went over the interstate highway of the Colorado & Southern Railway Company; the two roads maintaining joint trackage rights over that part of the road, which is a part of the through highway of interstate commerce over which the interstate trains of the Colorado & Southern Railway Company are operated.

At times the cars and trains of the plaintiff in error, while being operated over portions of said line of railway have passing points with interstate passenger and freight trains of the Colorado & Southern Railway Company, and at such times it must protect its trains against all trains having special rights. In order to prevent accidents it is necessary that they should have telegraphic train orders, and occasionally train orders relating to passing or meeting points of delayed passenger trains on the Colorado & Southern Railway Company. These orders were transmitted through this operator, Ream. Occasionally orders were in the same way issued and transmitted through this operator relating to meeting and passing places of extra Colorado & Southern interstate trains and defendant's trains. That part of the plaintiff in error's road from Marshall to Eldorado Springs is clearly an interstate highway, and so are the tracks from Vesuvius Mine to Boulder Junction and from Louisville Junction to Boulder, which were used by the Colorado road for its interstate trains and by the plaintiff in error for all its trains going to Boulder. The operator at Globeville received his orders from the chief train dispatcher of the Colorado & Southern Railway Company, and he had to direct his trains in accordance therewith. This clearly made the plaintiff in error a

road engaged in interstate commerce, and Mr. Ream an employé engaged in the operation of trains. Baltimore & Ohio R. R. Co. v. United States Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; N. Y. Central R. R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; Seaboard Air Line v. Koennecke, 239 U. S. 353, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; St. Joseph & Grand Island R. R. v. United States, 232 Fed. 349, 146 C. C. A. 397. In Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, it was held:

"If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés, engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

In the Carr Case it was held that a brakeman on an interstate car in a train consisting of both intra and inter state cars, who is engaged in cutting out the intrastate cars, so that the train may proceed, is, while so doing, engaged in interstate commerce.

The proper transmission of train orders through this operator at Globeville, was at times essential to the safe operation of trains intra as well as inter state, on the lines used jointly by these two roads, and when the plaintiff in error required this operator to receive orders from the train dispatcher of the Colorado & Southern Railway Company and transmit them to its employés in charge of its trains, which were operated on an interstate highway, it and the operator were clearly engaged in interstate transportation, and the operation of interstate trains. The fact that on that particular day this operator at Globeville had received no orders relating to interstate trains is wholly immaterial. This act differs in this respect from the Employers' Liability Act. The latter is expressly limited to employés injured "while engaged in interstate business," while the Hours of Service Act applies to all employés actually engaged in or connected with the movement of any interstate trains, regardless of the fact whether at the time the offense was committed he was so employed.

There was a joint traffic arrangement over this line and that of the Colorado & Southern Railway Company, over certain parts of an interstate highway, and all trains using that highway were under the control of one person, the train dispatcher of the Colorado & Southern, admittedly an interstate railway, from whom this operator received his orders, which he was bound to transmit. The courts have been very liberal in construing who are employés of a railroad engaged in interstate transportation. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Pedersen v. Delaware, L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Illinois Central Ry. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Houston & Texas Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341. And in our opinion the defendant and its operator were clearly engaged in interstate commerce.

Upon the agreed facts the judgment of the court below was right, and is accordingly affirmed.

E. I. DUPONT DE NEMOURS POWDER CO. v. DUBOISE.

(Circuit Court of Appeals Fifth Circuit. November 4, 1916. Rehearing Denied December 1, 1916.)

No. 2989.

1. EXPLOSIVES ⟸9—LIABILITY FOR SALE OF EXPLOSIVES.

If a person, not a vendee of defendant, who without fault on his part, while using, in a way they were intended to be used, dynamite caps manufactured and sold by defendant, is injured by the explosion of the caps by the heat of the sun, defendant is liable for such injury, if it knew, or by the exercise of reasonable care might have known, that such caps, when put out by it, were capable of being so exploded, and negligently failed to give such notice as might reasonably be expected to warn a user.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

2. EXPLOSIVES ⟸9—ACTIONS—BURDEN OF PROOF.

The mere explosion of dynamite caps carries with it no presumption of negligence on the part of the manufacturer or seller, and the injured party has the burden of proving that the manufacturer or seller was guilty of the negligence charged.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

3. EXPLOSIVES ⟸9—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for injuries received from the explosion of dynamite caps, which it was claimed was caused by exposure to the sun's rays, testimony that some time after the accident other caps, while left in the sun on a stump, exploded, is not admissible to establish the likelihood of caps to explode when exposed to the sun's rays; the witness not having been where he could see the caps for about a half hour before the explosion, and it being only his conjecture that there were no other causes that might have produced it.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

4. EXPLOSIVES ⟸9—ACTIONS—JURY QUESTION.

In an action for injuries received by plaintiff on the explosion of dynamite caps, where the evidence as to the cause of the explosion was uncertain, and it might have resulted from a number of causes, for some of which defendant was not liable, the matter cannot be left to the jury, but verdict must be directed for defendant.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

In Error to the District Court of the United States for the Southern District of Alabama; Henry D. Clayton, Judge.

Action by George Duboise against the E. I. Dupont De Nemours Powder Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

A. G. & E. D. Smith, of Birmingham, Ala., and D. P. Bestor, Jr., of Mobile, Ala., for plaintiff in error.

Gregory L. Smith, of Mobile, Ala., for defendant in error.

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

WALKER, Circuit Judge. While the defendant in error, George Duboise, the plaintiff below, acting as an employé of the Newport Tur-

pentine & Rosin Company, engaged in blasting stumps for his employer by the use of dynamite, dynamite caps, and fuse, was preparing to make a blast, he sustained very serious personal injuries as the result of an explosion which occurred in a wooden box, open at the top, in which was carried a number of sticks of dynamite, a box of dynamite caps manufactured and sold by the plaintiff in error, and the fuse. In two of the four counts of the amended complaint, upon which the case went to the jury, it was averred that, while the plaintiff was handling and using said caps in the manner in which they were commonly used and handled for blowing up stumps, some of such caps in the box with others were exploded by the heat generated by the rays of the sun, and the others of said caps in said box were, by such explosion, also exploded. In one of these counts it was charged that said explosions resulted from the defendant's negligently manufacturing said caps, or some of them, so that they would explode by the heat generated by the rays of the sun. In the other one of these two counts it was charged that said explosion resulted from the defendant's negligently selling said caps that would be exploded by the heat generated by the sun. In each of the other two counts upon which the case went to the jury there were similar averments as to how the caps were being handled and used, and it was averred that some of them, in the box with others, exploded without any fuse attached thereto having been lighted, and without any other artificial heat being applied thereto, and others of said caps were, by such explosion, also exploded. The charges of negligence of the defendant made in these two counts, respectively, were in one of them that it negligently manufactured, and in the other that it negligently sold, said caps, or some of them, that would explode without any fuse attached thereto being lighted, and without any other artificial heat being applied thereto. Issue was joined on the plea of not guilty to each of the four counts.

[1] It is not doubted that if a person, not a vendee of the defendant, who, without fault on his part, while using in a way they were intended to be used dynamite caps manufactured and sold by the defendant, was injured by the explosion of one or more of them by the heat imparted by the rays of the sun, or without any artificial heat being applied, the defendant would be liable for such injury if it knew, or by the exercise of reasonable care might have known, that such caps as they were when put out by it were capable of being so exploded, and negligently failed to give such notice as reasonably might be expected to warn a user of the caps of the danger of their being exploded in the way mentioned. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453; Keep v. National Tube Co. (C. C.) 154 Fed. 121; Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303.

[2] But one so injured, who asserts such a claim, has the burden of proving the negligence charged against the manufacturer or seller. The mere happening of the explosion carries with it no presumption of negligence on the part of the manufacturer or seller. It is an affirmative fact for the injured person to establish that the party sought to be charged with liability has been guilty of negligence. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361;

Looney v. Metropolitan Railroad Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Moit v. Illinois Central R. Co., 153 Fed. 354, 82 C. C. A. 430. The plaintiff was not entitled to recover on either of the counts, unless evidence was adduced which furnished substantial support for the conclusions that the explosion occurred as alleged, that the defendant was negligent as charged, and that to that negligence the explosion and the plaintiff's consequent injury were attributable.

[3] On the direct examination of E. O. Griffin, a witness for the plaintiff, he testified that he had known of some caps like those used by the plaintiff exploding without the application of fire to them, or without any jarring of them, or anything, and that that happened in November, 1914, after the plaintiff was hurt in June of that year. After it was brought out on the cross-examination of this witness that the explosion about which he had testified occurred while he was at work at a place from which he could not see the caps which, about a half hour previously, he had left on a stump in the woods, and that he did not know that nothing touched the caps before they exploded, the defendant moved to exclude the above-recited statement of the witness on his direct examination, on the ground that his testimony showed that he did not have any personal knowledge of the explosion or the cause of it. The defendant excepted to the action of the court in overruling this motion. We are of opinion that this exception was well taken. The testimony of the witness on his cross-examination showed that he had no personal knowledge of the circumstances of the explosion he mentioned. His statement of his mere conjecture as to how it happened was not admissible as evidence.

[4] The only witnesses who claimed that they were in a position to know what occurred at the time of and just prior to the explosion complained of were the plaintiff, John Hussey, a coemployé, whose task was to dig around and chop the roots of the stumps preparatory to the plaintiff's doing the work of blasting, and Ben Scott, a boy who carried water, brought a stick lighted at one end when called for to set off the fuse, and otherwise acted as a helper. According to the testimony of these witnesses, just before the explosion occurred the plaintiff was engaged in putting a piece of dynamite in a hole which had been bored in a stump, Hussey was several feet from him, and several feet distant from each of them was the box containing the supply of dynamite, the dynamite caps and the fuse; there was no fire near that box, and nothing jarred its contents; the box was open at the top and the caps were "awful hot," it being a pretty warm day, 96 or 98 in the shade, and the caps had not been exposed to any heat except the sunlight. While this was the situation the explosion occurred in the box, injuring and blinding both the plaintiff and Hussey. Other persons who were attracted by the sound of the explosion came to the place shortly afterwards, and found some sticks of dynamite unexploded, but no unexploded caps, all of them apparently having been exploded.

It may be assumed that the circumstance last mentioned furnished some support for an inference that the explosion had its origin in the caps, rather than in the dynamite or the fuse, which were also in the box. But we are not of opinion that any evidence was adduced which furnished any substantial support for a finding that any of the caps as

they were when they passed out of the possession or control of the defendant were capable of being exploded by the heat of the sun, or without any artificial heat or friction being applied. The mere fact that a cap exploded on a hot day does not tend to prove that the sun's heat caused the explosion. If the testimony as to the weather had referred to the wind blowing at the time, instead of referring to the heat of the sun, this, in the absence of evidence that the defendant ever used material in caps it put out which made them capable of being exploded by the wind, would not support a finding that the wind caused the explosion. There was no evidence tending to prove that any dynamite cap ever put out by the defendant contained an ingredient which made it capable of being exploded by the heat of the sun, or without artificial heat or friction being applied.

The testimony was such that it is impossible to tell from it what caused the explosion. One or more of the caps may have been made more subject to explosion as the result of something that happened to them after they passed out of the possession and control of the defendant. The evidence did not disclose where they had been, or what, if anything, had been done to them, after the plaintiff's employer bought them. Where several things may have caused the injury complained of, for some of which the defendant is responsible, and for some of which it is not, it is not for the jury to guess between the different possible causes, and find that the negligence of the defendant is the real cause, when there is no satisfactory foundation in the evidence for that conclusion. Patton v. Texas & Pacific Ry. Co., supra. The evidence was such as to make it pure guesswork to say that the defendant was negligent as charged, or that to that negligence the injury complained of was attributable. In this state of the evidence it was error to refuse the requested charge for a verdict in favor of the defendant.

The judgment presented for review is reversed.

GARDEN CITY v. GARDEN CITY TELEPHONE, LIGHT & MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1916.)

No. 4658.

ELECTRICITY ⟸11—ELECTRIC COMPANIES—REGULATION OF RATES—VALIDITY OF ORDINANCE.

In determining the validity of an ordinance fixing rates to be charged by an electric company, claimed to be unconstitutional as confiscatory, the capital on which the company is entitled to a fair return is the reasonable value at the time of the property being used in the service, and it is immaterial that such property was in part acquired or paid for out of previous earnings of the business, or whether or not previous rates were reasonable or excessive.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⟸11.]

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

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

Suit in equity by the Garden City Telephone, Light & Manufacturing Company against the City of Garden City. Decree for complainant, and defendant appeals. Affirmed.

Richard J. Hopkins, City Atty., of Garden City, Kan., and F. Dumont Smith, of Hutchinson, Kan., for appellant.

W. P. Dillard, of Ft. Scott, Kan. (Harry Warren, of Ft. Scott, Kan., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The appellee, the Garden City Telephone, Light & Manufacturing Company, brought suit against the city of Garden City and the mayor, council, and city attorney of said city, to enjoin the enforcement of an ordinance fixing the rates and charges for the furnishing and supplying of electric light and electric current to the inhabitants of Garden City, passed August 5, 1912. The case was referred to a master, who reported that the complainant was entitled to the injunction sought. This report was confirmed by the District Court, and a perpetual injunction was granted as prayed, and the city of Garden City appeals.

The appellee is incorporated under the laws of Colorado and was authorized to do business in Kansas on January 3, 1907. The city of Garden City, Kan., was laid out in 1879. It became a city in 1886, and still remains a city of the second class. The federal census shows it had a population of 1,490 in 1890, 1,590 in 1900, and 3,171 in 1910. It is the practice of the Bureau of the Census to estimate the population between census periods by adding 10 per cent. annually of the growth in the last decade each year until the new census is taken. In July, 1908, the city of Garden City granted a franchise to the appellee which had bought the plant in 1907 from D. R. Menke. At the time this ordinance was passed the population of Garden City was probably about 2,850. The ordinance contained no rates to be charged. Very little, aside from the pleadings, the report of the master, and the various actions of the court, is preserved in our record. To illustrate: There is nothing to show what coal is worth at Garden City, the kind used by the appellee in producing current, and nothing to show how much coal was used; but it does appear how much was paid out for fuel per month. It appears that the appellee bought the plant, together with a gristmill, for $18,000. The man who made the sale testifies that this was $6,000 for the gristmill and $12,000 for the electric plant. It seems to be conceded that the machinery in the building used as a gristmill was removed and the building converted into a warehouse for the use of the electric light, power, and telephone business and a merchandise warehouse for articles used in connection with the telephone and electric light business. The exact value of the warehouse does not appear, much less the relative amount of its use given to the various lines of business conducted in it. C. D. Marsh, manager of the appellee, testified that all improvements, extensions, betterments, and repairs had

been paid out of the earnings of the company from its telephone, light, and merchandise business and out of borrowed money, amounting to $4,500, and the auditor and bookkeeper of the appellee testified substantially to the same effect. The bill alleges that on June 6, 1912, and for more than a year prior thereto, the plaintiff had in effect charged its patrons and consumers in said city of Garden City, Kan., the following rates:

"1 to 75 kilowatt hours, 15c. per kilowatt hour. 75 to 150 kilowatt hours, 13c. per kilowatt hour. All over 150 kilowatt hours, 10c. per kilowatt hour. Customers using an average of 200 kilowatt hours or more per month, 10c. per kilowatt hour. Customers using an average of 500 kilowatt hours or more per month, 8c. per kilowatt hour. Minimum rate, $1.50 per month on metered service. Flat rates varied from 50c. to $1.00 per lamp per month, according to size of lamp and hours use of same. All night hall lights in business blocks, $1.50 per month."

The special master of the District Court reported that from the time of the appellee's franchise—

"down to the commencement of this suit, the plaintiff had in effect and charged for furnishing lights to the inhabitants of said city, 15 cents per kilowatt hour for current furnished, with a minimum rate of $1.50 per month on metered service. It does not appear to have had a special rate on current furnished for power and heat purposes."

The city of Garden City on June 6, 1912, passed an ordinance fixing the rates for electric light and current for power considerably lower than the ordinance now in controversy. Thereupon in June, 1912, the appellee filed a complaint with the Public Utilities Commission of the state of Kansas, praying that it investigate the matter, and that if it should be found that the rates were unreasonable and against the public welfare, or contrary to law, that it advise the city to make such changes in the ordinance as might be reasonable to meet the objections made. The case was heard by the Public Utilities Commission, and it was found that the electric plant had cost the appellee $60,973.83, including $5,785 paid to parties interested at the time of the purchase for which appellee received no value; in other words, that the plant had cost net $55,188.83. It also found that it would cost $51,051 to reproduce such a plant, and that the plant was worth 87.7 per cent. of its value new, and the present value of the plant was $44,772; that a new plant adequate for Garden City at the present time and for a number of years would cost $40,000; and taking into consideration all the conditions, including the intangible value, the value of the property used for the benefit of the city was $45,000. The Public Utilities Commission recommended a new schedule of rates, and its recommendation was incorporated in the ordinance in controversy of August 5, 1912. The case was referred to a special master, who found that the electric plant was worth $44,000, and this was confirmed by the District Court.

This suit was brought to enjoin the rates fixed by the ordinance: (1) Because they were alleged to be confiscatory under the Fourteenth Amendment; and (2) because they would not pay 8 per cent. on the amount of actual cash invested, in violation of section 1502 of the Statutes of Kansas of 1909, which provides:

"That said board of commissioners [of the city] shall at no time fix a rate which shall prohibit such person, firm or corporation from earning at least eight per cent. on the amount of its actual cash investment in such city over and above its reasonable operating expenses and expense for maintenance and taxes."

The bringing of an action upon these two grounds is supported by Louisiana R. R. Comm. v. Cumberland Tel. Co., 212 U. S. 414, 420, 29 Sup. Ct. 357, 53 L. Ed. 577.

There is a broad distinction between these two propositions. If a set of rates provide sufficient revenue after paying depreciation and all other expenses, so that the capital in the plant represented by stock and bonds will sell at par, it would be difficult to say where there has been any confiscation; but one would be loth to invest his capital, and take the perils of loss of it, if in case of success he could only get a barely nonconfiscatory rate. The state of Kansas has seen that it could not hope for development unless it allowed investors a more liberal rate, if they could make it, than a rate that scarcely escaped confiscation. Of course with whether the rate fixed by Kansas is a fair and reasonable rate we have nothing to do.

In the brief of appellant it is stated that the following are the only specifications of error relied upon:

"First. That the court erred in confirming the report of the master in the particular objected to, whereby the master took as the basis of a compensatory rate for the plaintiff the present cash value of the plant, and not the amount of cash actually invested therein by the plaintiff.

"Second. That the court erred in refusing to fix as a basis of the rates which the plaintiff might receive, the amount of cash actually invested by the plaintiff, but instead took as the basis of value upon which rates should be fixed the present cash value of the plant."

It is further stated in the brief of appellant:

"We contended that the words 'cash investment' meant the cash invested by the plaintiff, its own money; that it excluded any sums wrongfully extorted from the consumers by illegal rates and reinvested; that it excluded depreciation funds reinvested as capital."

The master found the depreciation would be 6 per cent. per annum. The appellant thinks 4 per cent. would be adequate; but it says in its brief:

"But we have not brought up the evidence on that point, and shall agree, for the purpose of this argument, that a 6 per cent. depreciation fund is proper, * * * and we shall assume, for the purpose of this argument, that 8 per cent. is a proper return."

These quotations seem to narrow the issue. In the absence of controlling authorities upon the question as applied to the electric light or current companies, we shall assume that, like other quasi public corporations, in the absence of any rate fixed by law, the company was only entitled to collect reasonable charges for use of electric light and current. 12 Ruling Case Law, 896; 1 Moore on Carriers (2d Ed.) 165; 3 Moore, 1780; 20 Cyc. 1165. It is in effect claimed that the appellee must have charged excessive rates for the early years of its existence, when no charges were fixed by law, and

invested these unjust exactions in the plant, and is now seeking to receive a return upon those illegal exactions.

No judicial authorities are cited on this point. In the first place there is no evidence that the company ever charged excessive rates until about the commencement of the controversy out of which this litigation arose; but, if it did so, the various parties from whom they were extorted had a cause of action against the company to recover the excessive rates until the statute of limitations had run. Presumptively they were not the identical persons who are now the consumers from the appellee. It is the practice of courts to try cases one at a time, and if the appellee has put money into the development of the plant, the court in this case could not stop to inquire just how it acquired the title to the money. Such a system would involve an investigation into the wholly collateral matter of the entire past life of litigants and the manner in which they acquired the money invested in a private enterprise.

It is conceded that the appellee has never paid any dividends, and, as already stated, appellee has borrowed $4,500 and paid for the development out of the earnings of the electric light business, and from the telephone business, in which it has about $50,000 invested, and from its merchandise earnings. We cannot find, in the absence of the evidence taken before the master, that the plant was worth less than $44,000, and a fair annual depreciation is, under the concession of appellant, $2,640. At the rates charged, exclusive of the street lights, which have now been taken over by the city plant, the receipts from the electric light plant for the years 1911, 1912, and 1913 were $36,492.35, and the necessary expenses were $20,834.39. Adding the depreciation, at $2,640 per year for three years $7,920, we find the net revenues of the three years were $7,737.96, or $2,579.32 per annum, or less than 6 per cent. upon the value of the plant.

The new ordinance reduced the rates nearly one-third. This means a loss in the absence of offsetting gain, as nearly as can be told from the evidence, of over $3,400 per year. It thus appears that, in the absence of an increase of business, the plant must be conducted at a net loss of $900 a year and all interest upon the plant be lost. In the years in question the appellee had a practical monopoly of the business of furnishing electric light and current to the inhabitants of the city. Now the city has constructed an independent municipal plant, and is actively competing with the appellee for all business, and the prospect for the appellee's future business is indeed gloomy.

We have carefully examined the whole case, and can but find that the rates fixed are confiscatory under the Fourteenth Amendment, entirely aside from section 1502 of the General Statutes of Kansas for 1909. This would have been a close case upon this question, if the city of Garden City had not founded a competing plant, and taken over the street lights, and competed for all other uses of current. In the Minnesota Rate Cases, 230 U. S. 352, 434, 33 Sup. Ct. 729, 754 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18) the court quoted with approval the statement that:

"What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property *at the time it is being used for the public.*"

As it seems clear that the rates fixed would be confiscatory under the federal Constitution, it seems almost unnecessary to say anything as to section 1502 of the Revised Statutes of Kansas, and we are loth to consider that subject, as the statute has never been construed on the point in question by the Supreme Court of Kansas. There is nothing to indicate whether the holdings of the appellee have appreciated or depreciated in value; but it appears that the only items of assets carried on the books which can refer to real property are: Building, $3,000; real estate, $4,300; and station, $2,740.26. The rest of the value of its assets must have been invested by the appellee, and it does not seem to us that we should investigate where the company got the money that it invested. As this question must ultimately be determined, however, by the Supreme Court of Kansas as to the true construction of the statute of Kansas, and as we hold that it clearly appears that the rates fixed were confiscatory, we need not say more upon this subject, except that in our judgment, and in the absence of an adjudication by the Supreme Court of Kansas, we think the rates are not only confiscatory under the fourteenth Amendment, but unreasonable under the statute of Kansas.

In view of the conclusion reached, it seems unnecessary to give great consideration to the motion which has been filed to dismiss this appeal. It will be overruled, and the decree of the District Court is affirmed.

SACRAMENTO VALLEY ELECTRIC R. CO. v. ASTON.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1916. On Motion for Rehearing, November 13, 1916.)

No. 2670.

RAILROADS ⊜110—CONTROL AND REGULATION—VALIDITY OF CONTRACT—CONSTRUCTION OF ORDER OF STATE COMMISSION.

Public Utilities Act Cal. Dec. 23, 1911 (St. 1911 [Ex. Sess.] p. 18), creates a railroad commission which is given the power to regulate and control public utilities, including the issue of stocks, etc., and the use of the proceeds thereof which in each case must be authorized by an order of the commission. Defendant, an electric railroad company, was authorized by an order of the commission to issue and sell preferred and common stock, the order providing that there should be $750,000 paid in for stock "before any construction work begins or any expense other than that incident to the sale of stock is incurred." *Held*, that a contract by defendant with a civil engineer to gather data and make a report showing the estimated cost of construction of the road, traffic conditions, etc., to be used in promoting the sale of stock and enlisting capital for the enterprise, was not prohibited by such order, but was valid, especially in view of the construction placed on the order by the commission itself by approving similar expenditures made for preliminary work, including the acquisition of right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 339–341; Dec. Dig. ⊜110.]

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 Taggart Aston against the Sacramento Valley Electric Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Aston (an alien), defendant in error here, but to be called plaintiff, sued the Sacramento Valley Electric Railroad Company (a California corporation), plaintiff in error (to be called defendant), for the breach of a contract alleged to have been entered into about September 22, 1913. By its terms Aston was employed as a consulting civil engineer, to gather data and prepare report showing estimates of the cost of construction of the defendant's proposed railroad project in California, including possible traffic, probable financial returns, traffic conditions to be developed by the construction of the proposed railroad, etc. It is alleged that when the contract was entered into it was agreed that plaintiff would cause the report to be presented to financial interests abroad by one Wilsey; that the terms of the contract required defendant to pay plaintiff for his services in furnishing the report $3,500 as follows: $750 on September 27, 1913; $750 on or before October 13, 1913; $500 on November 3, 1913; $500 on November 17, 1913, provided the report was completed by that time, and, if not, upon the completion thereof; and the balance of the whole sum of $3,500, amounting to $1,000, to be paid when the defendant should hear from Wilsey in London that the matter of the presentation of the report was receiving favorable consideration. Plaintiff alleges that he proceeded to perform, and that about October 1, 1913, the defendant repudiated the contract and refused to proceed further, but that, before repudiation, defendant accepted the performance of the contract by plaintiff and paid him on account $150; that plaintiff offered to perform, and tendered also the services of Wilsey in the matter of the presentation of the report to financial people abroad, but that the tenders were refused. In a second cause of action plaintiff pleaded quantum meruit. The answer denied all the material allegations of the complaint, and set up that under the laws of California defendant could not lawfully enter into any contract with the plaintiff, such as plaintiff alleged in his complaint, and could not employ plaintiff to render any services or to pay him the sums alleged.

The District Court found that the contract as pleaded had been entered into, but that defendant never heard from Wilsey from London that the presentation of the report was receiving favorable consideration; that plaintiff was performing his contract when defendant repudiated it; that plaintiff offered to perform, but that defendant refused to perform its part under the contract; and that there was no inhibition of law forbidding the defendant from making the contract found to have been made between it and the plaintiff. Judgment went for plaintiff for $2,614.58.

The Public Utilities Act of California, adopted December 23, 1911, created a railroad commission and invested it with certain powers. Section 52 of that act contains a provision giving to the railroad commission right of supervision, regulation, restriction, and control over public utilities, in issuing stocks, stock certificates, bonds, notes, evidences of indebtedness, and creating liens on their property. The section requires that, before a public utility may issue stocks, stock certificates, bonds, and notes, it must have an order detailing the amount and purposes of the proposed issue, and reciting that in the opinion of the commission the money, property, or labor to be procured or paid for by the issue of securities is reasonably required for the purposes specified in the order. The commission is authorized to grant permission to issue stock, stock certificates, bonds, notes, or other evidences of debt, and may attach to the exercise of its permission such condition or conditions as it may deem reasonably necessary. No public utility without the consent of the commission is permitted to apply the issue of any stock or stock certificate, or bond, or note, or other evidence of debt, or any proceeds thereof, to any purpose not specified in an order of the commission, or to any purpose specified

in excess of the amount authorized for such purpose. The statute also provides that all stock and every stock certificate, and every bond, note, or other evidence of indebtedness, of a public utility, issued without an order of the commission authorizing the same then in effect, shall be void. It is also provided that every public utility which directly or indirectly issues or causes to be issued any stock, or stock certificate, or bond, note, or other evidence of indebtedness, not in conformity with an order of the commission, or which applies the proceeds from the sale, or any part thereof, of stocks or bonds, or other evidences of indebtedness, to any purpose other than the purposes specified in the order of the commission, is subject to a penalty; and every officer, agent, or employé, and every other person, who knowingly applies the proceeds from the sale of any stock, or bond, or note, or other evidence of indebtedness to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized, is made guilty of a felony. Another section of the act (79) applies to individuals, and makes criminal the act of any person who aids or abets any public utility in its noncompliance with, or failure to comply with, the statute. Section 81 of the act makes it a contempt for a public utility or any person to disobey an order of the commission.

On August 13, 1912, the railroad commission of the state by an order authorized the defendant to issue 30,000 shares, par value of $3,000,000, preferred stock, and 7,500 shares, par value $750,000, of common stock, the preferred stock to be sold at par, with an allowance of 25 per cent. for commissions. Among other things the order recited: "In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be $750,000 paid in on stock before any construction work begins, or any expense other than that incident to the sale of stock is incurred by the company, and title to rights of way should be taken conditioned on the receipt by the company of the above amount of money. In order that the commission may assure itself at all times that the money received from the sale of this stock is being properly and judiciously expended for the purposes named, we recommend that, in addition to a compliance with order No. 24, applicant be ordered to submit to the commission for its approval, before the execution thereof, all general contracts exceeding the amount $1,000."

In the formal order the commission provided that construction should not be entered upon, "nor liability created, nor money paid out, except for commissions as aforesaid, until there shall be in the hands of the company from the sale of stock $750,000." The order then laid down the uses to which the proceeds from the sale of preferred stock shall be put, and specified purchase of material and rolling stock and construction of electric railroad as set out in the application and exhibits attached to the application. It was also ordered that the company should keep separate and true accounts showing the application in detail of the proceeds of the sale or exchange of stock authorized by the order to be issued, and full accounts of the sale or disposal of stocks during each month, of moneys or property realized from the sales, and the use and application of the money or property. It was also ordered: "And in addition thereto said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds, and all materials, labor, and property involving costs in excess of $1,000."

In its activities the company, under the order of August 13, 1912, and up to August 31, 1913, received $416,401.55 on account of the sale of its preferred stock, $212,290 of which was cash and $204,111.55 represented in promissory notes, and it appeared that it had paid out in commissions on the sale of such capital stock, $80,290.29, and for expenses in conducting the business of the corporation, $40,468.40. It thereafter appeared, from the opinion of Commissioner Edgerton of the railroad commission of the state of California, dated September 27, 1913, that at the hearing before the commission, through the activities of the officers and agents of the company, 90 per cent. of the neces-

sary right of way for the construction of the railroad had been given to the company. The commission then ratified the payment of $40,468.42 on account of general expenses, and directed that the company should submit for the approval of the commission a detailed statement showing general expenses incurred from August 31, 1912, the date of the first order of the commission, to September 27, 1913, the date of the second order of the commission. The same order of the commission of September 27, 1913, gives authority to the company to expend for general purposes similar to those detailed in the statements theretofore made an amount not to exceed $1,000 per month, provided said $1,000 should not be taken from cash in the hands of the corporation, but should be realized from the sales of promissory notes thereafter taken for stock sales. Provision was then made that the company should each month make report to the commission concerning the sale or disposal of stocks during the preceding month, the conditions of the sale or disposition, the moneys or properties realized therefrom, "and the use and application of such money or property. And in addition thereto said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipment of all kinds, and all materials, labor, and property involving costs in excess of $1,000."

Thereafter, on December 30, 1913, a second supplemental order was made by the commission to meet the application of the company to allow payments on account of current expenses in the sum of $1,250 per month, instead of $1,000 per month, for the approval of certain expenses incurred by and on behalf of the company both before and after incorporation, payment to be made in par of preferred stock. Upon this matter the commission had this opinion: "In the supplemental order of September 27, 1913, applicant was ordered to file a detailed statement of unpaid obligations not included in the statement of expenses covering the period up to August 31, 1913. Such detailed statement has now been made, showing a total of $1,647.49, and request is made that the amounts therein contained be allowed to be paid. An examination of these items shows that they are proper items of expense, and therefore should be allowed. Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was incorporated. During such activity they expended, on behalf of the project, various sums, totaling $3,159.55, which they now ask this commission to allow applicant to pay in par of preferred stock. It is evident that these men did expend from their own resources the amounts named, and the evidence shows that the board of directors of applicant has allowed these various sums as constituting obligations in favor of these men. Therefore I think this request should be granted and applicant be authorized to issue preferred stock at par in settlement."

Black & Clark, of San Francisco, Cal., and A. C. Huston, of Woodland, Cal., for plaintiff in error.

Jacob M. Blake, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The question for decision is whether or not the contract sued upon in the first cause of action is made invalid and unenforceable by the Public Utilities Act of the state. It goes without saying that such a contract is in itself not against public policy. A railroad company might well be expected to employ an engineer to gather information and data and to embody the result of his investigations in a report to be used in enlisting capital for the carrying out of the enterprise. When the contract was made, the parties to it evidently believed that it was not against the statute of the state. Mr. Huston, counsel for the corporation, testi-

fied before the District Court that it was his opinion that the power to make such a contract was implied in the order of the commission of August 13, 1912.

It was not unreasonable to construe the order of August 13th prohibiting the creation of liability and payment of money "except for the commissions as aforesaid" until the sale of stock reached $750,000 as referring solely to prohibiting construction contracts. The purpose of employing Aston was evidently to gather data sufficient to enable the newly incorporated company to take its initial steps toward obtaining preliminary financial aid in the large principal cities abroad and in the United States. The contract in its essence pertained to formative matters rather than to contractual relationships which could not ripen into binding agreements without first having the approval of the commission. Actual construction of the road and liability for money paid out for commissions for sale of stock had to do with things which would arise after the preliminary arrangements could have been successfully made.

The concluding provision of the order of August 13th requiring the company to submit to the commission for its approval the form of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor and property, involving costs in excess of $1,000, does not interfere with the power of the company to contract generally and for labor and property, grading, and such matters, where the cost did not involve a sum more than $1,000. Furthermore, the provisions in the same order requiring accurate accounts to be kept and a report to be made to the commission, showing the terms and conditions of sales of stock authorized to be issued, and the use or application of such money or property, lends support to the argument that it was not intended to prevent the company from paying money on accounts of the nature of the one here involved, or other than on account of commissions for the sale of its stock. Confirmation of this view is found in the recital in the supplemental opinion and order of the commission made on September 27, 1913, where the activities of the officers and agents of the company were recognized by the commission as having been the means whereby 90 per cent. of the needed right of way for the railroad line had been obtained, for it is but reasonable to believe that such activities could only have been carried on by persons employed by the railroad company as right of way agents.

Some further aid in construing the orders of the commission is found in the supplemental order of September 27, 1913, wherein the commission expressly ratified the action of the corporation incurring obligations in excess of $40,000, this sum being made up of items of expenses apart from corporate obligations on account of commissions for sales of stock. It appears that informal consultations were had with Commissioner Edgerton and his views were sought, and while he could not authorize any act to be done which required the authority of the commission, still, as one in authority, his interpretation of the

duties and intentions of the commission was entitled to respectful consideration by the officials of the company, and when afterwards the ratification of payments of large sums for expenses and obligations incurred between August 13, 1912, and September 27, 1913, was had by order of the commission, it served to show what construction was placed upon the language used in the order of the commission. Again, a second supplementary order of the commission, dated December 30, 1913, authorizing payment by the company of detailed expenses aggregating nearly $5,000, is evidence of the meaning to be put upon the original order of the commission.

There having been no apparent purpose in the commission to prevent the railroad company from making such a contract for services preliminary to construction as is here sued upon, the plaintiff properly prevailed, unless the law itself forbade the contract. The statute, however, makes no declaration that a contract between a public utility and an engineer for work appropriately connected with preliminary matters is void without an order of the commission authorizing the same. With unmistakable certainty stock, stock certificates, bonds, notes, or other evidences of debts issued without an order of the commission shall be void; but notwithstanding the far-reaching power of the commission, as upheld in Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, after careful examination of the several provisions of the act, they fail to satisfy us that it was the intent of the law that the courts should refuse to enforce a contract which has not direct relation to stocks, bonds, and other evidences of debt, and which we cannot find is included in the meaning of the prohibitory terms of the statute. Fackler v. Ford et al., 24 How. 322, 16 L. Ed. 690.

It being our conclusion that the contract with plaintiff for services was not beyond the power of the corporation, the District Court was right in its judgment.

Affirmed.

On Motion for Rehearing.

The motion for rehearing raises and argues the question whether application of the issue of any stock or bonds issued by the railroad company, or the proceeds of any stock issued or bond sales made, may lawfully be used to pay the judgment affirmed by this court. As the question of a way of paying the judgment was not directly involved in the case, the point was not considered for decision, and we express no opinion on it now.

Counsel say that we have put a mistaken construction upon a portion of Mr. Huston's evidence before the District Court. But if we accept it that Mr. Huston did not mean that it had been his opinion that the corporation had the implied power to make such a contract as was involved, it does not affect the material question presented for decision.

The motion is denied.

MURRAY et al. v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1916.)

No. 2726.

1. NEGLIGENCE ⊜65—"CONTRIBUTORY NEGLIGENCE"—NATURE OF DEFENSE.
"Contributory negligence" is a want of ordinary care upon the part of a person injured by the actionable negligence of another combining and concurring with that negligence to produce the injury, and therefore the defense of contributory negligence concedes that there was actionable negligence on the part of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 83, 94; Dec. Dig. ⊜65.

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

2. CARRIERS ⊜333(5)—CARRIAGE OF PASSENGERS—NEGLIGENCE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.
Deceased, a passenger on a train, was notified by the brakeman who had promised to let him off on the side of the train opposite from the station that his stop had been reached. The brakeman opened the door and trap, the train being a vestibuled one, and, without waiting for a stop, deceased prepared to alight, starting down the steps holding to the rail on the opposite side from the direction in which the train was going, and carrying his grip in his other hand. He either stepped off or was, in trying to recover himself at the last moment, thrown from the train, his hold on the rail turning him with his back towards the engine, so that his body swung outward and his grasp on the rail was broken. *Held*, that deceased was guilty of contributory negligence as a matter of law in attempting to alight while the train was in motion; for an adult passenger, who knowingly and unnecessarily attempts to alight from a train while it is in motion, ordinarily is chargeable with contributory negligence as a matter of law, and deceased's manner in going on the steps was negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1391; Dec. Dig. ⊜333(5).]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Action by Mary Murray and Lena Murray, a minor by her guardian ad litem, Mary Murray, against the Southern Pacific Company, a corporation. There was a judgment of nonsuit after grant of new trial to defendant, and plaintiffs bring error. Affirmed.

See, also (D. C.) 225 Fed. 297.

The plaintiffs in error, Mary Murray and Lena Murray, commenced an action in the superior court of the county of San Luis Obispo, in the state of California, on August 11, 1913, to recover damages against the defendant in error in the sum of $50,000, on account of the death of Henry Murray on May 30, 1913, which it is charged was caused by the negligence of the defendant. The case was removed to the United States District Court for the Southern District of California, Southern Division, and tried before the court sitting with a jury. On November 28, 1914, the jury returned a verdict in favor of the plaintiffs in the sum of $5,000. A judgment was rendered upon this verdict on November 30, 1914. The defendant thereupon moved for a new trial upon the ground, among others, that the evidence was insufficient to justify the verdict of the jury in finding that the deceased was free from contributory negligence which was the proximate cause of the injury. The court granted the motion for a new trial. (D. C.) 225 Fed. 297. It was subsequently stipu-

lated between the parties that the cause should be submitted to the court, sitting without a jury, upon all the evidence taken at the previous trial, for the purpose of permitting the defendant to move for a nonsuit. The evidence being submitted to the court in pursuance of the stipulation, the motion for a nonsuit was granted, and a judgment in favor of the defendant and against the plaintiffs entered on September 11, 1915. From this judgment plaintiffs bring this case here upon writ of error.

There is practically but one question submitted to this court for determination, and that is whether or not the conduct of the deceased immediately preceding the accident was such as to constitute, on his part, contributory negligence as a matter of law. The material facts are not in controversy. On the evening of May 30, 1913, Henry Murray, the deceased, and one William Thomas Moran left San Francisco for Santa Margarita, in San Luis Obispo county, Cal., on one of the regular passenger trains of the defendant corporation. Moran testified that during the trip Murray rode in the smoking car and found the brakeman, Edward Mulville, to be an acquaintance, and talked with him some time. In the course of the conversation the brakeman, upon learning that Murray intended to stop at the Hotel Santa Margarita, explained to him that: "The Santa Margarita Hotel is on the opposite side of the station. That station is on the left side, and the Santa Margarita Hotel is on the right-hand side, and when we get there I will show you where to get off." Moran testified that: "As we came into Santa Margarita, of course, we knew it was the station Santa Margarita. The whistle blew, and very soon afterwards Mulville came in from the rear of the smoker and came down and called and beckoned to us, and says: 'This is where you fellows get off.' We went back to the rear end of the smoker, and Murray was first, and I followed him, and the brakeman was ahead of Murray. He opened up the gate, the trap, and the door, on the forward end of the coach immediately behind the smoker, or at the rear end of the smoking car, * * * and he pointed out and said, 'There is your hotel up there,' and he left at once and went to the front end of the smoking car."

The brakeman, Mulville, corroborated Moran as to what occurred at this point of time, and testified that after opening the vestibule doors he went into the smoker to announce the station. He testified, further, that when the train was approaching the station he said to Murray: "Here, I will tell you what I will do. At this station, on account of picking up a helper, I will open the trap, and then when the train stops you can cross over, and when it does stop, it will be almost directly opposite the hotel."

The testimony of the witness Moran is all the evidence there is in the case concerning what followed, relating to the conduct of the deceased immediately preceding the accident. He testified: "Murray started down the steps, and the train was slowing down, and in fact it was just gliding along, and I was going down after him, but I knew that he was very close to the bottom—must have been on the last step—and I happened to glance up and saw the light from the car windows out on the ground, and I saw we were going quite fast, a great deal faster than I ever thought we were going, and Murray at the same time made an effort to step or get off or something, and I called to him, and it was too late; he was overbalanced, and he went off. He had a grip in his left hand, and had hold of the handhold on the right-hand side. He went to go off, and as I called to him of course his grip came down, and he would let it rest on the step and then pick it up, and he raised his foot to go off, and he started straight back, and the grip swung out and his left hand swung around, and he just went as quick as that (snapping fingers); he was gone. His back was toward the engine when he fell. * * * It was dark; you couldn't see a thing there. It was very dark, excepting where the lights of the train—where I was the light shone there from the smoker I came out of, and also the lights from the coach behind was showing through, and there was a porter or somebody standing just inside the door of that coach, and that door was open. It was too dark to see the ground immediately below the step. The only reason why I knew that Murray was making a mistake was because I got a glimpse of the ground from the lights of the car windows down below, the way it would shine out below. * * * There was no light

immediately in front of the steps when he stepped off—absolutely. * * * After I saw Murray disappear, I went down the steps and got off and ran back along until I found him. I called to him several times, but I found him lying alongside of the track. He was unconscious. I went across the lots and brought a doctor, and when I got back the doctor was there and some one else, and we took Murray—the doctor was there and he examined him and he had an awful hole in the back of his head. We put him on the stretcher and put him in the observation car and brought him to San Luis Obispo. There was an ambulance waiting for us there, and we took him to a sanitarium there. He lived about three hours. * * * It was a solid vestibule train, as far as I know. It was vestibuled between the smoking car and the first coach back. There was no platform provided for passengers alighting where Murray attempted to alight, the ground was just the same as you will get along any railroad track where they haven't made provisions for passengers to get off—just like anywhere along the last 50 miles back."

On cross-examination this witness testified: "We left San Francisco at 8 o'clock in the evening. The accident happened 20 minutes after 11. * * * Murray then descended the steps with his grip in his left hand. He had hold of the handhold with his right hand. He did not turn his back to the engine while he was on the car. When he went out hanging onto this thing it swung him with his back to the engine. The train was going perhaps 12 miles an hour, perhaps more; I could not tell. I happened to look out. I was standing back from the steps, and I had to glance up, that was, to where the light was cast out of the car windows, and there I saw the ground. I saw Murray step off; he stepped like he thought there was another step or the ground. I think the train was going 12 miles an hour, fully that. He heard my warning and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight and I called to him. He tried his best to recover himself, but he could not get back. The train ran about seven coaches from where he got off."

This witness was asked on redirect examination: "Q. And you went out there and started to get off because of the language and actions of the brakeman? A. Yes." There was a motion on the part of the defendant to strike out this question as leading and suggestive and the answer a conclusion of the witness. After discussion, the question was propounded by the court in this form: "Q. * * * what was your reason for getting off at that particular place?"—to which the witness answered: "A. Because we were directed to do so by the brakeman."

The deceased was 43 years of age; weighed about 230 pounds; was 5 feet and 11 inches in height, and in good health.

Theodore A. Bell, of San Francisco, Cal., and Milton K. Young, of Los Angeles, Cal., for plaintiffs in error.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The rule respecting contributory negligence is clearly stated in 7 Am. & Eng. Ency. of Law (2d Ed.) 371, as follows:

"Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."

It follows that the defense that the injured person is chargeable with contributory negligence concedes that there was actionable negligence on the part of the defendant. 29 Cyc. 506.

[2] Whether in this case the invitation of the brakeman to the deceased to alight from the train on the side opposite to the station *after the train had stopped,* coupled with the act of the brakeman in opening the gate, trap, and door on that side of the train and then, *while the train was still in motion,* leaving the platform to announce the station in the smoking car, constituted negligence on the part of the brakeman, and whether that negligence was attributable to the defendant, are not questions to be now determined. It is assumed, without so deciding, that the act of the brakeman was such negligence. The question here is, Did the deceased fail to use ordinary care in his movements in going down on the steps of the car while the train was in motion, and thus become chargeable with contributory negligence? The train was a vestibule train. On the outside it was dark. The deceased was unfamiliar with the locality. He was a strong, healthy man, in the possession of all his faculties, and knew that he was about to alight on the side of the train where there was no station and no platform, and that it was dangerous to go down on the steps of a vestibule train while the train was in motion. Moreover, the permission of the brakeman was not that he should go down on the steps of the car while the train was in motion, but that he should alight from the train on that side *after the train had stopped.* In going down on the steps of the car while the train was in motion, the deceased, not only assumed the risk of the situation, but he failed to use the care of an ordinarily prudent person. And then followed what we think was the fatal mistake of the deceased, growing out of a manifest lack of ordinary care in his movements. He carried a grip in his left hand. With his right hand he took hold of the handhold on the right-hand side of the steps, which on that side of the train was a hold in the opposite direction to the forward movement of the train. This was an exceedingly insecure and dangerous hold while the train was in motion, and unquestionably resulted in his fall from the train. When he fell, his back was toward the engine, showing that he had fallen backward. Had the unfortunate man carried his grip in his right hand and had taken hold of the handhold of the car with his left hand, facing forward (which, in the exercise of ordinary care, he should have done), he could have held himself securely on the steps with the motion of the train until it stopped, and the accident would have been avoided. These facts are not in dispute, nor are the inferences of fact to be drawn therefrom in substantial controversy. They are facts from which all reasonable men must draw the same conclusion. Grand Trunk Railway v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485.

In the case of Secor v. Toledo, Peoria & Warsaw R. Co., in the United States Circuit Court of Illinois, 10 Fed. 15, the question was whether a passenger who was injured in attempting to alight from a train while it was in motion was guilty of contributory negligence as a matter of law. The question arose in proceedings under a railroad receivership. The injured passenger presented a petition to the court, asking for compensation for the injury, to be paid by the receiver under the order of the court. Whether it was a claim to be

paid by the receiver was purely a question of law. The court states the facts as follows:

"While the train was still in motion the petitioner went out upon the rear end of the forward car of the train and was standing on the lower step, the train having apparently almost ceased to move; and, while he was in the act of stepping from the car to the platform of the station, the car was moved forward with a jerk, in consequence of which the petitioner was suddenly thrown with violence upon the platform of the station and injured."

These facts, particularly the jerk of the train throwing the petitioner upon the platform, presented a much stronger case in favor of the petitioner than is presented in favor of the plaintiffs in this case. Judge Drummond, in passing upon this petition, said:

"We think it must be stated, as a sound proposition in law, that wherever passengers undertake to leave a train under such circumstances as these, before it has actually stopped, they take the risk upon themselves. If they choose to act in accordance with the promptings caused by their own impatience, and to leave the train before it can be done with safety, the risk is theirs. In this case, in addition to the statement that has been made of the actual condition of the petitioner at the time, there is reason to believe that his attention was withdrawn from what he was about to do by conversation with another person, who was then or had just been talking to him."

The general rule is that an adult passenger who knowingly and unnecessarily attempts to alight from a railroad train while it is in motion is chargeable with contributory negligence as a matter of law. Hoylman v. Kanawha & Michigan Railroad Co., 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, 17 Ann. Cas. 1149, and cases cited in note.

We think the facts in the present case show conclusively as a matter of law that the deceased was chargeable with contributory negligence, and that the trial court was right in granting a nonsuit.

Judgment of the lower court affirmed.

UNION PAC. R. CO. v. CAMPBELL et al.

(Circuit Court of Appeals, Eighth Circuit. October 13, 1916.)

No. 4529.

WATERS AND WATER COURSES ⇐118—EMBANKMENTS—SURFACE WATERS.

Defendant's predecessor constructed a solid embankment over marshy ground, which embankment was maintained for over eight years before defendant purchased the right of way at foreclosure sale. The embankment sometimes in cases of high water impounded water on adjoining land, though there were no well-defined water courses. Thereafter plaintiff purchased adjoining land, and neither plaintiff nor his lessee requested defendant to remove the embankment or provide outlets. *Held*, that defendant was not liable for injuries to the crops of plaintiff and his lessee by reason of the impounding of waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 128–130; Dec. Dig. ⇐118.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by James W. Campbell and J. N. Counter against the Union Pacific Railroad Company. There was a judgment for plaintiffs, and defendant brings error. Reversed, with directions to grant new trial.

This action was instituted on July 2, 1914, to recover damages alleged to have been sustained by the defendants in error, who will be referred to herein as the plaintiffs, against the plaintiff in error, who will be referred to as the defendant. The complaint contains two counts, each of them being based upon the alleged negligence of the defendant for "negligently, wrongfully, and tortiously maintaining a solid earth embankment forming an impervious dam, and thereby causing the overflow waters to be impounded on the land of the plaintiffs, and which could only escape therefrom by evaporation and seepage." The plaintiff Counter is the owner of the land alleged to have been damaged. It is triangular in shape, bounded on the north side by the embankment, which it is charged was constructed and maintained by the defendant; that the land is situated in the bottoms of the South Platte river, but at a sufficient level above the ordinary water line of the river to be free from overflow, except in times of high water, by flowage from the river for short periods down a natural drain or water course which transverses said land from southeast to northwest and continues in a general northerly direction from the north side thereof, rejoining the river. It is charged that the said defendant has negligently, wrongfully, and tortiously filled up and completely blocked the said water course on the north side of said land by the aforesaid embankment; that, but for this embankment, the water course would have carried off, without injury to the land or crops, all water coming thereon during the years complained of; that, from a point near the northeast corner of plaintiff's land, the line of defendant's railroad in its westerly course crosses the South Platte river by a bridge constructed, owned, and maintained by the defendant; that the said bridge is, and was at all times mentioned in the complaint, constructed and maintained negligently, wrongfully, and tortiously in this: That the space between the piles of the bridge was so narrow that, besides in themselves hindering the rapidity of the flow of the river, they hinder, limit, and check the passage of trees, boards, and planks; also that débris flowing down the said river is caught and held by and between the said piles, forming an artificial obstruction, and causing the waters of the stream to back up and reach a much higher level than they would otherwise reach in times of high water; that the defendant, during many years prior to the accrual of the causes of action alleged, negligently, wrongfully, and tortiously allowed débris washed down by said river to lodge and accumulate against said piles for a long period of time, causing the formation of artificial obstructions, and raising the level of said river, at the times alleged, to a much higher point than it would otherwise have reached; that by reason of these negligent, wrongful, and tortious acts of the defendant, the waters of the river were dammed back and caused to reach a much higher level than otherwise they would have reached, and caused the overflow upon the land set out in the two counts of this action; that the defendant wrongfully, negligently, and tortiously had constructed and maintained along the south side of the said embankment a deep excavation or cut, extending through the west bank of the river and leaving an open passageway through said bank, through which waters from the said river entered and overflowed the said land. The plaintiff Campbell was a tenant of this land for the years complained of, the crops raised on said land being the joint property of the plaintiffs during the years 1912 and 1914. The first count is for damages alleged to have been sustained by the plaintiffs by reason of the destruction of the crops on said land in July, 1912, on account of the negligent construction and maintenance of the embankment and excavation hereinbefore mentioned; the waters of the said river being backed up, overflowing the land and destroying the crops. The damages claimed for that year are $1,984. The second cause of action is for like damages sustained in 1914, causing, it is claimed, a damage of $6,900.

The answer denies that the defendant had constructed or negligently maintained a solid earth embankment, or an excavation, as charged in the complaint, and also denies the alleged damages. It charges that the plaintiffs

themselves were guilty of negligence and lack of ordinary care and caution in the protection of the crops planted, and that said negligence caused and directly contributed to the happening of the loss complained of. For a further defense it is claimed that the damages to the crops complained of were due to the scarcity of water in the natural streams and water courses, uses of appropriations by prior appropriators of water therein, limited natural precipitation, aridity of the soil and climate, nonproductivity of the soil, and destruction by insects. For a further defense it is alleged that the embankment described in the complaint was constructed prior to the year 1880 by the predecessor in title to the defendant, and ever since has been maintained in its original condition, and was at all times proper and necessary, and was used in connection with the operation of a railroad thereon; that by reason thereof the defendant acquired a vested right to maintain said embankment; that during the year 1898 the defendant acquired title to said embankment and right of way by purchase at a foreclosure sale held pursuant to a decree of court; that the plaintiff Counter became the owner of the land during the month of January, 1908, and his coplaintiff, Campbell, acquired a leasehold interest in it thereafter, both with full knowledge of the existence of said embankment, thereby assuming the risk of damages arising therefrom; that the damages, if any, were caused by an act of Providence and unavoidable accident, to wit, an unusual and extraordinary flood, which could not have been reasonably anticipated and guarded against; and that no request had ever been made of defendant to provide outlets.

There was a trial to a jury, who returned a verdict in favor of the plaintiffs upon the first cause of action, assessing the damages at the sum of $1,200. On the second count, for the injuries sustained in the year 1914, the jury found the issues in favor of the defendant. To review the verdict in favor of the plaintiffs on the first count a writ of error was granted.

Ralph G. Miller, of Denver, Colo. (Hughes & Dorsey and John Q. Dier, all of Denver, Colo., on the brief), for plaintiff in error.

W. C. Hood, Jr., of Brighton, Colo., for defendants in error.

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

TRIEBER, District Judge (after stating the facts as above). There are 40 assignments of error, most of them mere repetitions. At the close of all the evidence the defendant asked for a peremptory instruction on both counts, which was denied by the court, properly excepted to, and assigned as one of the errors committed by the court. This is the only assignment of error which we deem necessary to determine.

[1] The undisputed facts established by the evidence are that between 1872 and 1875 the Boulder Valley Railway Company built a trestle across the place where the embankment is now. The ground was low and marshy, and the trestle was built because less expensive than to have built a solid embankment at that time; that not later than 1890 the Boulder Valley Railway Company, who was still the owner of the railroad, filled this trestle, removed the bridge, and made a solid embankment, which embankment has been maintained ever since without any change, either by the Boulder Valley Railway Company or the defendant. In 1898 the defendant became the owner of the Boulder Valley Railway Company, by purchase at a foreclosure sale made by order of the court, and has ever since been the owner thereof; that the excavation mentioned in the complaint, along the south side of said embankment, was also made at the time the filling was done. The land of the plaintiff is low, and long before the plain-

tiff Counter purchased it and the defendant became the owner of the railway, this land had been overflowed when there were extraordinary heavy rains, such as those in 1912 and 1914. No request to provide outlets for the water was ever made by the plaintiffs. There was no bridge or trestle at that place since 1890, after the filling had been done.

There was no substantial evidence that there ever had been a water course to carry off the water from this tract; there were several depressions on the land, but no definite course that could be traced. Upon these facts we are of the opinion that there is no liability on the part of the defendant, and that the court should have directed a verdict in favor of the defendant, as requested.

The defendant did not construct this embankment; it had been there for at least eight years before it purchased the Boulder Valley Railway. It has done nothing since its purchase which could in any wise add to the injury of plaintiffs' land. When the plaintiff Counter purchased the land, and his coplaintiff, Campbell, rented it, they knew that the embankment was there, that it was a permanent structure, and would prevent any flood waters from running off their lands toward the north, and no doubt that fact was taken into consideration in determining its value. No request was ever made to the defendant to remove it, or provide outlets. Upon these facts the defendant is clearly not liable. Cases directly in point are Philadelphia, etc., R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131; Central Trust Co. of New York v. Wabash, etc., Ry. Co. (C. C.) 57 Fed. 441; Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333; Noyes v. Stillman, 24 Conn. 15; Conhocton Road v. R. R. Co., 51 N. Y. 573, 10 Am. Rep. 646; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; McDonough v. Gilman, 3 Allen (Mass.) 264, 80 Am. Dec. 72; Nichols v. City of Boston, 98 Mass. 39, 93 Am. Dec. 132; Castle v. Smith, 4 Cal. Unrep. Cas. 561, 36 Pac. 859; Pierson v. Glean, 14 N. J. Law, 36, 25 Am. Dec. 497; Beavers v. Trimmer, 25 N. J. Law, 97; Board of Directors v. Barton, 92 Ark. 406, 123 S. W. 382, 25 L. R. A. (N. S.) 645, 135 Am. St. Rep. 191. As stated by Judge Dallas in Philadelphia, etc., R. R. Co. v. Smith:

"A grantee should not, of course, be held responsible for the creation of an injurious structure by his grantor, and, if not notified of objection, he may be ignorant of its harmful nature, or may legitimately presume that it is voluntarily submitted to; and therefore a plaintiff ought not to be permitted to recover damages for injury alleged to have been done to him by the maintenance of a pre-existing condition during a period when, with full knowledge of his hurt, he had made no complaint of it, nor requested the removal of its cause."

For refusing to direct a verdict in favor of the defendant, the cause is reversed, with directions to grant a new trial.

EWERT v. JONES.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4539.

TRUSTS ⊂⊃72—RESULTING TRUST—ESTABLISHMENT—STATUTE OF FRAUDS.

Though an oral agreement to procure a mining lease for a term of 10 years and to convey it to another was unenforceable under the statute of frauds (Rev. Laws Okl. 1910, §§ 941 and 1143, respectively), declaring that an agreement for leasing for a longer period than one year is invalid unless there be some written memorandum subscribed by the party to be charged or his agent, and that no conveyance other than a lease for a period not exceeding one year shall be valid unless reduced to writing and subscribed by the party to be charged, a resulting trust arose under St. 1890, § 4187, now Rev. Laws 1910, § 6660, declaring that, when a transfer of real property is made to one person and the consideration therefor paid by another, a trust is presumed to result where defendant, under an oral agreement to obtain a mining lease for 10 years and to assign it to plaintiff, obtained the lease for which plaintiff paid the consideration as well as a small sum for defendant's services.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. ⊂⊃72.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Paul A. Ewert against A. L. Jones. From the decree for defendant, plaintiff appeals. Reversed and remanded, with directions.

Paul A. Ewert, of Joplin, Mo., for appellant.

A. Scott Thompson, of Miami, Okl., for appellee.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing the complaint of Ewert upon the facts as stated therein. The action was brought for the purpose of having Ewert adjudged to be the owner of a mining lease executed January 21, 1911, by Grace Sacto Cooper, and the appellee, Jones, that Jones be adjudged to hold said lease as trustee, and that he be directed to transfer and assign the same to Ewert.

The contract between Ewert and Jones upon which Ewert bases his cause of action is stated in the complaint substantially as follows: During the month of December, 1910, Ewert and Jones entered into an oral agreement wherein and whereby for a good and valuable consideration Jones, acting as the agent of and for Ewert, was to procure for him (Ewert) and for his exclusive use and benefit, in the name of Jones, a mining lease from said Grace Sacto Cooper, running for a term of ten years from the date of said lease upon certain lands situated in Ottawa county, Okl., and described as follows:

"S. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. E. ¼ and the W. ½ of the S. W. ¼ of the S. E. ¼ of section 21, township 29, range 23."

By the terms of said oral agreement it was expressly understood by and between Ewert and Jones that Jones was to procure said min-

ing lease for Ewert as his agent; that the said mining lease was to be taken in the name of Jones for Ewert and for his exclusive use and benefit; that Ewert should be the owner of the lease, and Jones should have no interest therein whatsoever, and would assign the same to Ewert at once upon his request. It was further agreed that Ewert would pay all necessary expenses and costs of procuring said lease and of recording same, together with a reasonable consideration for the services of Jones in procuring said lease, which said services Jones then and there agreed to render for a nominal sum because of the friendly relations and business arrangements then existing between Ewert and Jones; that Ewert thereafter prepared a mining lease, and gave it to Jones with the request that said Jones should under and pursuant to the terms of said oral agreement procure said lease to be signed by said Grace Sacto Cooper; that on the 21st day of January, 1911, Jones did under and pursuant to the terms of the said oral agreement procure from the said Grace Sacto Cooper the said mining lease running for the term of ten years upon the land above described; that Jones caused said lease to be filed for record in the office of the register of deeds in and for the county of Ottawa, aforesaid, on January 30, 1911, and shortly thereafter Jones delivered the same to Ewert, who has ever since had and now has said lease in his possession; that at the time of the delivery of the lease to Ewert there was paid to Jones by Ewert the sum of $12.50, the cost of procuring and recording said lease, together with one dollar for services rendered by Jones for Ewert as his agent in procuring said lease; that during the month of March, 1911, Jones came to the office of Ewert, and, pursuant to the agreement between them, an assignment of the said mining lease was there drawn and prepared for the signature of Jones, but the same was not then and there executed because no notary public could be conveniently found; that during the month of October, 1913, Ewert became aware that Jones was setting up an adverse claim to the lease in question and claimed the ownership thereof; that Ewert then made demand upon Jones that he assign said lease as he had agreed to do. Jones refused so to do, and has ever since refused to assign said lease to Ewert.

The mining lease executed by Grace Sacto Cooper to Jones was in consideration of one dollar, the receipt of which was acknowledged, and a sum of money equal to 5 per cent. of the market value at the place mined or produced of all oil, gas, asphaltum, lead, zinc, and all other minerals or substances whatever which might be mined or removed by said Jones from the land in question. It is claimed by Jones that the lease from Grace Sacto Cooper to him conveyed an interest in the real estate, and, if there was an oral agreement on his part to convey this interest to Ewert, that agreement should have been in writing, and, not being in writing, the agreement is void. The law of Oklahoma makes an agreement for the leasing for a longer period than one year or for the sale of real property or an interest therein invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or by his agent. Sections 941 and 1143, Revised Statutes of Oklahoma 1910.

It was contended in the court below, and the same contention is made here, that an oral agreement to procure a conveyance of land to oneself, and then to convey to the promisee, is invalid as being within the statute of frauds and must be in writing. Dunphy v. Ryan, 116 U. S. 491, 6 Sup. Ct. 486, 29 L. Ed. 703. The trial court sustained this view and dismissed the complaint of Ewert because the contract between Ewert and Jones was not in writing. Conceding that this view of the case was correct, we do not think it followed that the complaint should be dismissed. The equities of the case are all with Ewert, and the relief prayed for should be granted unless the court is prohibited by sound principles of law from so doing. All allegations of the complaint well pleaded are admitted by the motion to dismiss, and it appears from the complaint that whatever money Jones paid for the lease he paid it for Ewert, and Jones was reimbursed by Ewert for the same. The lease is made an exhibit to the complaint, and it appears therefrom that Jones did pay at least one dollar for the same, and the motion to dismiss admits that $11.50 was paid to Jones by Ewert as the cost of procuring and recording the lease. If the agreement between Ewert and Jones that Jones should assign the lease to Ewert is void by reason of the statute of frauds of Oklahoma, then the case must be considered as if there was no such contract, and we proceed to consider what the rights of the parties would be in the absence of contract.

If the cash consideration for the lease was paid by Jones for Ewert, then Jones would hold the lease in trust for the use and benefit of Ewert. The statute of uses and trusts of Oklahoma provides as follows:

"*Trust Presumed, When.*—When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Section 4187, now Rev. Laws 1910, § 6660.

We think under this statute Jones holds the lease in controversy in trust for Ewert, and that he (Ewert) is entitled to be declared the owner thereof, and to have an assignment of the same by Jones. If it was not for the statute of frauds the delivery of the lease by Jones to Ewert under the circumstances detailed in the complaint would no doubt constitute an equitable assignment thereof. It appears also that Ewert has renewed the lease for the years 1912, 1913, and 1914 and paid the rent and penalty money accruing under the lease.

The decree below should be reversed, and the case remanded, with instructions to the trial court to overrule the motion to dismiss and allow the appellee to answer the complaint if he shall be so advised, and otherwise proceed in the case as equity and justice may require.

ALASKA S. S. CO. v. GILBERT.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1916.)

No. 2829.

1. SEAMEN ⊂⊃12, 13—DISCHARGE—WRONGFUL DISCHARGE.
A seaman employed as a watchman on a vessel had been employed on a previous voyage, when his hours were from 6 p. m. to 6 a. m. The shipping articles did not specify the hours, nor did the rules of the sailors' union of which he was a member. The mate of the vessel demanded that the seaman begin his watch at 5 p. m., and the seaman refused unless given overtime, but proceeded to enter upon the discharge of his duties. He was discharged when the vessel reached a port of call, being paid the amount of wages earned up to that time. *Held*, that the discharge was improper under the circumstances, and the seaman was entitled to recover the cost of his passage to the home port, and of maintenance awaiting passage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 45–51, 30; Dec. Dig. ⊂⊃12, 13.]

2. ADMIRALTY ⊂⊃124—PROCEEDINGS—COSTS.
While Rev. St. § 824 (Comp. St. 1913, § 1378), allowing proctor's fees for depositions taken, limits the fee to cases where the deposition is admitted in evidence, costs for transcribing depositions of witnesses, one of whom was the libelant, taken in good faith, but which were not used, because of the personal presence of witnesses, may be allowed.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836–857; Dec. Dig. ⊂⊃124.]

Appeal from District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Libel by Arthur J. Gilbert against the steamship Seward, which was claimed by the Alaska Steamship Company as owner. From a decree for libelant, the owner and claimant appeals. Affirmed.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, Lawrence Bogle, and Eugene C. Luccock, all of Seattle, Wash., for appellant.

Eimon L. Wienir, of Seattle, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. [1] As the opinion of the District Court clearly states the facts of this case, we affirm the decision of Judge Neterer on the merits, and append his opinion.

[2] The appellant has also presented a question of costs. It appears that the testimony of the libelant, Gilbert, and of one Bering, a witness on his behalf, was taken by deposition before trial by stipulation of proctors. When the trial came on, the deposition of the libelant was not used, as he was produced and examined in open court. In making up the costs bill, a proctor's fee for taking the

deposition of the witness Bering and the cost of the transcript of all the depositions, including the deposition of libelant, was included. The claimant excepted to these items, and the exception was allowed as to the item for the transcript, but the clerk disallowed cost of the transcript of depositions of Gilbert and Bering. The District Court allowed costs for transcript of all the depositions on the ground that they were taken in good faith, even if the necessity for their use had disappeared. The claimant objects to the allowance of costs for the transcript of libelant's own deposition, upon the ground that libelant was produced in open court and his deposition was not used.

There is a distinction between costs allowed as fees of proctors and those allowed for transcribing evidence. In respect to depositions in the admiralty court, no proctor's fee is recoverable in a cause unless the deposition taken is admitted in evidence. Section 824 of the Revised Statutes (Comp. St. 1913, § 1378) allows proctors' fees on depositions only when the deposition has been admitted in evidence. Barnardin v. Northall et al. (C. C.) 83 Fed. 241; The Persiana (D. C.) 158 Fed. 912; United States v. Venable Construction Co. (C. C.) 158 Fed. 833. But the allowance of disbursements for transcribing a deposition pertains directly to testimony intended to be used in the case, and when the deposition has been taken in good faith and under apparent necessity therefor, the fee for transcribing it so that it can be used may be allowed in the discretion of the court, even though the witness himself is produced and for this reason the deposition is not used. Nead v. Millersburg Home Water Co. (C. C.) 79 Fed. 129; G., C. & S. F. R. Co. v. Evansich, 61 Tex. 3; The Oregon, 133 Fed. 609, 68 C. C. A. 603.

Finding no substantial reason for disaffirmance of the discretion exercised by the District Court, the order taxing costs is sustained.

Affirmed.

Opinion of Neterer, District Judge.

"Libelant was employed as night watchman on board the steamship Seward, September 25, 1915. No hours of employment were specified in the shipping articles. On a previous trip on the same vessel his hours were from 6 p. m. to 6 a. m. He understood the same hours applied upon the trip in issue, and he was on duty from 6 p. m. to 6 a. m., from the time the vessel left the port of Seattle until the controversy arose some days later. On October 3d, while preparing to 'turn to' his watch at 5:45 p. m., the first mate asked him. 'Why aren't you on watch?' Libelant replied, 'It isn't 6 o'clock yet;' to which the mate replied that it didn't make any difference, he was supposed to be on watch at 5 o'clock, to which libelant replied, in substance, that it would mean an hour overtime for him. There was some further conversation between libelant and the mate, in which the mate asked libelant whether he would not work unless given overtime, and libelant said he would not, or words to that effect, but proceeded to enter upon the discharge of his duties. He was discharged and taken from the vessel on its arrival at Juneau, Alaska, the following day. The mate tendered to libelant the amount of wages earned to the time of discharge, which the libelant refused. Libelant remained at Juneau, Alaska, for the period of 10 days before securing return passage to Seattle. His fare from Juneau to Seattle was

$16. He has brought this action to recover the wages for the trip, expenses necessarily incurred to return to Seattle, and $500 damages.

"No hours of employment were mentioned in the shipping articles. The agreement between the Puget Sound Shipping Association, of which claimant is a member, and the Sailors' Union of the Pacific, of which libelant is a member, provides that the hours of regular seamen shall be from 7 o'clock a. m. to 5 o'clock p. m., with one hour off for lunch, and further provides that the work outside of these hours, 'except such work as is necessary for the immediate safety of the vessel or passengers, cargo and crew,' shall be paid for as overtime. The agreement further provides that quartermasters, stationmen, and watchmen, when working, shall perform their regular duties without charge for overtime, and provides the hours of such employment to be from 7 a. m. to 5 p. m. These hours manifestly do not apply to night watchmen. Section 13 of this agreement provides: 'Members of the sailors' union shall use their best judgment at all times, and if in doubt as to what shall be charged as overtime, shall do the work required of them, and then refer the case to the union for adjustment.' The conduct of the libelant in this case does not indicate that the language employed expressed his real intention, except as a claim under section 13, supra, as he immediately 'turned to' his work and remained aboard the ship until his discharge, at all times manifesting his willingness to do his duty. The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors' Union of the Pacific, and the hours of 6 to 6 having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service, nor mutinous or rebellious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him. I think the libelant should recover his wages for the trip, the $16 fare expended, and $35 to reimburse him for the outlay which was occasioned at Juneau, Alaska.

"A decree may be prepared."

GRAHAM et al. v. O'FERRAL et al.

(Circuit Court of Appeals, First Circuit. October 19, 1916.)

No. 1149.

1. COURTS ⟸405(14)—APPEAL FROM PORTO RICO COURT—TIME FOR PERFECTING —STATUTES.

As Judicial Code (Act March 3, 1911, c. 231) § 244, 36 Stat. 1157 (Comp. St. 1913, § 1221), and Act Jan. 28, 1915, c. 22, 38 Stat. 803, attaching Porto Rico to the First circuit, makes no provision in terms fixing the time for taking appeals or suing out writs of error for cases from the Porto Rico Supreme Court which may be reviewed by the Circuit Court of Appeals, the time for perfecting an appeal is left to be determined by the rule of the Circuit Court of Appeals, and so an appeal will not be dismissed for two years' delay, where no rule requiring an earlier perfection was in force.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⟸405(14).]

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2. COURTS ⊜405(14, 16)—PERFECTION OF APPEAL—LACHES.
On appeal to the Circuit Court of Appeals, that tribunal may relieve an appellant from the effect of his laches in omitting to give security for costs, or to seasonably furnish a transcript of the record.
[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊜405(14, 16).]

3. APPEAL AND ERROR ⊜801(4)—MOTION TO DISMISS—MATTERS TO BE CONSIDERED.
As a question of defect of parties is one requiring an opening up of the record, that matter will not be considered on motion to dismiss the appeal, where the error may probably be met by amendment, but will be postponed until hearing on the merits.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3162, 3163; Dec. Dig. ⊜801(4).]

Appeal from the Supreme Court of Porto Rico.

Action by Andres B. Crosas Graham and others against Andres Crosas O'Ferral and others. From a judgment for defendants, plaintiffs appeal. On motion to dismiss. Motion denied.

S. Mallet-Prevost and Hugo Kohlmann, both of New York City, for appellants.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. The motion to dismiss this case was denied after argument on March 1, 1916, stating that a formal opinion will be filed later. It has never been filed, but it follows herewith:

[1] The matter we have to consider is a motion by the appellees to dismiss this appeal, on the ground that it was not seasonably taken and perfected.

In connection with the statutes attaching Porto Rico to the First circuit (section 244 of the Judicial Code, Act of March 3, 1911, 36 Stat. at Large, § 244, pp. 1087, 1157, and 1158, and the Act of January 28, 1915, c. 22, 38 Stat. at Large, pp. 803 and 804), no provision was made in terms fixing the time for taking appeals to this court or suing out writs of error from this court for the cases from the Supreme Court of Porto Rico which might reach this court. It was, in fact, a casus omissus. This petition for dismissal related to a decree in the Supreme Court of Porto Rico which was entered on March 5, 1913, while the appeal was not allowed until March 4, 1915, and was not perfected by giving security until June 21, 1915. It assumes that the time limit for taking out writs from this court is two years. The time limit for taking out writs from the Supreme Court, or appeals thereto, according to section 124, p. 1008, of the Revised Statutes, is two years, and the statutes are thought to transfer that period of two years to appellate proceedings in the Court of Appeals in the First Circuit, without using any statutory language literally to that effect.

With reference to writs of certiorari to the Supreme Court in accordance with the original act establishing the Court of Appeals, there was a like deficiency in not naming the time in which writs of certiorari

may be applied for. This might be made good according to the decision of the Supreme Court in The Conqueror, 166 U. S. 110, 114, 17 Sup. Ct. 510, 41 L. Ed. 937, decided March 8, 1897; but the matter of applying for writs of certiorari was there shown not to be settled by strict law, but to be determined by the discretion of the court under certain limitations, so that The Conqueror was not a precedent for this case, which is governed by strict law so far as the statutes are concerned, in which no provision has been made by express statute as to this particular. Consequently The Conqueror is no precedent for this case. It must, therefore, be assumed to be regarded by Congress as involving the matters of mere regulation by rule or order, and thus left to the courts to be properly moulded as circumstances might require.

We are not informed, and we are assumed not to be informed, what injustice or harshness might be involved in a declaration which would cut off present or future appellees in any abrupt manner. Therefore, we are this day entering a rule in reference to such appeals which we assume will do no injustice to any one; and this line of reasoning and method of proceeding, of course, require us to refuse to dismiss this appeal for any delay in completing it.

[2] With reference to matters not jurisdictional, referred to in this petition to dismiss, see Freeman v. United States, 227 Fed. 732, 142 C. C. A. 256, and Cardona v. Quinones, 240 U. S. 83, 36 Sup. Ct. 346, 60 L. Ed. 538, to the effect that we need not now specifically notice them. In order to plainly secure uniformity, we make the new rule broad. Various complaints are made with reference to the omission to give security for costs, or to seasonably furnish a transcript of the record, or seasonably to perform some other matters which are not of a jurisdictional type; but this court can relieve from all laches in reference thereto on proper application therefor, and none of them forms a proper basis for a petition to dismiss.

[3] Also objection is made by the appellees for alleged defect in parties; but, as this requires the opening up of the record, it can be better disposed of when the record is opened up than now, and can be probably met by amendment if required; so it is postponed for the present.

Circuit Court of Appeals.

October Term, 1916.

Additional Rule 37, Adopted October 19, 1916.

Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ of error from the Court of Appeals, or from the court or judge in Porto Rico, as the case may be.

KELLIOKA COAL & COKE CORP. v. BROCK.

(Circuit Court of Appeals, Sixth Circuit. November 10, 1916.)

No. 2833.

DEEDS ⊂=211(1, 3)—FRAUD—FORGERY—EVIDENCE.

In a suit to set aside a deed on the ground that it was a forgery, or was obtained through gross fraud, the grantor being illiterate, evidence *held* to warrant a decree for the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–640, 642, 644, 645, 647; Dec. Dig. ⊂=211(1, 3).]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Bill by Z. B. Brock against the Kellioka Coal & Coke Corporation. From a decree for plaintiff, defendant appeals. Affirmed.

J. H. Jeffries, of Pineville, Ky., and J. W. Chalkley, of Big Stone Gap, Va., for appellant.

W. Low, of Pineville, Ky., for appellee.

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

SESSIONS, District Judge. Questions of fact only are presented by this appeal. Appellee (plaintiff) filed his bill in the court below, seeking to have set aside and canceled a deed purporting to have been signed by him (by his mark) and to convey to appellant (defendant) several parcels of land situate in Harlan county, Ky., for a cash consideration of $6,000. Plaintiff alleges in substance that he did not receive such sum of money and never knowingly executed the deed, and that it is either a forgery or that a criminal fraud was practiced upon him in its procurement.

The testimony is so conflicting as to be irreconcilable, and to discuss it in detail would serve no useful purpose. Defendant claims that, on January 23, 1911, three of its agents and a fourth person called upon plaintiff at his house upon one of the parcels of land, and that, then and there, in their presence, the deed was executed and acknowledged by plaintiff, and the money paid to him by one of their number. Plaintiff claims that, upon the same date, in the yard and near the house of a neighbor, and in sight of such neighbor and his wife, and at the request of one and in the presence of another of the same agents of defendant, he executed what he supposed to be an oil lease of his lands in consideration of the sum of $50, which was then paid to him by such agent. The testimony shows conclusively that both of these transactions did not occur. If the deed was given, the oil lease was not; and, conversely, if the oil lease was given the deed was not. The problem which confronted the trial court, and which confronts this court, is to determine which of these two stories is true. One or the other is untrue. It is conceded that defendant sent the sum of $6,000 to one of its agents to be paid to plaintiff for the deed. If the money was not

paid to plaintiff, one or more of defendant's agents must have taken it, and have been guilty of a gross fraud against both parties. On the other hand, if plaintiff's claim is without foundation of truth, the commencement and prosecution of this suit, with full knowledge that his testimony would stand alone against the testimony of four other persons, constituted such an improbable and daring disregard of consequences by an illiterate, but fairly intelligent, old man 90 years of age, as to be almost incredible.

A careful and painstaking examination of this voluminous record convinces us that plaintiff has established his right to the relief which he seeks by the measure of proof which the law requires in such cases. His testimony is, in the main, straightforward and convincing. His statement that the only written instrument signed by him was a lease, and was executed in a neighbor's yard, and not in his own house, and in the presence of but two, instead of four, of defendant's agents, is directly corroborated by the positive testimony of two of his neighbors, who, so far as appears, are wholly disinterested, as well as by the equally positive testimony of a son and a daughter. His story of the transaction is also strengthened by the testimony of several other witnesses, some related to him and some not, to the effect that only two of the four persons who claim to have been present when the deed was executed and the money paid were actually together in that vicinity at the time, and that the others were then at a place several miles distant. Many closely connected circumstances might be mentioned which tend to support plaintiff's version of the affair. And while the evidence is hopelessly contradictory, upon the whole record we are led to believe that plaintiff has fairly made out his case. We are fortified in this view by the fact that the trial judge, who heard the case upon testimony taken partly in open court and partly by deposition, and who had the opportunity to see and observe several of the principal witnesses upon both sides, reached the same conclusion.

The decree of the lower court is affirmed.

NEUMAN v. VULCAN MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

MASTER AND SERVANT ⊜234(4)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.

Plaintiff, a machinist of long experience, was directed to make a die and punching apparatus for insertion in a machine operated by compressed air. When the machine was in operation it was suspended from a crane, but when the repairs were directed to be made it had been lowered to the floor and rested on blocks against a pillar. Though not directed, plaintiff, after inserting the die and punching apparatus, turned on the air to see whether the machine was in proper working order. The movement of the machine caused it to fall and injure plaintiff. *Held* that, in view of plaintiff's knowledge, he was guilty of contributory negligence, and could not recover; the master not having directed him to operate the machine and not being liable, either under the common law or the Wis-

consin safe place statute (St. Wis. 1915, § 2394—48), the machine being safe as it stood on the blocks, if not attempted to be operated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 708; Dec. Dig. ⊂⇒234(4).]

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by Theodore Neuman against the Vulcan Manufacturing Company, a corporation. There was judgment for defendant, and plaintiff brings error. Affirmed.

William L. Tibbs and H. B. Walmsley, both of Milwaukee, Wis., for plaintiff in error.

Charles B. Quarles, of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, MACK and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Writ of error to reverse a judgment for defendant rendered on a directed verdict. Plaintiff was in defendant's employ as a machinist. His duties consisted in making repairs and alterations on machinery used about the plant.

On the day of the accident, plaintiff was directed by the superintendent to make a die and punching apparatus which was to be inserted in the open end of a large horseshoe-shaped machine to replace a riveting apparatus. The method of operating this machine for punching or riveting purposes was to suspend it from a crane attached to the upper side by which it would be moved to some place convenient for operating it. Compressed air would be then applied through a tube connected with a cylinder in horizontal position attached to the lower side. This operated a piston at the other end of which was a toggle joint connected with the moving part of the die or riveting apparatus, whichever happened to be inserted in the machine for the time being. When the machine was not in use, it was lowered to the floor and rested on blocks against a pillar.

Plaintiff had never been engaged in operating the machine, but on completion of the die and punching apparatus he fitted it to the machine and, without being specifically directed thereto, prepared to ascertain whether it was in proper working condition. He found the machine not in use, but set on blocks and leaning against a pillar. After inserting the die and punching apparatus in the open end of the machine, he attached the compressed air tube to the nearest compressed air supply pipe, but without first suspending the contrivance on a crane. The immediate motion of the piston and toggle joint against the blocks caused the machine to fall over on the plaintiff, injuring him severely.

Plaintiff knew that it was the uniform practice to lower the contrivance when it was not in use, and that the machine was designed for operation only when suspended on a crane, and not when resting on the floor. He testified, further, that when he desired to test it out he could have put it into operation in the usual manner, namely, by first suspending it. Neither the superintendent nor anybody else in author-

ity ordered or permitted him to test the die and punching apparatus by operating the machine while it was resting on the blocks, or knew that he was thus testing it. There is no basis in the evidence for a finding that defendant failed either in its common-law duty of exercising reasonable care to provide a reasonably safe place to work or, in view of the nature of plaintiff's employment, in its duty under the Wisconsin safe place statute to make the employment and place of employment as safe as the nature of the employment would permit, or that there was negligence in tilting the machine against a column when not in use.

The machine was in a secure position while at rest, and plaintiff knew or should have known as a machinist of 23 years' experience, that he could not operate the machine in the position in which he found it without probable danger to himself. In our judgment, the only conclusion that could reasonably be drawn from the evidence is that the fall of the machine and the resulting injuries to plaintiff were proximately due solely to his negligence in attempting to operate the machine in the position in which it was at the time the accident occurred. While plaintiff had never seen the contrivance in operation when it rested on the blocks, but only when suspended, it must have been perfectly apparent to this experienced machinist that the application of compressed air to the cylinder in this position might well—indeed probably would—cause the piston to move the toggle joint against the blocks and thereby cause the machine to move or fall over. He negligently took his chances.

Under the common law and the statutes then in force, the burden of loss due to injuries thus occasioned are on the worker, and not on the industry. As there was no error in directing the verdict for defendant, we need not consider the defense of the release.

Judgment affirmed.

PREETORIUS et al. v. ANDERSON.

In re BARRETT.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1916.)

No. 2914.

1. COURTS ⟸359—FOLLOWING STATE LAW—LIENS.

   In determining the priority of liens in a bankruptcy case, the state law governs.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⟸359.]

2. MORTGAGES ⟸151(1)—LANDLORD'S LIEN—PRIORITY.

   Civ. Code Ga. 1910, § 3340, gives a landlord a special lien on crops made on rented land superior to all other liens except for taxes, and a general lien on all property of the debtor liable to levy and sale, which shall date from the time of the levy of the distress warrant to enforce it; section 3341 declares that the general lien shall be inferior to liens for taxes and of laborers, but shall rank with other liens according to date of the levying of the distress warrant; while section 3701 provides that the landlord's lien for rent shall attach from the time of levying the warrant, but shall

take no precedence of a lien of older date except as to crops. *Held*, that a landlord's general lien for rent is inferior to the lien of mortgages executed before the levying of the distress warrant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 326; Dec. Dig. ⊂=151(1).]

Petition for Superintendence and Revision of Proceedings of the District Court of the United States for the Southern District of Georgia in Bankruptcy; Emory Speer, Judge.

In the matter of the bankruptcy of M. W. Barrett. E. M. Anderson's landlord's lien was granted priority over the mortgages of W. S. Preetorius and E. K. De Loach, and they petition to superintend and revise the order. Petition granted, order reversed, and marshaling of liens affirmed.

Wm. R. Hewlett, of Savannah, Ga., and Hinton Booth, of Statesboro, Ga., for petitioners.

H. B. Strange, of Statesboro, Ga., opposed.

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

PARDEE, Circuit Judge. This is a contest for priority between two mortgage lienholders with duly recorded mortgages and a landlord's lien with long after issued distress warrant. The bankrupt's property was sold by the trustee free of liens, liens to attach to the proceeds. Among the several claimants of liens which were before the referee and marshaled by him were the following in the order of priority allowed:

"(a) Taxes due state, county and city; (b) I. W. Rhodes, laborer's lien for wages; (c) W. S. Preetorius, mortgage; (d) E. K. De Loach, mortgage; (e) Carter Company, judgment; (f) E. M. Anderson, landlord's general lien for rent."

The landlord excepted to the findings of the referee, claiming priority over the Rhodes labor lien, Preetorius mortgage, and E. K. De Loach mortgage. Upon the hearing before the court, the following order was entered:

"After considering the exceptions and petition for review of the findings of the referee in the above cause as to the priority of liens between mortgagees and landlord, it is ordered by the court that the findings of the referee holding that the mortgages of W. S. Preetorius and E. K. De Loach are superior to the lien of E. M. Anderson, landlord, be and the same are hereby overruled, and the lien of said landlord for rent is made a prior lien on said fund for distribution. It is further ordered that the findings of said referee, except as herein overruled, be and the same are affirmed.

"Dated, this March 22, 1916."

And Preetorius and De Loach, the mortgage creditors, bring this petition to revise.

[1] The law of Georgia controls. Remington on Bankruptcy, § 1896, and authorities there cited.

[2] In Georgia landlords have two kinds of liens for rent: (1) Special, on crops made on lands rented superior to all other liens, except for taxes; (2) general, on all property of the debtor liable to levy and

sale, which shall date from the time of the levy of a distress warrant to enforce the same. See Code Ga. 1910, § 3340. Such general lien of landlords shall be inferior to liens for taxes and the general and special liens of laborers, and with each other according to date; the date being from the time of levying a distress warrant. Code Ga. § 3341. The landlord's lien for his rent shall attach from the time of levying his distress warrant, but it shall take precedence of no lien of older date, except as to crops raised upon the premises. Code Ga. § 3701.

It seems to be well settled in Georgia that the lien and distress warrant attaches at the instant of its levy; and as against liens imposed by law, the lien of a mortgage, if registered in due time, attaches from the time of its execution. See Jones v. Howard, 99 Ga. 454, 27 S. E. 765, 59 Am. St. Rep. 231; Garmany v. Lawton, 124 Ga. 881, 53 S. E. 669, 110 Am. St. Rep. 207; Elam v. Hamilton, 69 Ga. 736; Worrill v. Barnes, 57 Ga. 404. In Jones v. Howard, supra, the execution of the mortgage and the levy of the distress warrant occurred on the same day. In discussing their relative priorities, the court says:

"Either the lien of the distress warrant or the lien of the mortgage first attached, and was, as a consequence, superior to the other. * * * The lien of the distress warrant attached upon the instant of its levy. The lien of the mortgage attached upon the instant of its execution. The liens of the respective instruments were referable in the one case to the fact of levy, and in the other to the fact of execution. Any difference of time in favor of one or the other would suffice to give that lien the preference."

This court in a recent case (Southern Railway Co. v. Wilder, 231 Fed. 933, — C. C. A. —), had occasion to consider the lien of the landlord as opposed to the trustee's lien in favor of general creditors given under the bankruptcy law, and we there held:

"Under Civ. Code Ga. 1895, § 2787, establishing liens in favor of landlords, section 3124, empowering them to distrain for rent as soon as the same is due, and section 2795, giving them a general lien on the property of the tenant liable to levy and sale, which dates from the levy of the distress warrant to enforce the same, the lien of the landlord for rent prior to distress is inchoate, and covers no specific property, and gives no priority over the lien given to the trustee in bankruptcy by Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631)."

Our conclusion is that the marshaling of the liens in the bankruptcy of Barrett, as marshaled by the referee, was in all respects correct, and that the order of the District Court was erroneous.

The petition to revise is granted, and the order of the District Court reversed, and the marshaling of the liens by the referee is affirmed.

EUSTIS v. EUSTIS et al.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1916.)

No. 2938.

1. HUSBAND AND WIFE ⊂=265—COMMUNITY RIGHTS—CONVEYANCES BY HUSBAND.

Where a donation by a husband to his nephew trenched upon or was in fraud of the inchoate rights of his wife, it is voidable under the laws of Louisiana, and subject to be reduced, or wholly set aside, as justice to the widow may require.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. ⊂=265.]

2. HUSBAND AND WIFE ⊂=246—COMMUNITY ESTATE—WHAT LAW GOVERNS.

Where stock in an Alabama corporation constituted part of the community estate of a husband and wife residing in Louisiana, a donation of the stock by the husband in fraud of his wife's community rights will, under general principles of equity, be voidable in Alabama.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. ⊂=246.]

3. HUSBAND AND WIFE ⊂=273(12)—COMMUNITY ESTATE—RIGHTS OF WIFE.

Civ. Code La. art. 2404, declares that the husband is the master of the partnership or community, entitled to collect the revenues and alienate them by onerous title without the consent and permission of the wife, but not to alienate the immovables of the community, by conveyance inter vivos, by gratuitous title, nor the whole nor a quota of the movables, unless it be for the establishment of the children of the marriage, but that the husband may dispose of the movable effects by a gratuitous and particular title, to the benefit of any person, and if it should be proven that he has sold the common property, or disposed of it by fraud to injure his wife, she may have her action against the heirs of the husband in support of her claim in one-half of the property. A wife contended that her husband's conveyance of corporate stock was in fraud of her community rights, but it did not appear that the donation exceeded the interest of the husband in the community at the time of the conveyance, or at the time of his death. *Held*, that the wife cannot, without first having established her claim against the heirs of the husband, attack the donation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1024; Dec. Dig. ⊂=273(12).]

Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Bill by Mrs. Ada M. Eustis against George Eustis and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Chas. Payne Fenner and Louis P. Bryant, both of New Orleans, La., for appellant.

Augustus Benners, of Birmingham, Ala., and Henry P. Dart and William Kernan Dart, both of New Orleans, La., for appellees.

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

PER CURIAM. [1] If the donation of John G. Eustis to his nephew, George Eustis, trenched upon, or was in fraud of, the inchoate community rights of his wife, it is voidable under the laws of Louisiana,

and subject to be reduced, or wholly set aside, as justice to the widow in community shall require.

[2] If the donation consisted of property in whole or in part belonging to the community, was without the wife's consent, and operated to deprive her of her full community rights upon the death of John G. Eustis in 1912, then the said donation on general equity principles is also voidable in Alabama.

[3] From the evidence in this case, it does not sufficiently appear that the donation in question exceeded the interest of John G. Eustis in the community existing between him and his wife, either in 1905 or 1912. In this connection, article 2404, Louisiana C. C., is pertinent. It provides as follows:

"The husband is the head and master of the partnership or community; * * * he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, nor of a quota of the movables, unless it be for the establishment of the children of the marriage.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud."

The case shows no adjudication between Mrs. Eustis and her husband's heirs, settling her community rights, but rather that she and the heir have apparently made common cause against the donee. We are of opinion that, before Mrs. Eustis can attack the donation of 1905, she must first judicially establish her community rights against the heirs of her husband and exhaust her remedies against them.

The decree of the District Court dismissing the suit was proper under the evidence, and should be affirmed; and it is so ordered.

FERRELL v. PRAME et al.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2828.

1. APPEAL AND ERROR ⊂⊃1097(1)—DECREE—LAW OF CASE.
Where the original decree in a suit applies to the facts, it becomes the law of the case on subsequent litigation.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358, 4359, 4363, 4427; Dec. Dig. ⊂⊃1097(1).]

2. EVIDENCE ⊂⊃597—FINDINGS—SUSPICION.
A finding of fact cannot be based on a mere suspicion.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. ⊂⊃597.]

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

Bill by Albert T. Ferrell against Frank J. Prame and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Wm. Howell, of Cleveland, Ohio, for appellant.

G. O. Willett, of Cleveland, Ohio, and W. J. Geer, of Galion, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This case is here for the third time. The general facts sufficiently appear from the reports in 166 Fed. 702, 92 C. C. A. 374, and 206 Fed. 278, 124 C. C. A. 342. Pursuant to our last mandate, the District Court heard further testimony for both parties, by deposition and in open court, and, upon consideration thereof, dismissed the bill.

We think the decree must be affirmed and the litigation ended. Upon the last hearing, we refrained from deciding two questions that were presented, viz.: (1) Whether the patents which Prame had taken out were so affected by the situation of the business to which they were incidental that when Prame was compelled to discontinue that business he had no right to sell and the new company had no right to buy and use these patents; (2) whether the efforts which the new company made to get the benefit of successorship to Prame's old business were unlawful.

[1] In these respects, the rights of the parties are measured by the original decree, and not by rules which might otherwise have been applicable. We do not construe the terms of this decree as extending beyond the acts of Prame and his agents, nor do we find substantial violation of the decree in either of the respects mentioned. Since the facts are peculiar, and the terms of the decree apply to these facts, a detailed discussion of them is unnecessary.

[2] Upon the meritorious question whether the defendants are good-faith purchasers from Prame, or whether they or some of them are continuing to hold his interests as dummies for him, the proofs do not overcome the burden which rests on appellant. The aspects of the case which gave the most serious trouble on the former appeal have been explained by testimony which there is no sufficient ground for rejecting. The sum of the whole matter is that, as to some of the transactions, suspicion persists; but this is not enough.

The decree is affirmed.

DAVIES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2354.

MASTER AND SERVANT ⊜129(7)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

A railroad company is not liable for injuries received by an employe, who was struck by the top of a switch stand, where the physical facts showed that he must have been in an unusual position, and the switch

was of the usual approved pattern, not unsuited to the particular locality, being placed in accordance with the general standard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 263; Dec. Dig. ⊂⇒129(7).]

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by James Davies against the Chicago, Milwaukee & St. Paul Railway Company, a corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Edwin J. Gross, of Milwaukee, Wis., for plaintiff in error.

C. H. Van Alstine, of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. The serious injuries sustained by plaintiff in error, evoking the natural sympathy of this court, as of the trial court, have caused us most carefully to review the evidence on the error assigned in the direction of a verdict for defendant. We are, however, constrained to concur in the conclusion of the trial judge, for the reason stated by him in directing the verdict and in overruling the motion for a new trial, that there is no such evidence of negligence as would have justified the submission of the cause to the jury.

Defendant adopted a switch, standard in height and distance from tracks, for use between two parallel main tracks spaced apart at a standard distance. No proof was offered tending to show, either that the progress of the art had made any of these standards obsolete, or that the switch so located was dangerous or unsuited to the particular locality. That with the use of a different switch at this particular point, under the circumstances of the accident, the injuries would probably have been averted, is not in itself sufficient to justify a finding of negligence.

The proof that the distance from the top of the tie to the lowest step on which plaintiff could stand, plus the measurement from plaintiff's sole to the hip bone, which was struck, exceeded the height of the switch stand by nearly two feet, demonstrated that either plaintiff was not knocked off the step by the stand, as he had testified, or that he was in an unusual squatting position. We concur in the view of the trial judge that such a position was necessarily so unusual as not to be reasonably foreseeable by defendant, or to lay a foundation for the negligence charged in not lowering the standard height of the switch, a height clearly sufficiently low under all but extraordinary conditions.

Judgment affirmed.

GOOD ROADS MACHINERY CO. v. HENRY COUNTY, ALA.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1916.)

No. 2987.

COUNTIES ⊜113(1)—CLAIMS AGAINST COUNTIES—ARBITRATION—AUTHORITY OF COMMISSIONERS.

As Code Ala. 1907, § 958, limits the authority of county commissioners to the allowance or rejection of claims, the commissioners have no authority to bind the county to a submission of a claim to arbitration.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 176; Dec. Dig. ⊜113(1).]

In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Action by the Good Roads Machinery Company against Henry County. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Frank S. White, of Birmingham, Ala., and Philip H. Stern, of Montgomery, Ala., for plaintiff in error.

Ray Rushton, of Montgomery, Ala., for defendant in error.

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

PER CURIAM. The main question presented in this case is whether the board of county commissioners of Henry county, Ala., had power to submit the allowance of the plaintiff's claim to arbitration, and thereby bind the county. The lower court held that the county commissioners had no such power.

With that holding we concur. The authority of the commissioners was limited to the allowance or rejection of the claim. Code Ala. 958; Ex parte Selma & Gulf R. R., 46 Ala. 246; Commissioners' Court v. Moore, 53 Ala. 25–27; Myers v. Gibson, 147 Ind. 452, 46 N. E. 914. The case seems to have been correctly ruled in the trial court, and we find no reversible error in the record.

Judgment affirmed.

HOUSEHOLD SUPPLY CO. v. WHITEAKER et al.

(Circuit Court of Appeals, Fifth Circuit. November 4, 1916. Rehearing Denied December 1, 1916.)

No. 2994.

BANKRUPTCY ⊜458—REVIEW—EXCEPTIONS BELOW—SUFFICIENCY.

Where an amendment to a bankruptcy petition recited it was made with leave of court, and exceptions to the master's report did not call the court's attention to the alleged absence of an order allowing the amendment, the absence of the order cannot be complained of on appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. ⊜458.]

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

The Household Supply Company, a corporation, was adjudged a bankrupt on the petition of Carson, Pirie, Scott & Co. and Mrs. Pearl Whiteaker and others, and it appeals. Affirmed.

Max J. Winkler and Victor Smith, both of Birmingham, Ala., for appellant.

Alex C. Birch, W. S. Pritchard, and Samuel B. Stern, all of Birmingham, Ala., for appellees.

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

PER CURIAM. We are of opinion that the evidence contained in the record in this case was such as to support findings that the alleged bankrupt was insolvent and committed an act of bankruptcy alleged in the petition as it was amended. It sufficiently appears that the amendment to the petition filed March 20, 1916, which recited that it was made "with leave of the court first had and obtained," was before the court and was considered by it in passing on the exceptions to the master's report; none of these exceptions calling the attention of the court to the alleged absence of an order by it allowing that amendment.

We find no reversible error in the record. The decree appealed from is affirmed.

STARK et al. v. SIMS et al.*

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

No. 2770.

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

On rehearing. Reversed.

For former opinion, see 230 Fed. 115, 144 C. C. A. 413.

George E. Holland, of Orange, Tex., for plaintiffs in error.

G. P. Dougherty, of Houston, Tex., and T. L. Foster, of Beaumont, Tex., for defendants in error.

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

PER CURIAM. On this hearing a majority of the judges, for the reasons given on former hearing (see Stark v. Sims, 230 Fed. 115, 144 C. C. A. 413), being of opinion that there was error in directing a verdict for the plaintiffs in the court below, the case is reversed and remanded, with instructions to award a new trial.

FARMERS' HANDY WAGON CO. v. BEAVER SILO & BOX MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1916. Rehearing Denied July 13, 1916.)

No. 2256.

1. PATENTS ⇐66—PRIOR ART—PATENTS ISSUED PENDING APPLICATION.

Where defendant in an infringement suit sets up as a defense that the patentee was not the first inventor of the thing patented, but that it was invented by another, who first applied for a patent, which was granted while the application for the patent in suit was pending, such prior

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

*Rehearing denied December 18, 1916.

patent must be considered in the prior art for whatever it discloses; but such disclosure is limited to the matters included in the several claims, unaided by the specification or by extrinsic evidence, except where necessary to elucidate and make the same clear.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⊂⊃66.]

2. PATENTS ⊂⊃127—VALIDITY—PRESUMPTION FROM GRANT.

Where applications for different patents were pending at the same time, the fact that no interference was declared and that patents were issued on each argues strongly for the validity of each as against the others, and the presumption of patentable novelty arising from the grant is very strong.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 179, 180; Dec. Dig. ⊂⊃127.]

3. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—SILO.

The McClure patent, No. 814,067, for a silo, relating particularly to a rigid door-frame constructed of angle-irons connected by cross-bars, was not anticipated, and discloses patentable novelty; also *held* infringed.

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃68—UNFAIR COMPETITION—COPYING ADVERTISING.

The practical adoption by an infringer of the advertising literature of the manufacturer of the patented article, even including its trade-name, *held* to constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⊂⊃68.]

5. COURTS ⊂⊃263—JURISDICTION OF FEDERAL COURTS—SUIT FOR UNFAIR COMPETITION.

In a bill for infringement of a patent, a claim for unfair competition in connection with the sale of the infringing article may properly be joined, regardless of the question of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. ⊂⊃263.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by the Farmers' Handy Wagon Company against the Beaver Silo & Box Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 219 Fed. 234.

Appellant filed its bill to restrain infringement of the three claims of patent No. 814,067, granted to C. W. McClure on March 6, 1906, for a silo, and also certain acts charged to constitute unfair competition and for an accounting. The invention relates more particularly to an independent rigid door-frame for the verticle opening of a silo. "The objects of my invention," says the patentee, "are to produce for silo-doors a frame that can be quickly and readily assembled without the aid of skilled labor, that will serve as a gage or guide for setting up the silo, and will form a secure support for the silo-doors and provide a support for the silo-hoops."

The claims read as follows, viz.:

"1. A frame for silo-openings, comprising in combination a pair of upright bars of L section, each bar being arranged with one of its members flush with the face of the adjacent silo-staves; a plurality of transverse bars spanning the silo-opening and rigidly secured to said upright bars, the ends of said transverse bars projecting beyond said upright bars; together with hoops encircling the silo and overlying the ends of said bars to hold them in contact with the silo-staves, substantially as described.

"2. The combination with the staves of a silo, of a metallic door-frame therefor relative to which frame the staves are erected, said frame comprising a pair of continuous angle-irons, one flange of each of which abuts the end staves of the silo, the remaining flange of which projects over the opening in the silo, to form seats or guides for the doors, and braces extending between the angle-irons and superposed upon the outer faces thereof, the ends of the braces overlying the end staves of the silo and separate means for securing the braces to the outer faces of the angle-irons and to the end staves.

"3. In a silo provided with a continuous opening, the combination of a door-frame comprising a pair of vertical angle-irons lining the walls of the opening from end to end, one flange of each of the angle-irons abutting the wall and the remaining flange overlapping the opening to form seats for the doors, braces connecting the angle-irons, the braces applied to the outer faces of the angle-irons and overlapping that portion of the silo adjacent the frame, and separate means for securing the braces to the angle-irons and to the silo respectively."

The drawings are as follows, viz.:

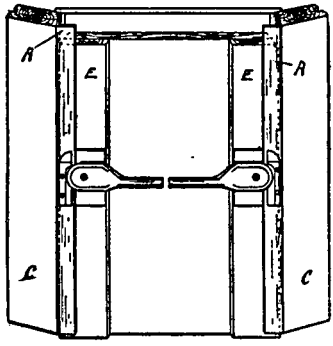


Fig. 1.

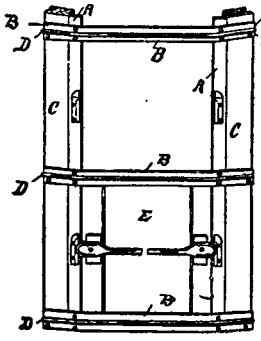


Fig. 2.

Fig. 3.

"Around the silo and lengthwise bar *B* extends a hoop or band *D*. The ends of the cross-bars *B* form a support for the hoop *D*, which spans the opening *E*. The hoop firmly holds the ends *B'* of the bars *B* against the staves *C*, thus relieving the bolts *B''* of strain due to expansion of the material in the silo.

"The combination of the two vertical side bars *A A* and the cross-bars *B B*, which are riveted to them, forms a rigid frame for the silo-opening. These parts are usually shipped assembled, it being only necessary when constructing a silo to set up the iron frame for the opening, erect the staves, and bind the silo in the usual manner by the hoops *D D*.

"The door-frame," says the specification, "consists in a pair of vertical members *A A*, each preferably made of a single piece of angle-iron or a metal bar of equivalent shape. It is preferably fastened, as shown in the drawings, to the edge of the stave at the side of the silo-opening. In the form illustrated in the drawings, where the side members are formed of angle-iron, the outer face of one leg of the angle rests against the edge of the stave *C*, and the other leg, which is practically flush with the outer surface of the stave *C*, projects over the opening to form a guide along which the door *E* may be slid vertically. Pressure against the door produced by expansion of the ensilage within presses the door out against the angle, and the greater the pressure from within the tighter the opening is closed.

"The side bars *A A* are bound together at any suitable intervals throughout their length by transverse strips or bars *B B*. The ends *B'* of the bars *B B* are secured to the outer face of the silo-stave *C* by bolts *B''*, rivets, or other suitable means. The bars *B* where they cross the opening of the silo are preferably curved to the contour of the silo, but may be straight, if desired.

"A silo-frame made as above described will not contract as the silo shrinks, and the clearance between the side bars *A A* will not decrease and bind the doors *E*, being prevented from so doing by the cross-bars *B*. The ensilage is prevented from coming in contact with the bars *A A*, being covered from within by the doors *E*. The frame of this construction is rigid and one side of the frame cannot drop down and throw the frame out of shape. Each of the side members *A* has a large bearing-surface against the edge of the stave *C*, and by reason of this large bearing-surface the bolts *B"* are relieved of the transverse strain which would, if it were not for the large bearing-surface, be brought upon them by reason of the crushing effect of the staves when they become soaked with moisture."

"A silo," says appellant's expert Carter, "in order to properly preserve its contents, must not only be water-tight, but practically air-tight. * * * On the other hand, the swelling of the wood, which results from its being wetted by the moisture which exudes from the green fodder, * * * is liable to develop enormous circumferential pressures, tending to strain and warp the sills or margins of the door opening and to force these parts inwardly towards each other. * * * Nor is this pressure constant, ordinarily, throughout the full height of the door opening. For most of the time the tank is but partially filled with the wet fodder, so that the portion of the staves above the level of the mass will tend to dry out," so that the door must be so constructed as to resist strain upon its shape under the uneven pressure. The silo must also be strong enough to resist wind pressure. The silo door-frame of the patent is assembled generally at the factory in conjunction with the end staves *C C* and shipped out to customers to form a strong and rigid nucleus around which the full silo is constructed.

The bill also contains charges of unfair competition on the part of appellee. Its advertising matter appropriates liberally the advertising matter of appellant, which action, appellant charges, has greatly affected its trade and produced heavy loss to it. Appellee sets up in its answer invalidity of McClure's patent, noninfringement, denies unfair competition, and introduces a number of prior patents, among which the following serve to disclose matter claimed as anticipatory, viz.: C. N. Crosby patent, No. 792,969, granted June 20, 1905, for a silo, on application filed April 13, 1904; W. L. Haag patent, No. 802,391, granted October 24, 1904, for a silo, on application filed February 8, 1904. Numerous instances of prior knowledge are also alleged and set out. The answer also charges that the patentee McClure was not the original or first inventor of any material or substantial part of said invention, that one C. N. Crosby previously knew of said invention and every material part thereof and filed his application for a patent thereon on April 13, 1904, that one Haag on February 8, 1904, did likewise, and that thereafter patents were issued to them respectively. The answer also sets out that others knew of said alleged invention prior to the time when appellant claims to have discovered it.

The District Court dismissed the bill for want of equity, from which order this appeal is taken. Other facts appear in the opinion.

Wallace R. Lane, of Chicago, Ill., for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The only serious question presented is that of the validity of the patent. If valid, appellee's device clearly infringes. It was so found by the District Court. The use of the Z-bar or the T-bar instead of the L-bar, and the location of the sealing pressure between the margins of the door and the inner faces of the marginal staves, do not serve to materially differentiate the two. The patent in suit, in the absence of prior patents or uses anticipating the same, is of a character to meet

the requirement of the statute as to invention. It is in an art which appeals most strongly to farming communities, where such assistance as it provides is in demand. The difficulty in procuring skilled labor and proper construction help makes the factory nucleus of a silo—one that will serve as a guide in building the necessary structure for a silo—a very serviceable device. This is clearly evidenced by the fact that great numbers of them have been and still are being sold. The demand for a strong and inexpensive structure has been and doubtless will continue to be very great. The device of the patent has gained great favor. The difficulty had been in constructing a rigid and true doorway for the vertical opening—one that would offset the weakening effect of such an opening. It will be borne in mind that a silo should be, as near as possible, both air and water-tight. Appellant uses in its door-frames a pair of angle-irons—one on either side of the opening. These are so arranged as to fit closely into the silo walls and at the same time afford a close, practically immovable, seat for the ends of the door sections, without so closely binding the latter as to make them difficult to remove. These bars are joined by cross-bars which are riveted thereto near their ends, which ends are prolonged so as to be fastened to the first stave, thus binding the two together on either side and also uniting the right and left adjacent staves. The other staves are readily put in place, and the whole bound with hoops.

While the patent claims a silo, the special feature seems to be the rigid factory-made and portable door-frame. The metal has the advantage over a wood frame in being rigid and not affected by the moisture of the contents of the silo or from the outside. "The angle bars," says appellant's counsel, "prevent this [distortion and binding] by furnishing a continuous reinforcement, in contact with the end staves from top to bottom and are capable, in connection with the cross braces *B*, of receiving and resisting the crushing effect of the staves, which is thus distributed along the length of the angle bars." The extension and fastening of the ends of the cross-bars to the end staves, it is claimed, afford a cantilever effect which relieves the angle-bar rivets. This feature of the construction is attested by appellant's salesmen to be a decided improvement upon the art as it theretofore existed.

The Crosby and Haag patents were co-pending with McClure in the Patent Office. On both of them patents were issued prior to McClure upon applications also filed prior to that of McClure. The appellant contends that these two patents were not in the prior art with regard to the McClure patent, because the several patents granted thereon were subsequent to the date of filing his (McClure's) application.

[1] Among the defenses filed were Nos. 3 and 4, set out in section 4920 of the Revised Statutes (Comp. St. 1913, § 9466). They read as follows, viz.:

"3. That it [the patent] has been patented or disclosed in some printed publication prior to his [the patentee's] supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor.

"4. That he [the patentee] was not the original and first inventor or discoverer of any material and substantial part of the thing patented—citing Crosby and Haag, with others, as having previously known of said inven-

tion and every material part thereof, and also as having filed applications and received patents thereon."

While under defense 3 aforesaid, in order to be considered in the prior art, the patent cited should have been granted prior to the filing of the application of McClure, yet where the fourth defense is set up, the question as to who was the first inventor is squarely raised, and that matter must be determined on its merits. Barnes Sprinkler Co. v. Walworth Mfg. Co., 60 Fed. 605, 9 C. C. A. 154; Sundh Electric Co. v. Rapid Transit Co., 198 Fed. 94, 117 C. C. A. 280. While McClure might have carried his date of invention back to the Crosby and Haag application filing dates, if such were possible, he did not do so. Therefore, Crosby and Haag, having filed their applications prior to McClure's date, must be deemed to have made their several inventions prior to the time when McClure made his. They are thus in the prior art as to McClure for whatever they disclose. This should, we hold, be limited to such matters as are included in their several claims, unaided by their specifications or by extrinsic evidence except where necessary to elucidate and make the same clear.

The first claim of Haag reads as follows, viz.:

"A silo composed of a series of like staves and having an unobstructed door-opening at one side, the side posts of which are the adjacent staves, a plurality of straight braces extending across the door-opening and having their ends curved to conform to the curvature of the body and bolted thereto, angular lugs secured to the inner faces of said braces and engaging the edges of the staves adjacent the door-opening, hoops having portions extending across the braces and lying thereon, a plurality of door-sections of a width greater than the width of the door-opening and having chamfered end portions adapted to lie directly against the inner faces of the staves adjacent the door-opening, hooks secured to each of said door-sections and adapted to overlie the brace adjacent thereto, and means for clamping the door-sections in the door-opening."

This substantially describes the invention. The device has no side frame L, or other iron section bars. Its metal cross-bars or braces are secured to the staves adjacent to the opening respectively by bolts. Practically all of its bolts or securing devices are anchored in wood and therefore subject to be loosened. The device has no metal seat for its doors. The idea of a rigid door-frame construction is not the object or central idea in the silo construction, and its door-frame is not independent. It does not, in our judgment, anticipate McClure. That its advent brought no contribution in practical advance to the art may be presumed from the fact that it has always remained negligible in the commerce of the art.

The District Court held the patent in suit invalid, as being anticipated by the Crosby patent. This device employs for the sides of its door-frames continuous sections of metal, Z-shaped in cross sections. One flange of this Z section is fastened or secured to the adjacent stave by a series of bolts passing through the flange and stave. The opposite flange forms the side portion of the door-frame. The rib or web connecting the two, spans the smooth, beveled edge of the adjacent stave. The Z sections are connected by steel cross-pieces which do not engage the adjacent staves. By the adjustment of the metal parts a

seat is provided for the board sections which compose the door itself, as in McClure. The L and Z shaped metal sections may be deemed equivalents for the present purposes. Crosby claims stability, durability, simplicity, and air and water tightness, together with facility in discharging the contents and resistance to great pressure. The use of metal hoops for holding the staves together is a necessity with Crosby as in all silo tanks, and especially in the case of circular silos.

Claim 2 of Crosby reads as follows:

"A silo having a door-section comprising two metal standards having oppositely-extending flanges and an intermediate rib, metal cross-pieces comprising cross-flanges secured to the oppositely-extending flanges and having central flanges rabbeted at their ends to fit over said oppositely-extending flanges and against the intermediate ribs thereof at intervals to form door-casings, and doors formed of staves connected by a bar and bound with felt, said doors being fitted behind the front flanges of the standards and having buttons pivoted thereto and provided with end portions arranged to swing to positions in front of the cross-pieces."

[2] This claim fairly expresses what the patent covers. As above noted, McClure, Haag, and Crosby were pending in the Patent Office at the same time. The fact that no interference was declared, and that each of them was granted a patent for what he claimed, argues strongly for the validity of each as against the others. The presumption of patentable novelty arising from the grant becomes in such case very strong. American Caramel Co. v. Glen Rock Stamping Co. (D. C.) 201 Fed. 363. Neither Haag nor Crosby were called as witnesses. That fact also contributes to the force of the presumption that the results produced by McClure's construction were new, or that they were obtained in a novel or improved manner. While both Haag's and Crosby's inventions are prior to McClure's, it is evident that, to overcome the presumptions above set out, the court must be able to find very clearly from the evidence that the subject-matter of Crosby is practically identical with that of McClure's claims.

[3] Crosby's cross-pieces serve only to unite the side door-frames or Z-bars. They fail to strengthen the union between the first or adjacent stave and the Z standards. All that holds the standard and stave together is the series of bolts which connect the stave with the outward flange of the Z-bar. These bolts of necessity have only a slight hold in the stave, not being supported by more than an inch or so of wood, which they serve to weaken, and which must, as a rule, be unable to resist the great strain caused by heavy winds and swelling staves, whereas McClure has provided, as aforesaid, for the extension of the cross-bar ends to embrace and form strong and rigid connection with the first or adjacent stave, thus more than doubling the strength effected by Crosby's union between the standard and the stave. This cross-section is, of course, in addition to the hoops which encircle the silo. Where independence, rigidity, and strength are essential, everything which contributes to those ends is most desirable. In the patent in suit, the angle-iron side-frame sections are covered by the wooden staves adjacent to them and therefore protected from the action of the acid of the silo, which, it is claimed, is destructive. On the other

hand, one flange at least of appellee's Z-bar is wholly exposed thereto, thereby subjecting the other two flanges also to the destructive process. In the desirable features of silo construction, such as strength, rigidity, and simplicity, the device of the patent had so far appealed to the trade that it had not only supplanted the alleged anticipating silos, but had for a number of years held the market to an unusual degree, sounding defiance to all comers. Appellee, having overlooked the silos of the prior art and openly appropriated that of the patent, must, by reason of its tribute implied in its almost literal annexation of the device, come somewhat limpingly to the contest against its validity. It certainly concedes its utility. All the said facts of the case considered, together with the further fact that appellee at once ceased infringing when notified of suit, we are satisfied that nothing in the prior art as shown, or prior knowledge, would justify us in holding that the patent in suit is void for want of patentable novelty. Nor is there proper ground for holding that it discloses an aggregation. All the elements combine to constitute a valid combination, well within the statute.

[4] With regard to the charge of unfair competition, the record is replete with the most bold and open appropriation of appellant's trade literature by appellee. Whole clauses are taken, practically adopting appellant's literature in its statements, prospectuses, and catalogues. It is in evidence that appellee's device and advertising seriously undermined appellant's trade, which, when appellee's infringement, on notice of suit, was discontinued, at once revived. Appellee even applied to its product the trade-name "All steel door-frame," which was used by appellant, utterly ignoring appellant's rights.

[5] The bill seeks to restrain infringement of the patent and also to restrain unfair competition. These are properly joined, independent of the question of citizenship. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540; Ludwigs Mfg. Co. v. Payson Mfg. Co., 206 Fed. 64, 124 C. C. A. 194.

Appellant is entitled to have its patent sustained, infringement thereof and unfair competition found and restrained, and an accounting taken.

The decree of the District Court is reversed, with direction to grant the relief prayed for.

UNITED STATES METALLIC PACKING CO. v. HEWITT CO.

(Circuit Court of Appeals, Seventh Circuit. April 24, 1916. Rehearing Denied July 13, 1916.)

No. 2235.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ROD PACKING RING.
The King patent, No. 914,426, for a metallic rod packing ring, divided into two segments interlocking with each other and the rod, was not anticipated and is valid; also *held* infringed by the ring of the Munich patent, No. 1,095,163.

2. PATENTS ⟸16—INVENTION.
Invention involves conception of at least some function, as well as the selection of the means whereby that function can be operatively secured.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸16.]

3. PATENTS ⟸72, 236—ANTICIPATION—CHANGE ON FORM OR NUMBER OF PARTS.
While the number of parts into which an object is divided, or the exact form it assumes, may be of no importance in determining anticipation or infringement, it may become absolutely determinative, if a given number of pieces or a certain shape is essential to the realization of one or the other conception.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91, 372, 373; Dec. Dig. ⟸72, 236.]

4. PATENTS ⟸72—ANTICIPATION—DRAWINGS OF PRIOR PATENT.
A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement of parts, when such arrangement is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86–91; Dec. Dig. ⟸72.]

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

Suit in equity by the United States Metallic Packing Company against the Hewitt Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 220 Fed. 171.

Francis T. Chambers, of Philadelphia, Pa., for appellant.

George P. Fisher, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. [1] The validity of letters patent No. 914,426 granted to appellant as assignee of Charles W. King for improvements in metallic rod packing ring and their infringement by appellee are involved in this appeal from a decree dismissing the bill. Judge Sanborn held the patent valid, but not infringed.

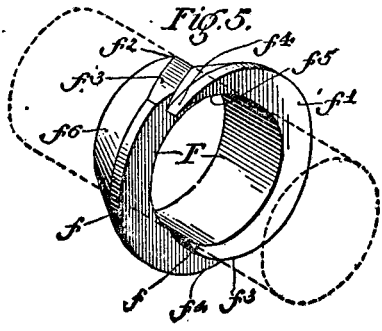
The second of the two claims in the patent had been disclaimed before suit. The first claim reads as follows:

"A rod packing ring of soft metal divided into two segments, each of which may be moved laterally over the rod to be packed and each having tapered ends, one with a convex end surface adapted to lie under, and the other with a concave end surface adapted to lie over the corresponding tapered ends of the other segment, said concave and convex surfaces being parallel to the axis of the ring and so disposed that, when assembled on the rod, the segments interlock with each other and the rod to prevent either segment from being moved laterally away from the rod, while the segments may be readily moved together or separated by moving one segment relative to the other in a direction parallel to the axis of the rod."

The purpose and function of the invention is thus described in the specifications of the patent:

"The object of the present invention is to provide a packing which will be effective in preventing the flow of fluid along the rod and will be simple in construction and composed of a relatively small number of parts and which can be readily assembled and disassembled.

"A particularly important feature of the invention is the formation of a soft metal packing ring in two parts, so shaped that the ring can contract readily to compensate for the wear of the rod or packing ring and thereby maintain a tight joint, while at the same time the parts interlock with each other and the rod, when assembled on the rod, in such manner as to prevent a lateral movement of either segment away from the rod, while at the same time each segment of the ring may be laterally moved onto or off the rod when disengaged from the other segment and the two segments when on the rod can be assembled together in the interlocking or normal position or disassembled by moving one segment relative to the other in a direction parallel to the axis of the rod. This I accomplish by the peculiar configuration which I give to the ring segments."



The drawing of Figure 5, described as a perspective view showing the manner of assembling and disassembling the ring on the rod, will be sufficient.

The inventor further states:

"The concave and convex end surfaces, however, are parallel to the axis of the rod, so that the segments may be readily separated by moving one segment relative to the other in a direction parallel to the axis of the rod in the manner shown clearly in Fig. 5.

"These surfaces must, however, be of sufficient capacity and convexity and so disposed as to permit the proper contraction of the ring, while at the same time the segments are effectively locked together when assembled on the rod. At the same time, each segment must not have its rod engaging surface so great or its overlying part f^4 so shaped that the segment cannot be moved laterally over the rod to be packed. This means that each segment must not engage the rod over an arc of more than 180 degrees."

The defense of noninfringement is based, first, upon the fact that in defendant's ring the meeting faces of the segments, instead of being strictly parallel to the axis of the ring, as well as to each other, form a slight angle about five degrees with the axis of the rod; second, upon the alleged limitation of claim 1 to this specific form by reason

of the disclaimer of the broader claim 2; and, third, upon the grant of the Munich patent of April 28, 1904, No. 1,095,163, under which defendant makes its ring.

If, however, the King patent is to be construed broadly enough to cover defendant's ring, then the defense of anticipation is urged primarily because of the Jerome patent, No. 211,299, for stuffing boxes for steam engines.

1. Infringement. There is one, and only one, difference between defendant's and the King ring. The meeting faces of the curved and tapered ends of defendant's ring, while parallel to one another, are not parallel to the axis of the ring. They depart five degrees from mathematical parallelism.

If King's claim is to be limited to the requirement of exact parallelism, there is no infringement. Concededly, mathematical parallelism is neither possible nor essential in devices of this kind, when made for commercial purposes. With substantial parallelism, the very functional interoperation described in the patent will be attained.

Defendant concedes that the King claim is not limited to mathematical accuracy in the parallelism. The real question is whether, notwithstanding a departure therefrom to the extent of five degrees, substantial parallelism still remains and, the functions thereby designed to be secured, are still attained. If so, then in our judgment the King claim is to be construed as including such substantial parallelism.

Now a material departure from substantial parallelism of the contacting surfaces with the axis of the rod in a ring having the King features would prevent the lateral application of the ring segments to the rod, because in at least one of them the ends of the inner faces would approach each other by a distance less than the internal diameter of the ring and the rod. Because of the softness of the metal, an essential element of the claim, a slight departure, a departure only to the extent that defendant has made, will not, however, affect the lateral applicability. Due to the softness of the metal and to the fact that the tips of the ring are finely drawn out, such segments cannot only be laterally applied to the rod without destruction or functional distortion, but, when so applied, they interlock by sliding together axially, and function exactly like plaintiff's with respect to packing for maintenance of tightness. It follows, therefore, that the substantial parallelism called for in the King patent covers a construction like defendant's, departing from mathematical parallelism by five degrees. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540.

That some advantages of plaintiff's more nearly mathematical parallelism are thereby sacrificed—defendant's segments are rights and lefts, while plaintiff's are interchangeable, further, defendant claims that there is a slight distortion of its sections or a slight inaccuracy in the fit—does not afford an escape from the charge of infringement; defendant's result "is the same in kind and effected by the employment of plaintiff's mode of operation in substance." Winans v. Denmead, 15 How. 330, 14 L. Ed. 717. And even if, by reason of the extent of defendant's departure from mathematical

parallelism and the inclination of the segment faces in the same direction, certain more or less compensating advantages are obtained—an easier assembling of the sections and their wedging together when assembled—and the Munch patent covering these be valid as an improvement in this particular on King, a point we need not determine, yet inasmuch as defendant still adheres to and necessarily must adhere to a substantial parallelism, "it has none the less succeeded in appropriating all that was of value" in the King ring. Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713.

Defendant's is no new combination of either the same or different elements; it has all of plaintiff's elements so combined as to perform the same functions in the same way. As in Elizabeth v. Pavement Co., 97 U. S. 126, 137, 24 L. Ed. 1000, defendant's peculiar form may constitute an improvement on plaintiff's and perform an additional office, but it none the less performs the office assigned to it in the King patent.

Clearly the second claim was disclaimed because it covered, not a ring, but an old combination of the ring and the other elements used in the stuffing box. The packing ring in this combination was described only as composed of interlocking segments and formed with a conical end. Obviously neither this claim nor its disclaimer can extend or limit the scope of the first claim, the only claim for a special ring construction.

[2] 2. Anticipation. Concededly the closest approach to the King ring is the ring shown in Jerome patent, No. 211,299, dated January 14, 1879, 30 years earlier than King. If the drawing alone were considered, it would seem fully to portray King's ring. But invention involves conception of at least some function, as well as the selection of the means whereby that function can be operatively secured. And while Jerome would anticipate all later inventors to the full extent of his invention as disclosed by his specifications and claims read in conjunction with the drawings, and that, too, irrespective of whether he understood the scientific principles involved therein or appreciated all of the functions of his construction, he does not anticipate that which cannot be attained compatible with his real conception.

[3] While the number of parts into which an object is divided or the exact form it assumes may be of no importance whatsoever in determining anticipation or infringement, it may become absolutely determinative if a given number of pieces or a certain shape is essential to the realization of one or the other conception. Now Jerome's drawing shows a ring of two segments, a preferential form, with tapering ends. But, far from pointing out any need of limiting the number of pieces to two, he expressly states that the ring may be composed of any desired number of sections. Moreover, he nowhere indicates that the degree of tapering shown in the drawing is functionally required. Therefore if, to attain some function, a ring of two segments, no more and no less, and each tapered in a certain way, is absolutely essential, the conception of that function as attainable by these means cannot have been anticipated by Jerome; and to that extent, at least, a subsequent inventor may have made a patentable

improvement. Nor is it material that the function attained by these limitations is itself old.

Concededly, to secure the interlocking of the sections with each other and with the rod when assembled thereon, sections which when not assembled on the rod do not interlock, and no one of which, without the other, interlocks with the rod, it is absolutely neceessary that the ring have only two sections, and that the ends taper no less than the drawing shows. The conception of this interlocking function of a segmental packing ring, essential to King's invention, was therefore not a part of Jerome's invention, and no one going to the Jerome patent alone would find therein any such disclosures.

[4] As was held in Brill v. Third Avenue Ry. (C. C.) 103 Fed. 289, quoted by us in Gray Tel. Pay Station v. Baird Mfg. Co., 174 Fed. 417, 98 C. C. A. 353:

"A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor."

An examination of Jerome's two segment sketch drawing discloses two contacting tapered faces that are not parallel either to the rod or to each other, but inclined in opposite directions toward the center of the rod, making it impossible to assemble or disassemble them by moving them in directions parallel to the rod. Jerome specifies several times that the opposite tapering ends of each section must be on a curve coinciding with the periphery of the ring, and in one place he uses the expression "exactly coinciding"; the meeting faces of the lapping ends must therefore be cylindrical. But, if they are cylindrical, the only form suggested or contemplated by Jerome, and not helical, like a later King ring covered by a 1914 patent, then, when the two sections are made in exact conformity with the drawing, they cannot slide together or apart along the rod by a movement parallel with the rod, because they would absolutely interlock with one another, and not also with the rod, thereby preventing a movement of one towards or from the other and parallel with the rod.

It follows, therefore, that a ring made in exact conformity with the drawing, read in the light of the specifications, as we believe it must be read if its teachings are to be discovered, would be impracticable and inoperative for the use intended by either Jerome or King; if the cylindrical surface were adhered to, and not, as in the model purporting to follow the drawing, concededly departed from sufficiently to permit a slight helical movement, the segments with laps as shown in the drawings could not be assembled on the rod; it would be necessary to slip the ring over the end of the rod; if, however, they were tapered less than the drawing shows, they could not interlock with each other and with the rod, when assembled together. And, in fact, no Jerome rings have ever been made for practical use.

That Jerome may have been ignorant of some function disclosed by his patent would not affect it as an anticipation; on the other hand,

the fact that the drawings might suggest some change therein, mechanically slight, but operatively yielding a new function, will not deprive the later inventor of his improvement.

In our judgment, neither Jerome's drawing of Figure 3, the ring, considered even entirely separate from Figures 1 and 2, the stuffing box, nor the Jerome patent itself, anticipated King.

It is unnecessary to examine in detail the other patents. None of them discloses a packing ring of King's construction or with its functions.

The decree must be reversed, and cause remanded, with directions to proceed further in accordance with the views herein expressed.

WESTERN GLASS CO. v. SCHMERTZ WIRE GLASS CO. et al.

SCHMERTZ WIRE GLASS CO. et al. v. WESTERN GLASS CO.

(Circuit Court of Appeals, Seventh Circuit. November 6, 1916.)

Nos. 2015, 2021.

PATENTS ⊂=319(4)—INFRINGEMENT—INTEREST—JUDGMENT—ALLOWANCE.

In a suit for infringement, the sum allowed plaintiffs as interest to the date of the decree on annual profits earned by reason of the infringement was disallowed, and the sum accorded to defendant against profits as interest on its invested capital was reduced. *Held* that, as the modification did not affect the ascertainment of profits, though there were changes in the amounts decreed due to plaintiffs, plaintiffs are entitled to interest on profits from the date of the original decree, at which time damages were liquidated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 585; Dec. Dig. ⊂=319(4).]

On motion to modify decree. Order modified.

For former opinion, see 226 Fed. 730, 141 C. C. A. 486.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

PER CURIAM. The decree of the District Court was heretofore modified in two respects. The sum therein allowed plaintiffs as interest to the date of the decree on annual profits earned by reason of the infringement was disallowed, and the sum credited to defendant against profits as interest on its invested capital was reduced one-fourth, because of our holding that one-fourth of defendant's capital was used in departments of its business other than that in which by reason of the infringement the profits were earned. The question now raised is whether interest is to be allowed on the net amount so found to be due plaintiffs from the date of the original decree or only from date of the decree in this court.

In our judgment, plaintiffs are entitled to interest from the time that profits were first judicially ascertained, notwithstanding the modifications subsequently made in the decree. These modifications did not

affect the ascertainment of the several elements, liquidation of which was essential to any decree. The separate sums so ascertained were not changed by this court; the modifications were due to a difference of opinion, not as to the facts, but as to the law applicable thereto. The amount of profits were definitely ascertained and liquidated in and by the original decree. Under these circumstances, notwithstanding the changes in the amount decreed due them, by reason of the disallowance of interest on profits up to the date of the original decree and the reduction in the credit given defendant, based upon facts therein found, interest on the net amount finally found to be due plaintiffs should be allowed from the date of the original decree.

The order heretofore entered will be modified in accordance with the draft presented by plaintiffs, appellants in No. 2021.

NATIONAL METAL MOLDING CO. v. TUBULAR WOVEN FABRIC CO.

(Circuit Court of Appeals, First Circuit. October 18, 1916.)

No. 1208.

PATENTS ⟸321—INFRINGEMENT SUITS—CIRCULARS.

Where a bill seeking to enjoin the infringement of a patent was upheld, and the patentee issued a circular letter to the trade in good faith, the issuance of the letter will not be enjoined, where it expressed the conclusions reached by the court, though it was not wholly accurate, and was rather strongly expressed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⟸321.]

Dodge, J., dissenting.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Bill by the National Metal Molding Company against the Tubular Woven Fabric Company. A temporary injunction was granted, and defendant moved to enjoin plaintiff from issuing a circular referring to the decision. From an order enjoining the issuance of the circular, plaintiff appeals. Order reversed.

See, also, 227 Fed. 884, 142 C. C. A. 408.

Carroll L. Perkins and W. K. Richardson, both of Boston, Mass. (Charles F. Perkins, of Boston, Mass., on the brief), for appellant.

William Quinby, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This case was in the nature of supplementary proceedings in reference to the publication of a letter referring to the decision of this court maintaining the bill and restraining its publication. The letter was, perhaps, strongly expressed, and not altogether accurate; but, clearly, we find no occasion to question its good faith, and without doubt it expressed the conclusions we reached, and on the whole we enter the following decree without further comment:

The order of the District Court is reversed, and the appellant recovers its costs of appeal.

DODGE, Circuit Judge (dissenting). I think the order of the District Court should be affirmed. Upon the entry of its interlocutory decree and the issuance of its permanent injunction on April 14, 1916, as required by the mandate of this court, the plaintiff had proceeded to send circulars, dated April 20, 1916, to the defendant's customers, announcing the effect of the decree and injunction in language of its own. From a party assuming to follow such a course, I think the District Court, wherein the case was still pending for further proceedings, had the right to require scrupulous care, not only to avoid actual misrepresentation as to the terms of the decree and injunction, but also to avoid conveying any possible misleading impression regarding them. I find no sufficient ground for disagreeing with the view of the District Court, that the language of these circulars was likely to lead to misapprehension of the scope of injunction. Like the circulars before the court in Rollman & Co. v. Universal Hardware Works (D. C.) 229 Fed. 579, they did not state what patent had been sued on, nor which claims had been held infringed, nor in what respect the defendant's structure before the court had been held to infringe. The fact that the defendant had sold its particular form of flexible conduit held to infringe, under its trade-name "Duraduct," when the bill was filed in 1912, and the references there to by that name during the proceedings in the case, seem to me insufficient to warrant any assumption that no form of flexible conduit could ever be lawfully made or sold by the defendant under that name, and therefore insufficient to justify the broad statements in the circulars that further manufacture and sale of Duraduct by the defendant had been enjoined, and that "dealers and makers of Duraduct" would also be liable. There was no mention of Duraduct in the opinion of this court, nor in the decree entered, nor in the injunction issued by the District Court in conformity therewith.

For these reasons I am obliged to dissent.

UNITED ELECTRIC CO. v. CREAMERY PACKAGE MFG. CO. et al.

(District Court, E. D. Wisconsin. June 9, 1916.)

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—VACUUM CLEANER.

The Dillon reissue patent, No. 13,352 (original No. 1,005.005), for a vacuum cleaner, although for an improvement on a prior device and comprising a combination of old elements, discloses patentable invention, in that it rendered the prior device for the first time efficient and workable; also *held* infringed.

In Equity. Suit by the United Electric Company against the Creamery Package Manufacturing Company and others. On final hearing. Decree for complainant.

See, also, (D. C.) 203 Fed. 53.

Complainant, owner of Dillon reissue patent 13,352, dated January 9, 1912, for improvement in vacuum cleaners, charges defendant with infringement.

The invention, as disclosed in the specification and claims, is as follows:

Specification.

"The invention relates to vacuum cleaners including an electric motor, a suction fan, and a separating-chamber communicating with a plurality of inlet-openings adapted to communicate with the tubular shanks of suction-nozzles. Such machines are designed and sold for the use of one or two or some other particular number of suction-nozzles at the same time, and it is desirable for practical reasons to construct the fan with a greater capacity than necessary to create the proper suction in the shanks of the particular number of nozzles which may be used; and it is also desirable for economy to make the motor with only a little greater capacity than necessary to create such suction. In the operation of these machines difficulty has been experienced when more than the particular number of inlet-openings have been purposely or accidentally used or opened at the same time, growing out of the fact that the work of the fan and the load on the motor will be so increased as to burn out the motor. This difficulty is overcome by providing a partition between the fan chamber and the inlet-openings with an orifice therein of substantially the same cross-area as the combined cross-areas of the openings in the particular number of suction-nozzles which may be used, thus limiting the amount of air which can be drawn into the fan to the amount of air which may properly be drawn through the shanks of such particular nozzles.

"The invention thus described as embodied in a stationary vacuum cleaner is illustrated in the accompanying drawings, forming part thereof.

"Figure 1 is a side elevation of the vacuum cleaning machine, with some parts broken away to show interior details; and figure 2 an elevation section of the electric motor, the fan blower, and the upper part of the separating-chamber.

"Similar numerals refer to similar parts throughout the drawings.

"The machine includes the separating-chamber *1* within the cylindric case *2*, the fan chambers *3* within the blower case *4*, and the fan *5* located in the fan chamber and secured on the lower end of the spindle *6* of the electric motor *7* which is secured on the blower case.

"The inlet-opening *8* of the collecting-chamber is provided in the cylindric case *2*, and communicates with the main conduit *9*, which is preferably extended inward or adjacent to the wall of a building (not shown), and is provided with a plurality of inlet-openings *10* normally closed by the valves *11*, for use in cleaning the various apartments of the building. One or more suction-nozzles, as *12*, are provided, and the tubular shanks *13* thereof are preferably extended as by the tubular handle *14* and the flexible

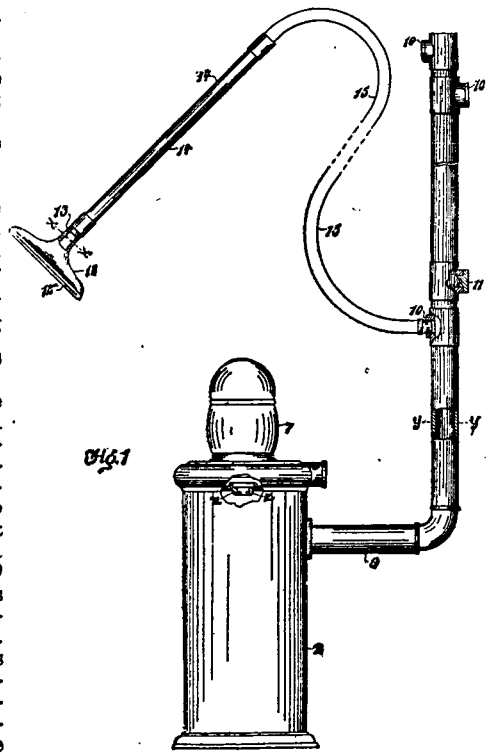


Fig. 1

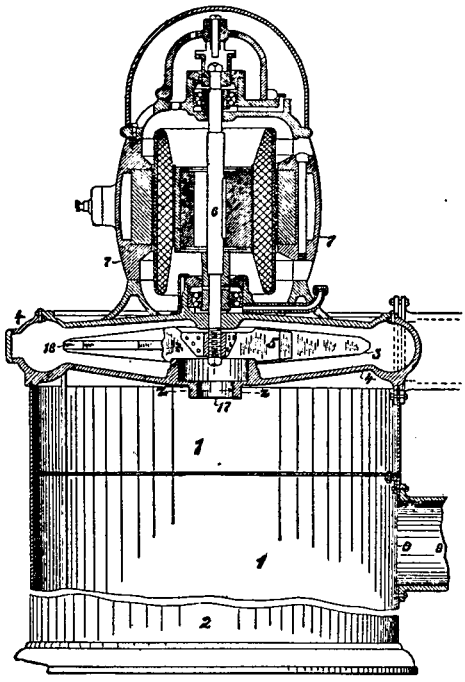


Fig. 2.

tube *15*, and the free ends of the flexible tubular extensions are adapted to be entered into or otherwise connected with one of the inlet-openings *10* when the valve thereof is open or removed, whereby the nozzle communicates with the collecting-chamber through said conduit.

"The cross-areas as at *x*—*x* of the opening in the shank of each nozzle is suitably proportioned to the area of the opening of the inlet slot *12a* of the nozzle to properly perform the work thereof, and substantially the same size of opening prevails throughout the nozzle-shank, the tubular extensions thereof, and the communicating inlet-opening. The cross-area as at *y*—*y* of the main conduit is preferably made much larger than the combined cross-areas of the openings in the particular number of nozzle-shanks designed to be operated at one time, which enlargement is made for the purpose of decreasing the resistance and friction caused by the flow of air through the main conduit, the same being generally extended a considerable distance from the machine to the various inlet-openings. For the purpose of reducing frictional resistance in the fan *5* at the speed adopted for operating the machine, the same is likewise made considerably larger in capacity, that is, the peripheral outlet slot *16* is widened to make a considerably larger outlet area than the combined areas of the openings in the shanks of the particular number of nozzles to be used at the same time; and this slot is so widened for the further purpose of freely passing articles of refuse which may be drawn through the fan, and which would otherwise lodge in and clog the slot. And the motor 7 is designed and adapted to normally rotate the fan at the adopted rate of speed, and as such speed of rotation to properly perform the work necessary to create the proper vacuum or suction in the tubular shanks of the particular number of nozzles which may be properly used.

"The orifice *17* which constitutes the inlet to the fan chamber is provided in the partition separating this chamber from the collecting-chamber, and, for the purpose of this invention, the cross-area, as at *z*—*z* of this orifice, is made substantially equal to the combined cross-areas of the openings of the particular number of nozzles designed to be used at one time, so that the fan can only take in the amount of air which properly passes through the shanks of such particular number of nozzles, and therefore the capacity of the motor cannot be overloaded to injure or to burn it out."

Claims.

"1. A vacuum cleaner including a separating-chamber having a plurality of valved inlet-openings communicating therewith, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the separating-chamber and

the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks.

"2. A vacuum cleaner including a separating-chamber having a plurality of valved inlet-openings communicating therewith, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the inlet-openings and the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks.

"3. A vacuum cleaner including a separating-chamber with a communicating conduit having a plurality of valved inlet-openings therein, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the separating-chamber and the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks.

"4. A vacuum cleaner including a separating-chamber with a communicating conduit having a plurality of valved inlet-openings therein, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the inlet-openings and the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks.

"5. A vacuum cleaner including a separating-chamber with a communicating conduit having a plurality of valved inlet-openings therein, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the separating-chamber and the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks, the cross-area of the conduit being greater than the combined cross-areas of said particular number of nozzle-shanks.

"6. A vacuum cleaner including a separating-chamber with a communicating conduit having a plurality of valved inlet-openings therein, suction-nozzles having tubular shanks adapted to be connected with the inlet-openings, a suction fan having a capacity greater than that required for the combined cross-areas of a particular number of nozzle-shanks, a motor connected with the fan having a capacity substantially equal to the requirements of said particular number of nozzle-shanks, and a partition between the inlet-openings and the fan having an orifice therein with a cross-area substantially equal to the combined cross-areas of said particular number of nozzle-shanks, the cross-area of the conduit being greater than the combined cross-areas of said particular number of nozzle-shanks.

"7. A vacuum cleaner including a separating-chamber having a nozzle conduit communicating therewith, a suction fan adjacent to the chamber with an intervening partition having a communicating orifice therein, and a motor in operative connection with the fan; the conduit and the fan being of greater capacity than the motor, and the size of the orifice being proportioned to the capacity of the motor.

"8. A vacuum cleaner including a nozzle conduit, a suction fan having a case with an inlet orifice in communication with the conduit, and a motor in operative connection with the fan; the conduit and the fan being of greater

capacity than the motor, and the size of the orifice being proportioned to the capacity of the motor.

"9. A vacuum cleaner including a separating-chamber, a suction fan and a motor in operative connection, there being a partition having a communicating orifice between the chamber and the fan; the fan being of greater capacity than the motor, and the size of the orifice being proportioned to the capacity of the motor.

"10. A vacuum cleaner including a suction fan having a case with an inlet orifice therein, and a motor in operative connection with the fan; the fan being of greater capacity than the motor, and the orifice being proportioned to the capacity of the motor."

Harry Frease, of Canton, Ohio, and Erwin & Wheeler, of Milwaukee, Wis., for plaintiff.

Luther L. Miller, Charles C. Linthicum, and Lincoln B. Smith, all of Chicago, Ill., for defendants.

GEIGER, District Judge (after stating the facts as above). The parties are agreed that, whatever may appear in the art or industry of vacuum or pneumatic cleaning, no substantial successes had been achieved until the advent of the Kenney patent, 847,947, issued in 1907, upon application filed in 1901. This concurrence finds further support in the view taken, upon consideration, by the House of Lords, of Booth's British patent, issued in 1901. The general survey of the art as found in the opinions filed in the latter case, is helpful in determining the scope of the present inquiry so far as it concerns the patentable novelty, or the quality of Dillon's structure. Thus it is observed:

"It is admitted that under the patent [Booth's], the extraction is satisfactory and thorough, and that while other persons, including the patentee, had been attempting to solve the problem of the complete removal of dust from articles like carpets, remaining in situ, all such attempts had substantially failed."

Again:

"In the present case, the attempted solution of the problem by a fan and by an ejector are very amply proven to have been inefficient, wasteful, and futile. The evidence is quite plain on that subject, and when, the problem having been thus before men's minds and a solution having been anxiously and repeatedly attempted and failed, I think, although not per se conclusive, it goes a long way to satisfy the mind as to the presence of invention, when Booth's attempt, under the patent now assailed, was accompanied by complete and satisfactory success."

Lord Mersey said:

"The claim is for a combination consisting of three things, namely, an extracting implement, a power-driven suction pump, and a dust-collecting apparatus. It is truly said that none of these three things was a novelty at the date of the patent, and it is also truly said that it required no ingenuity to place them side by side. But the evidence, I think, shows that they are not merely placed side by side, but that they are fitted and worked together in combination in such a manner as to produce one machine which is both novel and useful. * * * The combination does its work well, and the machine is admittedly a practical success. No earlier contrivance having the same object in view has been anything but a failure. This circumstance may not be conclusive, in law, in favor of the patentee, but it goes a long way to prove that there is invention. * * *"

Complainant's proofs respecting the art as developed prior and subsequently to the advent of the Kenney patent are quite elaborate, and

its contention, in brief, is: That when Goughnour (who, defendant claims, invented, if any one did, whatever Dillon claims) in 1909 disclosed his invention, there were two assumptions dominant in the endeavors of all seeking to perfect a vacuum cleaning machine: (1) That high vacuum was essential to success; and (2) that a centrifugal fan was not adequate for its production. And complainant readily concedes to Goughnour a large forward step in the art through his contribution of a new form of fan. Whether the so-called high vacuum cleaning systems produced successful machines is not, so plaintiff concedes, repugnant to the claims or merit on the part of either Goughnour or Dillon, because their endeavors were directed to avoiding deficiencies of the so-called high vacuum principle. Thus, while it is conceded that when a high vacuum is created, such vacuum and its resultant suction is extended to the nozzle, it is not maintainable at that point without expenditure of power at all time equal to exhausting from the apparatus the precise volume entering upon release of the suction. That is to say, the power to exhaust must, at all times, be present to meet the inrush of air displacing the vacuum. Now, Goughnour, in directing his effort to remedy this, devised a fan, whose general structure is now well known in the art, which is of the centrifugal type, with two converging walls forming substantially uniform air passages, and concededly having a capacity of producing a continuous movement of an air volume at great velocity through the apparatus.

So, too, in meeting the claims made by defendants, the basic contention of complainant with respect to the particular art of vacuum cleaning is that it must be distinguished from ordinary dust-collecting or pneumatic conveyors; that it combines the act of *collecting* with that of *extracting* dust and dirt from fabrics. Therefore the organization of a structure must be efficient in both these aspects. Complainant gives to Goughnour the credit of recognizing that efficiency. To meet these combined requisites depends, not so much upon the *amount* of vacuum which can be created in the apparatus, or at the operating tool or nozzle, but rather upon the *constancy* and *continuity* of a volume sufficient both for extraction and collection; that the cleaning is not produced by the quantum of vacuum pressure, but by the continuity and constancy of the volume of air passing through a fabric, or upon or along a surface to be cleaned. Complainant further credits Goughnour with a new collecting tank into whose upper part the dust-laden air is admitted, and from whose upper end the air is drawn directly into the eye of the fan, thus permitting a gravity separation of dust from the air, and thereby dispensing with filtering means; that his fan permitted the use of suction-nozzles with wider slots, tubes and hose with larger diameters than those permitted with high vacuum exhausting pumps; that the saving of power as well as the protection of electric motors in their use in the modern air-cleaning apparatus, is to be credited to Goughnour in preventing: (1) An excess of vacuum; (2) a decrease in consumption of power when the suction-nozzle is closed; (3) and the prevention of loss of power by a filtering wall, by air slipping or by frictional contact.

The efforts of Goughnour culminated, late in 1909, in the commercial development of what is known as the Goughnour power machine, and, shortly thereafter, the Goughnour Tuec machines were brought out. The ensuing year brought out 600 of these machines, and they achieved what appeared, initially, to be decided success. A reference to this period may be helpful in view of complainant's insistence respecting its bearing upon the quality of Dillon's discovery. The displacement, at this early stage, of competitors' apparatus in the market by complainants is proved; but with it is also the proof respecting the failure of the Tuec to maintain its position among users. In a great majority of instances the apparatus became crippled through the burning out of the electric motor, and as a result of this situation, imminent failure threatened complainant "because no suitable means had been discovered or devised for protecting the machine against inherent tendency to destroy itself." This seems, in the proofs, to have developed as a defect or deficiency in the Goughnour construction, and, during the year preceding Dillon's disclosure, was the occasion of close and rather unremitting experimental endeavor directed to its remedy. Thus small holes were made in the bottom of the bearing head to help ventilate the motor; the motor case was changed; slots were put in the top to afford ventilation. Later a new style of fan was devised, it was changed by closing the eye of the outer wall of such fan, and the inlet-opening in the lower wall was reduced; again, the diameter and the peripheral outlet of the fan were modified by reduction.

Now, if complainant's proofs respecting its own experience amount to anything, they support its claim that during this period Goughnour had demonstrated the feasibility of a centrifugal fan operating on a low-pressure principle, provided the machine or apparatus would stand the strain at the motor end. By this is not meant that he discovered the centrifugal fan, nor the principles of pneumatics inhering in its use. But the record here does show that his labors produced a new combination in air-cleaning apparatus.

Up to this point it may be conceded that Dillon had contributed nothing which, being in his present patent, is to *his* credit as an inventor; and defendant, to support its contention of invalidity, makes the broad claim that, beginning with 1869 (McGaffey's patent), all the elements of Dillon's claims are found in the art; the rotary fan, a separating-chamber, the vertical stand-pipe with openings, the suction-nozzles, the acknowledged status of the Kenney patents, the electric motor, and, lastly, the Goughnour fan embodied in his patent granted in 1911 upon an application filed in 1909. The defendant's conclusion is therefore thus stated in its brief:

"It thus appears that all of the actual physical elements of the Dillon construction are all old and have all been used in the prior art in the same combination and for the same purpose. *None of the prior art patents referred to, however, contains any restriction as to the relative capacity of the fan, inlet orifice, and the motor, and nothing concerning the substantial equality of the cross-area of the inlet orifice* and the cross-areas of the nozzle-shanks. So far as these vacuum cleaner patents are concerned, Dillon's contribution to the art consisted in making the inlet orifice of the fan substantially equal to the cross-areas of the nozzle-shanks intended to be used at one time so as to limit the power demand on the motor; but this was also old, old in the

vacuum cleaning art, and well known to those who were employed in installing such devices and in experimenting generally with the use of suction fans."

If, therefore, Goughnour did disclose a new organization of elements—and the proofs show that his combination was new—is Dillon entitled to recognition as an inventor for making as a minimum of contribution what the defendants concede to him? Can he claim to have produced something which was lacking when Goughnour's work was finished, and which has turned to good account all that Goughnour and his predecessors had done? The proofs, in my judgment, show that Goughnour, with all his labors, had failed to make a combination that could stand the strain of use. Whether the precise trouble was caused by clogging of the fan, by the amount of air going through the fan, or by other causes, may be indefinitely debated. The fact remains that, in all experiments made prior to December, 1910, the pneumatic principle now embodied in Dillon's patent had not been resorted to as a possible remedy for the difficulties attending plaintiff's machines in the hands of users. Nor ought it, in my judgment, to detract from the quality of Dillon's act as inventive, to point out that, despite the tribulations of plaintiff, the Sturtevant patent, issued more than 40 years ago on a centrifugal blower, may have pointed out this matter of relationship between inlet pipes and the blower opening; or that engineers in experiments had recognized the propriety of maintaining a relation between the inlet orifices and the fan capacity, because of its effect upon power consumption; or that in dust-collecting apparatus in factories, the principle had received recognition. The accomplishment of Dillon—assuming it to be no more than defendants concede it to be—is subject, justly, to recognition as inventive, within the doctrines of Air Brake Co. v. Christensen Engineering Co. (C. C.) 123 Fed. 306, Gen. Electric Co. v. Hartman, 187 Fed. 131, 109 C. C. A. 49, Toledo Comp. Scale Co. v. Computing Scale Co., 208 Fed. 410, 125 C. C. A. 622, and other cases cited by counsel. If the record here showed that Goughnour had solved the problems arising out of the breaking down of the machines; that after altering his fan construction no further trouble was experienced—a question quite different than the one before us might be presented. As it is, the record shows that Dillon's act overcame the deficiencies, and I think he is entitled to credit as an inventor, no matter how much credit may be due to Goughnour for *his* development. Were there doubt on this, the proofs respecting the success of the apparatus, its acceptability, as shown by sales, would solve such doubt.

Coming to the issue of infringement, a comparison of defendants' apparatus with complainant's, and with the patent structure, one is at first led to wonder, not how a charge of infringement is to be substantiated but rather how it can be avoided. For example, identity of suction-nozzles in respect of shape, size of slot, diameter of the shank; length, diameter, and shape of ends of tubular handles; length, diameter, structure, fittings of hose; diameter of suction tubes; the separating tank in its material structure; the size, shape of parts, diameter of exhaust pipe of the fan-casing; the size, conical shape, the

width of peripheral outlet slot; the reduced inlet orifice of the fan—these as well as the size, general appearance, even as to the coat of paint, are not only established but appear on mere inspection and comparison. The differences apparent are the *shape* of the dust-collecting tank and the position given to the fan casing and the motor. Now, as I view the proofs in the case, the real and only question of infringement is that arising upon the contention of defendants, of their substantial variation from the patent structure which arises through the change attempted in the subsequent patent granted to Benbrook and Campbell. It is true that such subsequent patent is not evidence of infringement, but it is equally true that the only substantial differences claimed between defendants' and the patent, as well as plaintiff's commercial devices, are the very ones which are claimed in such later patent as disclosing the point of distinction.

By recurring to Dillon's specifications and claims, it will be observed that his point of greatest stress is the recognition and maintenance, substantially, of relations there specified, between the inlet orifice, the fan, the motor, and the nozzle openings. That the defendants recognized this, and no doubt can be entertained (in view of their relationship to the plaintiff at the time they applied for a patent) that they were speaking directly to Dillon's structure, is shown by the following excerpts from their patent specifications:

"By the above-described arrangement of adjustable sleeve in connection with the intake opening of the fan-casing it is apparent that after the apparatus is set up, by removal of the cap *16*, said throat-sleeve may be adjusted to regulate the intake opening to the fan in proportion to the number of suction-nozzles that may be used at the same time in the operation of the device. Thus the intake orifice is predeterminedly set with respect to the number of tools to be operated whereby the amount of air drawn into the fan is limited accordingly. Hence great economy in the construction of the machine is effected, due to the fact that a single machine may be designed and utilized for one or a series of suction-nozzles without special construction or variations." Lines 12 to 29, p. 2.

"We are aware that vacuum apparatus of this general character have been utilized wherein a partition between the fan-chamber and inlet-opening is provided with an orifice that is substantially the same in cross-sectional area as the combined cross-sectional area of the number of openings in the stand-pipe for attaching suction-nozzles, thus limiting the amount of air which can be drawn into the fan to the amount of air which may properly be drawn through the shanks of the particular number of nozzles. This construction requires specially designed machines in each instance for accomplishing the desired result whereby our apparatus as previously described, being arranged with an adjustable air intake without respect to the cross-sectional area of the partition in the separator, can be used for one or more suction-nozzles by a simple adjustment." Lines 43 to 63, p. 2.

It seems clear that defendants, in constructing their machines, have done the very thing which they above aim to do—not, as suggested, rejected Dillon's disclosure, but *adopted* it, and, by means of an adjustable sleeve upon the orifice and a conical projection on the fan, endeavored to evade it by claiming that through these there is a substantial departure from a fixed relation of the orifice, ascribed to Dillon. Each of the claims of their patent industriously includes, as an element, a section chamber "provided with a discharge opening and an air inlet-opening of *unrelated areas*," but couples therewith (for ex-

ample claims 1 and 6) *adjustable means*, or an adjustable *sleeve* for regulating the "flow of air through the chamber." It is my judgment that this is as palpable an attempt to merely color Dillon's disclosure as was condemned in the Tire Chain Cases. Defendants, in attempting to distinguish from the latter cases, say:

"The case at bar does not fall within that class, since the adjustment is made at the factory, and then the adjustable device is bolted up in the interior of the machine, where the purchaser *is not even aware* of its existence; and the complainant has utterly *failed to show the position of the adjustable sleeve* at the time of sale."

This amounts, in substance, to saying that the machines of defendants, as they put them out, purposely ignore exact relations taught by Dillon; that they purposely ignore proportions, but that they provide means for fixing either, as efficiency may from time to time dictate. Therefore, because the machine when put out *may not* then have fixed relations or proportions within the reading of Dillon's claims, and because the purchaser may be actually ignorant of the means provided for getting within the range of such claims, there is no infringement. This would afford an easy method of covering infringement—a complete frustration of the Tire Chain Case doctrine.

Without analysis of the proofs submitted by defendants respecting the detail construction of their various machines, the conclusion seems irresistible that all embody the very construction for which Dillon was given credit in his patent, and that they infringe its various claims.

The contention that the reissue patent is invalid because of its inclusion of the last four claims is, in my judgment, unsound. Dillon, certainly, as against the present defendants, is entitled to liberality in respect of his disclosure in his original specifications. It cannot be urged that the Commissioner of Patents did not acquire and have jurisdiction to entertain the application for reissue. That is to say, it does not appear that there was not a proper showing of inadvertence or the like as a basis for entertaining the application. Nor is there a suggestion of laches during which intervening rights accrued which should bar exercise of the jurisdiction. Giving to his specifications and original claims the liberality to which they are entitled, the demonstration offered by complainant, respecting the coincidence of claims 6 to 10, with the invention or its parts disclosed in such original specifications, is entirely tenable. Computing Scale Co. v. Computing Scale Co., supra.

The plaintiff is entitled to a decree, adjudging the patent valid and infringed.

PITTSBURGH IRON & STEEL FOUNDRIES CO. v. SEAMAN-SLEETH CO.

(District Court, W. D. Pennsylvania. October 13, 1916.)

No. 55.

1. PATENTS ⟸157(1)—CONSTRUCTION—"ESSENTIALLY"—"SUBSTANTIALLY."
The word "essentially" is not a synonym for "substantially," and, when used in a patent claim, means something essential or indispensably necessary.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⟸157(1).
For other definitions, see Words and Phrases, First and Second Series, Essentially; Substantially.]

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ALLOY OF IRON.
The Speer and Forster patent, No. 1,071,364, for an alloy of iron in which chromium, nickel, silicon, and carbon, in small, but varying, proportions, are essential ingredients, is void for anticipation and lack of novelty; also *held* not infringed if conceded validity.

3. WORDS AND PHRASES—"ALLOY."
An "alloy" is a mixture or combination of metals while in state of fusion.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Alloy.]

4. WORDS AND PHRASES—"ESSENTIAL."
"Essential" means indispensably necessary; important in the highest degree; requisite.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Essential.]

5. WORDS AND PHRASES—"ESSENCE."
The word "essence" means that without which a thing cannot be itself.
[Ed. Note.—For other definitions, see Words and Phrases, Essence.]

6. WORDS AND PHRASES—"CONTROL OF CARBON."
What is ordinarily meant by the "control of carbon" appears to be such a chemical action upon the carbon in an alloy as will keep it largely in a combined graphitic state.

In Equity. Suit by the Pittsburgh Iron & Steel Foundries Company against the Seaman-Sleeth Company. On final hearing. Decree for defendant.

F. W. Winter and F. N. Barber, both of Pittsburgh, Pa., for plaintiff.

C. M. Clarke, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This is a patent case. The plaintiff and the defendant are both corporations of the state of Pennsylvania, have their principal offices and foundries in this district, and are competitors with respect to their respective products of various kinds, but especially with respect to rolls which are used in forming and finishing rails, beams, and other forms of steel, and perhaps of other metals.

The patent in suit is United States patent No. 1,071,364, issued August 26, 1913, to James Ramsey Speer and William L. Forster, assignors of the plaintiff, for "alloy of iron." The plaintiff charges the

defendant with infringing its rights under said patent by the use of the alloy therein disclosed.

The defenses are that the patent is invalid and void, because the alloy of iron covered by the patent had been in public use and on sale in the United States for more than two years prior to the application of the patent, because the same had been patented and described in printed publications prior to the same period, and because the subject-matter of the letters patent does not involve invention; and further it is insisted that there is no infringement on the part of the defendant.

[3] As an alloy is a mixture or combination of metals while they are in the state of fusion, it was to be expected that many analyses would be the subject of consideration in the disposition of this case. The patent in suit itself contains five separate analyses. The analyses offered by the plaintiff as tending to show infringement are reasonably few in number, but the analyses offered on the part of the defendant as tending to show the state of the prior art are very numerous.

Of the two claims of the patent in suit, one only is in issue which reads as follows:

1. "As a new article of manufacture, an alloy comprising essentially silicon, .10% to 2.00%; chromium, .5% to 1.50%; nickel, .25% to 1.00%; sulphur, not exceeding .05%; phosphorus, not exceeding .12%; manganese, not exceeding .45%; total carbon, 1.25% to 3.50%; and iron approximately sufficient to complete the 100%."

[1, 4, 5] We notice in the claim, after the word "alloy," the words "comprising essentially." The use of those words in their ordinary meaning tends to convey the idea that any alloy which did not contain the several metals named in the claim and within the limits of the percentages therein stated would not be the alloy of the patent. "Essentially" means the "state or quality of being essential." "Essential" means "indispensably necessary; important in the highest degree; requisite." The word "essence," from which both said words are derived, means "that without which a thing cannot be itself." The word "essentially" is not a synonym for "substantially." The use of both words by the patentees is found in the second claim of the patent, which is not in litigation, and cannot there be deemed, even by the patentees, to have been intended as synonymous.

[2] It appears in the claim that there are seven separate metals which are to be expected in the alloy in addition to iron. The percentages of the metals, when compared with iron, are very small, but as between themselves they have quite a large range. With respect to three of the metals, to wit, sulphur, phosphorus, and manganese, the minimum amount is not disclosed, while the respective maximum percentages are sulphur .05, phosphorus .12, and manganese .45. Because, therefore, with respect to these three metals, the minimum is not expressed, it is reasonably concluded that their relation to the other metals was not deemed important, except that they should not exceed the respective percentages disclosed as the maximum limits. Nowhere in the specifications or in the evidence on the part of the plaintiff is emphasis placed upon the value of either of those three named elements. In the original first claim filed with the application for the patent in suit there is the statement that "manganese, sulphur and phosphorus are held uni-

formly low approaching the standard for steel, in order to reduce their undesirable effects." Mr. Speer, on the witness stand, referring to the same three elements, said:

"They exist in our product, as they do in other products of iron and steel, especially steel," and that "our effort was to keep them as uniformly low as was reasonably consistent with good manufacturing practice."

It is therefore reasonable to conclude that they were made parts of the alloy of the patent merely because they were found in all steels to a greater or less extent, and for that reason only were elements *essential* to the production of the metal which the patentees believed to be new.

Excluding, therefore, the said three metals, and as well also iron, which is necessarily the main constituent of the alloy, we have left four other metals which are essential, in accordance with the instructions of the patent, to give to the alloy the characteristics which the patentees claim it possesses. Because the words "nickel" and "chromium" and the words "silicon" and "carbon" occur in the specification, respectively, in apparent association, we have given a relative proximity to such terms in the following rearrangement of the five several analyses set forth in the patent, all of which come within the ranges of percentages found in the claim in suit:

(a)	Chromium	1.05	Silicon	.60	Sulphur .03
					Phosphorus .043
	Nickel	.50	Carbon	2.13	Manganese .30
(b)	Chromium	.85	Silicon	1.55	Sulphur .023
					Phosphorus .096
	Nickel	.43	Carbon	2.93	Manganese .45
(c)	Chromium	.85	Silicon	1.70	Sulphur .023
					Phosphorus .096
	Nickel	.43	Carbon	3.20	Manganese .45
(d)	Chromium	.90	Silicon	.70	Sulphur .033
					Phosphorus .040
	Nickel	.50	Carbon	1.88	Manganese .250
(e)	Chromium	.90	Silicon	.60	Sulphur .033
					Phosphorus .073
	Nickel	.53	Carbon	2.26	Manganese .22

The general statement is made in the specification in reference to castings containing the elements and percentages specified in claim 1 that:

"Such castings show remarkable results in tensile and transverse strength, and in wearing and abrasive qualities, and in resistance to the action of heat."

With respect to the product from the uses of the analysis above marked "(a)," this statement is made:

"The result was a very hard resistant material, requiring the lowest lathe speed and the highest grade of tool steel to dress it."

With respect to the product arrived at from the uses of the analyses above marked "(b)" and "(c)," this statement is made:

"The results obtained in these cases were materials which were hard and resistant to the action of abrasion under heat, and susceptible of being forged."

With respect to the alloy arrived at from the analyses above marked "(d)" and "(e)," it is stated:

"It can be forged into a lathe tool or drill and properly annealed and hardened. The performance of these tools is the equal of the highest grade of crucible tool steel." "The tensile strength of the first sample showed 91,220 pounds per square inch without any change in area, elongation, or elastic limit other than would be observed in cast iron."

The differences between the products of the analyses "(d)" and "(e)" are not stated in the patent. It will be noticed that the differences between those two analyses are merely that the nickel is .50, silicon .70, and carbon 1.88 in "(d)," and nickel .53, silicon .60, and carbon 2.26 in "(e)." If there is a difference between the products respectively obtained by the use of "(d)" and "(e)," what is that difference, and why does it exist? The same may be observed with respect to analyses "(b)" and "(c)." The only differences are silicon 1.55 and carbon 2.93 in "(b)," and silicon 1.70 and carbon 3.20 in "(c)." That the patent contemplates differences in the products from the use of different analyses is plain, else why are definite analyses and products mentioned, and why is claim 2 limited to definite percentages? Yet there is nothing in the patent to show why, when the percentages of one metal is increased, others are not ratably increased also. The specification says:

"We have found that in casting various sections the amount of silicon and carbon must be varied in accordance with general foundry practice to get the desired results; and it is for that reason that the maximum and minimum limits which we have given for silicon and total carbon are quite far apart. In fact, we would not limit ourselves to the amount of silicon and carbon mentioned herein, in case the castings to be made should have a very enormous section."

Again, the specification contains these words:

"It has been claimed that iron castings containing nickel and chromium with a high total carbon content are of value. From our experience we do not attach any importance to the increased carbon contained in such castings, made with the combination of alloys similar to ours; at least, no such results can be obtained in tensile and transverse strengths as we have obtained in our alloy, where the control of the carbon is not complete in connection with the control of the silicon, depending upon the size and sections of the casting. It has also been claimed that manganese over .25% in steel metal mixtures containing nickel and chromium is most harmful, where hardness and toughness are the special qualities required. From our experience we do not attach any importance to this claim for low manganese in a higher carbon alloy such as ours. Our best results are obtained, as previously stated, by a complete control of the carbon and silicon; the manganese varying in usual limits without any serious effect."

From the patent alone it might be inferred that what the patentees meant by the control of the carbon and silicon was the ordinary control well known by steel makers, whereby carbon and silicon are worked out of the charge in the furnace as indicated by the following language from the specification:

"If, however, our materials in the raw material charge do not run in analyses as figured, it may be necessary for us to hold a charge in the furnace a sufficient length of time to eliminate elements, as silicon and carbon, which run higher than we have figured them."

Mr. Speer, however, testified to a control of carbon by chromium. He states that the plaintiff depends for the hard surface on the chromium in combination with carbon, and refers to the equilibrium of the chromium and carbon in the plaintiff's product. There appears to be no such suggestion in the patent. In other words, there does not appear to be satisfactory information in the patent with respect to the relations of silicon and carbon with each other, or with the metals nickel and chromium. Nor does there appear to be any disclosure in the patent with respect to the relation between nickel and chromium, or why they should be varied in any way to secure products of different degrees of hardness or toughness, which should be respectively imparted to the iron or steel in which they are alloyed. While the court has grave doubts about the sufficiency of the disclosure of the patent in suit, it is not deemed necessary to determine that question, because the court must hold, from all the evidence, that there was no invention or discovery by the patentees.

It is admitted by the plaintiffs, as well as disclosed by a mass of evidence introduced by the defendant, that every one of the metals which together form the plaintiff's alloy were used together in the prior art in varying percentages. It was proven that many of the alloys thus found in the prior art contained the different metals within the range of percentages required to meet claim 1 of the patent in suit. Many more of the prior art alloys contained many of the metals within some of the percentages in said claim, while some of the metals were beyond the range fixed by the claim. That chromium added to an alloy of iron tended to increase the hardness, that nickel added to an alloy of iron tended to produce a toughness, that both together secured the best results when the chromium exceeded the nickel in about the same relation as disclosed by the patent in suit, were not only believed, but well known to those skilled in the art prior to the time Speer and Forster claimed invention, which was about the close of the year 1911.

[6] The control of the carbon was well known and practiced long prior to the time of their alleged invention. What is ordinarily meant by the control of carbon appears to be such a chemical action upon the carbon in an alloy as will keep it largely in a combined graphitic state. The increase of the combined carbon is obtained, not only from its association in the metal during fusion, but from the treatment of the alloy at the time of casting or by a subsequent heat treatment.

It appears in the evidence that prior to 1911 the defendants, adopting the views of many others, confirmed by the results of their own experiments, decided that sulphur could be used with advantage at a higher limit of percentage than many persons skilled in the art had prior to that time believed, and that the increased percentage of sulphur tended to give a hardness to the metal in which it was alloyed and to increase the combined carbon. The defendant, therefore,

found it advantageous to use that which the patentees deemed to be injurious above a certain limit, and which they stated to be an essential element of their alloy because it could not be avoided. The introduction of increased sulphur in the defendant's roll prior to the time of the alleged discovery by the patentees was deliberate, because they found that it seemed to unite with iron in such a way that a peculiarly dense and effective surface was provided on metals which were to be used for abrasive or rolling purposes. This mechanically fine surface appears to be an advantage to the defendant in addition to the increase of hardness which is secured. If the defendant, notwithstanding its use of sulphur in its alloy beyond the limits of the claim of the patent, may nevertheless be held to be an infringer of such claim, why may not early analyses, which vary from the limits fixed by the claim in issue in a similarly slight degree, be deemed anticipations of such claim?

In the year 1910 the Pennsylvania Steel Company began to make and to advertise extensively by means of pamphlets what is designated by them as "Mayari steel." This steel is made from iron ore found in the island of Cuba. This ore contains the valuable alloying elements, nickel and chromium. The steel made therefrom by that company contained, not only such said elements, but others used in the alloy of the patent. It was natural that the manufacturers of the country would experiment with such steel. The defendant, early in 1911, began to use it. The plaintiff at some later date acquired some. Other corporations did likewise. Where the percentages of the metals composing the alloy known as Mayari were found to be too large, other steels were used with it which did not contain such particular metals which were not desired in an excessive quantity, and results were obtained which seemed clearly to have anticipated the alloy of the patent in suit. Some of these alloys contained all the metals of the alloy of the patent and within all the ranges of claim 1 except with respect to one or perhaps two of the percentages named in such claim. In February, 1911, certain steel was made by the Pennsylvania Steel Company for the Carpenter Steel Company. The analysis of that steel was:

Color carbon	1.27
Carbon by combustion	1.22
Silicon	.09
Phosphorus	.007
Sulphur	.034
Manganese	.40
Copper	.19
Chromium	.60
Nickel	.45

It will be observed that there is copper mentioned in that analysis, which is not mentioned in claim 1 of the patent; but in the specification of the patent there is an allowance of metals in addition to those specified in the claim, as appears from the following language:

"With or without small quantities of copper, tungsten and other rare metals which do not materially affect the character of the alloy as hereinafter described."

Therefore, excluding further consideration of the copper in said analysis, we find a slight variation of .01 of 1 per cent. less silicon than specified in claim 1 and very slightly less carbon than is required therein. This is an illustration of how precarious the situation of the plaintiff has become by insisting that said alloy was not an anticipation of the patent in suit, and that the product of the defendant, which had sulphur in a more marked variation from the limit disclosed in the claim, infringed.

As an example of a prior patent giving an analysis for the making of steel, United States patent No. 735,365, issued to Robert Abbot Hadfield on August 4, 1903, may be referred to. That patent discloses the use of all the metals forming the alloy of the patent in suit, giving variations within the range of which may be a combination which is within the range of the percentages of claim 1 of the patent in suit.

From the prior publications offered in evidence one only is selected, and that is what is termed in the evidence "the Borchers article." That article is mainly a description of a furnace, which is a furnace preferred by the patentees, according to their specification, for the making of their alloy. It was published in January of 1910. Not only does the writer describe the furnace, but he gives a number of analyses of products which were obtained by its use. His seventeenth analysis is an alloy which he designates as having the property of tool steel. The percentages are as follows:

Total carbon	1.251
Manganese	.258
Silicon	.176
Chromium	1.21
Nickel	.49
Phosphorus	.008
Sulphur	.01

The foregoing is in all respects within claim 1.

It is unnecessary to go further into the consideration of the patent in suit. As we have seen, it is met in the prior art by manufacturers, by patents, and by publications. It is therefore void.

There is, moreover, another reason why the patent should be declared void. If the alloy of the patent be all that plaintiff claims it to be, yet it differs from previous alloys only in degree. It is the result of continued experimentation by the patentees, and by their predecessors, and by some of their contemporaries, with all of the elements of the alloy in various relationships and proportions. The plaintiff, according to the testimony of Mr. Speer, is still experimenting with them. That it may use proportions as the result of the patentee's experiments different from those used by others does not entitle it to the protection of a patent. Brady Brass Co. v. Ajax Metal Co. (C. C. A. 3d Cir.) 160 Fed. 84, 87 C. C. A. 240.

Had this court been able to sustain the patent, still the conclusion would have to be reached that the defendant does not infringe. We have already indicated the reason for this to be the use by the defendant of sulphur in marked excess of the percentage required by the claim in suit. The defendant realizes that there is a value in the use of sulphur, while the patentees deemed it of no value, but rather

harmful. It is unnecessary to refer in detail to the analyses of the rolls made and sold by the defendant.

In every aspect of the case the court is obliged to find against the plaintiff, and therefore directs that a decree may be presented dismissing the bill at the plaintiff's cost.

R. E. DIETZ CO. v. BURR & STARKWEATHER CO.

(District Court, W. D. New York. June 15, 1916.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DESIGN FOR LANTERN.
The McArthur design patent, No. 42,488, for a design for a tubular lantern, is limited to the shape or configuration of the chimney, and does not include the lantern as a whole, and, as so limited, is void for lack of invention; also *held* not infringed.

2. PATENTS ⟸28—INVENTION—DESIGNS.
In design patents, as in mechanical patents, the test of invention is whether the new combination is within the province of the ordinary workman.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. ⟸ 28.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TUBULAR LANTERN.
The Erb patent, No. 962,135, and the Bergener patent, No. 962,114, each for a tubular lantern, both *held* to disclose invention, and both *held* infringed.

4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TUBULAR LANTERN.
The Bergener patent, No. 1,072,688, for a tubular lantern having a new and novel device for raising and lowering the globe, while limited to the specific device described, was not anticipated, and discloses invention; also *held* infringed.

In Equity. Suit by the R. E. Dietz Company against the Burr & Starkweather Company. On final hearing. Decree for complainant in part, and for defendant in part.

Wilhelm & Parker, of Buffalo, N. Y. (Arthur E. Parsons, of Syracuse, N. Y., and Charles W. Parker and Karl E. Wilhelm, both of Buffalo, N. Y., of counsel), for plaintiff.

Church & Rich, of Rochester, N. Y., and Whittemore, Hulbert & Whittemore, of Detroit, Mich. (Frederick F. Church, of Rochester, N. Y., and L. J. Whittemore, of Detroit, Mich., of counsel), for defendant.

HAZEL, District Judge. This is a suit in equity to enjoin infringement of four letters patent—design patent No. 42,488, dated May 7, 1912, to Warren McArthur, Jr., and mechanical patents Nos. 962,114 and 1,072,688, dated June 21, 1910, and September 9, 1913, respectively, to Charles Bergener, and patent No. 962,135, dated June 21, 1910, to Charles F. Erb. These patents all relate to tubular lanterns of the cold blast type, having a base, an oil fount, a burner underneath the globe, which engages at its top a chimney extending into or through a round casing or dome supported at the sides by tubing; the upper

ends thereof being attached to the dome or chimney, while the lower ends are made to communicate with the air chamber under the burner. The globe is supported by a plate resting upon the burner and having perforations through which the cold air enters, while the chimney also has small openings for admitting current to the inside of the lantern.

McArthur Patent, No. 42,488.

[1] This is a design patent, in which the specification reads as follows:

"The accompanying drawing represents a perspective view of a tubular lantern embodying this design. The characteristic feature of this design consists of the upwardly contracted or downwardly flaring shape of the chimney *A* which extends from the globe *B* to the top *C* of the lantern frame. I claim: The ornamental design for a tubular lantern as shown and described."

The patent, in my opinion, is limited to the shape or configuration of the chimney, or to that portion of the lantern extending from the globe to the apex of the lantern frame, and does not include the tubular lantern as a whole. The well-proportioned, bulbous globe was not an element of the design, and although the lantern has a pleasing appearance and is readily distinguished from prior tubular lanterns using pear-shaped globes, still its distinctiveness is appreciably due to the mechanical changes required for use with the shorter globe. To adapt the tubular lantern to such shorter globe, it was necessary to extend the chimney downwards, broadening it at the lower end to fit over the upper rim of the globe, at the same time retaining a narrow cylindrical top, which could be moved into or within the air chamber when the globe was raised or lowered by the use of the lifting device. To so change or alter the tubular lantern did not involve the exercise of the inventive faculty or of artistic ability. A skilled mechanic, having before him the Osborne patent, No. 248,878, and Defendant's Exhibit P, Ham Fire Chief Lantern, with its tapering or flaring chimney, could readily extend the ordinary lantern chimney downward and flare it to fit the short globe.

[2] The tubular lantern art was crowded at the time the design patent herein was granted, and there was little room for originality in design. In design patents, as in mechanical patents, the test of invention is whether the new combination is within the province of the ordinary workman. Steffens et al. v. Steiner et al. (C. C. A., Second Circuit) 232 Fed. 862, — C. C. A. —, decided February 15, 1916, and Strause Gas Iron Co. v. William M. Crane Co. (C. C. A., Second Circuit) 235 Fed. 126, — C. C. A. —, decided April 11, 1916. It is believed that any one wishing to adapt a tubular lantern chimney to a short globe would at once set about it by carrying the end of the chimney downward to bring it into juxtaposition with the top of the globe. At the trial I expressed the opinion that the design was not without merit, and I credited the lantern with an appearance distinctive from those of the prior art; but this was owing to the fact that at that time I had in mind the tubular lantern as a whole.

Erb Patent, No. 962,135, and Bergener Patent, No. 962,114.

[3] These patents describe improvements in tubular lanterns in which the frames are made of two stamped half tubes of sheet metal, in which are formed ribs for stiffening the tubes and for stretching the metal as it is being shaped in the dies, and which are then secured together by overlapping seams extending along the inner and outer edges of the half tubes. The single claim of the Erb patent reads:

"A tubular lantern having tubes composed of stamped half tubes of sheet metal which extend in a continuous piece from end to end and are provided between their ends at intervals with hollow transverse stiffening beads, said half tubes being joined on opposite sides by overlapped seams, substantially as set forth."

Claim 1, relied upon in the Bergener patent, reads:

"1. A tubular lantern having tubes which are each composed of two substantially half-round half tubes, stamped of sheet metal and secured together by seams on the inner and outer sides of the tubes, and each half tube being formed between said seams with a hollow longitudinal rib thrown out on the half-round surface of the half tube, substantially as set forth."

The proofs show that any novelty there may be in these patents resides in the adaptation of transverse and longitudinal beads to half tubes of lantern frames stamped from flat blanks to stiffen the tubes and prevent them from buckling. Of course, the use of beads, ribs, corrugations, or crimps, in metal or tin, for strengthening or stiffening, was an expedient as old as the art itself and had been applied to lanterns. The prior patents and publications in evidence show beads or ribs stamped into the metal for preventing the denting or injuring of the tube; but such two-piece lantern tubes often parted or buckled where they were joined together in the dies, resulting not infrequently in great wastage of tin plate.

The patentees herein were employés of the competing companies, which afterwards became complainant's predecessors, at the time the patents were granted, and each inventor independently sought to overcome said difficulties. Previously the C. T. Ham Manufacturing Company sold side lamps or single tube lanterns in which a half-round tube section only had been strengthened by corrugations or beads formed in the tin blank, and the Buhl Stamping Company, manufacturer of the lantern sold by defendant, had also previously manufactured lanterns with transverse beads in upright tubes; but such prior constructions and patents (Betts patent, No. 340,274, and Ham patent, No. 628,461) are not anticipatory. The lanterns constructed under such patents were not composed of half tubes joined together at their seams and extending in a continuous piece from end to end with transverse or lengthwise beads, as in the Erb and Bergener patents. In the Betts patent the upright tubes were provided at their upper ends with beads; but the beads were used to connect the parts together, and not to accomplish the objects of the patents in suit. So, also, in the Ham patent the beads were not projected outwardly beyond the surface of the top; their purpose being to make a small joint, and not to stiffen tubular half sections.

In the Orphy patent, No. 390,699, the half tubes are shown to have been made of single strips of metal, and not of two round half portions joined together. No doubt the corrugations or ribs of the Orphy patent were intended to stiffen the flat side of the tube; but their function was different from that of the ribs of the patents here considered, which were intended, not only to facilitate assembling, but also to retain the half tubes in position to prevent them from buckling while being seamed or joined together by the die or stamp. The inventions, true enough, are of modest character; but, as said by Judge Lacombe in Miehle Printing Press & Mfg. Co. v. Whitlock P. P. & M. Co., 223 Fed. 649, 139 C. C. A. 203:

"Patentable novelty is sometimes found in discovering what is the difficulty with an existing structure and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old and their adaptation to the new purpose involves no patentable novelty."

Moreover, the improvement seems to have been considered as fairly important, as shown by the popularity attained by the lanterns embodying it, together with the improvement described in the Bergener patent, hereinafter considered. The Buhl Stamping Company had manufactured tubular lanterns for many years prior to the inventions in question, and evidently failed to perceive that the operation of joining half tubes would be facilitated by putting in them either transverse or longitudinal beads. The defendants have unquestionably appropriated both inventions by embodying them in Buhl lantern No. 775.

Bergener Patent, No. 1,072,688.

[4] This patent is for a specific device for raising and lowering a lantern globe, supported at the bottom by a movable plate, which is raised or lowered by a lifting shaft extending across or around the plate. The lifting shaft is attached to the inside of one of the tubes, or part of the frame, and at one end has a projection or lever for rocking it, so as to raise and lower the globe-supporting plate, and to cooperate with a catch device arranged on the inner side of the side tube, to which it is firmly attached. The novelty of the invention rests in the lifting arrangement positioned between the side tube and the globe, and in the adaptation of the catch plate secured to the tube on the inner side thereof, and having an outwardly turned locking face against which the lever bears. The claims in issue are the fifth and seventh to fourteenth, inclusive. It will suffice to set out claim 5 which reads as follows:

"5. The combination with a tubular lantern frame and a globe support movable up and down therein, of a flexible transverse lifter shaft connected with said globe support and provided with a lifting lever, which is arranged on the inner side of one of the side tubes, and a catch plate secured to said tube on the inner side thereof and having an outwardly turned locking face, against which said lever bears with an inward pressure, substantially as set forth."

Claims 7 and 8 relate to details for attaching the catch device to the side tube by projecting the convex ends of the arms thereof into the tube, while claims 9 to 14 particularize the construction and arrangement of the catch or holding device.

As the prior art discloses somewhat similar instrumentalities for achieving the result of the patent in suit, the claims in controversy are limited to the specific forms and instrumentalities described for holding the globe on the plate and for raising or lowering and tilting the same. But in the prior art structures, the Schlafly and Everett devices, the lifting or locking device was attached to one side only of the lantern, and had no shaft extended across the lantern and under the globe-supporting plate. In structures having a lifting lever journaled in one side of the frame it was necessary to use a gage for determining the position of the bearings and catch plate, and for attaching the lift on the outside of the frame, while in the patent in suit the arrangement of the catch device on the inside enabled combining the catch plate and bearings with the frame, thus facilitating the adjustment thereof. The parts can be readily joined together and attached to the inner side of the tube by unskilled labor, while skilled labor was required to properly align and solder the lift and bearings on the outer side of the frame, as shown in the Everett patent, No. 815,276, and in the Dietz patent, No. 655,328.

Complainant also points out that, by putting the catch device on the inside of the tube, the lift or lever was in a protected position, while lifts placed on the outside of the frame were easily bent or disarranged by contact. These advantages were slight, but a new and novel result was nevertheless attained by the patent in suit.

Several prior patents and structures were cited by defendant to anticipate some, or all, of the claims in controversy, especial importance being attached to the Dietz and Everett patents; but as they related in the main to holding devices on the outside of the tube away from the shaft bearing, instead of on the inside near the globe, and as they were not formed in the same piece with bearing for the shaft as in complainant's patent, they are not anticipatory. Nor are there any features or elements shown in the prior patents or publications requiring voiding the claims in suit as mere aggregations.

The defendant, in its tubular lantern of the cold blast type, employs the precise structure described and claimed herein—i. e., the lifting shaft on the outside, and the catch arranged on the inside of the tube in the same way as in the Bergener patent—and the identical result is achieved.

Unfair competition was also alleged; but, as no actual deception was proved, this allegation will not be considered.

A decree may be entered for defendant, holding the McArthur patent, No. 42,488, invalid and not infringed, and patent to Erb, No. 962,135, and patents to Bergener, Nos. 962,114 and 1,072,688, valid and infringed by the defendant Burr & Starkweather Company, with two-thirds costs and disbursements.

TODD PROTECTOGRAPH CO. v. NEW ERA MFG. CO.

(District Court, E. D. Pennsylvania. November 2, 1916.)

No. 1567.

1. PATENTS ⟸297(2)—INFRINGEMENT—DECISION AS TO VALIDITY.
Rights granted by letters patent, whose validity has been adjudged by the courts, should thereafter be recognized and enforced, in so far as the legality of the patent is established, under the general doctrine of stare decisis, which is peculiarly applicable to patent cases; and the question of the legality of the patent should not be brought in issue in a subsequent proceeding, so as to in that manner obtain a review of an earlier decision.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 482; Dec. Dig. ⟸297(2).]

2. PATENTS ⟸289—INFRINGEMENT—RECOVERY—LACHES.
Though defendant's counsel advised him that complainant patentee had no rights, and defendant began to infringe on a large scale, defendant cannot defeat an injunction of the infringement on the ground of the patentee's laches, where the patentee did no act to entice defendant into the position of a trespasser.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467–469; Dec. Dig. ⟸289.]

3. PATENTS ⟸156—DISCLAIMER—NECESSITY.
Under Rev. St. § 4917 (Comp. St. 1913, § 9462), relating to disclaimers, a patentee cannot assert any rights under a patent until a disclaimer for an invalid claim is filed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 228; Dec. Dig. ⟸156.]

4. PATENTS ⟸156—PROCEEDINGS—VALIDITY—INFRINGEMENT.
In a previous suit involving the validity of a patent, it was not necessary to pass on a particular claim. The bill as to such claim was dismissed. *Held* that, in a subsequent infringement suit, where such claim was not involved, relief will not be denied until a disclaimer under such claim is filed, for a patentee is not required to file a disclaimer until there is a final ruling as to the invalidity of the particular claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 228; Dec. Dig. ⟸156.]

5. PATENTS ⟸312(1)—INFRINGEMENT—BURDEN OF PROOF.
Because a patent had before been infringed raises no inference that defendant was guilty of infringement, and the patentee has the burden of establishing the infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544, 545; Dec. Dig. ⟸312(1).]

6. PLEADING ⟸93(1)—DEFENSES—INCONSISTENT DEFENSE.
A pleader is bound at his peril to put in issue all of his defenses, and it is not essential that each defense be consistent with the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. ⟸93(1).]

7. PATENTS ⟸304—INFRINGEMENT—INJUNCTION.
Where a patent, the validity of which has been established, is shown to be infringed, the infringement will be temporarily enjoined, with leave to defendant to obtain a stay upon filing a bond for appeal.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⟸304.]

In Equity. Suit by the Todd Protectograph Company against the New Era Manufacturing Company. Sur motion for preliminary injunction. Motion granted.

Church & Rich, of Rochester, N. Y., and Cyrus N. Anderson, of Philadelphia, Pa., for plaintiff.

Joseph C. Fraley, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case and applied rulings may be thus formulated:

[1] Rights granted by letters patent, whose validity has been adjudged by the courts, should thereafter be recognized and enforced within the limitations of the necessary exceptions. There are no facts in this case which, on a motion for preliminary injunction, exclude this defendant from the operation of the general rule. The plaintiff was granted through the Patent Office the rights given by law to advance the policy of promoting invention by the stimulation of self-interest. The rights thus given were adjudged valid by the courts through the decree of the Circuit Court of Appeals (Whitaker v. Todd, 232 Fed. 714), and the claims now in issue sustained. As has often before been observed, a right of property is no right, unless the law by which it was conferred and recognized will sustain the owner in the assertion of it. On the face of this record, the plaintiff has not only a prima facie right to the remedy he invokes, but one which makes a strong appeal for its enforcement. The defendant, therefore, is properly called upon to supply the reason for its denial.

No one, of course, would be heard to assert that the determination of one case under its facts precludes another defendant from asserting his rights under a different state of facts. When, however, we are outside the domain of facts, and the law of a case has been once determined and settled, that law is no law unless it is of universal application, and the principles of its application are thereafter followed in all cases. The general doctrine of stare decisis is applicable in a peculiar sense to patent cases in which the validity of a patent, which has been once adjudged, is brought again in question. To gain an appellate effect by the bringing of a second action in the mere guise of a new action through the simple expedient of introducing a second infringer is an effort which ought not to be countenanced. This is so obvious that the principle is self-supporting, and is, of course, frankly accepted by counsel for defendant.

[2] The defense now urged is put upon grounds which will be considered in a different order and in a somewhat different form of statement from that in which they are discussed by counsel. One is what, for terseness of statement, may be presented as the defense of laches. It is asserted that the plaintiff, with full knowledge of defendant's infringement, has permitted it to assume such proportions that it would be inequitable now to stop it, because of the great loss which would be thereby entailed upon defendant. This may be answered by the observation that, if a patentee whose rights have been found is afforded no protection until the end of long and costly litigation and successive proceedings, all practical relief is

denied him. He cannot secure earlier relief until he has been through one such experience. If by any act of his an innocent defendant were enticed into the position of a trespasser, the aid of a chancellor might be refused to such a plaintiff. The mere size of the wrong done would not seem to justify its continuance. The fact that the wrongdoer was advised by his counsel that the patentee had no rights would not excuse the trespass. This defendant stands or falls by whether or not it is an infringer. The consequences of this it assumed and must accept.

[3, 4] Another defense is that based upon section 4917 of the Revised Statutes. If claim 5 of the patent were in issue here, the failure of the plaintiff to have secured an adjudication of its validity would be an answer to a motion for a preliminary injunction based upon the claim of right which was in turn based upon this claim of the patent. There was no adjudication of the invalidity of this claim. Such a finding was expressly refused. Counsel for plaintiff were willing to accept the consequences of the legal effect of a simple dismissal of their bill as to this claim, and it did not appear that defendant was entitled to a decree which went further.

The clearness and force with which this defense is presented calls for a word more. If claim 5 is invalid, it must be disclaimed, or the rights conferred by the letters patent are annulled. If invalid, no rights can be asserted until the disclaimer is made. If in the case of Whitaker v. Todd the invalidity of claim 5 was determined, plaintiff could not be permitted to rely upon the ruling of that case in part, and reject it in part. A patentee is not, however, obliged to accept any ruling not a final one of invalidity, and is not required to disclaim until there is such a finding. The decree in Whitaker v. Todd was supported by the finding of the validity of claims 1 and 3. It was not necessary to pass upon 5 or 8. Technically there was no finding as to claim 5, except in the dismissal of the bill. This did not necessarily involve a finding of invalidity. There was, therefore, no legal consequence, except the dismissal of that bill, and no legal necessity for plaintiff to appeal, as long as the findings on claims 1 and 3 would support the decree made. If the present bill was based upon claim 5, there would be no adjudication to support the motion for an injunction. As it is, that claim is not involved, and we do not know, except as a matter of opinion, whether it is valid or not.

[5-7] This brings us to another ground of defense, which may be expressed as a denial of infringement. There the plaintiff is on new ground. There no inference arises that the present defendant has infringed because it has been found that another defendant had so infringed. The infringement now asserted must be now shown. The plaintiff has submitted evidence of the fact. In passing upon the proofs, the inconsistency between this defense and the defense of laches may be more apparent than real. The failure of the owner of a patented device to warn the user of another device may be due to a sluggish assertion of his rights, or may be due to his knowledge that there has been no infringement in fact. More than this,

consistency is not one of the crown jewels of a pleader. He is bound at his peril to put in issue all his defenses. Where he introduces several, he is not held to make each consistent with every other one.

The question with which we are concerned is the narrow one of whether infringement so far appears as to justify the court in stopping the defendant pendente lite. The pinch of the argument (which from the deserved high reputation of counsel may be assumed to present the real pinch of the case) seems to come on the method of securing registration. The essential of such registration is one at the time of contact. In the Todd machine this was assured by keeping the parts in fitting position each with the other throughout the operation. In the Whitaker machine this idea of being always in the desired mating position was departed from, and the expedient resorted to of bringing the parts into proper position at the important moment through the operation of a cam.

We are not now required to find what the construction of the machine of the present defendant is; but it is sufficient for present purposes to find, as we do, that such infringement appears from the proofs as now submitted as to justify protecting the plaintiff until the facts may be fully developed and found. This brings us to the practical question of how this protection may be afforded. It may be done through an injunction. Some measure of it, at least, may be afforded by refusing or vacating the injunction upon defendant filing a counter bond. The latter may prove to be practically inadequate, and the result is best reached by allowing the writ upon bond being filed, with the allowance of a stay if an appeal is taken upon bond in like amount being entered for a supersedeas. Bond to be in $5,000.

UNITED STATES, to Use of JACKSON ORNAMENTAL IRON & BRONZE WORKS, v. BRENT et al.

UNITED STATES, to Use of CONKLING ARMSTRONG TERRA COTTA CO., v. SAME.

(District Court, W. D. South Carolina. August 8, 1916.)

1. PAYMENT ⇐47(1)—APPLICATION—SUBSEQUENT TRANSFER OF CREDIT BY AGREEMENT OF PARTIES—RIGHTS OF SURETY.

Where a debtor makes a payment to a creditor to whom he owes two separate accounts, without directing its application, he thereby consents that the creditor may apply it to either account; and, when it is applied to one, a surety for such account is at once discharged from liability pro tanto, whether he had notice of the payment or not, and the credit cannot thereafter be transferred without his consent, although his principal and the creditor agree to the transfer.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 127; Dec. Dig ⇐47(1).]

2. PRINCIPAL AND SURETY ⇐57—SURETY COMPANIES—RIGHT OF ACTION AGAINST REINSURER.

Where a surety company transferred its business and good will to another company, which assumed all of its outstanding contracts and agreed to fulfill its obligations on its bonds the same as though they had been

issued by itself, a beneficiary of a bond issued by the former company may maintain an action on the contract against the reinsurer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 101; Dec. Dig. ⊂⊃57.]

3. UNITED STATES ⊂⊃67(1)—CONTRACTOR'S BONDS—RIGHTS OF ASSIGNEE OF CLAIM.

An assignee of an account due for materials supplied to a subcontractor and used in the construction of a government building, through an assignment by the trustee in bankruptcy of the original creditor of all accounts with all securities whether legal or equitable, is entitled to the benefit of the bond given by the contractor pursuant to Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923).

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂⊃67(1).]

At Law. Action by the United States, for the use of the Jackson Ornamental Iron & Bronze Works, and by the United States, for the use of the Conkling Armstrong Terra Cotta Company, against W. J. Brent and others. On exceptions to master's report. Sustained in part, and overruled in part, with judgment for claimants.

Logan & Grace, of Charleston, S. C., for New York Central Iron Works Co.

Whaley, Barnwell & Grimball, of Charleston, S. C., for W. J. Brent Const. Co.

Smythe & Visanska, of Charleston, S. C., for National Surety Co.

Ansel & Harris, of Greenville, S. C., for Southwestern Surety Co.

JOHNSON, District Judge. This is an action brought on the bond of a contractor under the act of Congress of 1894, as amended by the act of February 24, 1905, to subject the principal and the surety to the payment of sums due to persons who furnished labor or materials in the construction of a public building at Gaffney, S. C., payment therefor not having been made. Proceedings were filed July 23, 1914, for the use of the Jackson Ornamental Iron & Bronze Works, claiming to be a party entitled to the benefit of the bond. There have been a number of interventions, setting up accounts for labor or materials and claiming the benefit of the bond. Some of these claims have been settled. There are left before the court for consideration two claims, namely: First, Jackson Ornamental Iron & Bronze Works; and, second, New York Central Iron Works Company, Incorporated.

The facts are as follows: W. J. Brent Construction Company made a contract with the United States for the erection of a public building, namely, a post office, in the town of Gaffney, in the Western district of South Carolina. On May 16, 1912, in order to secure the faithful performance of the contract, a bond was given by W. J. Brent Construction Company, with Empire State Surety Company as surety thereon. On October 16, 1912, the Treasury Department notified the contractor that the government had revoked the authority of Empire State Surety Company to sign bonds running to the United States and that other security must be given. On December 3, 1912, the

contractor gave another bond, in the sum of $23,000, with the Southwestern Surety Insurance Company as surety. This bond was made to cover all obligations theretofore or thereafter made in the erection of the Gaffney post office. On September 18, 1912, National Surety Company made a contract of reinsurance with the Empire State Insurance Company. By this contract, the National Surety Company agreed to repay the Empire State Insurance Company, its successors or assigns, any sums which said company might be liable to pay in consequence of default of the principals on certain bonds, including bond of the Brent Construction Company for the erection of the post office at Gaffney, S. C. On December 12, 1912, Empire State Insurance Company was placed in the hands of a receiver and its affairs liquidated, and it was finally dissolved September 23, 1913. W. J. Brent Construction Company also had a contract with the United States to erect a public building at Darlington, a town in the Eastern district of South Carolina. For the faithful performance of the Darlington contract, Brent Construction Company gave bond to the United States, with Fidelity Deposit Company as surety. Work on the post office at Darlington and work on the post office at Gaffney was going on at the same time. Jackson Ornamental Iron & Bronze Works furnished materials to Brent Construction Company for each of the buildings, and kept separate accounts on their books, charging to the Gaffney account materials furnished for the Gaffney post office, and charging to the Darlington account materials furnished for the Darlington post office. On July 8, 1913, W. J. Brent Construction Company remitted to Jackson Ornamental Iron & Bronze Works the sum of $250 in payment of its account. The construction company at that time was largely indebted to the Jackson Ornamental Iron & Bronze Works on both accounts. With the remittance the debtor gave no directions as to its application. Upon receiving it, the Jackson Ornamental Iron & Bronze Works applied it as a credit to the Gaffney account. Thereafter, on December 10, 1913, Jackson Ornamental Iron & Bronze Works received a statement from W. J. Brent Construction Company, by which it appeared that the construction company had placed the credit of the $250 on the Darlington job. Thereupon the Jackson Ornamental Iron & Bronze Works changed the credit on their books from the Gaffney account to the Darlington account, and wrote W. J. Brent Construction Company that they had already applied the money to the Gaffney account, but that in order that their books might correspond with those of the construction company, they had changed the credit from the Gaffney to the Darlington account. An action similar to this has been brought in the Eastern district for South Carolina against the contractor and the surety on the bond on account of the public building at Darlington. The contractor is bankrupt. Each surety claims the benefit of this $250 payment. The record shows that the special master in the Eastern district of South Carolina reports the credit should go to the Darlington account. The special master for the Western district of South Carolina reports that the credit should go to the Gaffney account. The only two questions in this claim before the court are: First, for what amount shall Jackson

Ornamental Iron & Bronze Works have judgment? Second, is the National Surety Company liable?

[1] The determination of the first question depends upon the application of the $250 payment. The debtor who pays his own money has the right to direct its application. If the debtor gives directions, his directions are controlling. If the debtor pays his creditor who has more than one claim and gives no directions as to the application, the creditor has the right to make the application, and whatever application the creditor makes is controlling. In neither case has the surety any control over the application. The decisions are not uniform in all the states as to the time within which the creditor may make the application. In South Carolina it is well settled that the creditor can exercise his right of application at any time before verdict or judgment. When payment has been made and applied, that completes the transaction. If payment is applied to a secured debt, the debt is extinguished pro tanto and to the extent of such payment the surety is discharged. Payment, once made and applied, cannot be recalled and otherwise applied without the consent of the surety. It is contended in this case that the surety knew nothing of this payment until long afterwards and that as the debtor and the creditor without any thought or suggestion of fraud practically agreed to the change in credit, it should stand. The answer to this contention is that the law does not require notice of partial payments or total payments to be given to the sureties. When a payment is made, it inures to the benefit of the surety whether he knows about it or not. It has been argued in this case that the change of credit from the Gaffney account to the Darlington account was tantamount to correcting a mistake, as the Brent Construction Company intended the payment to go to the Darlington account. There was no mistake. W. J. Brent Construction Company had a right to direct the application of the money. What W. J. Brent Construction Company may have intended to do is immaterial as it is an undisputed fact in this case that the W. J. Brent Construction Company did not direct the application of the payment. Failing to direct the application of the payment, the creditor had the right to make it and did make it. "As the tree falleth, so shall it lie." I stated above that while the doctrine in South Carolina allows the creditor until verdict or judgment to make his application, that does not, by any means, imply that he can change the application from time to time until verdict or judgment. I have not been able to find any authority which allowed an application once made to be changed. Of course a change could be made as between the debtor and creditor if no surety was involved, if they consented to it, or a change could be made where there is a surety, provided he consented. This in effect would be a new contract. In United States Fidelity & Guaranty Company v. Eichel, 219 Fed. 803, 135 C. C. A. 473, the parties sought to change an application of payment and the court declined to allow it. In Columbia Digger Company v. Rector (D. C.) 215 Fed. 618, the court said:

"Rector and Daly had a right to make application of this payment and, in the manner indicated, have done so. This operated instanter to discharge the liability of the sureties pro tanto and, while plaintiff and Rector and Daly

might thereafter, as between themselves, change the application of such payment, it would not operate to revive the extinguished obligations of the defendants."

That court proceeded to say:

"It is true, as a general proposition, that a surety cannot direct the application of payments made by its principal, and is bound by any application made by the principal and creditor, or either of them."

In the case of the United States v. Massachusetts Bonding & Insurance Company (D. C.) 198 Fed. 923, on a contractor's bond where the rights of the surety company were involved, it was held that, the application of credits having been once made by the parties, there was no authority to make any other application thereof. It is contended in this case that the debtor and creditor agreed upon the application that was made in December to the Darlington account. Did the debtor and creditor not agree to the application of the credit to the Gaffney account in July? It seems to the court that that is the only legal effect, for Brent Construction Company sent a check for $250 to the Jackson Ornamental Iron & Bronze Works without any direction as to its application, which was tantamount to saying, "We agree to whatever application you make," and the moment the Jackson Ornamental Iron & Bronze Works applied the credit to the Gaffney account, the legal effect was, in no manner, different from what it would have been if there had been a long parley preceding the application. The court holds, therefore, as a matter of law that the application of the payment having been made by the creditor to the Gaffney account, the account was extinguished pro tanto, and the surety is entitled to the benefit of such payment.

[2] The next question relates to the liability of the National Surety Company. The case is not without difficulty. The weight of authority seems to be that there is no privity between the assured and the reinsurer, and that therefore the assured has no cause of action against the reinsurer. There are, however, some very strong cases upholding the contrary view. The case now under consideration is not an ordinary reinsurance contract. It is something more. It is the taking over of practically the entire business and good will of one insurance company by another as is manifest from the following language found in the contract:

"Whereas the Empire State Surety Company has heretofore issued and now has outstanding unexpired surety and fidelity bonds; * * * whereas the Empire State Surety Company wishes to relieve itself from any and all liability that may accrue under said unexpired bonds * * * and the National Surety Company is willing to assume such liability in the manner hereinafter stated; therefore this agreement witnesses: * * * The National Surety Company agrees to fulfill all the obligations of the Empire State Surety Company under the bonds * * * and agrees to adjust all claims arising as aforesaid under any of such bonds * * * at its own expense and to pay as aforesaid all valid claims arising under said bonds * * * in accordance with their terms and conditions occurring after August 22, 1912. The Empire State Surety Company hereby transfers to the National Surety Company all its rights, interests, powers, and privileges under all such bonds * * * so that the National Surety Company may act thereon in all respects as if it had itself issued such bonds * * * and said National Surety Company may

give any notices in relation to said bonds that the Empire State Surety Company could give, such notices to be given in its own name or in the name of the Empire State Surety Company or both; and all notices, proofs of loss, and other papers which the obligees in any of the said bonds shall have the right to give to the Empire State Surety Company may be given in like manner to the National Surety Company with like effect as if given to the Empire State Surety Company, it being the intention of this agreement that the National Surety Company shall take the place of the Empire State Surety Company as to all said unexpired bonds * * * in all respects with regard to all obligations therein, etc. * * * The Empire State Surety Company also sells, assigns, and transfers to the National Surety Company all its good will and interest of every kind in the bonds herein reinsured; and also sells and transfers to the National Surety Company all its applications, indemnity agreements, collateral, and other like securities, schedules or statements, papers, records, books of records and accounts, and the covers containing the same of every kind relating to the bonds * * * hereby reinsured and further agrees to forthwith furnish to the National Surety Company a list of its agents and managers representing it, together with the transcripts of the agency contracts made with such agents. * * * The Empire State Surety Company further agrees with the National Surety Company that it may appoint as its agents all or any of the agents of the Empire State Surety Company with whom the National Surety Company may desire to negotiate."

The contract further provided that all losses should be adjusted and all litigation conducted by the National Surety Company at its own expense. Under circumstances of this kind it seems clear from the meager authority that I can find that the reinsurer assumes to the insured all the obligations of the original obligor. Under the subject of Reinsurance, in 24 American & English Encyclopedia of Law at page 258, it is said:

"The holder of an original policy of insurance acquires a right of action on a contract of reinsurance where the original insurer sells its business and good will to another company and the latter company in consideration thereof reinsures the risk of the first company and contracts to pay the losses under the first company's outstanding policies."

As authority for that statement the author refers to a number of decisions in Kansas, Wisconsin, New York, and California. It seems to me that this doctrine is sound.

Some question has been made about the National Surety Company not being properly made a party to this suit by the Jackson Ornamental Iron & Bronze Works. There were two actions, in one of which the surety company was made a party; and, as the statute limits the number of actions that can be brought to one, his honor, Judge Smith, consolidated the two actions. The National Surety Company is before the court, asserting its rights with great vigor and ability. The court certainly has jurisdiction of the subject-matter; the only purpose in serving the defendants would be to bring them into the court. I should be inclined to hold that, if the pleadings of the Jackson Ornamental Iron & Bronze Works are not sufficient to allow them to amend nunc pro tunc.

Wherefore it is ordered, adjudged, and decreed that the exceptions to the report of the standing master be overruled, and his report confirmed as to the claim of the Jackson Ornamental Iron & Bronze Works, and that the defendants do pay to the Jackson Ornamental

Iron & Bronze Works the sum of $537.96, with interest thereon at 7 per cent. from the 1st day of July, 1913.

[3] The branch of the case with reference to the claim of the New York Central Iron Works Company, Incorporated, comes up upon exceptions to the report of the standing master, and grows out of the construction of the post office building at Gaffney, S. C. W. J. Brent Construction Company, the contractors, contracted with Earle & Cook Company to furnish and install the boiler and certain attachments. Earle & Cook Company ordered the boiler and attachments from New York Central Iron Works. The latter company shipped the boiler and attachments to Earle & Cook Company, care W. J. Brent Construction Company, Gaffney, S. C. These articles were installed in the post office building, and were accepted by the government. Earle & Cook Company became bankrupt. New York Central Iron Works Company also became bankrupt, and the trustee in bankruptcy of said corporation sold to Odello D. McCardell, Daniel A. Stickel, and L. D. Perry, Creditors' Protective Committee, all the book accounts, trade lists and records, accounts and bills receivable, claims in equity, bankruptcy, and all other securities held in fee or in trust. This creditors' committee in turn sold and assigned all of the book accounts, rights, and equities of the New York Central Iron Works Company to the New York Central Iron Works Company, Incorporated, the intervener here. The purchase price of the boiler and attachments was $399. It was shipped in August, 1912.

The questions arising from this state of facts are these: First, is the New York Central Iron Works Company, Incorporated, the intervener, the owner of the account due by Earle & Cook Company to the New York Central Iron Works Company? Second, is the intervener entitled to the benefit of the surety bonds required by the government under the acts of Congress for the protection of those who furnish materials and labor in public buildings?

In answer to the first question, the court finds as a fact that the intervener herein is the owner of a claim of $399 for material furnished in the construction of the United States post office at Gaffney, S. C., and that the material was furnished at the instance of Earle & Cook Company, a subcontractor, by the New York Central Iron Works Company and no part of the claim has been paid.

The court believes that the intervener is entitled to the benefit of the surety bond. In the case of Hill v. Surety Company, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, the court held that the statute was highly remedial, and should be given a liberal construction. In every case that has been before the court involving this statute, that same spirit has been manifested. The purpose of the enactment of the law was to insure payment for labor and materials entering into public buildings. The court in the Hill Case said:

> The "language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. There is no language in the statute, nor in the bond which is therein authorized, limiting the right of recovery to those who furnish material or labor directly to the contractor but all persons supplying the contractor

with labor or materials in the prosecution of the work provided for in the contract ought to be protected. The source of the labor or material is not indicated, or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished. If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors, and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated. * * * It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnished work or labor to go into the structure."

Our own Circuit Court of Appeals, speaking through Judge Pritchard, in construing this act of Congress, held:

"It was the manifest purpose of Congress in the enactment of this statute to protect the rights of parties performing labor as well as those supplying material for the construction of public buildings. Such being the case, this act should be interpreted so as to effectuate the intent of Congress by giving the same a liberal construction." Bankers' Surety Company v. Maxwell, 222 Fed. 797, 138 C. C. A. 345.

The master has held that the intervener has not brought himself within the terms of the act of Congress for the protection of those who furnish labor and materials for the construction of public buildings. There can be no doubt under the authorities about the right of the New York Central Iron Works Company which furnished the boiler to recover on the contractor's bond. The trustee succeeded to all the rights of the New York Central Iron Works Company. It surely would not be seriously contended that the trustee in succeeding to all the rights of the bankrupt could not avail himself of a security which the bankrupt had for the payment of a claim. Nor can it be doubted that when the trustee in bankruptcy sold the accounts with all securities, whether legal or equitable, the purchasers succeeded to all the rights of the trustee, and when the purchasers from the trustee in turn sold and assigned the accounts with all the rights and securities legal and equitable to the New York Central Iron Works Company, Incorporated, that company stood in the same plight as the original New York Central Iron Works Company which furnished the material that was used in the construction of the Gaffney post office. I know of no law that prevents the assignment of an account like this. Even if the assignment had not specifically provided that all securities, whether legal or equitable, should pass, it seems that the only logical position is that the security did pass with the account to the assignee. The assignor never held the bond. It was held in trust by the Secretary of the Treasury for the benefit of those who furnished labor and materials in the construction of the building. The purpose of the statute is to insure payment of accounts for labor and materials furnished the contractor in the erection of public buildings. The bond is in lieu of the security afforded in practically all the states by what is known as Mechanic's Lien Law. It has been repeatedly held that the ac-

counts for labor and materials under the Mechanic's Lien Law may be assigned, and that the assignee is entitled to all the benefits of the law.

I hold, therefore, that the intervener is the owner of the claim of the New York Central Iron Works Company, and is entitled to the benefit of the bond given by the contractor and deposited with the Secretary of the Treasury. Wherefore it is ordered, adjudged, and decreed that the report of the standing master of this court be overruled, and that the defendants do pay to the New York Central Iron Works Company, Incorporated, the sum of $399, with interest thereon from January 1, 1913, at 7 per cent., and, if this and the preceding claim be not paid by the defendants in 30 days, that the Jackson Ornamental Iron & Bronze Works and the New York Central Iron Works Company, Incorporated, each shall enter judgment and issue execution thereon.

SOUTHERN TRANSP. CO. v. UNKEL.

(District Court, E. D. Pennsylvania. November 1, 1916.)

No. 26.

1. SHIPPING ⊜175—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"DEFAULT."

The word "default," as used in a provision of a charter party fixing the lay days for loading and requiring payment of a fixed sum per day "for each and every day's detention by default" of the charterer, merely means the failure to load within the stipulated time, and does not involve any question of fault or negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 572–574; Dec. Dig. ⊜175.

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

2. SHIPPING ⊜179—CHARTER—DEMURRAGE—DEFAULT.

Unusually cold weather during the loading of a barge in January, which in fact delayed the loading, but did not actually prevent it, did not relieve the charterer from liability for demurrage, under a provision requiring him to pay demurrage for delay through his default.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 586; Dec. Dig. ⊜179.]

3. SHIPPING ⊜180—DEMURRAGE—LIABILITY OF CHARTERER.

Where a vessel was bound by her charter to deliver her cargo of lumber at the rail, from where it was to be taken by the charterer, and the consignee of the cargo was stevedore for both vessel and charterer, the charterer cannot be held liable for demurrage because of delay in unloading, due to the stevedore's refusal at first to handle the lumber because of its icy condition, and therefore to perform the initial duty of the vessel to deliver it at the rail.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 587, 588; Dec. Dig. ⊜180.]

In Admiralty. Suit by the Southern Transportation Company against F. W. Unkel. Decree for libelant.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.
Howard M. Long, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. This controversy had its beginnings in two charter parties entered into, one on November 13, 1914, for the charter of the barge Pamunky; the other on December 12, 1914, for the charter of the barge Wicomico. The barges were to carry lumber from Acquia Creek, Va., to Philadelphia. The place of shipment in the first charter party is given as Quantico, and in the other as Cole Landing. The pertinent provisions of the contracts will be stated in connection with the points raised.

The claim of the libel is for demurrage, dead freight, and towage. The issues as raised by the pleadings, supported by the evidence and discussed by counsel, can be best presented by treating each barge as a claimant, and considering the claims of each separately. The claim of the Pamunky, as set forth in the libel, is this:

The contract was that the respondent should "load and stow" the lumber on the barge. The "lay days," or days allowed for loading, should "commence from the time the captain reports his barge ready to receive cargo." Ten of such lay days were allowed the charterer, but Sundays and legal holidays were to be excluded from the count, and also days on which the charterer was "prevented from working the major portion of the day by rain." The vessel was to be paid $2.25 per M. for carrying the lumber and $15 per day "for each and every day's detention by default" of the charterer. The claim is for $52.50 for such demurrage. The barge is averred to have been reported by her master ready to receive cargo at 12 o'clock noon November 18, 1914, and that her loading was not completed until 2:40 p. m. December 4, 1914, whereby a demurrage charge for 3½ days had accrued to the vessel.

The answer sets up some defenses not necessary to consider. The sufficient one is the averment of the loading having been completed on December 1, 1914, and within the 10 lay days allowed by the charter party. It will perhaps contribute to the clarity of the discussion if the position of the litigants is stated and then the facts found from the evidence. If the vessel was in fact loaded by noon of December 1st, the days would, on the vessel's own count, be just 10. The libelant claims, however, this half day and additional days for December 2d, 3d, and 4th, making the total count of 3½ days. The merit of the claim turns upon when the loading of the boat was completed.

The real defense is that the loading was done by December 1st, so that the boat was free to sail within the 10 days allowed for loading. The fact would clearly seem to be, and is so found, so far as the charterer was concerned, that the loading was so completed. Mr. Wallace had some lumber of his own, not sold to the charterer, which he desired to ship to Philadelphia, on the venture that Mr. Unkel might be persuaded to buy it, and that, if he did not, some one else would. There was not much of it, either in quantity or value. The captain agreed that it might be put aboard and carried on the account of Mr. Wallace, if put aboard before the vessel was ready to sail. There was

good judgment in his doing so, and therefore nothing improbable in the statement that he had so done. He could safely take it and thereby earn additional freight. The putting of it aboard involved no delay. The agent of the charterer could have no valid objections, if it was understood that it was not loaded on his account, nor made the subject of a demurrage charge. At all events, under this view of the facts, there was "no detention" of the vessel due to the "default" of the charterer.

The testimony of the captain is not inconsistent with this version. He admits he had planned to take his boat away on December 1st. He admits he said he would sail as soon as the tug arrived, whether all of the lumber was then aboard or not. He does not deny that the quantity of lumber put aboard after December 1st was small and of little value. All that he denies is that he expressed any opinion as to when the lay days expired. In view of the attitude of his employers when his testimony was given, this is not surprising. Under the finding of fact made, the libel as to this item of claim should be dismissed. The question of when the lay days began to run is eliminated by the finding of facts.

Presenting, in like manner, the claim made on behalf of the Wicomico, we have first a similar claim for demurrage at Cole Landing, the port of loading. The provisions of the charter party are the same, except that the lay days are reduced to 7. The pertinent averments of the libel are these: The captain reported the vessel ready to receive cargo at 11:30 a. m. December 18, 1914. The loading was completed January 11, 1915. The elapsed time, excluding the excepted days, was 10 days. A demurrage claim of $45 for the 3 days' excess is in consequence made.

The answer again sets up a defense not necessary to consider. It further claims that on the demurrage days the charterer was prevented from loading by unusual and exceptionally severe weather conditions, which should excuse him of default. The tabulations made by counsel of the days of loading relieve the case of all questions except the one of weather conditions, other than the one stipulated in the contract, excusing the detention of the vessel. The libel claims only 3 days' delay. The days other than the first, and other than Sundays, holidays, and rainy days, exceed the demurrage demanded. If the excuse advanced is a valid one, the detention is brought easily within the number of lay days allowed. This, then, is the only question arising out of this branch of the case.

There is no dispute over the facts. The weather conditions were severe. They are found to be unusual in the sense in which we speak of unusually cold weather. They were not, however, unusual in the sense of being extraordinary, or beyond what they might be expected to be in that latitude. They did in fact practically interfere with and reasonably delay the loading. There was no actual prevention of the loading, but the difficulties presented were such that the finding might well be made that the delay in proceeding with it was not due to lack of diligence on the part of the charterer. In other words, if the demurrage claim had as its basis damages due to the culpable negligence

of the charterer, the finding of negligence might be refused. This claim, on the contrary, however, has a contract basis. The charterer agreed to load in a given number of days. If this were done, the vessel would be earning freight. If it were not done, the vessel would be idle for the overtime, and for this the charterer agreed to pay a per diem allowance. On the face of the contract it might be argued that the contract was not to pay for all the delay, but only for such part as was due to the "default" of the charterer, and default suggests the idea of culpability.

[1, 2] The real question is the interpretation of the clause "detention by default of the charterer," and either party, according as that meaning is, may retort upon the other, "If you wished the contract to be different from what it is, you should have so contracted." Discussion of the question is uncalled for, because it has been expressly ruled. "Default" does not mean "fault," but merely failure to comply with the agreement to complete the loading in the stipulated time. The only exception is vis major or its equivalent. If the case of Burrill v. Crossman (D. C.) 65 Fed. 104, had been consulted and its experience in the appellate courts as reported in 69 Fed. 747, 16 C. C. A. 381, and 179 U. S. 106, 21 Sup. Ct. 38, 45 L. Ed. 106, traced, and this had been followed up by consulting a table of the cases in which this case was cited, there would have been no occasion to submit this branch of the instant case for decision. This part of libelant's claim is allowed on the authority of Burrill v. Crossman.

[3] Another claim is made for $82.50, demurrage at the port for unloading. The averments of the libel are that the master reported the vessel as ready to discharge at 7:30 a. m. January 25, 1915, and that she was not discharged until 12:20 p. m. February 4, 1915. This is charged to have involved a detention of 5½ days. The terms of the charter party governing unloading vary, from those affecting loading, only in the respect that the time allowance is not measured by days, but by the quantity unloaded. It is made 50,000 feet per day. The cargo is averred to have been 162,258 feet, and the lay days to have expired January 29, 1915. The answer is based upon a further provision of the charter party that, while it was made the duty of the charterer to load and stow the lumber, it was also made the duty of the vessel to "discharge to rail." This duty it is averred the vessel did not fulfill until January 28, 1915, and not until then did the lay days commence to run against the charterer. There was, in consequence, no demurrage payable.

There is no substantial disagreement between the parties as to the facts in evidence. The dispute is as to an inference of fact to be drawn. In the view presented by libelant, the delay was caused by the refusal of the consignees to receive the lumber. The charterer says it was due to the fact that the vessel neglected to discharge. Whatever difficulty there may be thought to be in disposing of this branch of the case arises out of the fact that the consignees fulfilled the triune characters of consignees, stevedores for the ship, and stevedores for the charterer. The solution of the problem presented is to be found by the simple expedient of separating them into those different per-

sons. The initial cause of the controversy was the condition of the cargo. The lumber was frozen fast and hard. This made it difficult and expensive to handle. It was consigned to the Pearson & Ludachler Lumber Company. They demurred for several days over taking the lumber because of its frozen condition. Had they taken it, or done what they finally did, the present dispute would not have arisen. Had they been only and merely consignees, the delay would have been chargeable to the charterer. They were, however, more than consignees. They were the vessel's stevedores, to do its work of delivering the lumber at the rail of the ship. This they refused to do. Had they been only and merely the ship stevedores, again, clearly the barge could not have made the charterer pay for a delay which the vessel had itself caused. This is clear on principle and under all the authorities. They were, however, more than stevedores for the vessel. They were the stevedores of the charterer, and as such took the lumber at the rail when delivered to them by the vessel. Here, too, it is again clear that, had they been merely and only the stevedores of the charterer, and had they detained the vessel by delaying the unloading, the charterer must pay for the detention.

As they were in fact all three of these characters, on whom, then, does the loss fall? The answer would seem to be found in this: They were the vessel in discharging the cargo to the rail. The vessel, therefore, refused to so discharge as it was bound by the charter party to do. The charterer, through them, as stevedores, completed the unloading by taking the lumber at the rail. This, it is true he was bound to do, but as his failure was caused by the vessel it cannot visit the loss consequences upon him. This part of the libel claim is disallowed, and the libel as to it is dismissed. It might perhaps be well to explain the apparent difference in the count of days. This is due to the fact that the libelant (as on its theory it would have been justified in doing) counts all the days after January 29th, whether rainy or not. The respondent throws out (as on the facts as found it was justified in doing) the rainy days.

The dead freight claim of $57.75 is for a failure to supply the vessel with a full cargo. The freight earnings were based upon the size of the cargo. The charter party bound the charterer to furnish a full vessel load, both "under and on deck." The answer sets up the very complete defense, if true, that all and more cargo was supplied to the vessel than the captain would permit to be put aboard. To get the point of impingement of the libel and answer, we must bring in a further provision of the charter party and certain bearing facts. The charterer selected the loading place. It was his place to see that such loading place gave a sufficient depth of water. Between the loading place provided and the channel of the Potomac river was a sand bar. The charterer had the lumber to put on the barge. There is no dispute over the fact that the captain stopped the loading when the barge was down to 8 feet. The suggestions made as to lightering are of little value to us under the facts of the case. The facts do not require a ruling of whether the charterer was bound to deliver, or the vessel to receive, cargo outside the bar. The vessel was to be loaded at a berth to be

provided, and the berth provided was at the landing, not outside the bar. The question to be decided is one of fact, and depends upon what took place at the wharf.

Neither the proofs nor the discussion of them are as helpful as they might have been made. The fact that the lumber was on the wharf to be loaded, that it was to the interest of the shipper to get it to market, and that the voyage was made without complaint of a shortage of cargo would so suggest a full one that we are justified in looking to the vessel for evidence of some facts justifying a finding of default on the part of the charterer. The first fact we have is the log book. Its statement is: "Finished loading at 2 p. m. Tuesday, January 11, 1915." This is consistent with a full load, and, although it may not confute a complaint of shortage, it certainly does not suggest it. The next fact we have is that the barge was then drawing 8 feet of water aft and 7 feet 4 inches forward. The positive evidence of the defense is that the captain then stopped the loading because the barge was hogged. If he so refused to take more cargo, the vessel surely cannot justly claim a shortage. The captain admits the refusal. He admits, also, that the barge had in fact hogged. He asserts that the refusal was because he could not get over the bar with more load, and that he offered to take more cargo if lightered to him outside the bar. There was evidence, also, that the owner had asked that additional cargo be lightered. The lightering question is, however, of no importance, if the master might have received, but refused, more cargo because of the condition of the barge. The weight of the evidence is that he did so refuse, and the admitted condition of the boat gives to the other evidence the added weight of probability. The libel is dismissed, also, as to this claim.

This brings us to the final claim for towage. No defense is interposed, except to the amount of the charge, because the services of another boat might have been secured for less. There is no need to extend this already overlong statement of findings, further than to make a finding of $30 in favor of the libelant.

A decree awarding the libelant $45 for demurrage and $30 for towage, with interest, and dismissing the other claims of the libel, may be submitted. The libelant is allowed one-half its costs, and the respondent is allowed the expense of the taking of his depositions, so far as taxable as costs.

UNITED STATES v. LELES.

(District Court, N. D. California, Second Division. September 30, 1916.)

No. 180.

1. ALIENS ⊜62—NATURALIZATION—RIGHT TO ADMISSION TO CITIZENSHIP—"GOOD MORAL CHARACTER."

Under Naturalization Act June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 597 (Comp. St. 1913, § 4352), requiring the proof to show to the satisfaction of the court admitting the alien to citizenship that he had five years previous to his application resided continuously within the United States, and that during such time he had behaved as a man of good moral

character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, an alien applying for naturalization, who had been conducting an immoral resort, a sort of combination saloon and rooming house, frequented to his knowledge by immoral characters, is not entitled to citizenship, for the act not only requires that the alien personally conduct himself as a person of good moral character, but that he be such in fact.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.

For other definitions, see Words and Phrases, First and Second Series. Good Moral Character.]

2. ALIENS ⟸68—NATURALIZATION—DEPOSITIONS.

Under Naturalization Act June 29, 1906, § 9 (section 4368), declaring that every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and that upon final hearing the applicant and witnesses shall be examined under oath before the court, a state court, hearing a petition for naturalization, cannot appoint its stenographer a commissioner to take the depositions of absent witnesses as to the applicant's good character; the proceeding not falling within the exception of section 10.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

3. ALIENS ⟸68—NATURALIZATION PROCEEDINGS—CURE OF ERROR.

In such case, the fact that the judge of the state court granting the certificate of naturalization testified that his finding as to the applicant's good moral character was not affected by depositions of witnesses taken out of court would not cure the error.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

4. ALIENS ⟸68—NATURALIZATION—CHARACTER OF PROCEEDINGS—RES JUDICATA.

Though an agent of the Naturalization Bureau was present at a hearing on a petition for naturalization, and as authorized by Naturalization Act June 29, 1906, § 11 (section 4370) participated in the interrogation of the witnesses, the proceeding was not adversary, and the government did not have its day in court, precluding it from subsequently attacking the certificate of naturalization on the ground that it was secured by fraud and issued in violation of the act, for the foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in court, and the mere appearance of an administrative officer would not bind the government.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

In Equity. Suit by the United States against John Leles to cancel and set aside a certificate of naturalization. Decree for the United States.

John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal.

Frank A. Duryea, of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. This is a suit brought by the United States attorney in pursuance of section 15 of the Naturalization Act of 1906 (34 Stats. at L. p. 596, c. 3592) to cancel and set aside a certificate of naturalization issued to the defendant on November 5, 1914, both on the ground of fraud in its procurement, in that defendant

was not at the time of good moral character, and that it was illegally granted, in that the method of proof followed in the state court issuing the certificate was in violation of the requirements of the act. On a motion to dismiss, the sufficiency of the bill was heretofore sustained. (D. C.) 227 Fed. 189. On the facts, the evidence has left no doubt on the mind of the court that, as to both grounds, it is sufficient to sustain the averments of the bill, if the validity of the proceedings of the state court be open to attack in this form.

[1] As to the charge of fraud, the evidence strongly preponderates in favor of the government's claim that for some time prior to his admission to citizenship the defendant had been conducting a place of bad repute in the community, a sort of combination saloon, restaurant, and lodging or rooming resort, some of the rooms being situated over the saloon and restaurant, and others in adjacent cottages in the rear; that the place was frequented by people of bad repute, both men and women, for evil and illicit purposes; and that the defendant himself was fully aware of the bad character of his resort and the class of people frequenting it. One of the essential qualifications for admission to citizenship is that the applicant shall be a man of good moral character. This must not only be alleged, but proved, before a certificate may be granted. The second subdivision of section 4 of the act requires the petition for admission to state "every fact material to his naturalization and required to be proved upon the final hearing of his application," and the fourth subdivision of the section provides:

> "It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

This means, not only that the applicant has in his personal habits and pursuits conducted himself as a man of good moral character, but that he shall, so far as the evidence shows, have been such in fact, since a man may not be said in any just sense to be "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same," unless he be a man of that character. If he does not at the time possess that qualification, but by his evidence and that of his witnesses has induced the court admitting him to believe that he does, then he is guilty of a fraud such as to warrant the cancellation of his certificate. United States v. Raverat (D. C.) 222 Fed. 1018.

[2] As to the charge that the proceedings for defendant's naturalization were conducted in a manner violative of the act and the certificate thereby procured to be illegally issued, it appears without controversy that on the final hearing, after examining in open court certain witnesses produced by the defendant as to his good character, the court appointed its stenographer as commissioner to take the depositions or evidence of certain other witnesses on the subject not then present, but residing in a neighboring town in the county, which

was accordingly done, and the evidence thus taken out of court, and out of the presence of the judge, was thereafter reported to and considered by the court before awarding the certificate in question. Section 9 of the act provides:

"That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court."

The only provision for taking evidence by deposition in such proceedings is found in section 10, which has no relation to the circumstances of this case. The method pursued was therefore directly in contravention of the requirements of the statute; and a like departure was held in United States v. Nisbet (D. C.) 168 Fed. 1006, to be fatal to the validity of the proceedings and the certificate issued in pursuance thereof.

[3] It is true that the judge granting the certificate was called as a witness for defendant at the trial, and testified in substance that his finding as to the fact of defendant's good character was not affected by the depositions of the witnesses taken out of court; that there was sufficient evidence on the question without their aid. But, assuming as we do the perfect truth of these statements, obviously, the opinion or declaration of the judge that his mind was unaffected by the evidence illegally taken and considered cannot cure the vice or defect, any more than could the certificate or declaration of a trial judge, in a bill of exceptions, that evidence admitted or excluded under objection did not affect the result, be held to cure an otherwise erroneous ruling. The purpose of the statute is to prevent such methods, and its requirements are mandatory. United States v. Kolodner (D. C.) 199 Fed. 809; United States v. Nisbet, supra. As stated by Judge Hanford in the latter case:

"The manifest intention of Congress, in the enactment of the naturalization law of 1906, was to prescribe rigid rules to be observed by the courts in naturalization proceedings and to correct the abuse of laxity in such proceedings. Therefore a court may not, in the exercise of assumed discretionary power, admit an alien to citizenship who has failed to establish his right by the kind of evidence which the statute demands."

And as to the degree of strictness, generally, with which the provisions of the act must be followed as the basis for the issuance of a legal certificate, see U. S. v. Simon (C. C.) 170 Fed. 680, U. S. v. Meyer (D. C.) 170 Fed. 983, and U. S. v. Plaistow (D. C.) 189 Fed. 1006.

[4] It appears that an agent of the Naturalization Bureau was present at the hearing and participated in the interrogation of the witnesses, as authorized by section 11 of the act, and defendant now renews his point, made upon his motion to dismiss, that proceedings under the present statute are thus made adversary proceedings; that, being such, the determination of the court awarding the certificate becomes res judicata, and not open to review other than on appeal; that, while the grounds assigned are such as might involve error or

irregularity, they do not affect the jurisdiction of the court and cannot be made the basis of a collateral attack upon the validity of the certificate. In response to this contention it was said in the opinion overruling the motion to dismiss (227 Fed. 192):

"But these contentions are fully met and negatived by the principles announced in Johannessen v. U. S., 225 U. S. 227 [32 Sup. Ct. 613, 56 L. Ed. 1066], where it is held that an adjudication like that here involved, while in some respects partaking of the nature of a judgment, 'is in its essence an instrument granting political privileges, and open, like other public grants, to be revoked if and when it shall be found to be unlawfully or fraudulently procured,' and that 'the act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard,' and it is held that the act is, in this respect, a proper exertion of the legislative will."

But it is urged that in the Johannessen Case the certificate was issued under the old statute, and the court expressly refrained from determining whether proceedings under the present act, of which this is one, are to be regarded as equally of an ex parte character as those under the old, where the proceeding was had without notice to the government. The reasoning of the court in that case, however, would seem to lend countenance to the contention of the government that the mere appearance at the hearing of the agent of the Naturalization Bureau to interrogate the witnesses, without filing any pleading making specific objection to the granting of a certificate or putting in issue any of the averments of the petition, cannot have the effect of converting the proceeding from an ex parte to an adversary one, in a sense to make the doctrine of res judicata apply. Speaking of that doctrine the court say (225 U. S. 238, 32 Sup. Ct. 615, 56 L. Ed. 1066):

"The foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts. §§ 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern Pacific R. Co. v. United States, 168 U. S. 1, 48 [18 Sup. Ct. 18, 27 (42 L. Ed. 355)]: 'That a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'"

Within this definition the presence of an agent of the Bureau of Naturalization, a mere administrative officer, should not be regarded as an "appearance" for the purpose of litigating the matter in a sense to make it an adversary proceeding. The agent is present, and is usually, as in this instance, permitted to interrogate the applicant and his witnesses; but, aside from this, the proceeding is no more in its nature an adversary one or less ex parte than under the old act. The government is not present as an adversary, but simply for the purpose of supervising the proceedings through the medium of its Naturalization Bureau. What the effect would be of a formal appearance by the law officers of the government, putting in issue the averments of the petition and calling adverse witnesses in support thereof, need not be determined.

These views find support in recent cases arising under the present act. U. S. v. Albertini (D. C.) 206 Fed. 133; U. S. v. Mulvey (filed April 18, 1916) 232 Fed. 513, —— C. C. A. ——. In the former case, where an agent of the Naturalization Bureau had, as here, appeared on the final hearing and the present objection was urged as the result, Judge Bourquin, speaking of the attitude of the government and the purpose of such an appearance, says:

"The government is friendly, and not adversary. There is no opposition, no contest, in the true sense of the word. In theory and form the proceedings may be in their nature adversary; but in practice and substance there is no adversary, and from that standpoint they are still ex parte."

And he adds:

"The design is to enable the government to exercise some supervision over the proceedings, some watchfulness, and in its discretion to oppose, contest, and convert the proceedings into those actually adversary."

And in the Mulvey Case, where a representative of the Naturalization Bureau appeared at the final hearing and took part in the proceedings, it is said by the Circuit Court of Appeals of the Second Circuit:

"It does not affirmatively appear in this record that any law officer of the government was heard in opposition in the proceeding originally had before the District Court, or that he was present or took any part in the proceedings. All that is disclosed is that some one connected with the Bureau of Naturalization was present and was heard in opposition. The representative of the Bureau was not the attorney for the government in the district in which the proceeding took place, and he was not even an attorney. His appearance at such hearings is as amicus curiæ, to present to the court such facts relative to the personal history of the several applicants as the Bureau's investigations may have disclosed. The order admitting the respondent to citizenship recites no appearance by the government on the hearing. No minutes of the testimony were taken, and no record preserved. Under such circumstances we do not think that the appearance of a representative of the Bureau in the proceedings is to be regarded as an appearance by the United States in the technical sense in which that word is used in judicial proceedings. The United States, therefore, is not so bound by the decree that it is not entitled to proceed by petition to cancel the certificate so issued."

These considerations are, I think, sufficient to show that the government should not be held to be estopped by the judgment or order granting the certificate from attacking its validity in this form, and that upon the facts disclosed it is entitled to a decree annulling and setting aside such certificate.

A decree may be entered accordingly.

PIONEER IRR. CO. v. BOARD OF COMR'S OF YUMA COUNTY, COLO.

(District Court, D. Colorado. October 9, 1916.)

No. 6486.

WATERS AND WATER COURSES ⊂=131—DIVERSION BY DITCH COMPANIES—PROPERTY RIGHTS IN WATER.

Under Const. Colo. art. 16, § 8, and Rev. St. Colo. 1908, §§ 3263–3268, relating to water rights, as construed by the Supreme Court of the state, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of a carrying ditch, in making the diversion from a natural stream, acts solely as the agent or trustee for him who applies the water to a beneficial use, and gets no title in or right to the use of the water, and has no property in it subject to disposal, but such property and right of disposal is in him who applies the water to a beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⊂=131.]

In Equity. Suit by the Pioneer Irrigation Company against the Board of County Commissioners of Yuma County, Colo. Decree for defendants.

Park & Gibson, of Denver, Colo., for plaintiff.
Jo. A. Fowler, of Denver, Colo., for defendants.

LEWIS, District Judge. This is a bill for an injunction against the enforcement of carrying rates for water in the plaintiff's canal or ditch fixed by the Board of County Commissioners. The plaintiff is the owner of the Haigler canal which receives its waters from the North Fork of the Republican River in Yuma County, Colorado. It extends from its headgate on the south bank of that stream to the state line between Colorado and Nebraska a distance of about seven miles, and thence in Nebraska about eight miles more. It was constructed in 1890 as a carrying canal and it has ever since served the purpose of furnishing water to farmers in Colorado and Nebraska for irrigation. Its relative priority to divert the waters from the stream was not fixed by adjudication until 1912 and 1914. In July of the first named year it obtained a decree fixing its priority and adjudging to it the right to divert fifteen cubic feet per second for the irrigation of lands in Colorado, and in the latter year it was adjudged to have the right to divert twenty-nine cubic feet per second, to be measured at the state line for lands in Nebraska. The lands in Colorado which it has heretofore served aggregate about 790 acres, and the bill alleges that none of the owners of said lands are the owners of the water carried in the canal, except the owners of 96 acres, approximating one and a half cubic feet per second, all of the other users being annual renters of water.

The plaintiff petitioned the board to fix the carrying rates which it should exact from the users of water from the canal as the state statute provides may be done, and in October, 1915, the board, after hearing the parties in interest, fixed the rate at the sum of $1.83 per acre.

The complaint is that the rate is too low and confiscatory, that the board

"in fixing said rate of compensation refused to consider the value of the water owned and carried by the said plaintiff in said ditch for the use of persons renting water annually therefrom, and refused in fixing the said rate to allow any compensation whatever to the plaintiff for or on account of such water to be carried by the plaintiff and furnished to farmers under said ditch upon an annual rental charge. That said rate so fixed by the said county commissioners requires the plaintiff to carry water, which it has appropriated and diverted and has a decree therefor and is the owner thereof, and deliver the same to farmers under said ditch for use without any compensation whatever, thus depriving the plaintiff of its property and compelling it to deliver the said water so owned by it to farmers under said ditch in the State of Colorado who have no property right therein for the purpose of irrigating approximately 695 acres of land; that the water so carried and required by said order to be delivered by the plaintiff to said farmers is of the reasonable value of $34,750; that the plaintiff is by law entitled, when required to furnish such water to farmers who are not owners of the water, to a reasonable return upon the value of said water."

The answer admits that the plaintiff has acquired the right to divert water from the river and carry the same through the canal for use in the irrigation of crops; admits that the board refused to recognize ownership of the water in the plaintiff or to consider such claimed ownership in the fixing of rates or to allow it anything for the water carried. It alleges that the users of the water are the owners of the right to its use, and that at the hearing the board took into consideration in fixing the rate all of the testimony adduced, such as the original cost, construction and present value of the canal, its headgates, dams, water-boxes, and the evidence as to the cost of maintenance and operating the same, the number of acres irrigated, the production and the benefits therefrom, but rejected the claim and contention of the plaintiff that it had any property right in the water or its use and ignored plaintiff's claim in that respect in fixing the rate.

There is diversity of citizenship. At the final hearing the controversy was submitted on the pleadings, and a written stipulation filed in the cause as follows:

"It is hereby stipulated and agreed by and between the parties hereto for the purpose of this trial, and it is admitted, to-wit:

"The sole question to be determined in this case is whether or not the Board of County Commissioners should have taken into consideration, in fixing the rates to be charged by the plaintiff for the carriage, distribution and delivery of water, the value of such water delivered to the class of consumers hereinafter described.

"Since the construction of the ditch the class of water users to which the rate fixed by the County Commissioners in 1915 applies were those users who have, since the construction of the ditch in 1890, paid annually an annual rate without any other contract with the plaintiff company other than a receipt for the amount of money paid for such carriage, and an agreement to conform to the rules and regulations of the company in distribution, measurement and application of such water, and they have so conformed, none of which such land owners has ever paid the plaintiff company any amount of money for the purchase of a perpetual water right, or any other amount than the annual carriage charge.

"Some of such annual users have used the same amount of water continuously. Others have used some of the water continuously but from year to year would either increase or decrease the acreage applied and paid for. Two or three have used it only intermittently. All of said water having been

used by such users for a beneficial purpose during all of said time. Plaintiff has not personally put any of said water to a beneficial use nor does it own any land under the canal.

"It is agreed that the rights contended for by the plaintiff exceed in value the sum of Three Thousand Dollars ($3000.00)."

I suppose the plaintiff was induced by San Joaquin, etc., Co. v. Stanislaus County, 233 U. S. 454, 34 Sup. Ct. 652, 58 L. Ed. 1041, to exhibit this bill. But I am not able to accept that case as a support to the plaintiff's claim. The Constitution and statutes of California empowered the carrying company in that case to appropriate water for sale, and in the exercise of the right thus given it acquired for that purpose some of the water by mere diversion from the natural stream and purchased some of it. A carrying ditch in Colorado is not given such power and cannot acquire such rights as a carrying ditch. There is merit in the contention that our Constitution (Article XVI, Sec. 8) and statutes (Rev. Stat. Col. 1908, Secs. 3263–3268) could be given a like construction, but our Supreme Court has decided otherwise. Wheeler v. Irrigation Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603; Canal & Res. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Wyatt v. Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; O'Neil v. Canal Co., 39 Colo. 487, 90 Pac. 849; Combs v. Canal & Res. Co., 38 Colo. 420, 88 Pac. 396.

If I rightly understand these cases, they hold: (1) the owner of the carrying ditch in making the diversion from the natural stream acts solely as the agent or trustee for him who applies the water to a beneficial use, (2) gets no title in or right to the use of the water and has no property in it subject to disposal, and (3) he who applies the water thus diverted to beneficial use acquires a property right in the use of the water thus applied which he, and he only, can sell, dispose of and convey by deed separate and apart from the land to which it has been applied or with the land to which it has been applied. The last proposition is made more certain by Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245; Irrigation Co. v. Res. Co., 25 Colo. 144, 148, 53 Pac. 318, 71 Am. St. Rep. 123.

No property right can be acquired in the use of water until it has been applied to a beneficial use. Thomas v. Guiraud, 6 Colo. 530; Coffin v. Ditch Co., 6 Colo. 443; Highland Co. v. Union Co., 53 Colo. 483, 485, 127 Pac. 1025.

There is no claim on the part of the plaintiff that it has ever used any of the waters in question to irrigate its lands or otherwise applied them to beneficial uses. Its contention, therefore, before the board of commissioners that it was the owner of the waters or of the right to their use and that by virtue of that ownership it was entitled to receive something from the users of the waters to whom they were delivered, was, in my judgment, rightfully rejected by the board in considering the question presented to it when it came to fix the rates for carriage which the plaintiff should receive.

I have not overlooked Denver v. Walker, 45 Colo. 387, 101 Pac. 348, and Denver v. Brown, 56 Colo. 216, 138 Pac. 44, but they are not in point. In neither of those cases were the rights of a carrying ditch involved. Those cases involved controversies between claimants to

the right to use water on the one hand, and appropriators who had diverted and applied to beneficial uses, or their grantees, on the other hand, to a claimed surplus of water not needed or applied for the time being by the appropriator.

However, my conclusion, thus stated, on the only issue presented is not an approval of what appears from the pleadings and argument at the bar to have been the basis adopted by the board in fixing the rates. It seems to have considered for that purpose only the cost, physical value and up-keep of the carrying canal and its physical adjuncts. The basis is too narrow, and if rigidly applied would be unjust one way or the other. Lands taking water from such a canal are usually too remote from the stream to justify the necessary expenditure by each owner separately to bring the water to his tract. The expenditure required would operate as a permanent prevention to the acquisition of the right. Early action by the carrying ditch and the priority obtained by it may furnish the land-owner an opportunity to avail himself of something of great value, and thus the amount of water diverted and the priority obtained for the carrying ditch become an inseparable part of the enterprise which necessarily fixes its value as a property and the resulting advantages to lands which it may serve. On the one hand, the amount of water diverted and the priority obtained for it by the carrying ditch might render the enterprise of small value to the owner and slight benefit to those taking water from it, while on the other, the priority obtained for the diversion would be such as to render the enterprise as a property of great value and its service to those whom it would serve large in beneficial results. In the one case it would be unjust to the irrigator to require him to bear the cost and up-keep of the canal if the priority was such as to deny him the use of the water when most needed, and likewise unjust to the carrying canal to allow it rates fixed only on the cost and up-keep if the priority gave an abundance when most needed. To illustrate: two carrying canals equal in cost and up-keep and diverting the same amount may serve an equal number of acres with vastly different results. One obtains the first priority, the other obtains the last. Under the first the users obtain an ample amount of water and their crops are abundant; under the other, water cannot be had when most needed and the yield is scant. A carrying canal is not like a railroad which brings you what you want when you pay the freight; it can only furnish water according to its priority—that is, when obtainable under the right which it acquired. It diverts water and obtains, by its foresight and effort, the priority for the benefit of the user of water. When the user receives his water from the canal he not only takes advantage of the service rendered in the mere carrying of the water to him from the stream, but of vastly more importance to him is the acceptance and adoption by him of the priority of diversion obtained by the canal for his benefit, and this diversion and its priority is an integral part of and inseparable from the ownership of the physical structure; and a just and fair rate for the service rendered by the owner of the canal cannot be fixed without its full consideration. But this element was not, according to the terms of the bill, presented to the board for its con-

sideration and is not included in the stipulation of facts presenting the only issue for determination, and, of course, is not now adjudicated.

Having determined the only issue presented against the plaintiff, the bill will be dismissed at plaintiff's cost.

UNITED STATES v. HEN LEE.

(District Court, S. D. New York. October 25, 1916.)

No. 14.

1. ALIENS ⟸32(8)—DEPORTATION OF CHINESE—TESTIMONY—RIGHT TO REJECT.
Where a Chinese person, whose deportation was being sought, made contradictory statements at the time he was being smuggled into the United States, his subsequent testimony in conflict with such statements may be disregarded.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. ALIENS ⟸32(5)—DEPORTATION—CHINESE PERSON—BURDEN OF PROOF.
A Chinese person, who attempted to surreptitiously enter the United States, and whose right to remain therein was raised on deportation proceedings, has the burden of satisfactorily establishing his claim of right to remain in the United States.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(5).]

3. ALIENS ⟸32(8)—DEPORTATION—CHINESE PERSONS.
In proceedings for deportation of a Chinese person, apprehended when surreptitiously entering the United States, evidence *held* insufficient to establish his claim of birth in the United States and right to remain therein, and so deportation was warranted.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

Proceeding by the United States for the deportation of Hen Lee. On appeal de novo from commission and order of deportation. Defendant ordered deported.

Edwin M. Stanton, Asst. U. S. Atty., of New York City.
B. W. Berry, of New York City, for defendant.

MANTON, District Judge. This is an appeal from an order of deportation entered against the defendant by a commissioner. The defendant, a Chinese person, without proper paper showing his right to be and remain in the United States, is a laborer. On September 4, 1915, together with three other Chinamen, he was apprehended while surreptitiously entering the United States from Canada, at Detroit. After arrest by an immigration inspector, a hearing was had, and after statement made by the defendant, to which reference is had in this proceeding, he was ordered deported to China, the country from whence he came. A writ of habeas corpus was issued, and this matter was reviewed before Judge Hough on November 5, 1915. The writ was there dismissed, and the relator remanded to the government for deportation.

An appeal was then taken by the defendant to the Circuit Court of Appeals, Second Circuit, which reversed the order of Judge Hough and ordered the relator deported to Canada. United States ex rel. Hen Lee v. Sisson, 232 Fed. 599, — C. C. A. —. The government, under the claim that the restrictive laws enforced in the Dominion of Canada including the exaction of a head tax of $500 for each Oriental entering Canada, has taken recourse to the Chinese Exclusion Law (Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, §§ 4315–4323]), which provides for deportation to China irrespective of the country from whence an alien comes, and it has canceled the proceedings under the Immigration Act (232 Fed. 559) by failing to have modified the deportation order of the Circuit Court. This complaint was filed with the United States commissioner on April 19, 1916, and after a trial had before the commissioner the relator was ordered deported to China on July 14, 1916. The case is before this court on an appeal de novo.

[1-3] The sole question for my determination is whether or not the evidence warrants a finding that the defendant was born in the United States. A full hearing was had before a commissioner. Under Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, the defendant there made a statement, and later testified and produced witnesses. The commissioner found against the defendant, and Judge Hough in the District Court affirmed this finding. Later, on appeal to the Circuit Court of Appeals, the court, through Judge Ward, said:

"There is no doubt that the relator should be deported from the United States under section 21 of the act of 1907 [Comp. St. 1913, § 4270], because he is subject to deportation under the provisions of section 3 of the Chinese Exclusion Act of May 5, 1892 [Comp. St. 1913, § 4317]."

In this proceeding under the Chinese Exclusion Act the defendant produced witnesses as to his birth, and others who alleged that they saw him during various periods of his life in the United States. This testimony was rejected by the commissioner, as he has found that the evidence does not warrant a finding that the relator was born in the United States. Upon the hearing before this court the defendant testified that he was born in San Francisco; that his parents lost their lives in the earthquake in San Francisco, and his certificate of residence was also lost. He has no relatives here, no sisters or brothers. There is no public institution, such as a school or mission school of California, where his record of residence may be checked up by the government officials.

His claim of birth and residence in the United States must depend upon the testimony of Leong Chong, Sam Kee, Natalie Miarano, and Francesco Manfridi. All, with the exception of Leong Chong, claimed to have seen the relator in New York City for five or six years before it is claimed that he went to Canada, where the relator claims he worked in Montreal. Sam Kee makes claim that he played in the parks in San Francisco with the relator. His manner of testifying, and the many contradictions as to happenings and events in his own life and his meetings with the defendant, require me to reject his testimony as insufficient to base any finding that the defendant was in the United

States during the time that Kee claims to have seen or to have known him.

The only direct evidence of the birth in the United States is given by Leong Chong. This witness says he is 64 years of age; that he lived in Fresno, Cal., where he was engaged in business. In one part of his testimony he says he "belongs to the same family" as the defendant and later denies any relationship. He says that in 1890 he happened to go to San Francisco to attend to some business in connection with a store that he maintained at Fresno, and tried to purchase some goods for the store. He says:

"I just happened to meet the defendant's father in the street and asked him why he was not working, and he asked why I came to San Francisco, and I told I came out here to buy some goods for the store, and he told me about his family, that his wife was sick and was going to have a child pretty soon, and after the birth of the child the father invited me to stay there to attend the christening, his Hi How Chow."

His testimony as to his acquaintance with his father is very meager and is a general statement that he had known him for a considerable length of time. He denies acquaintance or knowledge of defendant's father in China. He states that he attended the head-shaving feast of the defendant in a restaurant in San Francisco, the number of which he cannot give. Later, while the witness was on his way to China, he stopped at San Francisco and saw the boy. Later he saw him in New York, and although he says he recognized the boy, he was obliged to ask, " 'You are Hen Lee?' to which the defendant said 'Yes,' and asked me my name, and I told him my name." He claims to have seen him in New York at a still later time. The witness appears to have been a friend of Leong Kai Main, who, it developed, was related to the defendant, and who was present in court and assisted counsel in interpretation. Still he was not called as a witness.

In answer to the court, this witness stated that he had been a witness in only one other such case as this, and that at Port Henry, N. Y. At the next hearing, the United States attorney produced the testimony (which it turned out had been taken at Plattsburg, N. Y.), where in answer to questions propounded in that hearing the witness said:

"Q. Give me the names of any Chinese persons born in the United States which you know? A. I only remember two, Leong Chu and Leong Goom, the defendants in this case. Q. You don't know of any other Chinese persons born in the United States? A. No, sir."

He was confronted by applications made to the government for leave to embark for China. His signature is upon such papers. At first he admitted the signatures, and afterwards denied them, and claims to have gone to China twice, although it was claimed by the government that he went three times. The exhibition of the witness in relation to these applications, his contradiction in connection with his signature thereto, and his manner of testifying, is very unsatisfactory. After due allowance made for his age, the court cannot help but be influenced by his dealing in generalities in his testimony and inability to give specific knowledge of the subjects sought to be obtained by inquiry. His manner of testifying and conduct, his tremor, all indicate to my mind

that his evidence does not come up to the standard required to base a finding that this defendant was born in the United States.

It may be that the witnesses called as to the defendant's residence in the United States in later years are truthful, but that does not aid in the determination of whether or not he was born in the United States. It might be some corroboration, if there was satisfactory evidence that the defendant was born in the United States.

In addition, it appears that a statement was taken from the defendant at the time that he was being smuggled into the United States. His statements there are wholly at variance with the statements now made under oath before me as to events in his past life. The court should not be charged with even the decent curiosity of trying to find out on which occasion he was telling the truth, but was justified in rejecting his testimony as unworthy of belief, although Judge Lacombe did say in United States v. Moy Toom (D. C.) 224 Fed. 520 (decided in June, 1915):

"Examination of very many records in these cases had induced the conviction that it tends greatly to elucidate the truth to hear what the Chinese person has to say about such simple facts as his age, parentage, relationships, occupation, and localities where he has lived, and the circumstances attending his latest entry into this country, before his lawyer appears."

The burden of proof requirement, of the defendant showing affirmatively and satisfactorily his claim of right to be and remain in the United States, has been uniformly restated by the courts. Li Sing v. United States, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634; Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Ah How v. United States, 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619; United States v. Too Toy (D. C.) 185 Fed. 838; United States v. Hom Lim (D. C.) 214 Fed. 456; Lee Sim v. United States, 218 Fed. 432, 134 C. C. A. 232. Judge Hough in United States v. Yee Tun (unreported but affirmed on appeal), laid down a rule which should be approved when he said:

"In this case the burden normally cast upon a Chinese person of proving his right to remain in the United States is increased by the surreptitious method of his attempted entry." [Decree affirmed 228 Fed. 1023, — C. C. A. —.]

And in the case of United States v. Lee Low You:

"In my judgment the action of the appellant in trying to enter as he did materially increased the burden cast upon him. In order to succeed he must show by clear and convincing evidence that that is true which he was afraid to urge until he was obliged to do it as a last resort." [Judgment affirmed 230 Fed. 820, — C. C. A. —.]

Applying these rules of law to the testimony disclosed on this hearing, I must find that this burden of proof the defendant has not sustained. An order will therefore be made directing his deportation to China under the Chinese Exclusion Act.

UNITED STATES v. MILLER et al.

(District Court, W. D. Washington, N. D. June, 1916.)

No. 3299.

1. WITNESSES ⟸45(1)—COMPETENCY—BELIEF IN DIVINE PUNISHMENT.
While the rule has been considerably relaxed, nevertheless, under the common law, a witness who does not believe in divine punishment for a false oath is incompetent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 104; Dec. Dig. ⟸45(1).]

2. CRIMINAL LAW ⟸10—COMMON-LAW CRIMES.
There are no common-law crimes in the United States as a unit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8; Dec. Dig. ⟸10.]

3. WITNESSES ⟸45(1)—COMPETENCY—FEDERAL COURT—"COMMON LAW."
Const. Wash. art. 1, § 2, declares that no person shall be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor may he be questioned touching his religious belief to affect the weight of his testimony; while Rev. St. U. S. § 858, provides that the law of the state in which the court is held shall be the rule of decision as to the competency of witnesses in the courts of the United States, in trials at common law, and in equity and admiralty. In a criminal proceeding by the United States, there was an objection to the competency of a witness on the ground that he did not believe in divine punishment as the result of a false oath. The common law is not a universal system, and there are no common-law crimes in the United States, as a unit. *Held*, that the term "common law," as used in the expression "in trials at common law," meant trials of civil actions dependent on those principles, maxims, usages, and rules founded on reason, natural justice, and immemorial custom, constituting the common law, and so in a criminal proceeding the rules of the state law as to the competency of witnesses do not govern, and the witness was properly held incompetent under the old common law applicable to the federal courts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 104; Dec. Dig. ⟸45(1).

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

Proceeding by the United States of America against Melvin B. Miller and others. On objection to competency of witnesses. Objection sustained.

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

Charles F. Riddell and W. R. Bell, both of Seattle, Wash., for defendants.

NETERER, District Judge. [1] The government having offered Mr. Kirkland as a witness, and the defendant objecting to the witness being sworn and permitted to testify, on the ground that he does not believe in the existence of a God, who is the rewarder of truth and the avenger of falsehood, the witness was interrogated as to his belief, and he stated:

"I believe there is a creator, a cause for all that we see and all that we hear.

"You do not believe that there is a God who rewards truth and avenges falsehood?

"I think a man gets all his punishment in this world, while he is here."

And in reply to a question by counsel for defendant:

"As a matter of fact, your belief is that the punishment you receive in this world comes from yourself, and from the men in the world. A. Yes. Q. And not from God? A. No; I don't think it comes from God."

In reply to an inquiry as to whether the taking of an oath meant anything to the witness, he shook his head and said it did not mean a great deal to him, and:

"I think I could tell the truth if I never took an oath."

Under the common-law rule a person who does not believe in a God who is the rewarder of truth and the avenger of falsehood cannot be permitted to testify. Thurston v. Whitney et al., 2 Cush. (Mass.) 104; Jones on Evidence, Blue Book, vol. 4, §§ 712, 713. District Judge Wilkin, in Fed. Cas. No. 446, held that the testimony of an atheist is not admissible. In U. S. v. Lee, Fed. Cas. No. 15,586, Circuit Court of the District of Columbia, it was held that a man who does not believe in the existence of a God other than nature or in a future state of existence is not a competent witness. In Wakefield v. Ross, Fed. Cas. No. 17,050, District of Rhode Island, it was held that a person who does not believe in the existence of a God or in a future state of existence is not a competent witness, citing Scott v. Hooper, 14 Vt. 535, and Thurston v. Whitney, supra.

The rigidity of this rule has been somewhat relaxed, and a person has been permitted to testify who believed in the existence of a God, who was the rewarder of truth and the avenger of falsehood, either in this or a future life. This rule did not necessarily imply that a person had to subscribe to his belief in the Christian religion. If a person believes in the existence of a God, who rewards truth and avenges falsehood, either in this or a future life, it is immaterial whether that belief is in accordance with the Christian belief or not. Any religious belief, whatever it may be, which recognizes the usual form of oath administered as invoking Deity to witness its truthfulness, and recognizes that falsehood will be punished, is sufficient.

I know of no cases that will permit a person to qualify as a witness who does not subscribe to some religious belief recognizing a Supreme Being, and who is not moved or impressed by some conscientious scruple with relation to the testimony in its truthfulness or falsity, to be rewarded or avenged in this life or some future life. State v. Wash, 49 La. Ann. 1602, 22 South. 841, 42 L. R. A. (N. S.) 553, and cases cited. And if our form of oath is not binding upon persons of other religious beliefs, the form which is recognized as binding can be administered. A Jew may be sworn on the Pentateuch or Old Testament, with his head covered; a Mohammedan on the Koran; a Gentoo, touching with his hand the foot of a Brahmin or priest of his religion;

a Chinese, by breaking a china saucer. Wharton Criminal Evidence, vol. 1, § 354.

[2, 3] Article 1, § 11, of the Constitution of the state of Washington, provides that:

"No religious qualification shall be required for any public officer; nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion; nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

Section 858 of the Revised Statutes of the United States provides that:

"The laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

The common law consists of those principles, maxims, usages, and rules founded on reason, natural justice, and an enlightened public policy, deduced from universal and immemorial usage, and receiving progressively the sanction of the courts. Common law is generally used in contradistinction to statute law. Levy v. McCartee, 31 U. S. (6 Pet.) 102, 8 L. Ed. 334. There are no common-law crimes in the United States as a unit, as recently held by the Supreme Court of the United States. In re Greene (C. C.) 52 Fed. 104. In the various states the common law as recognized is by no means universal. Patterson v. Winn, 30 U. S. (5 Pet.) 233, 8 L. Ed. 108. The term "common law" is used in our statute to distinguish it from criminal actions. It was held in Kirby v. C. & N. W. R. Co. (C. C.) 106 Fed. 551, that within the meaning of the Act of March 31, 1887, c. 373, § 1, 24 Stat. 552, providing that courts of the United States shall have original cognizance of all suits of a civil nature at common law or in equity, the expression "common law" is used to distinguish it from a criminal action. The Supreme Court in Logan v. U. S., 144 U. S. at page 300, 12 Sup. Ct. 629, 36 L. Ed. 429, clearly limits the application of the expression "at common law," used in section 858, supra, when it says:

"By the Judiciary Act of September 24, 1789, c. 20, § 34, it was enacted '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.' 1 Stat. 92. Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court at December term, 1851, upon a certificate of division of opinion of the Circuit Court, directly presenting the question, that the section did not include criminal trials, or leave to the states the power to prescribe and change from time to time the rules of evidence in trials in the courts of the United States for offences against the United States."

This case has not been overruled or modified. The Circuit Court of Appeals for this Circuit, in Cohen v. U. S., 214 Fed. at page 28, 130 C. C. A. 422, say:

"The competency of witnesses in criminal trials in the courts of the United States is not governed by the statute of the state, but by the common law, except where Congress has made specific provisions on the subject."

My attention has been called to the expression of the Supreme Court in Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; but this case, when taken with what is said by the Supreme Court in Logan v. U. S., supra, cannot have any weight upon this issue.

I see no other course than to sustain the objection.

In re BLANK et al.

(District Court, E. D. Pennsylvania. November 2, 1916.)

No. 5493.

1. BANKRUPTCY ⟸407(5)—DISCHARGE—FALSE STATEMENTS.
A bankrupt, who obtained money or property on credit upon a materially false statement in writing, made for the purpose of obtaining the credit, must be denied his discharge under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. 1913, § 9598), although the creditor might have discovered the falsity of the statement by an investigation of the real estate records.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

2. BANKRUPTCY ⟸407(5)—DISCHARGE—RIGHT TO.
In such case a discharge will not be granted, where the statement of the bankrupt's financial condition omitted an indebtedness for moneys borrowed from a building and loan association, on the theory that the omission was immaterial, because the money was secured by a mortgage or a pledge of stock in the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

3. BANKRUPTCY ⟸407(5)—DISCHARGE—FALSE STATEMENTS.
Where a statement prepared by one member of a partnership on which to obtain credit omitted individual indebtedness of members of the firm due their relatives, the omission is such as to preclude his discharge under the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

4. BANKRUPTCY ⟸407(5)—DISCHARGE—RIGHT TO—MATERIAL MISSTATEMENTS.
Where a bankrupt omitted liabilities amounting to $4,700 from a statement prepared to secure credit, and it appeared that the total assets were about $43,000, and the liabilities listed about $19,000, the amount of the omitted assets is such that the omission cannot be deemed immaterial, and the bankrupt granted a discharge, despite the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸407(5).]

In Bankruptcy. In the matter of the bankruptcy of David Blank and Edward Blank, individually, and trading as Blank Bros. Upon exceptions to report of special referee upon specifications of objection to bankrupts' discharge. Exceptions dismissed, report of referee confirmed, and application of Edward Blank for discharge refused, while that of David Blank granted.

Clinton O. Mayer, of Philadelphia, Pa., for bankrupts.

Nathaniel I. S. Goldman and J. Howard Reber, both of Philadelphia, Pa., for exceptant.

THOMPSON, District Judge. The facts are fully set out in the report of the referee. He bases his recommendation that the discharge of the bankrupt, Edward Blank be refused upon the ground that building association mortgages, to the amount of $2,000, and debts to relatives of the bankrupts for money loaned, amounting to $2,700, were omitted from the statement.

Counsel for the bankrupt contends that the referee erred in finding an intent to deceive. There is no denial that, when Edward Blank made the statement to Liberman Bros., he knew of the existence of the additional mortgages upon the real estate, and of the liabilities of the partners to their relatives.

The case does not come within the facts appearing in Gilpin v. Merchants' National Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, where it was held that the words "false statement" connote a guilty scienter on the part of the bankrupt. In the Gilpin Case the statement to the bank was prepared and sent by a bookkeeper, and there was no evidence that the bankrupt had any knowledge of its untruth upon that ground. The referee followed the Gilpin Case in recommending the discharge of the other partner, David Blank.

It is contended by counsel for Edward Blank that, although the statement was untrue, it was not within the meaning of the word "false," as defined by Judge Gray in the Gilpin Case, for three reasons: (1) Because the building association mortgages were upon record, and an examination in the recorder's office would have disclosed their existence; (2) because the impression of the bankrupt was that the money was borrowed upon the security of shares in the building association of the individual members of the firm; and (3) because the debts were individual and not firm liabilities.

[1] The first of these contentions cannot be sustained, because it would mean that, although a statement for the purpose of obtaining credit may be knowingly untrue, it is not to be regarded as false if the creditor may by inquiry elsewhere discover the truth.

[2] As to the second contention, the materiality of the omission, under the head of "Liabilities," of the indebtedness for the $2,000 borrowed from the building association, is the same, in determining the net worth of the partners, whether it was secured by mortgage or by the shares of stock, except as to the effect of the lien upon the real estate created by the mortgage. The intent to suppress the fact of the $2,000 liability may well have been found upon either theory.

[3] The third contention will be considered in connection with the omission from the statement under the head of "Other Liabilities" of the indebtedness of the partners to relatives. As to these debts, it is likewise contended by counsel for the bankrupts that there could have been no intention to deceive, because the partners owed the

money as individuals, and therefore they were not firm debts, and did not, at the time the statement was made, appear upon the partnership books.

It is not necessary to elaborate the proposition that the individual liabilities of partners affect the resources to which creditors may look for payment of the firm's debts. As stated in the referee's report, he regarded the concealment of the loan to relatives as a more fatal omission from the credit statement than the mortgage on real estate, because it is a matter of common experience that relatives receive first consideration in case of insolvency. That the referee was justified in that conclusion in this case appears from the following statement in the brief for Edward Blank:

"It was shown subsequently that these bankrupts did not have the ready cash to pay out of their individual account, and this money was then paid by the firm and charged up on the books of the firm against each individual member of the partnership."

[4] It was further argued that the materiality of the omission is not established because of the relation of the amounts omitted to the amount of surplus set out in the statement. The amount of the total assets was stated to be $42,710.73, and the total liabilities $19,270.35, leaving a net surplus of $23,440.43. The total of omitted liabilities amounted to $4,700, which would reduce the surplus to $18,740.43. There may, indeed, be a point at which the proportion of sums omitted in an untrue statement to the total sum of liabilities or surplus may be so insignificant as to have no weight in making the untruth material.

I cannot agree with counsel for the bankrupt that in this case the sums omitted were so insignificant as to be immaterial. In consideration of this question, each case must stand upon its own facts. The referee has found that they are material in amount, and that credit would have been refused if they had been declared. I discover no error in the findings of the referee, nor in his conclusion that the omission of the building association mortgages and the debts of the relatives are false statements within the meaning of section 14b (3) of the Bankruptcy Act.

It is ordered that the exceptions be dismissed, and the report of the referee confirmed, that the application for discharge of Edward Blank be refused, and that the application for discharge of David Blank be granted.

In re OLD OREGON MFG. CO.

(District Court, W. D. Washington, N. D. June 19, 1916.)

No. 5553.

1. BANKRUPTCY ⟸257—SALES—PURCHASERS.
Where, in bankruptcy proceedings, land is sold subject to a mortgage, the mortgagee, who did not prove his claim, may, as any other person, bid for the owner's equity of redemption.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. ⟸257.]

2. BANKRUPTCY ⟸327(2)—PROOF OF CLAIMS—NECESSITY.
Where, upon bankruptcy of the mortgagor, the mortgagee did not prove his claim for the amount of the mortgage, he cannot thereafter resort to the bankrupt estate, but is relegated to the mortgaged property as security.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501, 502, 507; Dec. Dig. ⟸327(2).]

3. BANKRUPTCY ⟸368—TRUSTEES—COMPENSATION.
Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557, as amended by Act Feb. 5, 1903, c. 487, § 11, 32 Stat. 799 (Comp. St. 1913, § 9632), provides that trustees shall be paid from the assets which they have administered such commissions on all moneys disbursed as may be allowed by the courts, not to exceed enumerated percentages; while section 72, as added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (Comp. St. 1913, § 9656), provides that neither the referee nor trustee shall in any form or guise receive nor shall the court allow, compensation in addition to that allowed by the act. A trustee administered the estate of a bankrupt, which consisted principally of an equity in mortgaged premises. The property was sold subject to the mortgage, and bought in by the mortgagee, who did not prove his claim. *Held* that, as the mortgagee did not prove his claim and could have no recourse against the bankrupt estate, the trustee was not entitled to commissions on the entire value of the mortgaged premises, but only to commissions on the purchase price of the equity of redemption.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⟸368.]

In Bankruptcy. In the matter of the bankruptcy of the Old Oregon Manufacturing Company, a corporation. Proceeding to review an order of the referee allowing compensation to the trustee. Order reversed.

Oldham & Goodale, of Seattle, Wash., for petitioning creditors.
Alexander & Bundy, of Seattle, Wash., for bankrupt and trustee.

NETERER, District Judge. The claim of the trustee in bankruptcy is presented for commissions in administering upon the above estate. The assets of the estate consist chiefly of timber lands and a sawmill. This is mortgaged in the sum of $100,000. At a meeting of the creditors the assets were ordered to be sold subject to the mortgage. At the sale the mortgagee became the purchaser of the equity held by the trustee for $7,000. A claim was presented for commissions upon $107,000. The creditors and the trustee appear to have agreed that

not to exceed $500 should be paid to the trustee as compensation. The claim was allowed in the sum of $300 on account and certified by the referee, accompanied by a statement of the facts and authorities which, it is contended, sustain such payment. The authorities presented are Varney, Referee, v. Harlow, 210 Fed. 824, 127 C. C. A. 374; In re Breakwater Co., 220 Fed. (D. C.) 226; Id., 224 Fed. 333, 140 C. C. A. 19.

[1-3] I do not think that these cases sustain such conclusion. In re Breakwater, 220 Fed. 226, supra, was reversed by the Circuit Court of Appeals in 224 Fed. 333, 140 C. C. A. 19, and therefore cannot have any influence in this consideration. Compensations of the trustee are predicated upon section 48 of the Bankruptcy Act as amended, which states that the fee shall be paid "from estates which they have administered, such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed," etc. The estate administered by the trustee was the interest which the bankrupt had in the property at the time of adjudication. This interest was the value of the property over and above the mortgage indebtedness. In Varney v. Harlow the property was sold clear of all liens, which is clearly distinguished from this case, where it was sold subject to the liens, and no attempt made to administer upon more of the property than the interest of the bankrupt, which was the value over and above the mortgage. In Re Varney, supra, the mortgagee became the bidder; the court permitted the payment to the value of the mortgage to be made in the security held upon the estate, and required only the overplus to be paid in money. It was immaterial whether the money was paid with the right hand and withdrawn with the left hand, so far as the estate was concerned. The value of the entire property was administered, and the disbursement made in contemplation of law to the full extent of its value, including the mortgage indebtedness; whereas, in the instant case, no such attempt was made—no claim was filed by the mortgagee against the estate. The mortgagee seemed content with the interest he had in the property, which was the mortgage indebtedness. When the property was sold subject to the mortgage indebtedness, no person was required to pay more than the value of the bankrupt's interest in the estate, and the mortgagee had as full a right to become a bidder as a third party, and the fact that he did bid does not change the status of the estate administered, or give to the trustee the right to commissions upon values not administered.

If the mortgagee had invoked the aid of the bankruptcy court by presenting his claim and setting in motion the machinery of the court for the purpose of liquidating such indebtedness and having the bankruptcy court's adjudication with relation to the issue tendered thereby, it would present a different matter. In the instant case sale was made, not with respect to the full value of the property; nor was the property offered with respect to its full value, but rather the value the bankrupt had which passed to the trustee. When property is sold subject to liens, the lienholder, not having presented his claim and invoked the administration of the full value of the property, cannot afterwards resort to the bankrupt estate, but is relegated to the property as se-

curity, and this act, so far as the estate was concerned, released this debt, even though it was not proven. The only authority authorizing the payment of compensation to the trustee or referee is that shown in sections 40 and 48 of the Bankruptcy Act, and that is: "From estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts. * * *" No allowance was made upon the mortgagee's claim by the court, as that was not presented. No occasion was made for recognition of the claim by the court, as the interest of the bankrupt over and above the indebtedness is all that was sold. Section 72 of the Bankrupt Act provides that "neither the referee * * * nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

In view of the provisions of the act and the proceedings in this estate, the order of the referee should be reversed. This conclusion, I think, is fully sustained by the Circuit Court of Appeals (In re Breakwater, supra), and appears to me to be clearly the intent of Congress.

EVERETT RY., LIGHT & POWER CO. v. UNITED STATES.

(District Court, W. D. Washington, N. D. May 12, 1916.)

No. 85, E

1. COURTS ⊜314—CITIZENSHIP OF PARTIES—CORPORATIONS—STATE OF CREATION.

   The citizenship of a corporation, for the purpose of jurisdiction of the federal courts, is in the state of its creation.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. ⊜314.]

2. COURTS ⊜276—FEDERAL COURTS—JURISDICTION—WAIVER OF OBJECTIONS.

   Since Tucker Act March 3, 1887, c. 359, 24 Stat. 505, under which a corporation sued the United States to recover moneys, the payment of which it was contended was wrongfully required, is for the benefit of the suitor, jurisdictional objections may be waived by the government.

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

3. APPEARANCE ⊜3—WHAT CONSTITUTES—MODE OF APPEARANCE.

   Appearance, which means the coming into court as a party in a proceeding and asking relief in the progress of the cause, may be made by the party in person or by his agent.

   [Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 9–11; Dec. Dig. ⊜3.

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

4. APPEARANCE ⊜8(4)—QUALIFICATION OF APPEARANCE—ORAL MOTION.

   That a motion for relief in the progress of a cause was oral does not qualify the appearance thus made.

   [Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 31–33; Dec. Dig. ⊜8(4).]

5. APPEARANCE ⊂⊃9(5)—EFFECT OF—WAIVER OF JURISDICTIONAL OBJECTIONS. Under the Tucker Act, a corporation created under the laws of Delaware sued the United States in the District Court for Washington. The United States orally moved for an extension of the time to appear, move, or answer in the cause, and the extension was granted, with the consent of plaintiff. *Held* that, though the motion was oral, nevertheless it constituted a general appearance, whereby relief was asked, and hence was a waiver of any objection that the suit could be maintained only in the district for Delaware, the state of the corporation's creation.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 47–49; Dec. Dig. ⊂⊃9(5).]

In Equity. Suit by the Everett Railway, Light & Power Company against the United States. On motion to dismiss. Motion denied.

James B. Howe, of Seattle, Wash., for plaintiff.

Clay Allen, U. S. Atty., and Albert Moodie, Asst. U. S. Atty., both of Seattle, Wash.

NETERER, District Judge. The plaintiff has sued the government, and prays refund of moneys heretofore paid to the government, which payments, it is alleged, were wrongfully required. Plaintiff alleges its residence is in the city of Everett, this district, and that it was incorporated under the laws of the state of Delaware and authorized to do business in this state; that all of its property is situated in this judicial district. On the 28th of March, 1916, in open court, the following order was presented to the court by the district attorney for signature, bearing the O. K. of counsel for plaintiff:

"Upon the oral motion of ——— attorney for the defendant in the above-entitled cause, it is hereby ordered that the above-named defendant be and is hereby given to and including the 29th day of April, 1916, in which to file herein its appearance, motion or answer.

"Done in open court this 28th day of March, 1916.

"Jeremiah Neterer, United States District Judge."

On April 28, 1916, the defendant, "appearing specially for the purpose of this motion, and for no other purpose whatsoever," moved the court to dismiss this action—

"for the reason that it is apparent from the face of the petition itself that this court is without jurisdiction thereof; it appearing that the plaintiff corporation was organized under the laws and is a citizen of the state of Delaware. No jurisdictional fact is disclosed in the petition."

[1] It is the settled law that the citizenship of a corporation, for the purpose of jurisdiction of the federal courts, is in the state of its creation. Revett v. Clise (D. C.) 207 Fed. 673, and cases cited. Home, domicile, habitat, residence, and citizenship of a corporation has been held by the Supreme Court of the United States, in Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, to be synonymous. In the language employed by the court in Shaw v. Quincy Mining Co., supra, the distinction, if any, between residence and citizenship, was not before the court. The only matter in issue was the citizenship of the corporation, and the language employed with relation to residence was purely obiter dictum. The Tucker Act, under which

this action is prosecuted, permits action in the district where plaintiff resides, whereas the provision of law considered by the court in Shaw v. Quincy Mining Co., supra, bases the jurisdiction upon citizenship.

[2] That the jurisdictional objection can be waived by the defendant, since the Tucker Act, under which this prosecution is instituted, was primarily intended for the benefit of the plaintiff, there is no longer question. U. S. v. Hvoslef, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; Thames & Mersey Ins. Co. v. U. S., 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087; N. Y. Co. v. U. S. (D. C.) 202 Fed. 311.

[3-5] I think this case must be determined upon the fact as to whether the appearing in court by the defendant and obtaining the order of enlargement of time to answer was the doing of an act in the progress of the cause, and therefore a general appearance and submission to the jurisdiction of the court. Appearance means the coming into court as a party in a proceeding and asking relief in the progress of the cause. Thompson v. Michigan Mutual Ben. Ass'n, 52 Mich. 522, 18 N. W. 247. A party may appear in person or by his agent. Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. And if he does any act or asks any relief from which it may be presumed that he acknowledged the court's jurisdiction, his act is an appearance. Barbour v. Newkirk, 83 Ky. 529, 532. Obtaining an extension of time to plead, answer, demur, or to take such other action as it may be advised is equivalent to a general appearance. Hupfeld v. Automaton Piano Co. (C. C.) 66 Fed. 788; Biggs v. Stroud (C. C.) 58 Fed. 717; Waters v. Central Trust Co., 126 Fed. 469, 62 C. C. A. 45.

The fact that the motion was made orally does not qualify the appearance. Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191. A defendant having by oral motion caused the court to make an order in the cause, thereby submitting to and invoking the jurisdiction of the court, may not thereafter challenge the jurisdiction. Murphy v. Herring-Hall-Marvin Safe Co. (C. C.) 184 Fed. 495. Defendant, appearing before the bar of the court and obtaining the grant of relief (Curtis v. McCullough, 3 Nev. 202; Ayres v. Western Railroad Co., 48 Barb. [N. Y.] 132), extension of time, necessarily submitted to the jurisdiction of the court, and must be held to be an appearance.

"It was doing an act in the progress of the cause and submitting to the jurisdiction of the * * * court, and was equivalent to an appearance, Ayres v. Western Railroad Co., supra. See, also, Curtis v. McCullough, supra; Insurance Co. v. Swineford, 28 Wis. 257; Texas & Pacific Ry. Co. v. McCarty, 29 Tex. Civ. App. 616, 69 S. W. 229; Murat v. Hutchinson, 16 N. J. Law, 46; Sargent v. Flaid, 90 Ind. 501." Murphy v. Herring-Hall-Marvin Safe Co., supra.

The order entered in this case is not unlike the order in issue in Murphy v. Hering-Hall-Marvin Safe Co., supra, which was by Judge Van Fleet held a general appearance.

I think the motion to dismiss must be denied.

THE MOANA.

(District Court, N. D. California, First Division. October 30, 1916.)

No. 16068.

SEAMEN ⊂=25—CONTRACTS.

Libelants, seamen who spoke a little English, were engaged by the assistant engineer to replace others who did not appear. They were informed that the voyage upon which they were entering was to be from San Francisco to New Zealand and return. Some days out of port they signed articles which provided only for a voyage to New Zealand, and when they reached that place they were discharged, signing a formal release to obtain their wages. They were not permitted to return as employés of the ship, because of the opposition of a sailors' union of which they were not members, and they returned on the ship as third cabin passengers. *Held* that, as the assistant was apparently authorized to engage the men, libelants were entitled to their wages for the return voyage, notwithstanding their execution of the release and signing of the articles, for under the circumstances there was practically nothing else they could do.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 129, 130; Dec. Dig. ⊂=25.]

In Admiralty. Libel by John Suarez and others, against the British steamship Moana, etc. Decree for libelants.

F. R. Wall, of San Francisco, Cal., for libelants.

Andros & Hengstler and Golden W. Bell, all of San Francisco, Cal., for respondent.

DOOLING, District Judge. Libelants, four seamen, shipped on board the British vessel Moana at San Francisco for a voyage, as they claim, from San Francisco to New Zealand and return. None of them speaks English very well, though all of them understand it to some small degree. Their claim is that before they went aboard, which was in fact just before the vessel sailed and to replace others who had been employed, but at the last moment had failed to appear, they were told by the assistant in the engineer's department, by whom they were actually employed, that the voyage upon which they were entering was to be from San Francisco to New Zealand and return, and that otherwise they would not have gone on board. Three days after leaving port they signed the ship's articles, which provided only, in so far as they were concerned, for a voyage to New Zealand; the vessel being then on the return trip of a voyage from New Zealand to San Francisco and return, and the articles being the original articles providing for such voyage. Libelants all testify that they were told at the time of signing the articles that these provided for a return trip to San Francisco. The purser, however, before whom the articles were signed, testified that it was explained to each libelant that the voyage for which they were signing would end at New Zealand. On their arrival at New Zealand libelants were discharged, and although they wanted to return on the vessel to San Francisco as employés, they were not permitted to do so, but were brought back as third-class passengers.

At New Zealand they were formally discharged before the shipping commissioner, were paid all wages due them, and signed releases accordingly.

This action is to recover the amount of wages claimed to be due them for the return trip to San Francisco, under the agreement made by them before they went on board. The only testimony before the court concerning what the engineer's assistant told them at the time he procured them to go on board shortly before the vessel sailed is the testimony of the libelants. From this and the attendant circumstances the court must find that libelants understood before they went aboard the Moana that they were shipping for a voyage from San Francisco to New Zealand and return, and under the circumstances the finding will be that such was their contract. That being so, it is not of much materiality to determine just what was done on board ship at the time of signing the articles, although I believe the libelants then understood they were signing articles for the return trip. There was, however, little else that they could then do, save to sign such articles as were presented to them. The ship in San Francisco was short-handed, and the time for her departure was near. It was necessary to have men, and the assistant engineer was apparently authorized to secure them, and did so. Under such circumstances his contract was the contract of the ship. That these seamen, speaking little English, signed off in a distant land before they could get the money then earned, does not seem to me to be a matter of much importance. They were prevented from returning as employés of the ship because of the opposition of the Sailors' Union in New Zealand, of which they were not members. The master, perhaps, did not know just what arrangement the assistant engineer had made with libelants; but, as such assistant was apparently authorized to employ the men, and did so, the ignorance of the master as to the terms of such employment cannot lessen the responsibility of the ship. Libelants were employed for a round trip from San Francisco to New Zealand and return, and are entitled to the wages prayed for.

A decree will be entered accordingly.

EWING v. S. L. LESZYNSKY & CO.

(District Court, W. D. Washington, N. D. May 22, 1916.)

No. 87E.

REMOVAL OF CAUSES ⇐=26—RIGHT OF REMOVAL—PLENARY SUIT BY TRUSTEE IN BANKRUPTCY.

A trustee in bankruptcy sued defendant in the state court on the ground that defendant had purchased the bankrupts' stock of goods without compliance with Rem. & Bal. Code Wash. § 5296, relating to bulk sales. Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565, as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (Comp. St. 1913, § 9654), declares that the trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided, and for the purpose of such recovery any court of bankruptcy, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. Section 23, subds. "a" and "b," declare that the federal Circuit Court shall have jurisdiction of all controversies in law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustee, and that suits by the trustee shall only be brought or prosecuted in the court wherein the bankrupt whose estate was being administered might have brought or prosecuted them if bankruptcy had not intervened, while sections 60b and 67e provide for suits to set aside preferences, etc. *Held* that the Bankruptcy Act did not deprive the defendant, a nonresident, of the right to remove the action to the federal court under the general law on the ground of diversity of citizenship, for the trustee represented the creditors, and such removal might have been had on that ground in a suit between them.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63; Dec. Dig. ⇐=26.]

Suit by Edwin C. Ewing, as trustee in bankruptcy of Joseph Paul and Samuel Paul, bankrupts, against S. L. Leszynsky & Co., a corporation, begun in the state court and removed to the federal court. On motion to remand. Motion denied.

Jones & Riddell, of Seattle, Wash., for plaintiff.

Leopold M. Stern and Preston & Thorgrimson, all of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiff, as trustee in bankruptcy, has commenced an action in the state court to recover from the defendant more than $10,000, alleged to be due to certain creditors, whose names are set out in the complaint, from the bankrupts; recovery being sought because the bankrupts transferred to the defendant their entire stock of merchandise in the city of Seattle, without taking from the debtors a statement of the names of the creditors, together with their addresses and the amount due the several creditors, as provided by the laws of Washington (section 5296, Rem. & Bal. Code), and that no part of the consideration of the sale of the stock of merchandise was paid to the creditors; that the stock of goods at the time was of the approximate value of $30,000. The cause was removed to this court on the motion of the defendant on the ground of diversity of citizenship.

The plaintiff has moved to remand to the state court on the ground that this is not a removable cause, and that the state court is the proper court in which it should be tried; that the suit is a plenary action instituted by the trustee in bankruptcy to recover property transferred in fraud of creditors more than four months prior to bankruptcy, which is permitted by the provisions of section 70e, Bankruptcy Act, as amended. The defendant agrees that section 70e refers solely to the jurisdiction of the bankruptcy court "as such," but that the defendants, nonresidents of the state, have a right to remove under the general law.

I do not think it was the intent of Congress to take away the rights of nonresident defendants to removal under the general law, where a plenary action is commenced for the assertion or enforcement of a legal right. The trustee, I think, from the language of the statute, section 70e, as well as sections 23, subds. "a" and "b," 60b, and 67e, stands in the same position, and none other, as would the creditors, for it is provided that the trustee may avoid any transfer made by the bankrupt of his property which any creditor might have avoided, and may recover it in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted. This clause concerns the right to sue only, and incidentally the jurisdiction of the court, and not the merits of the case. The bankrupt himself could have brought the suit in the state court, and the defendant would have had the right of removal, provided the amount in controversy was sufficient.

I think the motion to remand must be denied, and this conclusion is amply sustained by Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Spencer v. Duplan Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; Bush v. Elliott, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114; Wood v. Wilbert, 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. 264.

In re ROSENBERG-OLDSTEIN CO. et al.

(District Court, E. D. Louisiana. June 26, 1916.)

No. 2093.

BANKRUPTCY ⟸396(3)—EXEMPTIONS—LIFE INSURANCE POLICIES.

Under Act La. July 9, 1914 (Act No. 189 of 1914), a policy of insurance on the life of a bankrupt is exempt, where at the time of the passage of the act the policy had no cash surrender value, and the debts scheduled were also incurred thereafter, so that at no time the creditors have the right to resort to the policy for payment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸396(3).]

In Bankruptcy. In the matter of the Rosenberg-Oldstein Company and others, bankrupts. On review of decision of referee. Reversed.

Edgar M. Cahn, of New Orleans, La., for bankrupts.

Benjamin Y. Wolf, of New Orleans, La., for trustee.

FOSTER, District Judge. In this case one of the bankrupts, Jonas Oldstein, claimed a certain insurance policy as exempt under the Lou-

isiana statute (Act No. 189 of 1914). The policy was issued January 1, 1913, and had cash surrender and loan values after the payment of three annual premiums, which would not be earlier than January 1, 1915. The Louisiana exemption act was adopted July 9, 1914, nearly six months before the policy was available as an asset. The bankrupt was so adjudicated December 13, 1915, at which date the cash value of the policy had accrued. The referee found the facts in this case to be identical with those in Matter of Bonvillain, 232 Fed. 370, recently decided by this court, and on the authority of that case, considering that the condition of the policy at the date of adjudication governed, ruled against the exemption.

However, it is evident from the Bonvillain Case that the test of exemption is not whether the policy had a cash surrender value at the moment of adjudication, but whether the debts scheduled and the cash surrender value both antedated the exemption act. As to the debts that did not come into existence before its passage, the exemption act is valid. And creditors cannot complain as to its exemption, if the policy was not property to which they might have looked for payment prior to the change in the law.

The order of the referee will be reversed, and the trustee directed to surrender the policy to the bankrupt.

EQUITABLE TRUST CO. OF NEW YORK v. WESTERN PAC. RY. CO. et al.

(District Court, N. D. California, Second Division. August 21, 1916.)

No. 169.

INTERNAL REVENUE ⊂⊃9—CORPORATION TAX—BUSINESS CONDUCTED BY RECEIVERS—"NET EARNINGS."

Where receivers through whom the court took possession of the property of an insolvent railroad company operated the railroad, funds in the hands of the receivers, represented by the net proceeds in conducting the operations of the road over and above the expense and authorized expenditures paid out by them, are not subject to the tax under federal Income Tax Act as "net earnings," and no return could be made thereon

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.

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

In Equity. Suit by the Equitable Trust Company of New York, a corporation, against the Western Pacific Railway Company, a corporation, and others. On application by receivers for instructions whether to make a return under the federal Income Tax Act. Receivers directed to make no return.

See, also, 231 Fed. 478; 233 Fed. 335; 236 Fed. 814.

Jared How, of San Francisco, Cal., for plaintiff.

Alexander R. Baldwin, of San Francisco, Cal., for defendants.

John S. Partridge and Garret W. McEnerney, both of San Francisco, Cal., for receivers.

VAN FLEET, District Judge. The question presented by the application of the receivers herein for instructions of the court is whether the fund in the hands of the receivers, represented by the net proceeds in conducting the operations of the road while in their hands over and above the expense and authorized expenditures paid out by them, is subject to tax under the federal Income Tax Act as net earnings of the corporation, and as such required to be returned by them to the Collector of Internal Revenue of this district for the purposes of such tax.

I am of opinion that the facts bring the case within the principles of Pennsylvania Steel Co. v. New York City Railway Co., 198 Fed. 775, 117 C. C. A. 556; and upon the authority of that case it is held that such fund is not subject to the tax.

The receivers will be governed accordingly, and an appropriate order to that end may be prepared by the attorney for the receivers and entered herein.

EQUITABLE TRUST CO. OF NEW YORK v. WESTERN PAC. RY. CO. et al.

(District Court, N. D. California, Second Division. September 5, 1916.)

No. 169.

RAILROADS ⊂=199—MORTGAGES—FORECLOSURE—ATTORNEYS' FEES—ALLOWANCE.

The allowance of compensation to attorneys for bondholders, not participating in the reorganization scheme, in a suit to foreclose a railroad mortgage out of the entire fund applicable to the payment of such bonds, rests within the discretion of the trial court, and, having been made, will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 664; Dec. Dig. ⊂=199.]

Suit by the Equitable Trust Company of New York, a corporation, against the Western Pacific Railway Company and others. Upon settlement of the account of the receivers, Pillsbury, Madison & Sutro applied for an allowance of fees for services rendered in the litigation, to be chargeable upon the corpus of the fund in the hands of the master. Application granted.

See, also, 231 Fed. 478; 233 Fed. 335; 236 Fed. 813.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for the application.

Jared How, of San Francisco, Cal., opposed.

VAN FLEET, District Judge. On the hearing of the settlement of the accounts of the receivers herein and the allowance of their compensation and that of the several counsel concerned, one of the applications was by Pillsbury, Madison & Sutro for the allowance to them of a fee for their services rendered in the litigation to certain minority bondholders, to be chargeable upon the corpus of the fund in the

hands of the special master applicable to the payment of bonds held by those holders not participating in the reorganization of the defendant company, upon the theory that the services performed had redounded to the benefit of all such nonconsenting bondholders, whether appearing or not, and thereby rendered such compensation a proper charge upon such fund. Objection was made by counsel for the plaintiff, based upon the contention that any compensation awarded for such services could only properly be paid out of the moneys from such fund payable to the holders of bonds represented by the intervener for whom counsel specially appeared.

The court being in doubt, the question was reserved, but an examination of the decree of confirmation of sale heretofore made herein by Judge Dooling at the instance of plaintiff satisfies me that the objection now made is not open to consideration under its terms. That decree, in providing for payments by the master out of the fund applicable to the satisfaction of the demands of such nonconsenting bondholders of a certain per cent., fixed in the decree, of the price of each bond, expressly recites that such payment—

"will be the amount such bondholder is entitled to receive as his proportionate share of the purchase price, after deducting therefrom a sum equal to the total amount of the claims herein set out, apportionable to the bonds of such bondholder, that is to say, the sum of 85 cents per $100 face amount of such bonds, and, after deducting therefrom a sum equal to $1.15 per $100 face amount of such bonds, to provide a fund to cover such compensation and expenses as may be hereafter allowed by the court to Messrs. Pillsbury, Madison & Sutro, the attorneys for Savings Union Bank & Trust Company, intervener herein, on behalf of itself and the holders of such bonds, which are not to be utilized by the purchasers in part payment of the purchase price."

This provision, it will be seen, expressly contemplates that the compensation of the attorneys named for the services in question shall, as now requested by them, be made a charge upon the fund applicable to the payment of the entire body of such nonconsenting or nonparticipating bondholders, and that such provision was a proper one, and entirely within the discretionary province of the judge making such decree, is well established. Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Buell v. Kanawha Lumber Corporation (D. C.) 201 Fed. 762, 767; Central Trust Co. v. United States L. & H. Co., 233 Fed. 420, 422, — C. C. A. —; Edwards v. Bay State Gas Co. (C. C.) 172 Fed. 971.

The objection will accordingly be overruled, and an order may be entered for the allowance of the compensation of the attorneys named as fixed by the court on the hearing.

FRIEDMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916. Rehearing Denied November 7, 1916.)

No. 2371.

CONSPIRACY ⊜43(11)—OFFENSES—INDICTMENT.

An indictment charging that defendants, expecting an involuntary petition in bankruptcy to be filed against one of them, and an adjudication and the appointment of a receiver to follow, conspired to conceal from the trustee property belonging to the expected bankrupt, and setting forth overt acts done pursuant to the conspiracy, is sufficient, though not alleging that the owner was a bankrupt at the time of the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 98; Dec. Dig. ⊜43(11).]

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

Koppel Friedman was convicted of conspiring to defeat the Bankruptcy Act, and he brings error. Affirmed.

Morris K. Levinson, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Joseph B. Fleming, both of Chicago, Ill., for defendant in error.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. Is an indictment valid which, after alleging that defendants expected an involuntary petition in bankruptcy to be filed against one of them and an adjudication and the appointment of trustee in bankruptcy to follow, charged a conspiracy to conceal from such trustee certain property belonging to the expected bankrupt and specifically described, and set forth overt acts done pursuant to the conspiracy, but did not allege that such owner was a bankrupt at the time of the conspiracy?

U. S. v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211, in our judgment, is conclusive of the question. While the only matter discussed in the opinion is whether the limitation period provided in the Bankruptcy Act (Act July 1, 1898, c. 541; 30 Stat. 544) or the general limitation statute is applicable to such an offense, the indictment upheld by the court was substantially identical with that in the instant case. The express contention of counsel for the government in that case that it is unnecessary in such a conspiracy charge to aver or prove that bankruptcy proceedings had in fact been instituted was necessarily sustained when the indictment was held valid. See, too, Radin v. U. S., 189 Fed. 571–575, 111 C. C. A. 6.

Judgment affirmed.

REICHARDT v. HILL et al.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2797.

1. BROKERS ⟸42—"MERCHANDISE BROKERS"—COMMISSION MERCHANTS.
Ordinances of the city of St. Louis declare that every person, firm, or company of persons who, for a commission, shall negotiate between the owner and purchaser for the purchase or sale of goods, wares, or merchandise, or other articles of commerce, are merchandise brokers, who shall be required to pay an annual license fee of $50, and that any person doing business as a merchandise broker or commission merchant without the license shall be deemed guilty of a misdemeanor, and on conviction shall be fined. The articles mentioned in the ordinances defining a merchandise broker are the same as those in Rev. St. Mo. 1899, §§ 8540, 8542, defining merchants. Plaintiff, the sales manager of a wholesale grocery company, negotiated a sale of several grocery stores owned by defendant. The value of the several stocks of goods was computed at current wholesale prices, but the values of the other things sold were fixed through negotiations. *Held* that, as the stores were going concerns with facilities for carrying on grocery business, plaintiff in selling the stores was not engaged as a merchandise broker or commission merchant, and not bound to obtain the license.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. ⟸42.

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

2. CONTRACTS ⟸136—ACTIONS—PROHIBITED CONTRACT.
No action can be maintained on a contract which is itself prohibited by law, though the prohibition be merely implied.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. ⟸136.]

3. COURTS ⟸365—PRACTICE—FEDERAL COURTS—STATE DECISIONS.
A contract made and to be performed within a state is affected by the state laws, and the state decisions will govern its construction.

[Ed. Note.—For others cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.]

4. BROKERS ⟸42—LICENSES—ILLEGAL CONTRACTS—ORDINANCES—CONSTRUCTION.
St. Louis ordinances require merchandise brokers to obtain a license, and declare the carrying on of business without a license to be a misdemeanor, punishable by fine. The ordinances are mere excise laws; no qualifications for merchandise brokers other than payment of the license being prescribed. *Held*, that a merchandise broker may maintain an action for commissions for sales effected, though he had not obtained the required license.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. ⟸42.]

In Error to the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Action by Arthur C. Reichardt against H. G. Hill and the H. G. Hill Grocery & Baking Company. There was a judgment for defendants and plaintiff brings error. Reversed and remanded.

Wm. Sacks, of St. Louis, Mo., for plaintiff in error.

E. A. Price, of Nashville, Tenn., for defendants in error.

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

WARRINGTON, Circuit Judge. In the amended form of the action below, Reichardt, plaintiff, sought to recover compensation for services alleged to have been rendered by him in September, 1911, at the request of Hill and the Hill Grocery & Baking Company, defendants, in procuring a purchaser for their nine grocery stores situated in St. Louis. Plaintiff alleges that his compensation was to be given in the form of an electric coupé of the value of $3,500, and that pursuant to this contract he negotiated the sale of the stores to the Maurer-Remley Company at a price of more than $52,000. Admittedly, the stores were sold to the purchaser named and the purchase price was paid. However, defendants deny that they requested plaintiff to secure a purchaser, or that they ever promised to compensate plaintiff for so doing, or that plaintiff did anything to aid the sale, except only in a friendly and gratuitous way to bring the parties together. As a further defense the defendants allege plaintiff's failure to comply with a certain ordinance of the city of St. Louis, where the sale was negotiated and the contract, if entered into at all, was made, and that in consequence of such failure the ordinance forbids recovery upon the contract in dispute. This ordinance defines a "merchandise broker," exacts of every such broker doing business in that city payment of $50 in advance for an annual license, and imposes a penalty upon any person there doing business as a merchandise broker without such a license. The evidence is in conflict touching the existence of the contract relied on. It appears that plaintiff had in the course of his business career of 20 years negotiated other sales similar to this and received commissions thereon, though it is not shown that he ever had a license under the ordinance, and concededly he had none at the time of the present transaction. At the close of all the evidence the defendants presented a motion for a directed verdict. The court was of opinion that so far as the question of fact was concerned—that is, whether the contract was entered into—the evidence required submission of the case to the jury, but that the alleged contract must be tested by the law of Missouri, and that since plaintiff failed to secure a license under the ordinance he has "no right of action on the contract, if it was in fact made"; and upon this ground alone the motion to direct a verdict was granted. Under the errors assigned, this ruling presents the only question for determination here.

[1] In view of the conclusion reached by the learned trial judge that there was a question of fact to be determined by the jury, in which conclusion we concur, it must be assumed for the purposes of this opinion that the contract alleged was in truth made. The controlling inquiries are: What application has the ordinance to the transaction? and if applicable, what is its effect? We hesitate to consider the first of these inquiries, for the case was tried below upon the theory involved alone in the second inquiry; still, in view of our conclusion that a new trial will have to be awarded, we are constrained to believe that the

theory of relevancy of the ordinance presents the initial question. The ordinance is embodied in the Revised Code of 1912 of the City of St. Louis, and comprises three sections, viz.: 2120, approved October 20, 1877; 2121, approved February 28, 1899; and 2122, approved December 30, 1898. These sections were in force during the whole of 1911, and it was admitted at the trial below that the sections of the ordinance were "passed by the city of St. Louis, and within its authority." The sections follow:

"Sec. 2120. *Merchandise Broker Defined.* Every person, firm or company of persons who for commissions, brokerage or other compensation shall negotiate between the owner and purchaser, or their respective agents, for the purchase or sale of goods, wares, or merchandise or other articles of commerce, is hereby declared to be a merchandise broker, whether such negotiations are on his own account or that of an employer or other person.

"Sec. 2121. *License of Merchandise Broker and Agents or Assistants.* Every merchandise broker and every member of a firm or company of merchandise brokers, and every clerk or assistant thereof, doing business as such in this city, shall pay in advance for annual license the sum of fifty dollars.

"Sec. 2122. *Penalty.* Any person doing business as a merchandise broker or commission merchant, whether alone or as a member of a firm or company of brokers, or as a clerk or assistant, or employé of such person or firm, without the license provided for in this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than twenty-five dollars nor more than five hundred dollars."

Counsel agree that this ordinance has never been construed by any court of Missouri, and the absence of such a decision is to be regretted. As to the relevancy of the ordinance, it is to be observed that a "merchandise broker" is defined to be a person who for a consideration "shall negotiate between the owner and purchaser * * * for the purchase or sale of goods, wares, or merchandise, or other articles of commerce." While the first two sections speak only of a merchandise broker, the last section mentions also a commission merchant—"merchandise broker or commission merchant"; yet the record furnishes no means for differentiating the merchandise broker from the commission merchant for any purpose indicated by the ordinance. However, the articles mentioned in the ordinance to define a "merchandise broker" are substantially the same as those contained in a Missouri statute to define a "merchant," and the definition of the latter seems to include a "commission merchant" (2 Rev. St. of Missouri [Ed. 1899] §§ 8540 and 8542, especially proviso in latter section); thus, whether the ordinance alone or both the ordinance and the statute be considered, the business of a merchandise broker and that of a commission merchant are practically the same, and may safely be so treated in determining the scope of the ordinance. The subjects embraced in the ordinance, which are seemingly in essential part designed to characterize and identify the persons in contemplation, are described generically, "goods, wares, or merchandise, or other articles of commerce," and these words must be regarded as of prime importance in determining the present relevancy of the ordinance. The words, it is true, are to be given a broad meaning, but they appropriately indicate and so comprehend articles which are involved in the usual and daily transactions occurring between dealers, such as wholesalers and

retailers, for the purpose of supplying their ordinary customers. The multiplicity of such transactions would naturally furnish opportunities for the conduct of a distinct business, such as that of brokers, to facilitate the customary barter and trade of dealers. Moreover, the association of "goods, wares, or merchandise" with "other articles of commerce" casts additional light upon the nature of the transactions which fall reasonably within the purview of the ordinance; for such association must signify that the "goods, wares, or merchandise" in contemplation are "articles of commerce"; noscitur a sociis. Such articles are not exceptional; they are the ordinary things, the staples, that enter into the every-day trade of merchants.

Now it is difficult to see how such an ordinance as this could have been intended to apply to a transaction of the character we have here. Here were nine grocery stores maintaind in nine different localities and designed to serve as many different communities in the city of St. Louis; they apparently comprised separate and distinct outfits, such as fixtures, means and appurtenances, horses and wagons, and stocks of goods, such as were usually required in the conduct and operation of separate stores; in a word, they were going concerns, and, inferentially, each was possessed of a good will of more or less value. True, the relations of defendants to the buildings, the realty, where the grocery stores were severally maintained and carried on, whether as lessees or owners, do not appear; but the entities, the stores, are none the less distinctive. All these objects are to be treated as a unitary subject, when considering the sale here negotiated and completed at a price of upwards of $52,000. In fixing the selling value of the stores, the stocks of goods, it is true, were estimated at current wholesale prices; but the other things entering into the sale involved estimates of value and also negotiations before the total value and price were agreed on. Can it be that all this involved simply a purchase and sale of "goods, wares, or merchandise, or other articles of commerce" within the true intendment of the ordinance? The fact that there were articles in each of these stores, say a stock of goods, which if separately considered would fall within the descriptive words of the ordinance, cannot justify the isolation of those articles for the purpose of treating them as the subjects of separate sales; they, like the other things sold, are to be regarded as constituting essential parts of an exceptional and unitary subject-matter of sale; certainly this must be true as respects a comparison of such a sale with the sales contemplated by the ordinance.

The difference between the present sale and the sales seemingly covered by the ordinance, derives emphasis from the fact that many of the things involved in the former, such as fixtures and the like, must have lost their identity as ordinary articles of trade, since it is to be presumed that they had been fitted and adapted to the particular places in which they were used and so did not possess the characteristics which might originally have brought them, as well as the materials from which they were made, within the descriptive words of the ordinance; and, moreover, it does not appear that these articles did not in

value constitute a substantial portion of the sale, since their continuance in the particular stores to which they belonged would naturally preserve values in them which could not otherwise have been realized; it therefore cannot be safely said that the stocks of goods embraced in the sale so far dominated the transaction as to bring it within the meaning of the ordinance. This would seem to be the inevitable result of taking over the stocks of goods at wholesale prices; for no advantage is perceivable in so purchasing the stocks of goods, instead of securing their equivalents in the open market, unless the other things purchased were material objects of the transaction. Above all, when stores are sold as going concerns, the good will usually attending them serves strongly to characterize the transactions as falling without the legislative purpose here disclosed; and while the record does not show the value of the good will which inferentially belonged to these stores, the customary inclusion of good will in such sales as this is helpful to a right interpretation of the ordinance.

It is not to be overlooked that the plaintiff testified that he had in the course of his long business career negotiated a number of sales similar to this one; but it is noteworthy that this seems to be the first time any one ever claimed that such sales were intended to be included within the ordinance. Indeed, such other sales seem to have been rather a negligible incident of plaintiff's regular business and conducted without any purpose of entering into the brokerage business. He was the secretary, treasurer and sales manager of the Niese Grocery Company, and, it is true, he would make sales of his company's goods two or three times a week to other stores, including those of the Hill Company which was one of its best customers; but it is not shown or claimed that he made these sales on commission or as a broker. Of course, such sales were, as he testified, the same in character as those made by other city salesmen. He also testified, in substance, that his object in bringing about sales of other stores was to keep in touch with them so as to make of the buyers customers for his own store. This testimony does not tend to show either that the plaintiff was holding himself out as a broker or engaged in the brokerage business in the sense that he was amenable to the license fee (Chadwick v. Collins, 26 Pa. 138, 139; Black v. Snook, 204 Pa. 119, 120, 53 Atl. 648; Pope v. Beals, 108 Mass. 561, 562; Johnson v. Williams, 8 Ind. App. 677, 678, 36 N. E. 167); the effect of such testimony would seem to fortify the distinction pointed out between sales like the one here involved and those contemplated by the ordinance. It need not be said that, if the foregoing view of the ordinance is correct, the motion below to direct a verdict should have been denied.

[2-4] But as the ordinance has received no judicial construction in Missouri and additional evidence may be introduced at the next trial, we deem it necessary also to consider the ground on which the motion to direct was granted. We thus come to the question, whether upon the theory of applicability of the ordinance it forbids recovery upon the contract in issue. The answer to this question must depend upon the purpose and effect of the ordinance. The rule that an action can-

not be maintained upon a contract which is prohibited by law is, of course, to be conceded. The ordinance does not in express terms prohibit such contracts as the one now in dispute. Still the prohibition need not be express; it may be implied. The prohibition of an act is implied in the imposition of a penalty for committing it. The prohibition, and the only one, to be deduced from this ordinance, touches pursuit of the business without first paying the license charge, and to secure payment of this charge is the paramount object of the ordinance. This will be clearly seen through close scrutiny of the ordinance as a whole. The ordinance recognizes the particular business to which it relates as entirely legitimate. For it prescribes no qualification as respects the persons desiring to engage in the business save only ability to pay an annual license charge of $50, and imposes a penalty on persons engaging in the business only because of their failure to pay that charge. It prescribes no regulations whatever according to which the business shall be conducted. It points out no public evil for either prevention or repression. It discloses no scheme of legislative policy except only a plan for the collection of revenue.

The most, then, that can be said of the ordinance is that it in effect lays a tax on persons who engage in the business, and unless the tax is paid imposes a penalty on such persons; but it nowhere discloses an intent to inflict the penalty of illegality upon contracts made between the delinquent broker and third persons. This interpretation of the ordinance admits of recovery on the contract under what seems to be a settled rule of judicial decision in the state of Missouri in cases (called by Judge Bland the "Missouri license cases") similar to the present one. And since the ordinance was adopted and the contract made in Missouri, and in view of the apparent harmony between the decisons of the Courts of Appeals and the Supreme Court of that state concerning the rule of the Missouri license cases, we shall for present purposes treat that rule as the law of this case; for in such a situation as this we do not regard the case of Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 721, 741, 68 C. C. A. 89 (C. C. A. 8) as applicable. And see In re Gilligan, 152 Fed. 605, 606, 81 C. C. A. 595 (C. C. A. 7).

In Tooker v. Duckworth, 107 Mo. App. 231, 235, 80 S. W. 963, 964, a real estate broker, without having obtained a license under a city ordinance similar to the one here involved, was allowed to recover for services performed for the defendant, Judge Bland saying:

"The purpose of the ordinance * * * is to raise revenue for the city, not to make that which was theretofore valid invalid if the ordinance is not complied with, or to impinge upon the right of real estate agents to make contracts. Whether or not the plaintiff is a licensed real estate agent is no concern of the defendant. As was said in the Prince Case [20 Mo. App. 332], it was essentially, and we might add exclusively, a matter between the city and the plaintiff. There are authorities in other states to the contrary, but they have not been followed in this state. * * *"

In Rothwell v. Gibson, 121 Mo. App. 279, 285, 98 S. W. 801, 803, a real estate broker's commission was denied under a statute which forbade offering real property for sale without the written authority of

the owner, but after reviewing, among others, the "Missouri license cases," Judge Bland distinguished the license cases thus:

"The case is also distinguishable from the Missouri license cases, supra, in this: The statutes requiring a merchant and real estate broker to take out a license to do business are mere excise laws, enacted for the purpose of raising revenue. No private individual has any special interest in them, nor were they enacted for the purpose of protecting the interests of private individuals, and hence no individual is in a position to invoke their noncompliance to defeat his contracts with an unlicensed merchant or real estate broker."

Indeed, as early as 1853, in Columbus Ins. Co. v. Walsh, 18 Mo. 230, 238, in passing upon the right of the insurance company to recover money paid for a loss under its policy in ignorance of subsequent insurance which in terms avoided the policy, and in denying the defense of illegality of the policy by reason of the company's failure to obtain a license, it was said:

"These agencies are required to obtain a license—to pay a tax, and upon neglect or failure, the statute makes them liable to a penalty of $500; but it does not declare contracts made by them void. The law requires a merchant to obtain license before he can sell his merchandise, yet should he sell without license and then sue to collect his debt, no person ever supposed the omission to obtain license would defeat his right to sue—would be a defense to his debtor."

And it is to be observed that in Ehrhardt v. Robertson Bros., 78 Mo. App. 404, 408, 409, when apparently distinguishing Columbus Ins. Co. v. Walsh, it was said of the statute law involved in the Walsh Case that its object was revenue. See, also, Prietto v. Lewis, 11 Mo. App. 601; Prince v. Eighth Street Baptist Church, 20 Mo. App. 332, 334; Smythe v. Hanson, 61 Mo. App. 285.[1] It should be said of Prince v. Baptist Church, Tooker v. Duckworth, and Prietto v. Lewis, above cited, that Judge Sanford believed that, if considered alone, they would entitle plaintiff here to recover on his contract, and that they are consistent with all the decisions of the Missouri Supreme Court, except one—Tri-State Amusement Co. v. Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808. We are not satisfied that they are not consistent also with that decision. The reason for this is that so far as appears none of the ordinances construed in the three decisions first named declared any rule of policy save only a plan for the collection of revenue, similar in substance to that of the present ordinance; while the statute passed

[1] It will not be amiss, though it is not strictly necessary, to call attention to the following decisions of other states which are in accord with those above cited in the opinion: Pangborn v. Westlake, 36 Iowa, 546, 548, cited with approval in Miller v. Ammon, 145 U. S. 421, 426, 12 Sup. Ct. 884, 36 L. Ed. 759; Ruckman v. Bergholz, 37 N. J. Law, 437, 440; Larned v. Andrews, 106 Mass. 435, 437, 8 Am. Rep. 346; Fairly v. Wappoo Mills, 44 S. C. 227, 233, 22 S. E. 108, 29 L. R. A. 215; Aiken v. Blaisdell, 41 Vt. 655, 665; Niemeyer v. Wright, 75 Va. 239, 242, 40 Am. Rep. 720; Taliaferro v. Moffett, 54 Ga. 150, 153; Watkins Land Mortgage Co. v. Thetford, 43 Tex. Civ. App. 536, 538, 96 S. W. 72; Walker v. Baldwin, 103 Md. 352, 354, 63 Atl. 362; Jones v. Berry, 33 N. H. 209, 210; Ober v. Stephens, 54 W. Va. 354, 358, 46 S. E. 195; Mandlebaum v. Gregovich, 17 Nev. 87, 92, 28 Pac. 121, 45 Am. Rep. 433; Randall v. Tuell, 89 Me. 443, 445, 36 Atl. 910, 38 L. R. A. 143.

on in the Tri-State Amusement Case declared a distinct rule of public policy independently of any purpose to collect revenue. The Tri-State Amusement Company was an Illinois corporation and seeking in that case to enforce a contract entered into between it and the defendant and intended to be performed in Missouri. The defense relied on, and on demurrer sustained, was that the plaintiff had not complied with the statute just alluded to and that the contract was invalid for that reason. The statute in express terms (1) prohibited any foreign corporation, organized for pecuniary profit, to transact business in the state until it should establish an office therein where legal service might be had upon it, and where certain prescribed corporate books should be kept; (2) subjected such corporations "to all the liabilities, restrictions and duties" which were or might be imposed upon domestic corporations of like character, and denied to them any "other or greater powers" than were possessed by "domestic corporations"; and (3) required them each to file with "the secretary of state a copy of its articles or certificate of incorporation," with a sworn statement showing "the proportion of its capital stock which is represented by its property located and business transacted" in the state, and also to pay "incorporation taxes" and fees equal to those exacted "of similar domestic corporations." It was held in respect of these provisions (Tri-State Amusement Co. v. Amusement Co., supra, 192 Mo. at page 420, 90 S. W. at page 1024, 4 L. R. A. [N. S.] 688, 11 Am. St. Rep. 511, 4 Ann. Cas. 808):

"In this way the lawmakers intended to make foreign corporations become locally incorporated in like manner and with like obligations and liabilities as are required of domestic corporations, and prohibits such foreign corporations from transacting business in this state until they have become so locally incorporated. * * * If the statute had stopped here, and made no other provision, or provided no other penalty, there would be no room for cavil that it was the intention of the Legislature to make contracts invalid that were entered into in this state by foreign corporations before complying with the statute."

True, as the court pointed out, the statute also provided that every such corporation should pay a fine of $1,000 and that it should not be entitled to maintain any suit or action upon any demand whatever, where it failed to comply with the statute; but to regard these provisions as having been designed in and of themselves, especially the one prescribing the fine, to reach and invalidate such contracts as the one there in issue, would be to ignore the corporate status with which it was the intention of the statute to invest foreign corporations entering the state for business objects. This status was the dominating feature of the statute, and its object was, as Judge Marshall in substance said in the course of the opinion, to force foreign corporations doing business or making contracts in the state to place themselves on an equality with domestic corporations; obviously, such an object can be but remotely related to the idea of securing revenue.

There are still further reasons for believing that the Missouri license cases are reconcilable with the Tri-State Amusement Case. They are not even alluded to, much less overruled, in that case; and in view of the extensive examination made of Missouri decisions in the Tri-

State Amusement Case, it is not to be presumed that the Missouri license cases would have been overlooked if they had been regarded as in conflict with the case in hand. Further, before the statute involved in the Tri-State Amusement Case was there interpreted, it had been given substantially the same construction by the two Courts of Appeals of Missouri (Williams v. Scullin, 59 Mo. App. 30; Ehrhardt v. Robertson Bros., supra, 78 Mo. App. 404); yet such construction of the Courts of Appeals was deemed by them to be quite consistent with the decisions in the Missouri license cases; and in Rothwell v. Gibson, supra, 121 Mo. App. at page 285, 98 S. W. 801, the Tri-State Amusement Case was one of a group of cases from which the Missouri license cases were expressly distinguished.

Attention has been called to the case of Downing v. Ringer, 7 Mo. 585. Ringer, as assignee of a note given by Downing in purchase of an unplatted lot, was denied recovery because of a statute forbidding under penalty any person to sell or offer for sale any lot within a town or village before a map or plat of the town was made and acknowledged and then deposited in the recorder's office. The rule was there laid down broadly that the prohibition of an act is implied in the imposition of a penalty for committing it. But the court must have construed the statute in that case as declaring a rule of policy looking to the protection of the public in respect of sales of unplatted lots; this was sufficient to characterize the statute and to exclude it from the category of revenue measures. The case therefore does not differ in principle from the Tri-State Amusement Case; indeed the Ringer Case was there cited and relied on. While it is true, as the court below said, reference is made in both the Ringer Case and Tri-State Amusement Case to Lord Holt's language in the note to his decision in the old usury case of Bartlett v. Vinor, 2 Carth. 251, 252, decided in 1743, stating in substance that the imposition of a penalty implies a prohibition, yet it is to be observed that the rule might well be applied in those cases without at all impinging upon the principle underlying the Missouri license cases, for these license cases hold that the contracts there in issue were not intended to be penalized by the legislative provisions construed; and the effect of this was in no wise opposed even to Lord Holt's rule, since under that rule, as Baron Parke said in Cope v. Rowlands, 2 M. & W. 149, 157, "the sole question is whether the statute *means to prohibit the contract.*" And likewise, as Mr. Justice Wayne said in the leading case of Harris v. Runnels, 53 U. S. (12 How.) 79, 83, 13 L. Ed. 901:

> "The statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the Legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice."

And see Dunlop v. Mercer, 156 Fed. 545, 555, 556, 86 C. C. A. 435 (C. C. A. 8); Victorian Daylesford Syndicate, Limited, v. Dott [1905]

2 Ch. 624, 630; Carland v. Heckler, 233 Fed. 504, 506, — C. C. A. — (C. C. A. 6).

The rule, then, to be deduced from the two lines of Missouri decisions above pointed out and sought to be distinguished, may be broadly stated thus: As respects an ordinance or a statute requiring payment of a license fee or compliance with other provisions as a condition to the pursuit of a business or calling, the effect of such ordinance or statute upon contracts made by persons defined therein, in the course of such business or calling, will, in the absence of express provision, be determined by the object of the measure; if the object is merely to provide a fiscal expedient, an inhibition against pursuit of the calling or business to be implied alone from the imposition of a penalty for failure to pay the license fee, will not be construed to reach and invalidate such contracts; but if the object is to exact qualifications of the applicants or otherwise to furnish protection to the public, even though the object also include revenue, such an implied inhibition will be as effective as an express provision would be to invalidate contracts. Treating the ordinance then as applicable to transactions like the one here involved, it plainly does not, under this rule, affect the contract.

The judgment will accordingly be reversed, with costs, and the case remanded, with direction to award a new trial.

MENEFEE et al. v. UNITED STATES.*

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

No. 2766.

1. CONSPIRACY ⟸45—EVIDENCE—ADMISSIBILITY.

The indictment charged that defendants conspired together to use the mails in connection with their disposal of corporate stock by misrepresentations, that defendants intended to induce investors and the public to purchase the stock by means of false and fraudulent representations sent through the mails, representing that the corporation whose stock was being offered was the owner of patents to certain devices, that on account of the ownership of the patent shares were of great commercial value, and that dividends would be shortly paid, when in fact the corporation was not the owner of the patents enumerated and was not then manufacturing. The corporation did own a patent for one device, but one of the defendants, learning that there was a prior patent for a similar device, which possibly rendered the patent of the corporation of little value, notified the other defendants of that fact, and they began to sell stock owned by them individually, instead of treasury stock. *Held* that, though there was no substantial issue involving the validity of the patent owned by the corporation, nevertheless in such case the existence of the prior patent and defendants' knowledge thereof was admissible on the question of their good faith in representing that the corporation was the owner of the patents as asserted.

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

2. CONSPIRACY ⟸45—EVIDENCE—ADMISSIBILITY.

In such case, the evidence is admissible, though there was no allegation in the indictment that the stock was worthless, or was not worth what it

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

*Rehearing denied January 8, 1917.

was represented to be, on account of the limitations of the patent which the corporation owned, by reason of prior claims of other inventors.

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

3. CRIMINAL LAW ⊂⊃1169(5)—APPEAL—HARMLESS ERROR.

In such case, where the court charged that if a conspiracy existed, and defendants represented that the corporation owned patents to machines which they proposed to manufacture, and such representations were false, and known by defendants to be false, the conspiracy would constitute a scheme to defraud, but if, at the time the representations were made, the corporation did in fact have patents issued for machines as represented, the representations would not be false, and bad faith cannot be imputed to defendants because the claims of such patents infringed prior patents, for there is a presumption that a patent, having been issued, does not infringe any known patent, and the patentee is not guilty of bad faith in accepting it, the admission of expert evidence concerning the patents held by the corporation, together with testimony as to their scope and validity, was harmless, though erroneous; the consideration of the jury being restricted only to those explanations which bore upon the mechanical features and the state of art before and at the time defendants made their representations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⊂⊃1169(5).]

4. CRIMINAL LAW ⊂⊃470—EVIDENCE—OPINION EVIDENCE.

In such case, expert testimony as to the validity of the patent held by the corporation was not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. ⊂⊃470.]

5. CRIMINAL LAW ⊂⊃763, 764(10)—TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

In a prosecution for conspiring to use the mails to defraud, by sending through the mails false and fraudulent representations as to corporate stock for sale, the court charged that one of the cardinal points in the case was the intent of the defendants, that questions whether it was their intent that they could make the business of the corporation successful must necessarily be answered "No"; that if they agreed to make false and fraudulent representations for the purpose of deceiving investors and the public, their ultimate belief that they could make the business a success would not excuse the false and fraudulent representations; that, in considering the question of intent to defraud, the jury should consider the intent as presented by the particular transaction attacked, and that it mattered not how confident defendants were that they could make the business succeed, or that they could return the money without loss or with profit. Other portions of the charge stated that the question for determination was not whether the business which defendants were engaged in was a legitimate or practical one, but was whether defendants were guilty of disposing of corporate stock with a criminal or wrongful intent. *Held* that, in view of the charge as a whole, the first portion of the charge was not objectionable, on the theory that it directed the jury that the defendants did not have an intention of making a success of the business, and that they did not believe it could be made successful, but the whole question of defendants' wrongful intent was left to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738; Dec. Dig. ⊂⊃763, 764(10).]

6. CRIMINAL LAW ⊂⊃763, 764(6)—TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

In such case, in view of the fact that the court charged that the jury should not accept its views concerning any disputed question of fact, unless they conformed to their own understanding, that portion of the charge that, if defendants agreed to make false and fraudulent pretenses or representations and assurances for the purpose of deceiving investors and

the public, then the intent to make the business a success, or the belief that they could make the business a success, would furnish no excuse, was not objectionable on the ground that the charge did not limit the matter to representations and pretenses, but included promises and assurances that dividends would be paid and that the corporation would be a success.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1733; Dec. Dig. ⊂⊃763, 764(6).]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Frank Menefee and others were convicted of violating Penal Code, § 37, by conspiring to violate section 215 by using the mails to defraud, and they bring error. Affirmed.

Defendants, plaintiffs in error here, Menefee, Todd, Campbell, and Bonnewell, were convicted for violation of section 37 of the Penal Code, as a result of charges that defendants conspired to violate section 215 of the Penal Code, which relates to the use of the United States mails to promote fraud. The United States Cashier Company was an Oregon corporation. Menefee was a director and president and general manager of the corporation. Defendant Bonnewell was the fiscal agent thereof. Defendant Todd was a sales agent for a time. Campbell was a director and vice president for a time. Between September 1, 1910, and January 31, 1914, the capital stock amounted to $1,200,000 divided into 120,000 shares, of the par value of $10 a share.

The charge is that defendants with others conspired to execute a scheme to defraud by means of using the post office, and to obtain money by false representations from a number of persons named in the indictment and from the public generally by inducing them to open negotiations with the defendants and with the United States Cashier Company, and to buy stock in the corporation, and to pay defendants therefor, the payments to be procured by false and fraudulent representations of the defendants to the investors and the public; that the conspirators were to induce the investors and the public to pay and deliver to the defendants and the corporation, in exchange for shares of stock, money, by means of false and fraudulent representations by means of printed matter to be sent through the post office to the investors and other persons, representing that the United States Cashier Company owned the patents to certain devices, a change computing machine, a bank cashier machine, a lightning change maker, a currency paying machine, and a new style adding machine, and that the Cashier Company was manufacturing the machines, and that, on account of the alleged ownership of said patents and the manufacturing business, shares in the corporation were of great commercial value, and that dividends would be paid within six months from the date of the purchase of the stock; that the Cashier Company would sell large orders for the machines; that its financial condition was excellent, and that a large amount of capital stock of the corporation offered for sale was the property of the corporation, and that the money to be obtained from the sales would be invested by the corporation in a way to increase the assets and make the stock more valuable; and that, as the assets of the corporation were greater than the liabilities, defendants were justified in raising the selling price of the shares.

The indictment negatives the truth of the representations by denying that either the corporation or the defendants owned the patents to the change computing machine, or the lightning change maker, or the currency paying machine, or the new style adding machine. There was no denial of the allegation as to the representation that the corporation owned the bank cashier machine. The indictment further alleges that the Cashier Company was not manufacturing, but that its business was to sell shares of stock, and that the defendants knew the shares were of little value, practically worthless, that no dividends would be paid, that the company was not the owner of any orders to buy shares, and that its financial condition was that of insolvency; that large numbers of shares, represented to be the property of the corporation, were shares owned by defendants, and that all of the money received on

account of sales would be appropriated by defendants, and none paid into the corporation treasury; and that defendants were not justified in raising the selling price of the stock, and that purchasers would lose on account of such transactions.

It is alleged that part of the scheme was that the defendants should publish untrue statements as to the financial condition of the corporation and that they were to sell shares to investors in many states, and that the business was to be so managed that more than 25 per cent. of all the sums of money received from investors and paid to the corporation for stock would be appropriated by the defendants to their own use and gain. The conspiracy is alleged to have been a continuing one—from September 1, 1910, until January 1, 1915. Certain overt acts are charged by the mailing of letters.

The bill of exceptions recites that the government offered evidence tending to prove the allegations of the indictment.

Martin L. Pipes, J. J. Fitzgerald, and John F. Logan, all of Portland, Or., for plaintiffs in error.

Clarence L. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The government, upon trial, identified and offered in evidence copies of six patents and twelve applications for patents for mechanical devices, all but four of which became the property of the United States Cashier Company, and four of which were assigned to the International Money Machine Company, an Indiana corporation. It appeared that about January, 1914, defendant Menefee and the other officers and directors of the Cashier Company made an arrangement by which the Cashier Company transferred to the International Money Machine Company substantially all its assets in Oregon, and entered into a contract with the International Company and the promoters thereof by which the Cashier Company received 50 per cent. of the paid-up stock of the International Company; the object of the Cashier Company having been, apparently, to continue its business in Indiana. There was evidence tending to show that the assignments made on the applications and patents by certain persons named in the evidence were transferred to the International Money Machine Company as part of the assets of the Cashier Company. But it was shown that, when it was published in Oregon and elsewhere that the United States Cashier Company owned the patents, it only owned what is spoken of as the Potter patent, for a device pertaining to money changing. Certain other patents obtained by the Cashier Company, or transferred directly to the International Company, were issued afterwards, and a number of applications for patents for the different machines were filed and were pending in the Patent Office at Washington; some of the claims having been allowed and some rejected.

[1] The evidence went to show that the representations as to the ownership of the patents to five machines, the change computing machine, the bank cashier, the lightning change maker, currency paying machine, and new style adding machine, were published in October, November, and December, 1911. It became material to inquire whether or not the representation made by the defendants of the ownership of certain patents was a fraudulent representation. Oviatt was the pres-

ident of the Payograph Company, a corporation engaged in making what are called Payograph machines. Oviatt said that in 1909 he had met Bilyeu. Bilyeu was one of the defendants, who was indicted herein, but he was acquitted by order of the court. Oviatt testified that in 1909 he had devised the principle of a coin-paying machine, and had gone to one Glover to have him develop it for him, but that, as Glover could not take up the matter, he (Oviatt) presented the idea to Bilyeu; that Bilyeu took it under consideration, and thereafter said he would go ahead with it if he could have 40 per cent. of the results, Oviatt to have 60 per cent., Oviatt to turn over to Bilyeu his ideas, and Bilyeu to go ahead developing and to make a model. Upon inquiry by defendants' counsel, the district attorney stated that the purpose of such evidence was to show that back in 1909 Oviatt was working on a coin-paying machine and made disclosure to Bilyeu, and that the government would show that the Payograph machines were thereafter made, and that the attempted sale of a similar machine in England by the defendants was had with the knowledge of the Payograph application for patent pending there; that it would be shown that there were conversations between defendants Bilyeu and Menefee and Le Monn with Oviatt concerning transactions which would be brought down to the date when Le Monn investigated the Payograph machine and sent a certain telegram which was introduced in evidence. Defendants objected, on the ground that the Cashier Company had a patent called the Bilyeu patent, and that there was no jurisdiction to try the question of ownership of any patent as between Oviatt and Bilyeu. Defendants' counsel also made the point that, there being no negative with respect to the bank cashier patent, evidence tending to show that the patent to that particular device was not perfectly good was improperly introduced.

The court ruled that if there was a patent to the cashier machine, and the Cashier Company had it, the validity of the patent issued could not be tried or determined, but that, as there was evidence tending to show that before defendant Le Monn made a visit to the Eastern States in 1912 and learned of the Payograph device, and that it was being made, he sent certain letters to Menefee, defendant, with reference to the matter, and had advised a course afterwards adopted by the corporation, testimony of the connection of the defendants with this patent was material to show their good faith. The reference of the court to a visit by defendant Le Monn to the East in 1912 is explained by certain evidence which showed that Le Monn, when in the Eastern States, saw the particular instrument (the Payograph device) being manufactured, and, believing it was valuable and would be a competitor, wrote to Menefee not to sell any more capital stock of the Cashier Company until the private stock of the defendants Menefee, Le Monn, and Campbell in the Cashier Company first had been disposed of, and that after Le Monn's telegrams, Menefee and Campbell, defendants, caused the board of directors of the Cashier Company to withdraw all the corporation's stock from the market, and a resolution was passed authorizing Menefee, Le Monn, and Campbell to sell their own personal stock.

Counsel for the defendants urge that the representation relied upon, and which the government was attempting to prove was false and fraud-

ulent, was that the defendants' company owned a patent to the bank cashier machine; that, inasmuch as it did have such a patent, the effect of admitting the evidence was to permit the jury to find therefrom, not that the representation made as to the bank cashier was false or fraudulent, but that, being true, defendants could, nevertheless, be convicted of bad faith upon this particular charge, notwithstanding the truth of the representation. It is also contended that the court left to the jury the right to find defendants guilty upon finding that any one of the representations was false and fraudulent, because the jury were told that they might find for the defendants upon every other issue, and yet find them guilty because they knowingly procured a patent which was subject to a successful attack by Oviatt.

It is true there was no substantive issue involving the validity of the Bilyeu patent; but there was a vital question as to the honesty of the conduct of the defendants in offering for sale and selling shares of stock in the Cashier Company under representations mailed to various persons as to present and prospective value of the patent rights, the foundation value of such shares. This being true, if the defendants who made such representations were well advised when they put them forth that there was a competing patented machine on the market, or about to be marketed, and that putting the competing device into the market would, with reasonable certainty, mean substantial impairment of the value of the shares in the Cashier Company, which depended, not upon the validity, but upon the value, of the patent owned by the Cashier Company, and if, despite such knowledge, defendants continued their representations of value of their patent to investors, and proceeded to dispose of their own stock because of their belief that the competing patented device would substantially lessen the value of the Bilyeu patent and shares in the Cashier Company, we believe actions and letters showing such conduct became relevant upon the issue of good faith in the making of the representations concerning the value of the stock defendants were trying to dispose of. Nor would the omission in the indictment to negative specifically ownership of the bank cashier machine affect the relevancy or admissibility of such evidence for the purpose stated. The test is: Did it have a bearing upon any material issue presented on the trial? As already said, we believe it did.

[2] It is urged that the testimony was inadmissible, because there was no allegation in the indictment that the stock was worthless, or not worth what it was represented to be, on account of the fact that the patent which the company owned was injuriously affected in its value by a prior claim of Oviatt or any one else. The question of bad faith, however, was not dependent solely upon positive proof that there was a legally established outstanding right. There might not have been an outstanding established legal right, and still, if there were claims of inventions and priority which defendants knew of and honestly believed could be established as valid, and which they believed had enough merit in them to affect the value of the patent rights owned by defendants, such a situation would have relation to the good faith of the persons making to prospective investors representations as to the value of shares, and so would have decided bearing upon the allegations of the

indictment charging fraud and deceit in the representations made to the investing public as to the value of the devices made, or to be made, under the patents as to which defendants asserted, or had, ownership.

[3] Other assignments of error deserving special mention are based upon the ruling of the court in admitting certain testimony given by E. D. Sewell, an expert upon patents from the Patent Office at Washington, D. C. His evidence covered a wide range. He was allowed to explain the method of applying for patents and the customary practice of the Patent Office in respect to prior patents issued that might interfere or be infringed by pending patents. He explained the practice of the department, and how, if the officials of the Patent Office believe that the claim applied for would be an infringement of a prior patent, the claim would be rejected; otherwise, it would be allowed. He testified as to the references to prior patents in respect to the applications made and of the patents actually issued, as appeared in the patents and applications admitted in evidence upon the trial. In substance he said that the Cashier Company did not own a patent for any machine designed to compute change, as described in one of the advertisements put forth by defendants in 1911, nor did it own a patent to an adding machine on October 29, 1911, nor did it have an application on file for the lightning change maker machine at that time; that between January 1, 1909, and December 31, 1914, the Cashier Company did not own patents to any machines described in certain advertisements concerning which he was interrogated, namely, lightning change maker, computing machine, adding machine, and Bilyeu cashier machine, with certain attachments, but that the patent which was issued on July 6, 1915, for the lightning change maker, had been assigned to the International Money Machine Company by the United States Cashier Company.

The witness testified as to applications for patents filed by or in behalf of the Cashier Company, or assigned to that corporation, and patents issued to it and assigned to the Cashier Company from 1908 to December 31, 1914. Only two patents in favor of the Cashier Company, or afterward assigned to it, appeared: the first, called the Potter patent, issued April 28, 1908, assigned to the Cashier Company in 1912; and, later, the design patent of Bilyeu. The purpose of the Potter machine was to deliver a predetermined number of coins of a predetermined value from a series of coin tubes; the witness saying that the six claims within the Potter patent were limited in certain detailed ways with respect to organization. He testified concerning the Bilyeu patent issued December 31, 1912, for a casing for coin-handling machines. This was assigned to the United States Cashier Company, and by that company to the International Money Machine Company. He said that there were other applications and other patents issued like that to Bilyeu, and that when the assignment was made to the International Money Machine Company there were some 18 applications and patents issued to Bilyeu or to some one else and assigned to the International Company; that of these 18 applications 6 patents had been issued and 12 applications were pending.

In giving the history of applications and patents, the witness said that, in the progress of the Bilyeu cashier machine patent application,

15 patents had been cited, among them one to Lindeloff, dated February 14, 1899. Witness was asked by the government counsel to say whether or not the Lindeloff patent dominated the Bilyeu cashier patent. Defendants objected, but the court, after argument, overruled the objection, and said that, notwithstanding the fact that patent had been issued, if defendants knew that their patents would not permit them to manufacture the machines, it was a circumstance going to determine whether they were acting in good faith or not, although it did not go to the validity of the particular patents. Witness was then permitted to say that the construction shown and described in certain claims of the Bilyeu patent was within certain claims of the Lindeloff patent, and that, as the claims had been allowed in the Lindeloff patent, they dominated the construction shown in the Bilyeu cashier machine.

Witness further testified concerning the patent No. 885,136, dated February 28, 1911, on an application filed by Bilyeu and Overlin, assigned to Bilyeu, and by Bilyeu assigned to the International Money Machine Company, and said that this patent was a modification in detail of the patent to Bilyeu, No. 1,114,574; but in the opinion of the witness the claims of the Lindeloff patent dominated this patent, as they did the original patent. He said that there were 13 patents, including the Lindeloff, cited in the Bilyeu patent issued prior to the date of the Bilyeu patent, and explained in detail the purposes of several applications and the improved mechanical details of several machines. When the witness came to an explanation of the bank cashier machine and the status of the patent record (application 702,164, filed June 7, 1912), defendants again objected upon the ground that the indictment did not particularize wherein the representations charged were false and fraudulent; but the court permitted the evidence, as bearing upon the question of purpose and intent in advertising the machine, and admitted evidence concerning other applications for devices and patents. After making comparison of certain devices, witness expressed the opinion that certain claims made by one Osborne in patent issued in 1907 were basic in the art and controlled the change-computing device covered by Overlin in application of July, 1912, and assigned to the Cashier Company, and by it to the International Company. Witness said the art of mechanical coin handling was old, and pointed out mechanical differences in detail of construction.

The argument of the appellants is that the effect of the ruling of the court was to permit the jury to conclude, from the evidence of Sewell concerning patents, that the defendants, in accepting the allowances made under applications and the patents, were guilty of fraud. It is said that, wherever a claim has been allowed or a patent issued, the department at Washington necessarily decided that the claim allowed or patent issued does not conflict with the patents cited against it, and that the jury were misled by a ruling said to have been, in effect, that in the process of getting patent applications allowed and patents issued, if the department has referred to prior patents, it is an evidence of bad faith, notwithstanding the decision of the department that the application is allowable and the patent good. If we assume that the view of the law, generally, is correctly stated in substance in the objection of the defendants, and that the testimony of the witness Sewell with

relation to the patent applications was improperly admitted, it is very clear that there was no prejudice to the rights of the defendants when we examine the special instructions of the court upon the matter of infringement. The court, after reciting the charge that one of the means to be used to carry out the scheme was to represent that the Cashier Company owned patents to certain coin machines, when in truth and in fact it did not own such patents, said:

"If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false, and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any willful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewell to that effect should be disregarded. The question on this branch of the case is: Were the representations made by the defendants, if any, concerning the patent situation, false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity?"

By this instruction there remained of Sewell's evidence only those explanations which bore upon the mechanical features and the state of art before and at the time the defendants made representations to investors or others who might be purchasers of the stock in the Cashier Company, and when such evidence was restricted in its bearing to the question of the intent of the defendants, we believe that it was not improperly admitted; that is to say, the jury were not to decide as a fact that the patents issued, or the claims allowed, infringed or were legally injuriously affected by other patents or inventions, but the evidence concerning the issuance of the patents, and concerning the mechanical nature of the inventions to which such other patents may have related, was competent and relevant, when considered with all the other evidence in the case, as having bearing upon the motives and conduct of the defendants in any representations that they may have made with respect to the value of the shares of stock which they were selling to investors.

[4] We agree with counsel for the defendants in their contention that the court ought not to have permitted the witness Sewell to state the prior claims dominated the patent owned by the Cashier Company or infringed other patents. In Winans v. N. Y. & Erie R. R. Co., 62 U. S. (21 How.) 88, 16 L. Ed. 68, the Supreme Court said:

"Experts may be examined to explain terms of art, and the state of the art, at any given time. They may explain to the court and jury the machines, models, or drawings exhibited. They may point out the difference or identity of the mechanical devices involved in their construction. The maxim of 'cuique in sua arte credendum' permits them to be examined to questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them, if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence."

But we think it would be very unreasonable to hold that the expression of opinion by Sewell construing the patents was prejudicial to the defendants, in the light of the instruction of the court. We all know how frequently it happens that an expert witness will inject his views of the law. But where the court takes the matter in hand, and tells the jury to disregard the legal views of the expert, the presumption is that the jury will understand its duty, and will accept the law given by the court, and cast aside that incorporated in the opinion of an expert witness.

[5] It is said that the court instructed so as to allow the jury to convict the defendants of conspiring to execute a scheme not within the terms of the indictment, and to take from the jury the right to determine the good faith of the defendants. To illustrate the point made by the defendants, it is necessary to set forth that part of the instructions specially complained of:

"It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be 'No.' If they agreed to make false and fraudulent pretenses, representations, or promises; if they agreed to make false and fraudulent representations, and assurances—for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

"In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return the money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent."

If we take the first few clauses of this excerpt from the instructions and consider them by themselves, they appear to mislead, in that they read, not as the opinion comment upon testimony, but as a charge to the jury to find as a necessary conclusion that the intent of the de-

fendants was not that they could make a success of the business of the Cashier Company, and not that they believed they could make a successful enterprise of the business. But by every sound rule the clauses which are objectionable when separated from the context should be read and considered with the rest of the instructions, and when this is done we do not perceive how the defendants were prejudiced; for the court, in the clearest way, repeatedly and elaborately charged that in order to convict, the prosecution must show that the defendants intentionally conspired to defraud investors. For instance, among other things, the court said:

"The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions. * * *

"They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the government to prove to your satisfaction, beyond a reasonable doubt. * * * The formation of the corporation and the sale of the stock therein is not itself criminal or wrongful, provided no deception or fraud is used to induce persons to make such purchases. The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out."

Considering these instructions quoted, together with others wherein the court at the outset with precision defined the allegations of the indictment and the purposes charged therein, it is quite plain that, in using the particular clauses referred to, the court was but further dwelling upon the feature of intent necessary to be found before conviction could be had, and was emphasizing the limitation which governed the definitions and applicability thereof by telling the jury, in effect, that the essential ingredient of intent charged and to be proved was not that defendants could make the business of the Cashier Company a success, not that they could make the enterprise successful, but was the making by them of the representations to defraud charged in the indictment. And in putting the matter interrogatively and giving negative answers, the learned judge used a method to draw the minds of the jurors to what was alleged by excluding specifically that which was not alleged.

[6] The appellants also complain of that part of the charge of the court where the jury were told that if defendants agreed to make false and fraudulent pretenses or representations and assurances for the

purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish condonation or legal excuse for the false and fraudulent representations which they would under the circumstances agree to make in order to induce the investors and the public to pay over money, and of another instruction wherein the court said it was immaterial how confident defendants may have been that the business could be made a success, or that they could return money invested without loss, because the representations which they would have agreed to make would have been made for the purpose of getting money in a wrongful manner, and they could not, under the circumstances, make that rightful by pointing to some ultimate good intent. The principal argument here is that the court did not limit the instructions to representations and pretenses, but included promises and assurances, and that, therefore, the effect of the court's instruction was that, if the defendants made a promise that they would get dividends and a profit on the stock they were buying, in the ultimate belief that their promise would be fulfilled and that they would make a success, they nevertheless could be found guilty.

Of course, promises and assurances that the stock would return dividends and be profitable, in the honest belief that the promises and assurances would be fulfilled, were not wrongful. But, without further quotation, our construction of the whole charge is that the jury were explicitly told that, to convict, there must have been false and fraudulent representations and assurances with a view to deceive investors and the public with respect to the true condition of affairs of the corporation or the value of its stock, but that a conviction could be had if such false representations were made, notwithstanding that defendants might have been confident that they could make a success of the enterprise. United States v. New South Farm & Home Co. et al., 241 U. S. 64, 36 Sup. Ct. 505, 60 L. Ed. 890, decided April 24, 1916. In Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, the Supreme Court said the significant fact under the statute is the intent and purpose. In the present case this was fairly and so repeatedly impressed upon the mind of the jury that we cannot find reasonable ground for holding that they misunderstood the issues.

The court told the jury of the presumption of innocence, and particularly charged that the jurors were the exclusive judges of all questions of fact, adding that if, at any time during the trial, the court had intimated its views concerning any disputed question of fact or the testimony of any witness, the rule was to disregard it, unless it conformed to their own understanding.

We have tried to cover the main points presented by the learned counsel for the appellants. We have given to their entire argument and brief our most careful consideration, and our conclusion is that no sufficient ground is advanced for holding that defendants did not have a fair and legal trial.

Judgment is therefore affirmed.

STEWART v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

Nos. 4440–4443.

1. CONTEMPT ⟸72—PUNISHMENT—CIVIL OR CRIMINAL PROCEEDINGS.
Where, on consideration of a motion, filed by the complainant in a suit in equity, asking for an attachment for contempt against certain persons for violation of an injunction issued in the suit, the court ordered cases docketed in the name of the United States against the persons charged, which was done, and all further proceedings were conducted under such title and under direction of the district attorney, such proceedings were at law for criminal contempt, and judgment imposing imprisonment on the defendants convicted were appropriate, and within the authority of the court.

[Ed. Note.—For other cases, see Contempt; Cent. Dig. §§ 249–256, 273; Dec. Dig. ⟸72.]

2. CONTEMPT ⟸66(7)—PROCEEDINGS FOR CRIMINAL CONTEMPT—CONCLUSIVENESS OF FINDING.
In such proceedings, while a finding of guilt must be based on testimony after the analogy of criminal cases, in which the presumption of innocence attends the defendant, and should be pronounced only on evidence which carries conviction beyond a reasonable doubt, nevertheless the judgment of the court is attended by all the conclusiveness of the verdict of a jury, and, if sustained by substantial evidence, will not be lightly set aside.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 237; Dec. Dig. ⟸66(7); Appeal and Error, Cent. Dig. §§ 365, 462.]

3. CONTEMPT ⟸20—ACTS CONSTITUTING CONTEMPT—INCITING TO VIOLATION OF INJUNCTION.
Language or conduct designed and having the natural effect to incite others to violence in disregard of an injunction, is itself a contempt of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58–62; Dec. Dig. ⟸20.]

4. CONTEMPT ⟸60(3)—PROCEEDINGS FOR CRIMINAL CONTEMPT—SUFFICIENCY OF EVIDENCE.
Findings that defendants in proceedings for criminal contempt were guilty of willful violation of an injunction, and that, although not parties to the injunction, they had full knowledge of the same, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 185–187; Dec. Dig. ⟸60(3).]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Proceedings for contempt by the United States against P. R. Stewart, against Pink Dunn, against George Burnett, and against Frank Gripando. Judgments of conviction, and defendants separately bring error. Affirmed.

Covington & Grant, of Ft. Smith, Ark., for plaintiffs in error.

J. V. Bourland, U. S. Atty., of Ft. Smith, Ark.

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

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

*Rehearing denied December 4, 1916.

VAN VALKENBURGH, District Judge. April 7, 1914, the Mammoth Vein Coal Mining Company, a corporation organized under the laws of the state of West Virginia, filed in the District Court for the Western District of Arkansas its bill of complaint against one M. Hunter and other defendants, charging that they, with others, had conspired and confederated together to injure and destroy the mines and property of complainant, located in Sebastian county, Ark., and to prevent complainant from caring for said property, and using the necessary means to pump the water from its said mine, so that the same might not be destroyed by an accumulation of water therein, and to prevent complainant from operating said mines, or conducting its business by producing coal therefrom and selling or disposing of the same. Some of the defendants named were said to represent the United Mine Workers of America, still others were alleged to be officials of Sebastian county, Ark., and the remaining defendants were understood to be union mine workers in this district. All were charged with interfering by threats and intimidation with the operation of said mines by complainant through the employment of nonunion miners. April 8, 1914, a temporary restraining order was issued, and, May 9th following, a decree of injunction dismissing the cause as to defendants Hunter, Bumpas, and McMulland, but as to others granting the relief prayed in the following language:

"And it was further considered, ordered, adjudged, and decreed by the court that as to all the other defendants named in the caption hereof, and each of them, and all other persons acting or co-operating with defendants, or conspiring or combining with them, or any person having notice of this order, be and the same are hereby perpetually restrained individually and collectively from interfering with, injuring, obstructing, or stopping by force, threats, or intimidation any of the business of complainant, and from in any manner interfering with the property of complainant, or trespassing upon the same, whether the same is specifically described in this decree or not, which property is generally described in such complaint as Prairie Creek Coal Company mine No. 4, and Mammoth Vein Coal Company mine No. 1, near the town of Midland, in the county of Sebastian, State of Arkansas, and from entering upon any of the grounds or premises occupied by the complainant as aforesaid for the purpose of interfering with the business of complainant, or with the property or employés of complainant, and from compelling by threats and force and violence, or by direct or indirect coercion, any of the present or future employés of complainant from performing their duties as such employés, or in doing any act whatever in furtherance of a design to restrain or prevent, by unlawful conduct, complainant from operating its said mines, and that said defendants, and each of them, and such persons unlawfully associating or conspiring with them, or having knowledge of this order, be further restrained from in any manner unlawfully interfering with any person or persons that the complainant may hereafter bring or cause to be brought to its said mines heretofore referred to, or from encouraging or abetting any person or persons to threaten or coerce, directly or indirectly, any person or persons that may enter or continue in the employment of complainant, and that they and each of them, their confederates, or associates, or persons having knowledge of this order, be enjoined from assembling in or upon the premises of complainant, for the purpose of holding disorderly or riotous meetings, or for the purpose of effecting unlawful interference with employés of complainant, or with its property, and from in any manner damaging or destroying the property of complainant."

None of the defendants herein were named parties to the bill of complaint. June 13, 1914, complainant, through its attorneys, moved the

court for an attachment for contempt against seven individuals, including defendants P. R. Stewart and Frank Gripando, charging them with violating the injunction orders of the court and with conspiring with others so to do. On the same day the court issued its order, the material part of which is in the following language:

"The court being well and sufficiently advised in the premises, it is considered and ordered that a case in the name of the United States against each of said defendants be docketed, and that the marshal of the Western district of Arkansas forthwith apprehend the said Morro Colo, Foster Bean, Sandy Robinson, Blue Johnson, James Slankard, Pete Stewart, and Frank Gripando, and bring them before the court July 1, 1914, at 10 o'clock in the forenoon, then and there to answer the charge of contempt of court for the violation of its decree aforesaid, as it is alleged, for which writs of attachment shall issue."

Motions and orders affecting parties other than those now before the court followed shortly after. Hearings upon these original attachments were held in due course, and on July 14, 1914, the causes were submitted, and by the court taken under advisement. July 17th, an armed mob appeared in the woods near one of complainant's mines, fired at the employés working therein, finally drove them away, and then burned the tipples, houses, office, and other property of complainant, and damaged the mines themselves with dynamite. On the 18th of July thereafter, complainant filed a further motion for attachment for contempt against the defendants Pink Dunn and George Burnett, charging them with aiding and abetting a mob in destroying the property of complainant by acting as guards or pickets for the purpose of preventing aid being taken to the employés of complainant who were besieged in mine No. 4 on the 17th of July, 1914, all in violation of the order of court of May 9, 1914, hereinabove set forth. The court, by its order issued on the same day, directed that a case in the name of the United States be docketed against each of said defendants, and the marshal was directed to bring them before the court forthwith to answer the charge of contempt of court for the violation of its said decree. On July 27th a motion was filed to reopen the contempt proceedings against the defendants Stewart, Gripando, and others, to which objection was lodged. The court, however, sustained this motion as to the defendant Stewart herein, and thereafter further hearings were held; the final submission being made August 25, 1914. September 1st, thereafter, judgment was pronounced, and each of the plaintiffs in error were sentenced to be imprisoned in the Sebastian county jail at Ft. Smith, Ark., for a period of four months, and to pay to the United States the costs of prosecution.

The cases were submitted together upon a single printed record. The main contentions for the defense are: (1) That the proceedings were, in fact, in the original cause in equity brought by the Mammoth Vein Coal Company and prosecuted by it; that it was not a proceeding for the benefit of the public, nor one in which the public, the government, or the court were concerned. (2) That, in any event, the evidence was insufficient to sustain a conviction.

[1] In Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the Supreme Court

makes clear the distinction between civil and criminal contempt. It is there said:

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' Bessette v. Conkey, 194 U. S. 329 [24 Sup. Ct. 665, 48 L. Ed. 997]. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. * * * But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial, by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. * * * Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. It is true that either form of imprisonment has also an incidental effect; for if the case is civil, and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt, and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment, which is merely coercive and remedial, into that which is solely punitive in character, or vice versa. * * * The distinction between refusing to do an act commanded, remedied by imprisonment until the party performs the required act, and doing an act forbidden, punished by imprisonment for a definite term, is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

Viewed in the light of this pronouncement, the classification of the case at bar is not difficult. The disobedience complained of was a thing accomplished, and consisted in doing that which the defendants had been commanded not to do, according to the motion for attachment. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. Gompers v. Bucks Stove & Range Co., supra. If, therefore, these cases were in fact proceedings in the original cause in equity, were intended to be primarily remedial in their nature and for the benefit of the complainant, instead of for the vindication of the court's authority, the judgment of imprisonment was without authority.

In Gompers v. Bucks Stove & Range Co., supra, the court held that that proceeding was for civil contempt, and pointed out a number of things as unavoidably so fixing the status of that case:

(1) The contempt proceeding was entitled, in the main cause, "Bucks Stove & Range Company, Plaintiff, v. American Federation of Labor et al., Defendants, No. 27,305, Equity."

(2) The answers of the defendants, every report by the examiner in chancery, every deposition, motion, and stipulation, every order, including the final decree and the amended decree, were all uniformly entitled in the equity cause.

(3) All the testimony, oral and written, was, by reference in the petition, made a part of the contempt proceedings.

(4) The trial judge quoted largely therefrom, and was evidently largely influenced by this evidence, which disclosed the great damage done to the complainant's business before the injunction issued.

(5) It was moved by the stove and range company, and adjudged by the court, that the complainant recover against the defendants its costs in said contempt proceeding.

(6) The complainant made each of the defendants a witness for the company, and, as such, each was required to testify against himself; a thing most unlikely, if either party had regarded the proceeding one at law for criminal contempt.

(7) The petitioner prayed for such other and further relief as the nature of *its* case might require, which was held to be equivalent to a prayer for remedial relief.

(8) The Bucks Stove & Range Company was not only the nominal, but the actual, party on the one side, with the defendants on the other. It acted throughout as complainant in charge of the litigation. As such, and through its counsel, acting in its name, it made consents, waivers, and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting a case of criminal contempt. It appeared in the Supreme Court as the sole party in opposition to the defendants; and its counsel, in its name, filed briefs and made arguments in that court in favoring affirmance of the judgment of the court below.

In the case at bar none of the foregoing features are present. It is true that the motions for attachment were entitled in the equity case and were filed by counsel for complainant; but inasmuch as there must be an allegation that in contempt of court a defendant has disobeyed a specific order, it is but natural, and without further significance, that the motion should be made in the case in which that order was entered, and further that it should be called to the attention of the court by some party interested in the maintenance of that order. The complainant might well have brought the disobedience complained of to the attention of the court, without compromising the nature of any subsequent procedure that might be instituted. United States v. Wayne, Fed. Cas. No. 16,654. The court, however, immediately considered and ordered that the case be docketed in the name of the United States. To the marshal was confided the execution of the writs. The cases were so entitled, and throughout the record this relationship has been preserved in fact, as well as in name. Under this title the defendants Stewart and Gripando filed answer. On behalf of Dunn and Burnett no formal answer appears. Objections to reopening the case before the trial judge were entitled "United States v. P. R. Stewart et al." It is further true that counsel for complainant appeared with the United States attorney and took a prominent part in the examination of witnesses at the hearing. Nevertheless, the cases were distinctly under

the control and jurisdiction of the latter, and in this court the brief is filed by the district attorney alone. Neither in the original motions nor subsequently did the complainant pray for relief of any character, whether directly or indirectly. Costs were neither asked nor awarded in its behalf. It was the evident purpose of court and parties to treat these cases as for criminal contempt to vindicate the authority of the court. No other purpose appears either in substance or in form. In Gompers v. Bucks Stove & Range Company, the court recognized the right and power of the Supreme Court of the District of Columbia to punish by a proper proceeding the contempt, if any, committed against it upon the facts disclosed in that case, and remanded the cause without prejudice to that power and right, if exercised in a proper proceeding. Had such been done, the procedure would not have differed substantially from that adopted in the present case. We are of opinion, therefore, that these cases are proceedings at law for criminal contempt, and that the judgments rendered conform to the requirements of such proceedings.

[2] It remains to consider whether the evidence is sufficient to sustain the convictions. While these actions are not for contempt committed in the presence of the court, but to vindicate the authority of the court and to punish a disobedience of its orders, requiring a finding of guilt upon testimony, after the analogy of criminal cases, in which the presumption of innocence attends the defendant, and guilt should be pronounced only upon evidence which carries conviction beyond a reasonable doubt, nevertheless the judgment of the court is attended by all the conclusiveness of a verdict by a jury, and, if sustained by substantial evidence, will not be lightly set aside.

[3, 4] The defendant Stewart is charged with having aided and abetted in the violation of the injunction by incendiary language and speeches, indulged in for the purpose of inciting an attack upon the employés and property of complainant, culminating in that of July 17th, to which reference has been made. That language or conduct designed, and having the natural effect, to incite others to violence in disregard of the orders of the court, is itself a contemptuous act, is well recognized. United States v. Debs et al. (C. C.) 64 Fed. 724; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; United States v. Haggerty et al. (C. C.) 116 Fed. 510; United States v. Gehr (C. C.) 116 Fed. 520. This defendant was district president of the United Mine Workers of America, and the language used was calculated to inflame the membership of that order and to lead to the acts of violence which, in point of fact resulted. United States v. Weber (C. C.) 114 Fed. 950. There was evidence that Stewart stated that all of the men who wanted guns could get them; that there would be another Colorado trouble, and that, rather than see the mines work open shop, he would go out and die himself; that he and his associates did not aim to let the mine be operated with nonunion labor; that the union men would prevent it. Upon being reminded that the court had granted an injunction, Stewart said:

"Damn the injunction. The national government is against us, but the people are with us, and we don't aim to let them dig coal."

A number of witnesses testified to his statements that arms were available to those that wanted them. The witnesses do not all agree as to the exact language used on the several occasions named, and Stewart himself denies part of the statements charged, and couples an explanation of others with an assertion of innocent intent. However, a patient and careful reading of the record discloses ample to sustain the finding and judgment of the court.

Dunn and Burnett were charged with having acted as guards, on one of the roads leading to the mines, for the purpose of intercepting passers-by and preventing interference with the assault upon complainant's property and employés. Their presence there with guns is not denied. Their act in turning people back is admitted. The explanation made was not credited by the court, and we find in its decision, upon testimony adduced, no abuse of judicial discretion.

Frank Gripando was charged with active participation in the battle. The witness Brown positively identifies him as one of an armed group from which shots were fired. This was between 10 and 11 o'clock in the forenoon. The defendant himself and some of his neighbors say that he and they went to the woods with their families while the shooting was in progress. Their answers to these critical questions were almost stereotyped. The time fixed by these witnesses was not clearly defined, but the impression conveyed was that they, including this defendant, spent practically the entire day thus in hiding. Great reliance is placed by the defense upon the witness Riley, a nonunion miner, who also found his way to these same woods behind the hill. An examination of Riley's testimony does not corroborate that of the other witnesses, nor bear the interpretation placed upon it by defendant's counsel. He says:

"A. I don't remember of seeing him but one time that day. Q. When was that? A. It was near along in the neighborhood of 1 o'clock. Q. Where was it? A. He was gone out on the hill for his family, his wife and children. Q. Did he bring them back with him? A. Yes, sir. I judge it was somewhere near 1."

This was not at all inconsistent with the testimony of Brown, who says he saw him armed and a part of the attacking mob between 10 and 11 o'clock. It also serves to explain the testimony of Gripando's friends, Faleno, Lavaino, and the Salas. The defendant, who took the stand in his own behalf, testified that:

"As soon as I heard the shots, I got out, and took my family, and went out in the woods."

This phraseology is similar to that of his other witnesses, with the exception of Riley. Later, upon cross-examination, he admitted that he had neither wife nor children, but boarded with a woman who kept a boarding house. The court resolved this testimony against the defendant, and, in so doing, we think it is sustained by the record.

None of these defendants were parties to the original proceeding for injunction, and the rule is invoked that, in order to charge such a person with contempt, he must have had actual notice of the injunction prior to the performance of the acts upon which the charge of contempt is based. He cannot be charged with contempt, unless a copy of the in-

junction was served upon him, or it is proved that he had knowledge of its provisions (citing Garrigan v. United States, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. [N. S.] 1295). The point thus raised has application only to the defendants Gripando and Burnett. Both Stewart and Dunn are conceded to have had knowledge of the injunction and its provisions. In the case last cited, the finding that the plaintiffs in error had "full knowledge of the injunction" rested alone on the alleged publicity of the issuance, through newspapers, and notices thereof which were posted on the wagons intercepted by the mob. The court said:

"The mere inference of 'full knowledge,' derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption [of innocence] thus defined."

Also, in that case:

"No proof appears that the plaintiff in error was engaged by or with any person or association enjoined in its violation."

This contention is thus met by the United States attorney in his brief:

"The record shows the locus and broad extent of the controversy out of which the injunction grew; it shows the general and generous posting of printed copies of the injunction by the United States marshal; it shows that Gripando, Burnett, and Dunn, union miners, all lived in the community in which the original controversy and it sequential events were staged, in which, indeed, the said notices were profusely posted. The record shows, moreover, that, although all these defendants were witnesses in their own behalf, not one of them pleaded ignorance or want of notice of the injunction."

In our opinion, the facts in the instant case clearly distinguish it from that before the Court of Appeals for the Seventh Circuit, and met the demands of the rule requiring notice and knowledge on the part of a stranger to the original proceeding.

On behalf of Stewart it is urged that the court erred in reopening the case against him after the happenings of July 17th. This hearing was before the court and the case undecided at the time the motion to reopen was filed. While the proceeding is criminal in its nature, it is not attended by such strict formality as obtains in the trial of ordinary criminal cases before juries. So long as the right to be confronted by witnesses, to cross-examine, to offer evidence in his own behalf, and, in general, to avail himself of every element of defense, was not denied—and no complaint is made on that score—we cannot see that the defendant was deprived of any substantial right in the reopening of his case for further hearing.

Because of the importance of these cases, in the view of the court, as well as of the parties, and because of an earnest desire that no injustice should be done through inadvertence or otherwise, the decision of these cases has been deferred for an unusual time, in order that all members of the court might have opportunity to give the record and briefs most careful scrutiny and consideration. The result is as stated above. The trial judge evidently approached this hearing in that spirit of dispassionate fairness which is characteristic of him. Of those cited, a number who were convicted have prosecuted no appeal. Others were discharged by the court at the conclusion of their hearings. The orig-

inal charge against the defendant Gripando was dismissed by the court upon its own motion. The cases presented appear to have been considered and adjudged with much care and discrimination. The learned trial judge had all the witnesses before him, and was able to note their demeanor on the stand. He could determine their credibility and the weight to be given to their testimony far more accurately than this court can do from the printed record alone. Since, then, there is substantial evidence to support his findings, we find warrant neither in law nor in fact to reverse his decision.

It follows that the judgments must accordingly be affirmed.

MILLER & LUX, Inc., v. PETROCELLI.

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

No. 2711.

1. NAMES ⟸16(2)—ADMISSIBILITY OF EVIDENCE UNDER PLEADINGS—IDEM SONANS.

The complaint, in an action for wrongful death, averred that plaintiff was the administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased. Probate proceedings offered in evidence were objected to on the ground that they were in the name of Peter Spino, deceased. It was stated in those proceedings that deceased was sometimes known as Pietro Spina. *Held*, that as the name "Peter" is the English equivalent for the Italian "Pietro," and as the substitution of an "o" for an "a" in spelling the name did not substantially change the sound, the probate proceedings were admissible in evidence.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 13; Dec. Dig. ⟸ 16(2).]

2. APPEAL AND ERROR ⟸209(2)—TIME TO ALLEGE ERROR.

In an action for wrongful death, it cannot be urged on appeal for the first time that there was no proof of heirship of those parties for whose benefit the action was brought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1291, 1293, 1296; Dec. Dig. ⟸209(2).]

3. APPEAL AND ERROR ⟸209(2)—ACTION FOR WRONGFUL DEATH—PROOF OF HEIRSHIP.

In an action for wrongful death, brought for the benefit of the widow and minor child of deceased, where the widow testified to her relationship and the existence of the child and probate proceedings on the estate of the deceased, establishing the heirship of the widow and child, were also introduced, there was sufficient proof of heirship; there being no objection below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1291, 1293, 1296; Dec. Dig. ⟸209(2).]

4. MASTER AND SERVANT ⟸279(5)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the death of the driver of a grain harvester, who was thrown from his seat and killed when his mules were frightened upon the running away of a horse driven by another employé, evidence *held* to warrant a finding that such other employé, who was representing the master, was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. ⟸279(5).]

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5. MASTER AND SERVANT ⊂⊃185(26)—INJURIES TO SERVANT—LIABILITY OF MASTER.
Where a master directed his servant to take a horse and drive to a grain harvester to ascertain how much sacked grain was on hand, the master is liable for the negligence of that servant, as he represents the master.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 417; Dec. Dig. ⊂⊃185(26).]

6. MASTER AND SERVANT ⊂⊃272—ACTIONS—EVIDENCE—ADMISSIBILITY.
In such case, evidence that the driver of the horse had been previously warned of the danger of scaring the mules drawing the harvester, but that he disregarded such warning, is admissible, for the master is liable for his negligence.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 933–935; Dec. Dig. ⊂⊃272.]

7. APPEAL AND ERROR ⊂⊃272(2)—EXCEPTIONS—TIME FOR TAKING.
To be considered, exceptions to instructions must be taken prior to the retirement of the jury for the consideration of the case and the return of the verdict.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1611; Dec. Dig. ⊂⊃272(2); Trial, Cent. Dig. § 680.]

In Error to the District Court of the United States for the Northern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, against Miller & Lux, Incorporated. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Edward F. Treadwell, of San Francisco, Cal., for plaintiff in error.

J. J. Dunne and M. H. Farrar, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This action was brought to recover damages growing out of the death of one Pietro Spina, sometimes known as Peter Spino, who was at the time in question employed by the plaintiff in error (defendant in the trial court) engaged in driving a team of 32 mules hitched to a large grain harvester on the Midway ranch of the plaintiff in error, in Merced county, Cal., on which harvester were also employed at the time four other men, named, respectively, Knight, Trainor, Albano, and Salapi, the latter working the header with a wheel, Trainor being the sack sewer, and Knight foreman in charge of the harvester. At the same time there was also in the employ of the plaintiff in error a boy between 16 and 17 years of age by the name of Twining, who was furnished by his employer with a horse and two-wheel cart, whose duties were, among other things, to drive from time to time to the harvester and get from the sack sewer the number of sacks of grain. The boy had been so employed for more than a month when, on the occasion in question, he was given by the plaintiff in error a new horse to drive, which he drove to the harvester, approaching from the rear, and was getting from Trainor a report of the number of sacks of grain when the horse became

frightened and ran, passing along the side of the team of mules, which thereupon became frightened and also proceeded to run away, thereby throwing the driver, Spino, from his seat, resulting in the harvester passing over and killing him.

The ground of the action is the alleged negligence of the plaintiff in error in furnishing the boy with a horse alleged in the amended complaint to have been "a restive, fractious, vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach said harvester team," and the alleged negligence of the boy in the handling of the horse that he was driving.

The action was originally brought in one of the courts of California by one Nordgren, as administrator of the estate of Peter Spino, deceased, the complaint alleging that his heirs were Jovetta Spino and Sunda Spino, to which complaint a demurrer was filed on the ground that it did not state facts sufficient to constitute a cause of action and because it was uncertain in certain specified particulars. Thereafter a proceeding was commenced in the same state court in the matter of the estate of Pietro Spina, deceased, sometimes known as Peter Spino, by the alleged wife of the deceased, in which petition it was alleged that the heirs at law of the said deceased are his surviving wife, Giuditta di Giovanni Petrocelli Spina, a sister of the petitioner, and a daughter, Assunta Spina, both of whom resided in Italy, and that the said widow had, in writing, requested the appointment of the petitioner as administrator of the estate. That proceeding resulted in an order of the probate court, revoking the letters formerly issued to Nordgren, and the appointment of the said Saverio di Giovanni Petrocelli administrator of the estate, the court having found that he was the brother of the surviving wife, Giuditta di Giovanni Petrocelli Spina. Thereafter the action was, on motion of the defendant thereto and on the ground of diverse citizenship, removed from the state court to the court below, in which court this stipulation was entered into by and between the respective parties:

"In the above-entitled action it is hereby stipulated and agreed that the demurrer heretofore interposed by the above-named defendant to the complaint in said action may be sustained, and that Saverio di Giovanni Petrocelli, administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased, heretofore substituted as the party plaintiff in the above-entitled action in the place and stead of 'G. E. Nordgren,' as administrator of 'the estate of Peter Spino, deceased,' and now plaintiff in said action, may have twenty (20) days from and after notice of the entry of the order of said court sustaining said demurrer pursuant to this stipulation within which to prepare, serve, and file an amended complaint in the above-entitled action.

"Dated April 30, 1913. Edward F. Treadwell,
"Attorney for Said Defendant.
"J. J. Dunne,
"Mercer H. Farrar,
"Attorneys for Saverio di Giovanni Petrocelli, Administrator of the Estate of Pietro Spina, Sometimes Known as Peter Spino, Deceased, Plaintiff in Above-Entitled Action."

[1] In pursuance of that stipulation the amended complaint upon which the case was tried in the court below was filed. When the probate proceedings that have been mentioned were offered in evidence they were objected to on the ground that they were "in the name

of the estate of Peter Spino, deceased, whereas the name of the decedent in this case is Pietro Spina." Not only is it stated in those proceedings that the deceased was sometimes known by the one name and sometimes by the other, but the testimony of several of the witnesses on the trial in the court below is to the same effect. Pietro in Italian is Peter in English, so that the sole difference is in the last letter of the surname, Spino or Spina. Even in criminal cases it was adjudged wholly immaterial whether a man was indicted as Foust or Faust, the Supreme Court saying:

"A name need not be correctly spelled in an indictment, if substantially the same sound is preserved." Faust v. United States, 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224.

We think the objection made in respect to the name of the deceased in the present case utterly without merit.

[2, 3] Nor are we able to sustain the contention of the plaintiff in error in regard to lack of proof of the heirship of the widow and child in behalf of whom the action was brought. In the first place, so far as appears, the contention is made in this court for the first time. Not only does it appear that the probate court of the state of California, in determining the matter of the appointment of an administrator of the estate of the deceased, found that this widow and child were his heirs, but in the record of the trial below is this testimony of "Mrs. Giuditta Petrocelli":

"My name is Giuditta Petrocelli. I knew Peter Spino (or Pietro Spina) in his lifetime; I was his wife. We were married in Moliterno, Italy, 13 years ago. He was 36 years old at the time of his death. I was 31 years old at the time he died. My husband supported me during his lifetime; that is all, he had nothing else. Just all I got was just whatever my husband used to send me. He sent me about $250 a year. He left Italy to come to the United States 7 years ago. I left Italy on the 25th of December, to come to the United States. I arrived in New York on the 12th of January, and got to California on the 1st of May. During the 7 years that my husband was here in the United States up to the time of his death, he sent me $250 a year on the average all the time. I have one child, Assunta Spina, 10 years old on the 15th of next August."

If any more proof on the question of heirship was required, the trial court would, no doubt, upon suitable and timely objection there made, have afforded the plaintiff an opportunity to supply it.

[4-7] The record contains no evidence tending to show any contributory negligence on the part of the deceased, which was alleged by the plaintiff in error; the real issue on the merits being whether there was sufficient evidence of negligence on its part to sustain the verdict that was rendered against it by the jury. We think there was. Many cases are cited to show that negligence cannot be presumed from the mere fact that the horse ran away and was the cause of the death of the deceased; which is readily conceded. But such is by no means this case. Here there was evidence given tending to show that mule teams are easily frightened, and that only three days before this accident the boy came out to the harvester for a count of the sacks, driving another horse, when the foreman from his position on top of the machine, saw the horse going around the team, "when," said the

witness, "the mules started to run, and I grabbed the brake and stopped them." The witness added that he then said to the boy:

"You take care of that horse or stay out of the field; that he might cause a runaway, and kill somebody, or some of the mules tear up the machine."

On the day of the accident, which was three days later, when the boy came to get the count of the sacks, he was driving for the first time another horse, and the witness Salapi gave in his testimony this account of his crossing that portion of the field from which the grain had been cut, and which was checked for irrigation:

"We began working at 6 o'clock; Spina was killed at 9. Between 6 and 9 the harvester passed over irrigating checks. In passing over those checks there was no runaway by the mule team. Shortly before Spina was killed I saw a boy in a cart come near the harvester. The boy was in a cart. It was a small cart. It had no brakes. It had two wheels. When I first saw the boy on that occasion in that cart he was about a quarter of a mile away back of the harvester. He was running, zigzagging before he gets there. When he got fairly close up to the harvester he turned his cart about twice around. He then got near the harvester. When he got near the harvester he was about five or six steps away. At that time when the boy was there alongside the harvester and five or six steps from it his horse was going slowly. The horse was walking. * * * The mules were walking also; both the mules and the horse and cart were walking straight in the same direction. At that time while those things were so, I saw Mr. Trainor; he jumps off the harvester. He moves about two steps near the cart. I see the boy in the cart at that time. He was looking to Billy Trainor. I saw that he was talking. I could not hear the words that they said, because the harvester was making a noise. The lines from the boy's horse were lying on top, loose, on top of the singletrees. He had the ends of the lines, the extreme ends, the tips, in his left hand. He was making motions to Billy Trainor with his right hand. His left hand that held the tips of the lines was laying on his left knee at the time he was making these motions to Trainor. While that was so, the horse ran at once directly to the team. When the horse reached the mules and got alongside of the mules, the mules ran away, right straight ahead. The horse runs alongside the team about seventy feet and then turns to the left. The mule team ran on the right side as far as the ditch. They were stopped there. When the boy's horse started to run I saw him get hold of the line with both hands and try to hold the horse."

What frightened and started the horse to run does not clearly appear, although the boy in his testimony states that in crossing one of the checks the harvester swayed, which might have frightened it.

Knight, the foreman of the harvester, testified, among other things, that on the day of the accident he saw the boy approaching the harvester. "When I first saw him," said the witness, "he was probably a quarter of a mile away, coming from the south. The harvester was going west. The boy Twining was approaching the harvester from the south on that occasion, between a gallop and a run. As he came up from the south and came on toward the harvester, he was twisting around some, and when he got up closer to the harvester he whirled around a couple of times, and then drove up in front of the machine where the sack sewer was. This was a different horse from the one he was driving on June 27th." Being asked as to the character of the horse, the witness answered:

"Well, in my opinion it was a high-lifed, small horse. One that needs attention. In my opinion it was a spirited animal. The reasons I have in mind for this opinion are the way the horse ran through the field and run

around the machine after he got him up there. He was running through the field, and I seen him running over the checks, and I could tell he was coming pretty fast. He did not pursue a straight line. He was turning, coming around, kind of twisting zigzag. The cart was a medium cart without any brakes. Had two wheels, and no dashboard. There was no one else in the cart except Twining. When I saw him approaching in the way I have described through the field approaching the harvester, I went down to the brake on the harvester. The mule team was all right, and was going a slow walk. At the time Twining's horse and cart got alongside the harvester, when the harvester was going west, and the horse walking, Twining's horse was walking. When the mule team was walking and Twining's horse was walking the distance between the harvester and the cart was probably 20 feet. When he got alongside the harvester in the position and under the circumstances I have described, I thought everything was all right, and I saw a check, and I went down to the brake. When I got down to the brake at that time, I could not see Twining or Trainor; my view was obstructed by the cleaner. * * * A check is a slight elevation in the ground to hold the water. Probably 2 feet high, a foot and a half, some higher and some lower, depending on the formation of the ground. They slope up and down, a gentle slope. When the harvester was nearing this check, and I was at the brake the mules started to run. At that time when the mules started to run I saw Twining. He was running right alongside the mules; his horse was going pretty fast. So far as my observation of the facts occurring there on that occasion permits, the harvester did not start Twining's horse to run, nor did the mules themselves, so far as my observation went, start Twining's horse to run. I did not see any member of the harvester do any act to start Twining's horse or the mules. After I lost sight of Twining and went behind the cleaner the next time I saw him the horse was alongside the mules and going pretty fast, 14 or 16 feet away from the mule team, running west. The mules were running west also and run probably 100 yards. They then turned to the right, turned right short, and run down through the grain field, probably a couple of hundred yards, and run into a ditch of water and turned to the left. I jumped off and run ahead of them and stopped them."

There was further testimony, tending to show that the horse was a high-spirited one; and while, as is usual in such cases, the evidence upon the question of the defendant's alleged negligence is more or less conflicting, we are of the opinion that if the testimony referred to was true (which, of course, was a matter for the jury to determine), it might well have drawn the conclusion that such a horse, which had just been driven across a checked field, in a zigzag course, at a gait ranging from a gallop to a run and turned around more than once, must have been in a somewhat excited condition, and that it was negligence for its driver to allow the lines to lay loose on top of the singletrees, holding only the tip ends in his left hand, while giving his attention to the sack sewer. If the driver was so negligent, it cannot be doubted, we think, that his employer, who furnished him with the instrumentalities and directed him to do the work in which he was engaged, must be held responsible. This rests upon the principle that the employé was the agent of the employer in doing the work he was sent to do, and, being such agent at the time of the accident, upon precisely the same ground he was the agent of the defendant when he received the warning from the foreman of the harvester three days before. We, therefore, think there is no merit in the contention that the court below erred in admitting in evidence the testimony in respect to such warning, and still less in the contentions of the plaintiff in error in respect to the other rulings on the trial, save only those re-

garding the instructions to the jury, given and refused, as to which the plaintiff in error is concluded by its failure to take any exceptions thereto prior to the retirement of the jury for the consideration of the case and the return of its verdict. It is too late now to question the well-established rule in this circuit that such exceptions must be taken prior to such time, which rule is in accordance with and founded upon the decision of the Supreme Court. See Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643; Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392; Star Co. v. Madden, 188 Fed. 910, 110 C. C. A. 652; Mountain Copper Co. v. Van Buren, 133 Fed. 1, 66 C. C. A. 151; Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305; Copper River & N. W. Ry. Co. v. Heney, 211 Fed. 459, 128 C. C. A. 131; Beatson Copper Co. v. Pedrin, 217 Fed. 43, 133 C. C. A. 29, and Alverson v. Oregon-Washington Railroad & Navigation Co., 236 Fed. 331, —— C. C. A. ——, a corporation, decided by this court September 5, 1916.

The judgment is affirmed.

EGGERS, Sheriff, et al. v. KRUEGER.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1916.)

No. 2681.

1. COURTS ⟸262(2)—RIGHT TO EQUITABLE RELIEF AGAINST JUDGMENT—EXISTENCE OF STATUTORY REMEDY.

In view of Code Civ. Proc. Cal. § 473, which provides that a court, upon such terms as may be just, may, on motion within six months, relieve a party from a judgment taken against him through his mistake, inadvertence, or excusable neglect, a federal court of equity will not enjoin enforcement of a judgment of a state court in an action at law, where it appears that complainant knew of the judgment within one month, and no reason is shown why he did not avail himself of the statutory remedy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸262(2).]

2. COURTS ⟸262(4)—FEDERAL COURTS—INJUNCTION AGAINST JUDGMENT OF STATE COURT.

In an action of ejectment in a state court, after an examination and a finding of incompetency, a guardian ad litem was appointed for the defendant, as authorized by Code Civ. Proc. Cal. § 372. Afterwards a judgment was entered against the defendant, pursuant to a compromise agreement made by the guardian ad litem, as also authorized by said section, which was submitted to, and approved by, the court. *Held* that, in the absence of allegation and proof of fraud, or that the court was misled, a federal court of equity would not entertain a suit to enjoin enforcement of the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸262(4).]

3. EXECUTORS AND ADMINISTRATORS ⟸430—PARTIES DEFENDANT—HEIR IN POSSESSION.

Where real estate of a decedent was occupied by her son, who was her administrator, and also her sole heir, and as such heir entitled to posses-

sion, an action of ejectment was properly brought against him in his individual capacity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1683-1688; Dec. Dig. ⟸430.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; M. T. Dooling, Judge

Suit in equity by August Ferdinand Krueger (otherwise Kruger) administrator of the estate of Anna Maria Krueger, deceased, against Frederick Eggers, as Sheriff of the City and County of San Francisco, and others. From an order granting a preliminary injunction, defendants appeal. Reversed.

August Ferdinand Krueger, as administrator of the estate of Anna Maria Krueger, deceased, brought suit in equity against Eggers, sheriff of the city and county of San Francisco, Sophie Suter as executrix of the will of Daniel Suter, deceased, Sophie Suter, Otto tum Suden, Edward C. Harrison, and Maurice E. Harrison to enjoin the enforcement of a judgment in the state court in California for the recovery of certain real estate in San Francisco. The appeal now before us is by the defendant's Eggers and others from an interlocutory order granting an injunction. The case concerns the legal effect and validity of certain judgments and proceedings as hereinafter briefly referred to.

Anna Maria Krueger, the mother of A. F. Krueger, appellee here, died intestate in California in May, 1902, leaving certain realty in San Francisco upon which there were two mortgages—one to the Hibernia Savings & Loan Society, of San Francisco, and the other to Daniel Suter, a lawyer, the bank being the holder of a first mortgage. After the death of Mrs. Krueger, Farnham, public administrator, was appointed administrator of her estate. In November, 1902, the Hibernia Society, mortgagee, brought action of foreclosure in the state court against Farnham, then administrator of the estate of Mrs. Krueger, and Daniel Suter. In this foreclosure proceeding Farnham did not appear. Decree of foreclosure was rendered, and thereafter, at foreclosure sale, on July 8, 1903, Daniel Suter, second mortgage holder, bought in the realty, paid the bank's claim, and received a commissioner's certificate of sale. In the bill herein it is alleged that there was no service of summons on Farnham in the action of foreclosure, and that no answer, appearance, or demurrer was ever filed in said action by the administrator or any one in his behalf, that Suter filed an answer praying foreclosure, that no deed was made by the commissioner to Suter conveying title to the property to Suter, and that Suter was not an innocent purchaser without notice.

The bill further alleges that in April, 1904, plaintiff first knew that Farnham had been appointed administrator of the estate of his mother, that the bank had foreclosed its mortgage, and that Suter bought in the property; and he avers that he had no notice and had no day in court, although he was living in San Francisco, and that when he learned of the condition of the estate of his mother he had himself appointed in place of Farnham; that he then moved in the state court that the decree of foreclosure be set aside, because the court had no jurisdiction, and because the judgment was a fraud on the estate; that after due proceedings the state superior court set aside the judgment of foreclosure and all proceedings had thereon; that upon the motion to set aside Suter appeared, but that the bank did not; that from the order of the court setting aside the judgment of foreclosure of the mortgage of the said bank, under which sale was made to Suter, no appeal or motion for new trial was made.

In 1913 Suter died. Defendant Sophie Suter, his wife, was appointed executrix, and it is alleged that in August, 1913, she brought action of ejectment in the superior court of the state against Krueger individually; that Krueger answered; that a trial was had in March, 1914, Messrs. E. C. and M. E. Harrison, who were named as defendants herein, appearing as counsel for Sophie Suter, executrix; that Krueger appeared in person, being without

money to employ legal aid; that at the suggestion of E. C. and M. E. Harrison and O. tum Suden, defendants, tum Suden was appointed guardian ad litem of plaintiff; that, after trial, judgment was rendered for Krueger, the defendant in that action. It is alleged that thereafter, without consulting Krueger, tum Suden consented to a new trial of the action, and that tum Suden permitted the judgment to be set aside and waived all rights of appeal, and that as a result the court set aside the judgment in favor of Krueger, and a judgment was entered in favor of Mrs. Suter on July 11, 1914; that afterward tum Suden informed plaintiff that he had received from Sophie Suter, executrix, $1,500 to be paid to plaintiff for his interest in said property, out of which was to be deducted $250 by tum Suden as a fee for legal services rendered.

It is alleged that in the filing of the action in ejectment against this plaintiff by Sophie Suter, executrix, and the making and entering of the second judgment, the defendants tum Suden, E. C. and M. E. Harrison, and Sophie Suter knew, and were charged with knowledge, of all the facts and conditions of the title and proceedings relating to the realty, and well knew that Daniel Suter had no rights therein; that defendants threaten to enforce the judgment in ejectment; that the value of the property is $18,000; that plaintiff has offered to pay Sophie Suter, executrix, all money due to her deceased husband, the money to be obtained by a sale of the property; and that plaintiff has paid the taxes on the property since the foreclosure judgment.

At the hearing upon the application for injunction it appeared by affidavit that upon the trial of the ejectment suit in the state court in December, 1913, Sophie Suter introduced two deeds from A. F. Krueger to his mother and a commissioner's deed from the commissioner appointed in the foreclosure suit to Daniel Suter, appellant Suter's testator; that upon the trial of that action August Krueger was called as a witness, but that his guardian ad litem objected because of incompetency of his ward, whereupon the court examined the witness and decided that he was incompetent and refused to permit him to testify. Defendant in that suit (Krueger) then called the attorney who had looked after Krueger's interest in the foreclosure suit, and he testified that after decree of foreclosure had been rendered in the foreclosure suit Krueger consulted him about appealing; that this was about five or six weeks before expiration of the time to take an appeal expired; that on May 20, 1904, he obtained an order making Krueger administrator of the estate of his mother, and had him substituted for Farnham as a defendant in the foreclosure proceedings. This witness also said that when he examined the foreclosure papers he found that, although the register disclosed that an affidavit of service of summons upon Farnham had been made, no such affidavit and no answer were on file; that he then moved the superior court to set aside the decree, because it recited that Farnham appeared and filed an answer, when in truth he had not. The state court denied this motion, and on application of Daniel Suter an order was made allowing Farnham to file an answer nunc pro tunc. Soon afterward the attorney for Krueger appealed from the order of the superior court, but before bill of exceptions was signed the court reconsidered its former action, and on September 5, 1905, granted a motion of Krueger's counsel to set aside the decree of foreclosure. The witness, Warner Temple, Esq., further deposed that when he looked into the foreclosure proceedings he ascertained that Daniel Suter had bought the realty involved at foreclosure from the commissioner. Upon that same trial George A. Clough, Esq., testified that he was one of the attorneys for the Hibernia Bank in the original foreclosure proceedings; that Messrs. McGowan and Westlake were attorneys for Farnham, as administrator of the estate of Anna Maria Krueger, deceased; that they had served an answer upon attorneys for plaintiff, and appeared as attorneys for the administrator; and that until later he did not know that the answer which had been served had not been filed.

When the ejectment suit came to trial in 1913, and judgment was rendered in March, 1914, for Krueger, defendant therein, and in due course bill of exceptions was presented, it turned out that there was an appeal pending from the decree in foreclosure, or from an order refusing to vacate the judg-

ment of foreclosure—the record upon this point is in conflict—and that as a consequence, in the opinion of the guardian, the order of the superior court setting aside that decree and ordering judgment for defendant was worthless. in that the court, when it made the order, was without jurisdiction. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805.

The situation then led to attempts at compromise. The guardian ad litem, by his affidavit originally filed in this matter in the superior court, explains that after full investigation and consideration of the rights and obligations of his client and of his mental condition, it would be better for the defendant to accept a reasonable sum in full settlement and liquidation if the guardian, on behalf of defendant, would consent to a new trial and judgment in favor of plaintiff and waive appeal, subject to the approval of the court. The guardian says that he regarded the litigation as doubtful in its outcome, and finding that the order of the superior court purporting to vacate the judgment of foreclosure was made after the appeal from the judgment of foreclosure had been perfected, as guardian he thought it better to obtain a compromise and settlement, and that, after being offered $1,500 and trying to obtain from Krueger consideration of the advantage of such offer, he submitted the matter to the court with "full explanation of the circumstances." Among the circumstances which the guardian sets forth is the fact that he made a computation of the amount of the debt resting upon the property and to which in equity the plaintiff in that suit would be entitled, and also of the value of the property, the calculation showing that the total amount of indebtedness was more than $13,500. The guardian says he inquired into the market value of the property, and finding that it did not exceed $16,000, and that under forced sale $14,000 to $15,000 would be a large price, he advised the compromise, and the court made the necessary order to permit the same to be carried out; that the money was paid over to the guardian, and has been by him held ever since, to be paid over to Krueger pursuant to the order of the superior court of the state, but that Krueger has failed to take the money.

It further appears from the record that on August 5, 1914, Krueger, the ejectment defendant and the plaintiff in this suit, appeared in the ejectment suit personally and through Arthur Crane, Esq., as an attorney, and moved to set aside all the rulings against him, including the order adjudging him incompetent, the appointing of the guardian ad litem, the order granting the new trial, judgment for plaintiff, order sustaining the compromise and allowing $250 as a compensation to the guardian. The grounds of these motions were that Krueger was competent and that the guardian ad litem did not have authority to compromise or waive rights of Krueger, and that the court was not advised of the value of the land and other facts regarding the compromise. Krueger, in his affidavit accompanying this motion, says that Otto tum Suden did not tell him that he expected a fee; that he thought the guardianship ad litem was at an end when the judgment in his favor was made on March 14, 1914; that he did not examine the records after March 14, 1914, until after July 22, 1914, and did not know until after July 22, 1914, that the guardian had purported to agree to the correctness of the bill of exceptions proposed, or that a motion for a new trial was pending or that the same was granted by the court, or that the guardian had been authorized to effect the compromise already referred to; that no conference was had by the guardian with him concerning the value of the land, which Krueger says is now more than $20,000, and that the liens and incumbrances upon it do not exceed $8,000, and that the value of his interest is $12,000.

H. L. Moise also filed an affidavit, in which he says that he has known Krueger for a good many years and that he is in a position requiring good common sense and ability, and that he has never exhibited any symptoms of insanity.

Against the motion were affidavits of Otto tum Suden and E. O. Harrison. Upon hearing of this motion on August 17, 1914, the superior court of the state denied the motion.

Upon motion the District Court dismissed the present bill as to the defendants Edward C. and Maurice E. Harrison, and granted injunction pendente lite as against the other defendants, who have appealed to this court.

Edward C. Harrison, Maurice E. Harrison, and Peter tum Suden, all of San Francisco, Cal., for appellants.

Warner Temple, of San Francisco, Cal. (M. H. Farrar, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We believe that under the circumstances set forth in the above statement the bill is without equity, in that it shows that there was a plain, speedy, and adequate remedy at law in the courts of the state in which the judgment entered July 11, 1914, was rendered. If we assume for the present purposes of the case that the judgment in ejectment entered against Krueger was obtained by the fraud of plaintiff's guardian ad litem and the adverse party, it still appears that the plaintiff herein had ample remedy, availed of by motion to set aside the judgment in the court where it was given. Section 473 of the Code of Civil Procedure of California provides that the court, upon such terms as may be just, may relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, provided application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding has been taken. It is plain from the record that this plaintiff knew of the judgment in favor of Sophie Suter against himself individually less than four weeks after rendition of the judgment, and inasmuch as he fails to show satisfactory reason for not availing himself of an appeal under the procedure of the state codes, his case is fairly within the rule established by the Supreme Court of the state of California in the case of Eldred v. White, 102 Cal. 600, 36 Pac. 944, and Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016.

In Eldred v. White, supra, the action was to set aside a judgment on the ground of fraud, but it was not instituted until 13 months after the date of the judgment in the foreclosure suit, and no reason was shown why it was not commenced sooner. The court held that no sufficient facts were stated to constitute a cause of action. In Heller v. Dyerville Mfg. Co., supra, the question arose upon a prayer to modify a judgment on the ground of fraud. The Supreme Court of the state held that there was no occasion to resort to equity, because the party seeking the modification was sufficiently advised of the proceedings within the six months from the entry of the decree, within which time, under section 473 of the Code of Civil Procedure of California, he could have moved for modification.

In Nougué v. Clapp, 101 U. S. 551, 25 L. Ed. 1026, application was made to set aside a decree of a state court and a sale on the ground that the decree was obtained and the sale conducted pursuant to a conspiracy to which the person obtaining the decree and who became the purchaser at the sale was a party; but the Supreme Court held that, inasmuch as the law of the state of Louisiana allowed a motion and procedure in its courts to set aside the decree, there being no showing in the bill that the plaintiff had pursued such remedy, the federal court

would not interfere. Justice Miller stated that, if the lower court of the state refused remedy, there was an appeal to the Supreme Court, and, moreover, that under the laws of Louisiana a remedy by a special proceeding was available, and that it was not for the federal courts to reverse a decree, and set aside an order of sale made by a state court, in a case where jurisdiction of the state court was undoubted. "It would," he continued, "be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practiced in the court, enable a party to retry in a federal court any case decided against him in a state court."

In Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, which was a bill to set aside a judgment as fraudulent, plaintiff alleged that he did not know of the fraudulent judgment until it was too late to make motions necessary to obtain relief under the state practice. The Supreme Court distinguished the case from Nougué v. Clapp, supra, and held that the facts took it out of the rule that relief will not be granted in equity, even where the party has an equitable defense if he could, by the exercise of diligence, have availed himself of that defense in the action at law to which he was a party.

In Bower v. Stein, 177 Fed. 673, 101 C. C. A. 299, suit was brought to set aside a judgment in foreclosure rendered in the state court where summons had been published; the claim being that the judgment was obtained by fraud. Judge Gilbert, speaking for this court, said:

"Another ground on which it should be held that there is no equity in the bill is the appellant failed to avail herself of the remedy afforded her by the statute of Oregon, which provides that the defendant against whom a judgment is taken on service by publication may upon good cause shown, and upon such terms as may be proper, be allowed to defend within one year after judgment. Under that statute, it has been held that an allegation that the plaintiff in the action did not try to find the defendant's address may be considered upon a motion to open the decree. Smith v. Smith, 3 Or. 363. According to the allegations of the bill, the appellant had notice of the foreclosure suit in ample time to have availed herself of the remedy so afforded by the state statute. A party who thus neglects to avail himself of the remedies afforded in the state court is precluded from resorting to a federal court to obtain relief against the decree. Nougué v. Clapp, 101 U. S. 551, 25 L. Ed. 1026; Graham v. Boston, H. & E. R. Co. (C. C.) 14 Fed. 753, affirmed in 118 U. S. 162, 6 Sup. Ct. 1009, 30 L. Ed. 196."

The doctrine of this last-cited case is pertinent, because in California, under section 473 of the Code of Civil Procedure, motion to set aside a judgment rendered on service by publication is put upon the same footing as a motion to set aside a judgment for fraud or inadvertence under the California Code. The general rule was announced also in Strand et al. v. Griffith, 144 Fed. 828, 75 C. C. A. 558.

In the more recent case of Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, the Supreme Court, while holding that a plaintiff with a valid state judgment can be enjoined by the United States court from its inequitable use and that the federal court may enjoin a party from using that which purports to be a judgment, but which is in fact an absolute nullity, nevertheless recognized the rule that where a state court had jurisdiction of the person and subject-matter, the judgment rendered in the suit would be binding on the par-

ties until reversed, and there would, therefore, usually be no equity in a bill in the federal court seeking injunction against the enforcement of the judgment in the state court thus binding between the parties.

[2] If, however, we look into the substance of the case, and test the bill by its averments of fraud, our conclusion would still have to be against this appellee. Stripped of immaterial matters, it appears that on August 5, 1913, Sophie Suter, as executrix, sued the appellee in the superior court of the state of California. A guardian ad litem was appointed by the court to act for the appellee Krueger, and Krueger also appeared in person. After trial the court gave judgment for Krueger. The guardian ad litem was appointed upon a petition duly made in September, 1913, and after order to show cause had been served upon Krueger, and after hearing by the superior court, and after an adjudication that he was an incompetent person, and that it was necessary that a guardian ad litem should be appointed to represent him in the action then pending against him. Thereafter, upon representation to the court, order of compromise was made by the court, and the guardian ad litem under due authority agreed with the appellant Suter, plaintiff in the action pending in the state court, that the judgment might be set aside, and accordingly judgment was set aside and a new trial was thereafter had before Judge Sturtevant, who had presided at the previous trial. On this second trial the court had before it all the evidence adduced on the first trial, and pursuant to an agreement between the guardian ad litem and this appellant Suter respecting a proposition of payment to Krueger in settlement, judgment was on July 11, 1914, given in her favor against Krueger. Thereafter, on July 11, 1914, the guardian ad litem told Krueger of the compromise and of moneys due to appellee under the compromise.

It is apparent that the guardian ad litem was appointed by order of the court in which the action was pending, and there is no real showing that the order of such appointment was brought about by any misrepresentation or fraud. It must therefore be regarded as binding. It also appears that endeavor was made to settle the controversy between the parties, tum Suden acting as guardian ad litem, and the adverse party, Mrs. Suter. No facts showing misrepresentation or deceit or fraud in this attempted compromise are pleaded; nor is there any showing that the court was not fully advised by the guardian ad litem of all the facts in the possession of the guardian ad litem and of the appellant Mrs. Suter, or that the court was deceived or misled. The court of the state certainly had the right to appoint a guardian ad litem after notice to Krueger, and after he had an opportunity to be heard upon the question of his competency.

As to the jurisdiction in the superior court of the state to approve a compromise between the guardian ad litem and Mrs. Suter without consulting Krueger, held to be incompetent, we can have no doubt when we examine section 372 of the Code of Civil Procedure of California. That section provides that when an incompetent person is a party—

"he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case."

The statute continues:

"A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding. * * * The general guardian or guardian ad litem so appearing for any infant, or insane or incompetent person in any suit shall have power to compromise the same and to agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending."

The guardian regularly appointed, being vested with the power to compromise and agree to the judgment to be entered in the suit pending for or against his ward, subject to the approval of the court, was authorized to take the course that he did. Krueger having been found and adjudged to be incompetent, notification to him personally of the proposed compromise was not legally necessary, provided always the court should deem the compromise to be fair to the incompetent. Procedure according to the terms of the statute was therefore had, and the federal court will not now entertain a bill which necessarily involves an inquiry whether or not Krueger was in fact competent, notwithstanding the decision of the state court, when the guardian ad litem acted in his behalf and with the approval of the court. We have considered the fact that a judgment had been rendered in favor of Krueger after the first trial, but we do not think that affects the question. The action was still pending (section 1049, Code of Civil Procedure of California), and the superior court of the state was authorized to grant a new trial and vacate the judgment, and, no facts showing fraud being alleged, to entertain the suggestion of a compromise and to approve of the same. Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016.

In Harbison v. Harbison et al. (Tex. Civ. App.) 56 S. W. 1006, a minor brought suit to set aside a waiver and abandonment of appeal made by his next friend upon the ground that, while the court approved the same, the decree was the result of fraud and mistake. The Court of Appeals of Texas cited the statute of Texas, which, much like section 372 of the Code of Civil Procedure of California, authorized a settlement by the next friend with the approval of the court, and held that, notwithstanding the fact that the bill alleged fraud in general terms, the decree should not be set aside, because there was no showing that the court had been deceived in making the decree approving the compromise, and because it must be assumed that the facts were fully before the court when such decree was made. In that case there was also a failure to allege that any misrepresentation had been made to the guardian or next friend by the adverse party, although the complaint alleged that, because of the compromise, property of great value had been sacrificed, to the injury of the minor, and that the settlement had been made without consulting him.

[3] It is urged that relief against the judgment had against Krueger personally should be granted, because Krueger now claims as the administrator of the estate of his mother. Thus is presented the question whether the judgment against Krueger individually affects his rights as administrator. Krueger, being the heir of his deceased moth-

er, whose estate he represents as administrator, as such heir is entitled to the possession of the property. As his possession flows from such right, as administrator he is privy to his possession as heir, and as heir may prosecute or defend the action. California Code of Civil Procedure, §§ 1452, 1453, and 1581; McFadden v. Ellmaker, 52 Cal. 348; Ryer v. Fletcher Ryer Co., 126 Cal. 482, 58 Pac. 908. Furthermore, Krueger having actually appeared and defended the action, it is not material that in making the defense he did not have himself substituted in his official capacity as the nominal defendant. California Code of Civil Procedure, § 1908; Estate of Ricks, 160 Cal. 467, 117 Pac. 539. We believe ejectment was properly brought against Krueger, occupant of the premises, individually rather than as administrator; the rule being that no action can be maintained against a personal representative, as such, for a tort. Luscomb v. Fintzelberg, 162 Cal. 433, 123 Pac. 247.

Careful examination of the whole record impresses us with the belief that there is no substance in the attack upon the good faith of the guardian toward his ward. Mr. tum Suden, who was the guardian, sets forth with great detail his belief that his ward was incompetent, and that he formed such belief after observing him and conferring with him and noting his unwillingness to take care of his interests in permitting judgments to go against him. Nothing is to be taken against the guardian ad litem because he was paid $250 for his services after a compromise had been approved: the judge found that that sum would be reasonable, and ordered it paid; and it is not enough to say that such a payment, made, as it was, under an order of the state court, is evidence of any impropriety or breach of good faith on the part of the guardian.

There is some conflict in the affidavits as to the value of the property. But all the facts, including statements concerning bills for taxes and other evidence relating to the market value of the property, were before the state court at the time that it passed on the motion for a new trial, which was made after judgment had been rendered in favor of Krueger. It was the opinion of the judge of the state court that under the law the motion for a new trial was well taken, because the decree in foreclosure was valid, and the order which had set it aside was in excess of the jurisdiction of the court, because it had been made pending appeal. Presumably such was the law of the state. Therefor the order granting a new trial was correct, and the guardian ad litem presumably acted in the best interests of his ward in using his best endeavors to effect a compromise whereby the ward would receive some advantage.

In conclusion, we think it appears, that the appellee, having had decision rendered against him by the courts of the state, which denied his claims, fails to show any ground for maintaining this suit in the federal courts, which is based upon the same grounds as the litigation had in the courts of the state. Relief herein must therefore be denied, and the order and interlocutory decree must be reversed, and the cause remanded to the lower court, with directions to dismiss the complaint.

Ex parte FOX (two cases).

In re GRAND JURY INVESTIGATION OF BREWERS' ASS'N.

(Circuit Court of Appeals, Third Circuit. November 13, 1916.)

Nos. 2123–2125.

CRIMINAL LAW ⊂⊃1134(3)—APPEAL—MOOT QUESTIONS.

In a grand jury investigation to determine whether corporations had violated Cr. Code, § 83 (Act March 4, 1909, c. 321, 35 Stat. 1103 [Comp. St. 1913, § 10251]), prohibiting campaign contributions by corporations in connection with elections at which Presidential and Vice Presidential electors or Representatives in Congress are to be voted for, etc., a secretary of an association of corporations was summoned and directed to produce books and papers. He failed and refused to produce books and papers in accordance with a subpœna duces tecum and the grand jury made presentment to the court concerning his failure, whereupon he was adjudged guilty of contempt. The grand jury proceeded, and upon other evidence returned true bills against the corporations being investigated. *Held*, that as the inquiry had ceased and the questions would probably arise on a trial of the indictments, questions as to whether the witness was bound to produce the documentary evidence and testify as desired will not be determined on a writ of error from the denial of a motion to quash the presentment by the grand jury, as well as writs of error to the denial of the witness' applications for habeas corpus, though to prevent complication the writs will be retained pending trial of the indictments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2989, 2990, 3056; Dec. Dig. ⊂⊃1134(3).]

In Error to and Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the Grand Jury Investigation of the Brewers' Association. Motion to quash presentment against Hugh F. Fox for declining to answer questions was denied, and he appeals. In the matter of applications of Hugh F. Fox for writs of habeas corpus. The writs were denied, and applicant brings error. Writs retained under further advisement pending trial of indictments found.

David A. Reed, of Pittsburgh, Pa., James Scarlet, of Danville, Pa., Samuel P. Tull and D. P. Hibberd, both of Philadelphia, Pa., and George E. Shaw, of Pittsburgh, Pa. (Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., of counsel), for plaintiff in error.

E. Lowry Humes, U. S. Atty., and Neil W. McGill and Benjamin M. Price, Asst. U. S. Attys., all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In these three cases—two writs of error and one appeal—Hugh F. Fox asks us to review certain orders of the District Court for the Western District of Pennsylvania. The facts are as follows:

On January 29, 1916, the grand jury for the district was about to reconvene, and the goverment had determined to lay before that body

the charge that numerous corporations had violated section 83 of the Criminal Code (Comp. St. 1913, § 10251). Accordingly the United States Attorney presented a petition on that date to the District Judges, setting forth:

"That he has reason to believe that various corporations in the Western district of Pennsylvania have, during the last three years and within the statute of limitations and for a considerable period prior thereto, been making large money contributions in connection with elections at which presidential, vice presidential, electors, representatives in Congress, and United States Senators have been voted for.

"That he proposes to submit to the grand jury which reconvenes at Pittsburgh, Pa., on February 1, 1916, an inquiry relating to the alleged violations hereinbefore referred to, and that to maintain the allegations of the government it would be necessary to establish the method employed by said corporations in contributing said sums of money for use in said elections aforesaid.

"That the government is informed and believes that said moneys were contributed through the agency of voluntary associations of which the corporations in question were members, and that in order to establish the allegations it will be necessary to [produce] before the grand jury the books, papers, records, correspondence, checks, and minutes of the said associations, and it will also be necessary in the tracing of said moneys and for the purpose of establishing the use that was made thereof to require the presentations of the bank accounts of said associations.

"That the government is informed and believes that the following associations, their officers, agents, and employés, and the following banking institutions, have in their possession books, records, correspondence, and other documentary evidence, the production of which will establish the allegations of the government, and that the same is material and essential to the inquiry to be had before said grand jury."

The petition prayed the court for leave to issue subpœnas duces tecum to various persons and corporations named—among others, the United States Brewers' Association, its president, Edward A. Schmidt, its treasurer, Gustav W. Lembeck, and its secretary, Hugh F. Fox, directing them to produce before the grand jury:

"(1) The card index and record of the members of the United States Brewers' Association, together with the accounts and records of the association, showing the payments either in the nature of dues or in the nature of contributions paid by the members of said association to the association for the years 1911, 1912, 1913, 1914, and 1915.

"(2) Also all cashbooks and ledgers showing a record of all moneys received by, and all moneys expended by, the United States Brewers' Association in the years 1911, 1912, 1913, 1914, and 1915.

"(3) The constitution and by-laws of the United States Brewers' Association, and also the minute books and records of the association, containing a record of all proceedings and meetings of the United States Brewers' Association, the executive committee, board of directors, board of trustees, or any other committee or board thereof during the years 1911, 1912, 1913, 1914, and 1915.

"(4) All check books, bank passbooks, books of check stubs, and canceled checks, covering all money deposited in any bank by the United States Brewers' Association or by the treasurer or any other authorized officer thereof, as well as all moneys expended by the said association, its treasurer, or any authorized officer thereof, during the years 1911, 1912, 1913, 1914, and 1915.

"(5) All correspondence, original letters or copies of letters passing between the United States Brewers' Association and any of its members relative to payment of dues and assessments, or the making of contributions either by such members, their officers, agents, and employés, or the receiving, contributing, or expending of any of the funds of the United States Brewers' Association by that association, its officers, agents, and employés during the years 1911, 1912, 1913, 1914, and 1915.

"(6) All correspondence, letters, or copies of letters passing between the United States Brewers' Association, its officers, agents, or employés and the Pennsylvania State Brewers' Association, the Brewers' Association of Western Pennsylvania, the Westmoreland County Brewers' Association, and the Fayette County Brewers' Association during the years 1911, 1912, 1913, 1914, and 1915.

"(7) All correspondence, letters, and copies of letters passing between the United States Brewers' Association, its officers, agents, and employés, and any other person, firm, or corporation, relating directly or indirectly to the expenditure of any of the funds of the association, or of any members of the association, or demanding or requesting the payment or the expenditure of any money belonging to the association, or any of its members, for any purpose, during the years 1911, 1912, 1913, 1914, and 1915."

On the same day the court allowed the subpœnas, which were afterwards issued and served. The subpœna to Fox commanded him to appear before the grand jury on February 7, "to give evidence on the part of the United States generally, and not to depart the said court without leave thereof or [of] the United States Attorney."

On February 8—the foregoing petition and the court's order of allowance not having been previously filed of record—Fox and several other persons moved the court to quash the subpœnas and to stay the proceedings, asserting that the subpœnas had been issued without authority of law, and were therefore void, for the following reasons:

"First. That said writs of subpœna duces tecum, by reason of the sweeping and unreasonable character of the command to your petitioners to produce all of the books, papers and documents of the several companies of which your petitioners are officers, is in violation of the fourth amendment of the Constitution of the United States protecting your petitioners against unreasonable searches and seizures.

"Second. That there is no entry upon the records of this court of any order or authority authorizing or directing the issuance of said subpœna duces tecum, and that your petitioners are informed and believe, and therefore charge, that at the time the said subpœnas were issued no order or authority had been obtained from this court authorizing the issuance thereof.

"Third. That said writs of subpœna duces tecum are fatally defective upon their face, in that they do not apprise your petitioners of the names of the persons with respect to whom your petitioners have been called to testify."

On February 15 Judge Thomson refused the motion, Judge Orr announcing a contrary opinion, but declining to note a formal dissent because he believed the matter to be for Judge Thomson alone to decide. Fox thereupon appeared before the grand jury, but failed to answer certain questions or to produce certain documents. On February 21 the grand jury made a presentment to the court, stating:

"That on the 1st day of February, 1916, one Hugh F. Fox was duly served with a subpœna duces tecum, which said subpœna was duly issued in pursuance of an order made by this honorable court.

"That the said Hugh F. Fox has appeared this day before the grand jury assembled, and has refused to testify to certain questions asked, in the following particulars:

"First. The said witness Hugh F. Fox, while admitting that he had been secretary of the United States Brewers' Association since January, 1908, refuses to testify as to his duties.

"Second. That the said Hugh F. Fox has failed and neglected to produce the original of certain records of the United States Brewers' Association in his charge, but in lieu thereof has produced what purports to be a copy thereof.

"Third. That the said Hugh F. Fox has failed to produce any of the correspondence of said association as called for by the subpœna served February 1, 1916, upon the said witness in this case.

"Fourth. The said Hugh F. Fox declines to answer as to the number of stenographers employed by the said United States Brewers' Association in New York City.

"Fifth. The witness declines to answer as to where the moneys of the United States Brewers' Association are deposited, although admitting that moneys come into his hands from various associations or corporations, and that he knows where said funds are deposited.

"The grand jury directs the attention of this honorable court to the fact that the said witness expressly stated that his refusal was not based upon any constitutional privilege, or upon any fear of incriminating himself by his answers, but because of advice of counsel.

"The grand jury, therefore, makes presentment of these matters to the court, and requests the court to direct and instruct the said witness to answer the foregoing matters in the presence of the said grand jury, or such part of the said matters as the court may deem proper, and that the court shall take such other action in the premises as shall be necessary to enforce its decree."

Thereupon the court ruled Fox to show cause why he should not answer the questions and produce the records, or, "in default thereof, why an attachment should not issue for contempt." This rule was returnable on February 23, and upon that day Fox filed an answer in which, inter alia, he gave his reasons for failing to produce the records, and stated also that (although the grand jury had apparently failed to understand him) he had in fact declined to answer the questions on the ground that his testimony might tend to incriminate him, and had attempted so to assert. The court called and examined Fox as a witness, and decided that he was not obliged to answer the questions involving self-incrimination, saying also, that, in view of his statement that he was ready and willing to produce the papers called for by the subpœna, the court would assume that the witness would carry this out in good faith. Accordingly no further proceedings were taken in the matter at that time, and Fox went again before the grand jury. On the same day, February 23, a second presentment was made, in which the grand jury stated:

"That the said Hugh F. Fox was this 23d day of February, 1916, called before the grand jury and asked to produce the books, correspondence, and records called for by the terms of said subpœna. That the said Hugh F. Fox, secretary, as aforesaid, has failed to produce the record of proceedings and meetings of the committees of said association for the years covered by the subpœna, although he is not only the secretary of the association itself, but the secretary also of the advisory committee, the vigilance committee, the labor committee, the publication committee, the membership committee, all of which are committees of said association.

"That he has also failed to produce any records of said association, showing the moneys expended by said association, during the years covered by the subpœna.

"That the said Hugh F. Fox has failed to produce any of the correspondence required by the subpœna for the years 1911, 1912, 1913, and 1914, and but very little of the year 1915.

"That the court may be advised as to the meager records and correspondence which have been produced by the said Hugh F. Fox, the grand jury asks the privilege, if the court shall deem proper, of submitting to your honorable court the records which have been actually produced."

To this Fox filed an answer on the same day, in which he declared as follows:

"It is true, as stated in the presentment, that affiant was served with a subpœna duces tecum, and it is true that affiant was called before the grand jury and asked to produce the books, correspondence, and records mentioned in the subpœna. It is not true that affiant has failed to produce the records of proceedings and meetings of the committees of said association for the years covered by the subpœna. Affiant produced to the grand jury the year books of the United States Brewers' Association for said years, which year books contain the records of the proceedings of the advisory committee, vigilance committee, labor committee, publication committee, and membership committee of said association. The record contained in said year books is the only record of the proceedings of said committees in the custody of affiant at or since the service of said subpœna.

"Affiant has had custody of no records of said association showing the moneys expended by said association during any of the years covered by the subpœna, at or at any time since the service of the subpœna.

"Affiant has not had in his custody at, or at any time since, the service of the subpœna any correspondence of the kind mentioned in the subpœna for any of the years mentioned in the subpœna, except such correspondence as affiant has already produced to the grand jury."

Later in the day the court examined Fox again, and in this examination the United States attorney and the counsel for the witness took part. At the end of the hearing the court adjudged the witness to be in contempt, and stated the reasons therefor as follows:

"The United States having under investigation certain alleged offenses against certain corporations—among others, the United States Brewers' Association—has instituted a proceeding before a grand jury now sitting in this district, alleging that certain books and papers are necessary to throw light on that investigation.

"The court, acting under the averments of the constituted authority of the United States, issued a very broad subpœna upon that corporation to produce certain books and papers therein specified. It appears that this subpœna was served upon Mr. Fox on February 1, 1916. Proceedings were had for the purpose of quashing that subpœna, which after full hearing, was denied by the court, and the corporation was commanded to produce the papers called for.

"On this day the grand jury have made a presentment, which has been filed, setting forth the service of this subpœna upon Mr. Fox and his appearance before the grand jury, and that he has failed to produce records of such association showing moneys expended by said association during the years covered by the subpœna, that is, the years 1911, 1912, 1913, 1914, and 1915, and also that he has failed to produce any of the correspondence required by the subpœna for the same years, or for the years 1911, 1912, 1913, and 1914, and very little for the year 1915.

"The investigation is against the corporation, and not against the witness. And it becomes the duty of the corporation, as the court understands it, to produce those books and papers in obedience to the order of the court. Not only so, but it becomes the duty of the officers of that corporation, who may be served, to produce those papers, to produce them. Good faith to the court, as well as good faith to the party himself, who is commanded to produce the papers, requires that this should be done.

"There is no allegation that there are no records of the association showing moneys expended by said association during the years covered by the subpœna. On the other hand, it appears to be conceded, or not denied, by the secretary that such records are in existence, but he says they are in the custody of the treasurer.

"As I view it, this is no answer to the subpœna. The corporation itself cannot produce papers. They must be produced by an officer of a corporation. And when the chief officer of a corporation is served with notice to produce

them, it becomes his duty, in obedience to the subpœna, to produce them, and not attempt to hide behind some other officer by saying that they are in the immediate custody of that officer. And Mr. Fox admits on the stand, under oath, that he has made no effort to produce these papers showing the moneys expended by that corporation, although he was so notified on the 1st of February, 1916.

"In my judgment, this is a clear and plain repudiation of the duty devolving upon him by order of the court.

"I am also by no means satisfied from the testimony of Mr. Fox that he has satisfactorily explained the nonproduction of the correspondence called for by the subpœna for the years 1911, 1912, 1913, and 1914. He was the custodian of those papers, the legal custodian of the papers. And his answer is that they cleared the files some time in January of 1916.

"As the papers were in existence, and as the papers representing the moneys expended are in existence, it was the duty of the witness to satisfy the court or show good cause for their nonproduction, and I have not been satisfied. And I am therefore compelled to adjudge Hugh F. Fox in contempt of the order and subpœna of this court with reference to the nonproduction of the records showing moneys expended by the corporation, and also with reference to the nonproduction of the correspondence called for.

"This being true, the order of the court is that he be committed to the custody of the United States marshal until such papers are produced before the grand jury, or until he purges himself of his contempt."

Fox was thereupon committed to the custody of the marshal and was imprisoned, but was released the next day on bail. On March 1 he and his counsel presented certain books and papers and asked the court to determine whether these documents came within the subpœna, and (if they did) whether they contained matters relevant to the inquiry. The court examined the documents, and decided that most of them were covered by the subpœna, but declined to decide the question of relevancy, saying:

"I think, therefore, the court will have to assume the materiality of the books, papers and documents in question. This assumption being based on the alleged necessity of the books and papers and documents embraced in the subpœna as set forth in the petition of the United States attorney.

"The objection of defendant's counsel is therefore overruled, and the papers which have been designated as coming within the terms of the subpœna are directed to be delivered to the grand jury in their investigation."

On the next day, March 2, Fox presented a petition setting forth:

"First. That by an order heretofore made in this proceeding your honorable court adjudged your petitioner to be in contempt of court in having failed to produce certain alleged papers mentioned in the subpœna duces tecum heretofore served upon your petitioner.

"Second. That your petitioner is advised by counsel and therefore avers that your honorable court was without jurisdiction in this matter to make the said order, or to try your petitioner, or to sentence him, or to commit him for contempt for the following reasons:

"(a) The presentment of the grand jury upon which said order of this court was issued was not made in any proceeding entitled as between the United States and this petitioner as defendant, and because the caption and title of this proceeding as shown in the said presentment was and is defective in failing to state that your petitioner is defendant in a criminal charge brought by the United States against your petitioner.

"(b) That said presentment charged no contempt or other crime on the part of your petitioner.

"(c) Because said presentment contained no prayer that your petitioner should be held to be in contempt or should be compelled to purge himself, or should be punished.

"(d) Because said presentment did not claim or aver the existence of any of the said papers which your petitioner was charged with failure to produce, and did not charge that your petitioner had knowledge of the existence of said papers, and did not charge that your petitioner had custody, actual or implied, of any of said papers.

"Third. That your petitioner is advised by counsel and therefore charges that your honorable court erred in finding that your petitioner was in contempt of court for the following reasons:

"(a) That your petitioner was not and is not in contempt of this court in having failed to produce books in the custody of Gustav W. Lembeck, treasurer of the said association, who had been subpœnaed to produce the same papers, and who at the time of your petitioner's trial was present in court in response to said subpœna served upon him.

"(b) That no evidence or other proof was produced by the government to overcome the presumption of your petitioner's innocence of the said crime of contempt, or to overcome your petitioner's sworn answer and sworn testimony to the nonexistence of any papers covered by the said subpœna other than had been produced by your petitioner."

For these reasons he asked the court: (1) To revoke and rescind the adjudication of contempt and the order of commitment; (2) to quash the presentment of the grand jury and all proceedings taken thereon for want of jurisdiction; and (3) to dismiss the presentment and the charge against him for want of supporting proof. On March 7 the court dismissed the petition. On March 16 Fox renewed this application by a simple motion, and this was dismissed on March 17.

The proceedings thus far described have been brought before us by the writ of error entitled Re Grand Jury Investigation (No. 2125).

The other two cases, Nos. 2123 and 2124, are a writ of error and an appeal, respectively, based on an order of the court, dismissing Fox's petition for a habeas corpus, and remanding him to the custody of the marshal. Each raises the same questions as the other, and both were sued out in order to avoid any question concerning the proper form of appellate procedure. The additional facts are as follows:

As already stated Fox was committed to prison on February 23; on the next day he presented a petition for a writ of habeas corpus, which was immediately issued, and he was thereupon released on bail, and has since remained at liberty. The petition asserted that he was in custody by virtue of the court's order of February 23, the order being based on the second presentment of the grand jury; that the presentment was founded on the petitioner's failure to produce certain books and papers; that Lembeck, the treasurer of the association, had also been subpœnaed to produce the same books and papers; that the petitioner had answered the presentment, and had denied that he was in possession of any of the books and papers therein described; that he had been examined in open court, and had testified to the same effect as his sworn answer, and that no proof in contradiction thereof had been offered. He further averred that his imprisonment was without authority of law, because: (a) He was not in contempt for failing to produce the books and papers described, as he had no such books and papers in his possession, and had not had since the subpœna was served, but that (if such books

and papers existed) they were in the custody, possession, and control of Lembeck, who had been in court at the time when the petitioner was examined; and (b) because he was not in contempt for failing to produce the correspondence described, as no such correspondence was now in existence, his repeated affidavits and testimony to the effect that such correspondence had been destroyed prior to the service of the subpœna on him not having been contradicted or shaken in any way by testimony or other proof. He amended his petition on March 2 by leave of court by adding the following reasons to (a) and (b) just summarized:

"(c) That this court was without jurisdiction to try or to sentence or to commit your petitioner for the said alleged contempt, because the said presentment was not made in any proceeding entitled as between the United States and this petitioner as defendant, and because the caption of said presentment was defective in failing to state that your petitioner was defendant in a criminal charge brought in behalf of the United States.

"(d) That this court was without jurisdiction to try or to sentence or to commit your petitioner, because the said presentment charged no contempt or other crime on the part of your petitioner.

"(e) That this court was without jurisdiction to try or to sentence or to commit your petitioner, because the said presentment contained no prayer that your petitioner should be held to be in contempt, or should be compelled to purge himself, or should be punished.

"(f) That this court was without jurisdiction to try or to sentence or to commit your petitioner, because the said presentment contained no allegation that in contempt of court your petitioner had disobeyed the command of the said subpœna, and no prayer that your petitioner be attached or punished therefor."

To this petition the marshal made two returns and, moreover, filed a full answer, to all of which the petitioner made objection and reply, the final result being that after hearing and argument the court dismissed the petition on March 17 and remanded Fox to the custody of the marshal. Thereupon the writ of error and the appeal now before us (Nos. 2123 and 2124) were taken.

We have stated the facts in all the cases fully in order to show clearly the nature and the object of the proceedings. The grand jury was conducting an inquiry for the purpose of determining whether section 83 had been violated; and, if so, by whom. To aid this inquiry, witnesses were summoned and were also directed to produce books and papers. For an alleged failure to obey the subpœna, the witness Fox was adjudged in contempt and was committed to prison. Now, if the inquiry before the grand jury were still in progress, and if before reaching a decision that body found it necessary to examine and consider the books, papers, and correspondence referred to, we might properly be called upon to determine the important questions raised by the writs before us. But, as we regard the situation, no such exigency exists; the questions have become academic for the reason that, as further appears, the grand jury has completed its deliberation, and enough evidence was laid before it to make out a prima facie case against the corporations complained of. True bills have already been found, and copies of these are now before us, which show that on March 2 indictments were found against numerous defendants charging the violation referred to, and that these have been docketed

at Nos. 25 and 26 November term 1915 and are now awaiting trial. As the only object of the grand jury's inquiry was to determine whether or not indictments should be found, and as that object has already been attained, we are unable to see that any helpful result would follow our passing at this time upon the questions propounded. These sufficiently appear in the foregoing statement, and we refrain from even intimating an opinion upon them. An additional reason for so refraining lies in the fact that some, if not all, of them will probably arise again upon the trial of the indictments, and may then come before us for review. In the course of a regular trial all the facts and circumstances bearing upon them can be made to appear by both parties much more completely than in the course of an ex parte proceeding such as we are now asked to review, and they can be raised and decided much more satisfactorily.

Ordinarily therefore we should dismiss the three writs before us, without prejudice to the right of the appellant and the plaintiff in error to raise hereafter the questions stated in the assignments. But, as such a dismissal might lead to some complications that should if possible be avoided, we shall content ourselves with the foregoing expression of our views, and shall retain the pending writs under further advisement, pending the trial of the indictments already found.

PHILADELPHIA CASUALTY CO. v. THACHER.

(Circuit Court of Appeals, First Circuit. October 3, 1916.)

No. 1192.

1. INSURANCE ⊂⊃623(3)—INDEMNITY INSURANCE—AGREEMENTS.

A credit indemnity bond or policy issued by defendant provided that all actions at law or equity should be barred if commenced later than one year after the policy's termination. Plaintiff made claim for a loss on the account of a bankrupt, and after termination defendant replied, stating that it was impossible at that time to ascertain whether any loss would be suffered, and that, should loss occur on final termination of the bankruptcy proceedings, the matter would be adjusted. After some other correspondence, plaintiff proposed arbitration, and referred the matter to his counsel, who wrote defendant, mentioning the expense and trouble of arbitration, and suggesting that, as time would determine the exact amount of the loss, the parties should simply await the result of the bankruptcy proceedings. Defendant replied, agreeing with the suggestion that it was better to let the matter take its course than to go into arbitration. *Held*, that defendant accepted the proposal of plaintiff's counsel that the amount of the loss should be determined by the result of the bankruptcy proceedings, and waived the provision in the bond or policy limiting the right of action to one year after expiration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1553; Dec. Dig. ⊂⊃623(3).]

2. APPEAL AND ERROR ⊜1062(4)—REVIEW—HARMLESS ERROR.
Where the jury by their special finding showed that they correctly interpreted written correspondence passing between the parties, the erroneous submission of the matter was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4215–4217; Dec. Dig. ⊜1062(4).]

3. INSURANCE ⊜623(1)—INDEMNITY INSURANCE—LIMITATION OF ACTIONS—WAIVER.
Where an indemnity credit policy or bond provided a limitation of one year upon any actions on the same, the limitation, being for the benefit of the company, may be waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. ⊜623(1).]

4. INSURANCE ⊜622(4)—INDEMNITY INSURANCE—LIMITATION OF ACTIONS—RUNNING OF STATUTE.
A credit indemnity policy, providing a one-year limitation after expiration in which to sue, provided that adjustment should be made by taking into calculation the actual irrecoverable loss. Proof of loss was filed on the expiration of the policy, but the matter was not adjusted within 40 days, nor was payment made within 50 days, as provided; instead, the insurer agreed that the matter should be held in abeyance until the termination of the bankruptcy proceeding, which would determine the actual amount of the loss. *Held* that, where suit was begun within six years after the making of the agreement to await termination of the bankruptcy proceeding, it cannot be defeated on the ground that limitations began to run within 50 days after proof of loss was filed, on the theory that such date marked the accrual of the cause of action, for the agreement was inconsistent therewith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1547; Dec. Dig. ⊜622(4).]

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Action by Thomas C. Thacher against the Philadelphia Casualty Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Edmund K. Arnold, of Boston, Mass. (Peabody, Arnold, Batchelder & Luther, of Boston, Mass., on the brief), for appellant.

Howard W. Brown, of Boston, Mass. (Davis, Peabody & Brown, of Boston, Mass., on the brief), for appellee.

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

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in an action of contract in which the verdict was for the plaintiff, now defendant in error.

The action was brought to recover for losses on merchandise accounts covered by a credit indemnity bond or policy issued by the plaintiff in error. The bond contained the following provision:

"All actions or proceedings at law or equity upon this bond shall be barred if commenced later than one year after the termination hereof"

—that is to say, within one year after December 31, 1907, the date of the termination of the period of the policy.

On February 17, 1908, a letter (Exhibit 8), was written by the Casualty Company to the plaintiff, in which the company stated concerning the claim for loss on the account of Alexander Crow, Jr., who was in bankruptcy:

"It is impossible at this time to state as to whether you will have a loss on this claim or not. So far as the information we have been able to gather goes, there will be no loss on this claim. We, however, hereby guarantee that, should you have a loss on this claim at the final termination thereof, we will adjust same and pay you what may be due you thereon in the same manner and upon the same conditions as if the loss had been ascertained on the claim during the life of your policy. And when such final termination has taken place, and should you have a loss thereon, kindly notify us, so that we may take same up with you at once. As explained to your Mr. Thacher, under the terms of the policy we are only liable for the 'irrecoverable' loss on a claim, and it is impossible for you or for us to say now whether there is any part of this irrecoverable or not, and it is therefore necessary to ascertain whether there will be a loss on this claim, and even so you are saved harmless by this writing, as we will adjust it at such time."

[1] On April 23, 1908, after other correspondence, the plaintiff, by letter, made various proposals, including a proposition to submit the matter to arbitration. By letter of May 18, 1908, plaintiff's proposition to submit the question in dispute to arbitration was assented to, and it was suggested that the plaintiff have a form of agreement drawn up and forwarded to the company. The plaintiff referred this suggestion to his counsel, Robert D. Weston, Esq., who, on October 15, 1908, wrote a letter referring to the expense and trouble of arbitration, and saying, "Time will determine the exact amount of the loss," and concluding:

"I therefore propose that, instead of making an agreement to submit to arbitration, we simply await the result of the bankruptcy proceedings."

By letter of October 26, 1908, the company acknowledged the receipt of Weston's letter, and replied:

"I believe with you that it is better to allow the matter to take its course than to go into an arbitration."

We think there is no doubt that this language amounts to an acceptance of the proposal of the letter of October 15th, that, instead of making an agreement to submit to arbitration, the parties should simply await the result of the Crow bankruptcy proceedings as the best method of determining the exact amount of the plaintiff's loss and of the company's liability.

The defendant's contention that the letter of October 15th was a withdrawal of the proposition for an arbitration, and that the defendant by the expression, "allow the matter to take its course," meant that the parties should stand upon their respective rights and liabilities as defined in the bond itself, including the limitation of one year for bringing suit, we regard as manifestly unsound.

The plaintiff's letter was not a withdrawal of the proposition for an arbitration, but a proposal of an alternative; i. e., to await the result

of the bankruptcy proceedings as a less troublesome, less expensive, and better method.

[2] The expression, "I believe with you," is ignored by the defendant; but this, in connection with the further expression, "that it is better to allow the matter to take its course than to go into arbitration," shows conclusively that the defendant assented to the alternative method proposed, and meant by the words, "allow the matter to take its course," to allow the bankruptcy proceedings to take their course and await the result. We think there is no other reasonable interpretation to be placed upon the correspondence. The jury made a special finding on this point. The following question was submitted:

"Did the parties substitute for the first agreement covering the year 1907 a new one under which the adjustment of the loss was not to be taken up until the final liquidation of Alexander Crow's estate in bankruptcy?"

The jury answered, "Yes."

This finding was correct, and it therefore becomes unnecessary to consider the sixteenth and seventeenth assignments of error, which raise the point that the court erred in leaving to the jury the construction of the documentary evidence. Without deciding that there was even technical error in this respect, it is enough to say that, if there was error, it was harmless.

[3] The contractual limitation for bringing suit was thus abrogated by agreement. It was a provision for the protection of the company, which it could waive, and did waive by its consent to awaiting the result of the bankruptcy proceedings. In view, especially, of that portion of its letter of February 17, 1908, which we have above quoted, we must regard this defense as unmeritorious.

The one year's contractual limitation was thus entirely abrogated, and not merely suspended. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. of Hartford, Conn., 149 Fed. 954, 79 C. C. A. 464. See also 9 L. R. A. (N. S.) 659.

[4] There remains the question whether the claim was barred by the Massachusetts statute of limitations, which fixes the period at six years.

The agreement to await the result of the bankruptcy proceedings was completed on October 26, 1908. The result of the bankruptcy proceedings was determined by the payment of the final dividend on January 18, 1913. The present suit was brought on April 4, 1914, less than six years after either date.

The defendant, now plaintiff in error, contends that the cause of action accrued not later than February 19, 1908, since the proof of loss was filed December 31, 1907, and the bond provided that the loss be adjusted within 40 days after its receipt, and paid within 10 days thereafter. But this contention is unsound, since the bond also provided that the adjustment should be made by taking into the calculation the "actual irrecoverable loss." It was the contention of the company that it was impossible to do this that led to the agreement to await the result of bankruptcy. This was so directly inconsistent with the requirement in the bond of an adjustment within 40 days of

proof of loss, and payment within 10 days thereafter, that the insured could not charge the company with a breach of contract for failure to pay until after the happening of what had been agreed upon as a condition precedent to adjustment of the loss and payment.

It follows, of course, that the statute of limitations did not run against the plaintiff during the time which preceded the happening of this condition precedent.

The agreement to extend the time was directly inconsistent not only with the provision for a one-year period of limitation, but also with the fixing of the time of payment at fifty days after the date of the proof of loss. Thus the contention of the company that the Massachusetts statute of limitations applies and cuts off the claim rests upon the same ground as its contention that the contractual limitation of one year bars the claim, namely, that the parties did not agree to extend the time and await the result of the bankruptcy proceedings.

The jury's finding and our opinion, to the contrary, cut under and destroy both branches of the argument that the action is barred by lapse of time.

The judgment of the District Court is affirmed, and the defendant in error recovers costs in this court.

CHAPMAN v. WHITSETT et al.*

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

Nos. 4573–4576.

1. BANKRUPTCY ⟸328—PROOF OF CLAIM—TIME FOR PROVING CLAIM.

Under Bankr. Act, July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), requiring claims to be proved within one year after adjudication, creditors who did not prove their claims because no assets were scheduled as available cannot, years subsequent, proceedings having been reopened on the ground of concealment of assets, prove their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

2. TRUSTS ⟸63½—DECLARATION OF TRUSTS—WRITTEN INSTRUMENTS.

Under Rev. St. Mo. 1909, § 2868, providing that all declarations of trust shall be proven by some writing, signed by the party, declaring such trust, or they shall be void, a devise of land absolute in form, confirmed and made final by the probate of the testator's will, without any contest within the statutory period therefor, cannot be defeated by the assertion of an oral promise by the devisee to hold the land in trust for another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. ⟸63½.]

3. TRUSTS ⟸63¾—RESULTING TRUST—CREATION.

Under Rev. St. Mo. 1909, § 2869, relating to trusts resulting where the consideration for a conveyance is paid by one and title is taken in the name of another, no trust results in favor of a son, where his father, upon the son's bankruptcy, devised property to the son's wife, which he had intended to leave to the son, for the son had no right to the property and paid no consideration therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98, 99, 100; Dec. Dig. ⟸63¾.]

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

*Rehearing denied January 13, 1917.

4. TRUSTS ⊂=375(1)—RESULTING TRUST—RECOGNITION—JUDGMENT.

Upon his son's bankruptcy, a father devised to the son's wife land which he had intended to leave to the son. Some time after the conclusion of the bankruptcy proceedings and the settlement of the estate, the wife conveyed the land to her husband. Thereafter she sued to set aside the conveyance on the ground of fraud and undue influence, and the husband set up a secret trust in his favor. A consent decree, whereby the wife received the rents from the portion of the property was entered. *Held* that, as the decree was conditional upon the wife's withdrawing her suit and was by way of compromise, there was no judicial recognition of a resulting trust, which would entitle creditors of the husband, who asserted that in bankruptcy proceeding assets had been concealed, to reach the interest received by the wife under the decree.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 613, 615; Dec. Dig. ⊂=375(1).]

Appeals from the District Court of the United States for the Western District of Missouri; John C. Pollock, Judge.

In the matter of the bankruptcy of Arthur Chapman. From an order denying leave to prove its claim on reopening of the proceedings, the Interstate Trading Company, a corporation, appeals. Suits by George P. Whitsett, trustee, and by Joseph M. Jones, trustee, against Jessie W. Chapman. From the decree, each party severally appeals. Order denying leave to creditor to prove its claim affirmed, decree reversed, and cause remanded.

E. J. Geittman and New, Miller, Camack & Winger, all of Kansas City, Mo., for Jessie W. Chapman.

Charles M. Howell and Joseph S. Brooks, both of Kansas City, Mo., for Arthur Chapman.

I. J. Ringolsky and H. S. Julian, both of Kansas City, Mo., for trustees and Interstate Trading Co.

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

HOOK, Circuit Judge. These appeals in bankruptcy involve the right of certain creditors of Arthur Chapman, bankrupt, to prove their demands, and also the claim of the trustees to the interest of his former wife, Jessie W. Chapman, in property devised to her by her father-in-law, Andrew L. Chapman, deceased.

[1] Arthur Chapman, a son of the testator, became bankrupt twice, once on his voluntary petition in February, 1904, and again in an involuntary proceeding January, 1913. In the first proceeding he scheduled no assets available to creditors, and but few of them proved their claims. He was discharged in January, 1905, and the case was closed. It was reopened in May, 1913, upon the petition of creditors, upon the ground of a fraudulent concealment of assets, and George P. Whitsett was appointed trustee. Joseph M. Jones is the trustee in the second bankruptcy proceeding. The Interstate Trading Company is one of the creditors who at the time of the first proceeding failed to prove their claims and are now asking to do so. The trial court denied them relief. The other creditors similarly situated are in the court below awaiting the result of the appeal of that company. This matter may be disposed

of at once. With some exceptions, not material here, the limitation of one year after the adjudication, prescribed by section 57n of the Bankruptcy Act for proof of claims, is definite and conclusive. The period is not enlarged or started anew by the discovery of unscheduled assets. In re Peck, 93 C. C. A. 470, 168 Fed. 48; In re Meyer (D. C.) 181 Fed. 904; In re Paine (D. C.) 127 Fed. 246.

[2] The other question depends upon whether the devise of property to Mrs. Chapman by the bankrupt's father in May, 1903, was upon a trust in favor of the bankrupt, enforceable by him or by his trustees in bankruptcy. Mrs. Chapman still retains an interest in that property, which at the instance of the trustees the trial court subjected to the claims of creditors, excepting those which might have been, but were not, proved in the first proceeding. The contention of the trustees is that the devise to Mrs. Chapman was in secret trust for the bankrupt, the testator's son, to be executed at his request; that the trust was enforceable under the Missouri laws, and was actually executed by her after his discharge in the first proceeding. The will was made and probated without objection or contest about ten months before that proceeding was begun. The testator's will, which theretofore had given the bankrupt a third share equal to that of each of his two brothers, was changed so that his share went to Mrs. Chapman to hold "in her own right," without qualification.

It is urged that the testator was induced to make the change because of the existing insolvency of the bankrupt and by her verbal promise to the testator to convey to the bankrupt whenever he desired. There is no contention that she solicited the testator to do so, or exercised undue influence upon him, or committed a fraud other than by her bare insistence upon a right in conflict with the alleged promise. We think the case is clearly within section 2868, Rev. Stat. Mo. 1909, which provides that:

"All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is, or shall be, by law, enabled to declare such trusts, or by his last will, in writing, or else they shall be void."

A devise of an estate in lands absolute in form, confirmed and made final by the probate of the will, without contest within the statutory period therefor, cannot be defeated by the assertion of an oral promise by the devisee to the testator to hold in trust for another. Such an insecurity of title is within the very condition which the statute was designed to guard against. The attack upon the manifest purport of the will not only assails the effect of the probate (Stowe v. Stowe, 140 Mo., 594, 41 S. W. 951), but seeks to accomplish by oral proof what should have been declared by the testator in his will or by the devisee in writing (Price v. Kane, 112 Mo. 412, 20 S. W. 609).

[3, 4] By the testator's devise to Mrs. Chapman there was no diversion of assets of the bankrupt to which his creditors had a right to look. If the property had been his, and he had conveyed it in anticipation of bankruptcy, they might have complained. But it was not his in law or equity, and had never been. It belonged to the testator, with the ab-

solute right of disposition. He could either disinherit his son or so give him the benefit as to withhold it from his creditors as by a spendthrift trust. Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086. The mere expectancy of inheritance by a son is not an asset for his creditors. It must so mature into a concrete form as to be susceptible of enjoyment or enforcement by him, and their right is measured by his. There was no resulting trust under section 2869, Rev. Stat. Mo. 1909. There was no fraud by Mrs. Chapman, nor payment of consideration by the bankrupt, as in the ordinary cases under that section.

But it is said Mrs. Chapman actually executed the trust by conveying her interest in the property, and her conveyance was confirmed by a decree of a state court at Kansas City. It is true that in May, 1906, three years after the death of the testator and more than a year after the discharge of the bankrupt in the first proceeding she executed a deed to him and he later deeded to the Arthur Chapman Investment Company, a corporation he organized. We see nothing of controlling significance in her conveyance. It was not expressed as being in execution of a trust, and in the circumstances of the case we think it quite as attributable to the desire of a wife with minor children to keep her family together and to put importunities at rest. In the fall of 1908, when the relations between the couple became openly strained, she brought suit in the state court against the bankrupt, the Investment Company, and others to annul the conveyance as having been obtained from her by fraud and undue advantage in her sickness. In answer, a secret trust based on her alleged promise to the testator and the execution thereof by the conveyance were set up in defense. In April of the following year, 1909, a contract of compromise and settlement of the suit and all matters of dispute was executed by Mrs. Chapman, the bankrupt, and the Investment Company. It provided that the title to the property should be confirmed in the company, the bankrupt's grantee, subject to a charge upon the rentals accruing from one of the tracts, securing the payment to her of a fixed sum during her life. Her suit to set aside the conveyance was to be disposed of by a decree in favor of defendants either by stipulation or upon hearing, at the option of the bankrupt, and in form to be approved by counsel for the parties. Various other provisions were made, which are not important here. The contract concluded with this clause:

"Performance of the above provisions by the parties shall be concurrent, and each shall be contingent upon the performance of the others."

On the same day another instrument was executed, securing her interest by a charge upon the rents, and a decree was entered in the state court containing a finding that the title to the property was vested in the Investment Company by conveyances from her and the bankrupt, and adjudging that she "take nothing by her petition herein filed and that the same be dismissed." The decree recited that the cause came on "to be heard on the pleadings and all the parties plaintiff and defendants consenting and agreeing thereto." The lease, upon the rentals of which the interest of Mrs. Chapman was secured, failed, so in

December, 1911, the matter was adjusted by payment to her of a lump sum and a contract for a less monthly sum than before, secured by a trust deed upon a third interest in another of the tracts of land which had belonged to the testator. This was more than a year before the second proceeding in bankruptcy was begun or the reopening of the first proceeding.

It is this interest of Mrs. Chapman and the payments to her which the trustees in bankruptcy now seek to reach. They rely upon the decree of the state court sustaining her conveyance of the estate she derived by the will, and interpret it in the light of the answer to her suit. But manifestly the decree was by consent, without trial upon proofs, and it was subject to a concurrent reservation to her of an interest in the property. It was not an adversary decree, by which she was defeated. She did not take what she got by gift of her husband and his investment company. In a give and take compromise and settlement of that kind, a creditor of one of the parties cannot go in and pick out what he likes, leaving the rest as undesirable. The parties were competent to contract; their mutual engagements were lawful and should be regarded as an entirety. There was recognition in the decree of a compromise, and the leaving of the title to the property in controversy where it apparently stood was a matter of convenience, rather than an adjudication against her, which precluded the exhibition and assertion of the other formal instruments concurrently executed.

The order denying relief to the Interstate Trading Company is affirmed. The decree of May 14, 1915, is reversed, and the causes are remanded for further proceedings in conformity with this opinion.

PACIFIC TELEPHONE & TELEGRAPH CO. v. DAVENPORT INDEPENDENT TELEPHONE CO.*

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

No. 2693.

1. SPECIFIC PERFORMANCE ⟸29(1)—CONTRACTS—CERTAINTY.
   A contract for the purchase and sale of the property of a telephone company is sufficiently definite to be specifically enforced, where representatives of the contracting parties had no difficulty in identifying and appraising the property in accordance with the provisions of the contract, for that is certain which can be made certain.
   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69, 70; Dec. Dig. ⟸29(1).]

2. VENDOR AND PURCHASER ⟸137—CONTRACT—CONSTRUCTION—SUFFICIENCY OF TITLE.
   A contract for the purchase and sale of the property of complainant telephone company, after providing for appraisal, recited that upon the fixing of the value defendant would pay the amount fixed, and complainant would convey that portion of its property which defendant might lawfully acquire; the title to such property being acceptable to defendant's at-

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

*Rehearing denied January 8, 1917.

torneys. Complainant admitted that the contract made defendant the judge of what property of complainant it might legally acquire. *Held* that, in view of such concession, specific performance cannot be enforced where the title to the property was not acceptable to defendant's attorneys, and they were not acting arbitrarily or capriciously, for it is competent for parties to stipulate that the title of the vendor shall be such as will be pronounced good by a specified attorney, and disapproval, if in good faith, is conclusive.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 260; Dec. Dig. ⟸137.]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Bill by the Davenport Independent Telephone Company, a corporation, against the Pacific Telephone & Telegraph Company, a corporation. From a decree for complainant, defendant appeals. Reversed, with directions to dismiss the bill.

June 20, 1914, the appellee (complainant in the court below) was in possession of and operating a telephone system in Lincoln county, state of Washington, consisting of approximately 300 miles of telephone wires, strung on poles and reaching and serving the towns of Davenport, Reardan, and Peach, in that county, and also a local exchange in Davenport, consisting of wires and poles connecting with the suburban lines mentioned, and was in possession of a large number of telephone poles, cross-arms, insulators, storage batteries, converters, and other property incidental to its telephone business, and was also in possession of a telephone line extending from Davenport to the city of Spokane, which was used as a toll line for connection with that city and with towns in Eastern Washington and Northern Idaho by patrons of the telephone exchanges at Davenport and Reardan.

On the said 20th day of June the appellant (defendant in the court below), through its president, wrote to the president of the appellee the following:

"The Pacific Telephone and Telegraph Company.

"Office of the Division Commercial Superintendent.

"G. E. Hickman. Spokane, June 20, 1914.

"Mr. A. T. West, Spokane, Washington—Dear Sir: Confirming our conversation of to-day:

"1. In the event of the consolidation of the two exchanges now in Spokane, the Pacific Telephone & Telegraph Company agrees to make a contract with the Davenport Independent Telephone Company, giving the Davenport Company a connection with the consolidated exchange, and through that exchange with the system of the Interstate Company, under the same terms and conditions as that connection is now given to the Davenport Company by the Home Telephone Company of Spokane.

"2. In the event that the Davenport Company desires to sell its property to the Pacific Company, and so notifies the Pacific Company in writing within 60 days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by one of our engineers, representing this company, and, in the event of your failure to agree with our representative, the value is to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company.

"Our Mr. Hickman is authorized to take up with you any matters in this connection.

"Yours very truly, G. E. McFarland, President."

In answer to the foregoing communication the president of the appellee wrote as follows:

"Spokane, Wash., Aug. 10, 1914.

"The Pacific Telephone & Telegraph Co., Mr. G. E. Hickman, Div. Com'l Sup't, Spokane, Wash.—Gentlemen: Please be advised that we desire to sell our property to you in accordance with conditions outlined in President McFarland's letter of June 20th last, addressed to the writer.

"Yours very truly, Davenport Independent Telephone Co.,
"By A. T. West, President."

Thereafter the appellant appointed as its engineer H. J. Tinkham to act with Mr. West in making an appraisement of the reproduction value of the property of complainant, for the purpose of fixing the price to be paid by the defendant to the suit therefor, which appraisers examined the property, and on the 5th day of October, 1914, fixed the said reproduction value at $34,623.00, by a writing in words and figures as follows:

"Price agreed upon as reproduction cost of Davenport Ind. Tel. Co. property, $34,623.00. H. J. Tinkham.
"Spokane, Wash., Oct. 5th. A. T. West."

The suit being brought to enforce the specific performance of the contract, the defendant thereto set up, among other things, that the writings between the parties did not constitute a valid contract; that the attorneys for the defendant to the suit examined the title to the properties referred to, and that such title was not acceptable to them, and that they so advised their client; that the complainant has not, as a matter of fact, a merchantable title to the said properties; that the complainant had not even a franchise or permit to operate an exchange in the city of Davenport; that on June 20, 1914, and for many years theretofore, and ever since, the defendant has been engaged in interstate commerce in telephonic communication between the states of Idaho and Washington, and has controlled and operated telephone lines between nearly all of the cities and towns in the state of Idaho in the northern part thereof, and nearly all of the cities and towns in the state of Washington, whereby the people residing or being in one state may have and do communicate telephonically through the lines operated by the defendant with the people residing or being in the other state; that on said June 20th, and before and since, the toll lines which the complainant claims to own, extending from Davenport and Reardan and other communities to Spokane, were connected telephonically with the lines of a system which was being operated in competition with the defendant's lines between Eastern Washington and Northern Idaho, which system belonged to the Interstate Telephone Company and the Home Company of Spokane, and that there was a contract between the complainant and the other companies providing for such connection, and by virtue thereof the complainant was engaged in interstate commerce, transmitting telephone messages between various points in the state of Washington and various points in the state of Idaho, whereby those resident or being in one state could and did talk over the said lines with those resident or being in the other state; that in July, 1913, the United States government brought an action in the United States District Court for the state of Oregon against the defendant to this suit and other companies for the purpose, among other things, of preventing this defendant from acquiring the properties of the Interstate Company and the Home Company referred to, upon the ground that such acquisition would violate the terms of the Sherman Anti-Trust Act, and in said action, prior to June 20, 1914, a decree was entered perpetually enjoining the defendant to the present suit from acquiring said properties, with the qualification that, if the local authorities of the city of Spokane should decide in favor of a consolidation of the two exchanges in that city, namely, the Home exchange and this defendant's exchange, then said decree might be modified to permit such consolidation, but with the proviso that the Interstate Company should be connected with and have the benefit of such consolidated exchanges, and said competition in interstate telephonic communication should be continued, all of which was well known to the complainant on June 20, 1914; that the defendant to this suit at that time desired to have said two exchanges thus consolidated, and expected to obtain municipal consent there-

to; that in order to protect the complainant in its connection in Spokane, and thereby with the system of the Interstate Company, and to protect its interstate business, the defendant to this suit agreed with Mr. West as set forth in paragraph 1 of the said letter of June 20, 1914; that the sale of the property in question would be in violation of the Sherman Anti-Trust Act, in that the same would be in restraint of commerce in telephonic communication between the two states mentioned, and would tend to monopolize such commerce; that said sale would also be in violation of the said decree in the suit brought by the United States government, which decree was known to the complainant on June 20, 1914; that the complainant has a full, complete, and adequate remedy at law; and that the court is without jurisdiction in equity.

The issue made between the parties in respect to the alleged part performance of the contract sued on having been determined in favor of the defendant to the suit by the court below, no further reference to it need be here made. The trial court held that the contract sued on violated neither of the provisions of the Sherman Anti-Trust Act nor the decree of the United States court for the District of Oregon, and, further holding that the title to the property covered by the contract sued on, tendered by the complainant, was a marketable title, and that, notwithstanding the objections made to it by the attorneys of the defendant to the suit, the latter was bound to accept the title and pay the purchase price in accordance with its promise, decreed a specific performance as prayed for, from which decree the present appeal comes.

Post, Avery & Higgins, of Spokane, Wash. (Pillsbury, Madison & Sutro, of San Francisco, Cal., of counsel), for appellant.

Turner & Geraghty, of Spokane, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The only uncertainty we see about the contract is the absence of a specific description of the property; but that that is certain which can be made certain is an axiom of the law, and the record shows that the representatives of the respective parties had no difficulty in identifying and appraising the property in accordance with the provisions of the contract. We therefore think the court below was quite right in not holding it void for uncertainty.

[2] But according to its express provisions, upon the fixing of the value of the property in the way agreed upon, the appellant was required to pay such value for, and the appellee to convey to the appellant, "that portion of its property which the Pacific Company [appellee] may lawfully acquire, the title to such property to be acceptable to the attorneys for this company." The record shows that the appellant refused to accept, and consequently to pay for, any portion of the property in question, first on the ground that it could not lawfully acquire any of it, and on the further ground that the appellee's title to the property was not acceptable to the appellant's attorneys. There is nothing in the record even tending to show that the action of either the appellant or its attorneys in the respects indicated was in bad faith, arbitrary, or in any way capricious. According to the express admissions made in the brief of the learned counsel for the appellee, the determination of the question as to whether the appellant could lawfully acquire any of the property was, by the contract, vested solely in the appellant. To show that we make no mistake in regard to that matter we quote from the appellee's brief as follows:

"The offer was for all the properties of the appellee, at a price to be fixed by appraisers, but to be fully complied with by the conveyance of such portion thereof as the appellant might lawfully acquire. Now, where is the uncertainty? The matter was not left open to further parley between the parties, because the appellee had agreed to convey all its property. It was not a matter to be determined by the preconceived view of attorneys on either side, as suggested by appellant, because the legal rights of suitors are not foreclosed in that manner. Clearly it was a matter for the determination of the appellant alone. It could take all the properties, if it thought such a purchase innocuous to the law. If it doubted its right to purchase all, it could take any part that it conceived it had a right to take. Can it be said that there is any uncertainty in a contract of purchase which gives the right to purchase, for a certain specified sum, all of a specified list of properties or such part thereof as the vendee may choose to take? Such a contract simply confers an election on the purchaser to be exercised by him at his option. Absolutely no will was to be consulted under this contract, but that of the appellant. The contract stood for all or a part, as the appellant itself might determine.
* * *

"If the appellant had been the actor, and had come into court for a specific performance, alleging either that it might lawfully acquire the whole of the property, or that it might lawfully acquire a part thereof, and praying specific performance in whole or in part as the case might be, it could not have been said that there was such uncertainty as to what it had agreed to do, or what the appellee had agreed to do, that specific performance would have been denied. The appellant had agreed to pay the reproduction value of all the properties. The appellee had agreed to convey all or any part of the properties that the appellant might conceive it had a right to purchase, and its election on that point, we submit, could not have been contested. Manifestly if the contract is sufficiently certain for the purposes of the appellant, it must be for those of the appellee. There must be mutuality.

"On this bill brought by the appellee there were two courses open to the court for the determination of the property to be conveyed: (a) It could have required the appellant to elect whether it would take all or only part of the property, as it would have been required to elect if it had been the moving party. (b) It could go on and determine for itself whether appellant might lawfully acquire all, or only a portion, of the property, and make a decree accordingly."

Passing that consideration, however, the refusal of the appellant to make the purchase being also based on the ground that the appellee's title to the property was not acceptable to the appellant's attorneys, and the evidence not only failing to show any bad faith, or arbitrary or capricious action, in that regard, but that the rejection of the title by the attorneys for the appellant was based upon defects which were clearly debatable, and at least not free from doubt, we regard it as clear that the decree enforcing the specific performance of the contract cannot be sustained. In 39 Cyc. 1509, 1510, it is said:

"It is perfectly competent for the parties to stipulate that the title of the vendor shall be such as will be pronounced good and merchantable by an attorney, title or trust company, or other third person, and the purchaser will not be required to take a title not so pronounced good so long as there is good faith, although the court may deem it good under the law. Under such a contract the approval or disapproval of such third person is conclusive, if made in good faith, and with no improper motive, although in the opinion of the court the title may be good as a matter of law."

See, also, Allen v. Pockwitz, 103 Cal. 85, 36 Pac. 1039, 42 Am. St. Rep. 99; Watts v. Holland, 86 Va. 999, 11 S. E. 1015; Atwood v. Fagan (Tex. Civ. App.) 134 S. W. 765; Ives v. Kimlin, 140 Mo. App. 293, 124 S. W. 23; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905.

It results that the judgment must be and is hereby reversed, with directions to the court below to dismiss the bill; the appellant to recover costs in both courts.

MALONE v. COHN.

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

Nos. 2939, 2940.

1. INSURANCE ⊕586, 587—LIFE INSURANCE—RIGHT OF BENEFICIARY.
Under Civ. Code Ga. 1910, § 2498, declaring that the insured may direct the money to be paid to his personal representative, or to his widow, or children, or his assignee, and upon such direction given and assented to by the insurer, no other person can defeat the same, a wife, designated as beneficiary of life policies, which reserved to the insured the right to change the beneficiary, has no vested and indefeasible interest in the policies, though the designation was assented to by the insurer, which will prevent the insured from subsequently changing the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1469, 1470; Dec. Dig. ⊕586, 587.]

2. BANKRUPTCY ⊕143(12)—RIGHT OF TRUSTEE—INSURANCE POLICY.
Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), declares that the trustee shall be vested by operation of law with the title of the bankrupt to all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, provided that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives, he may, within 30 days after the surrender value has been ascertained, pay or secure to the trustee the sum so ascertained, and continue to own, hold, and carry such policy free from the claims of creditors. Insurance policies on the life of a bankrupt, having a cash surrender value, designated his wife as beneficiary, but the bankrupt was authorized to change the beneficiary, and the wife had no vested right. *Held*, that as the beneficiary could be changed by the bankrupt and he could in that way obtain their surrender value, the right to such policies or their surrender value passed to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⊕143(12).]

3. BANKRUPTCY ⊕143(12)—INSURANCE POLICIES—RIGHTS OF TRUSTEE.
Where a life policy, authorizing change of beneficiary by insured, though not fixing a cash surrender value, declared that cash loans might be obtained by the insured on the sole security of the policy, such policy is so completely under the dominion of the insured that on his bankruptcy it is an asset passing to his trustee, though the insured upon paying the trustee the loan value of the policy, may retain it free from the claims of creditors; the purpose of the proviso in the section being to enable bankrupts to continue in force insurance on their lives and to free the estate from difficulties in continuing such insurance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⊕143(12).]

Petitions to Superintend and Revise from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

In the matter of the bankruptcy of A. S. Cohn. Petition by R. A. Malone, as trustee in bankruptcy, to superintend and revise a decree

denying the right of the trustee to policies of insurance on the life of the bankrupt. Petitions granted, and decrees reversed.

Alexander Akerman and Chas. Akerman, both of Macon, Ga., and Sam S. Bennet, of Albany, Ga., for petitioners.

George S. Jones, of Macon, Ga., and I. J. Hofmayer, of Albany, Ga., for respondent.

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

WALKER, Circuit Judge. At the time the petition in bankruptcy was filed and when the adjudication of bankruptcy was made there were in existence three policies of insurance on the bankrupt's life, two in the Penn Mutual Life Insurance Company, issued, respectively, in 1902 and 1905, and one in the New York Life Insurance Company, issued in 1902. At that time the bankrupt's wife was the beneficiary of each of the policies. By the terms of each of the policies the assured, the bankrupt, had the right, at any time during the continuance of the policy, to change the beneficiary if the policy was not then assigned. By the terms of the Penn Mutual policies each of them had a present stated "loan or cash surrender value." The New York Life policy did not, in terms, provide for a "cash surrender value" during the 20-year accumulation period of the policy, but provided that stated "cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made." The petitions to superintend and revise bring into question decrees to the effect that the trustee in bankruptcy was not entitled to either of the policies, or to be paid the cash value thereof.

[1] In the District Court the view prevailed that a Georgia statute has such effect as to deprive the policies in question, after the bankrupt's wife was named as the beneficiary thereof, of the qualities of property to which the trustee in bankruptcy is entitled under section 70a of the Bankruptcy Act. The statute to which such effect is attributed is section 2498 of the Georgia Code of 1910, which reads as follows:

"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

[2] We have the authority of the Supreme Court of Georgia for saying that the original enactment of this provision was but a statutory adoption of a proposition announced by the Supreme Court of Georgia in the case of Grenville v. Crawford, 13 Ga. 355, which was decided not long before that enactment was made. Smith v. Head, 75 Ga. 755, 758. In the case of Grenville v. Crawford it appeared that the insured in a life policy assigned it to his creditor, accompanied by a stipulation that should he die before the secured debt was paid the assignee was to hold the policy as collateral security for the debt and

turn over the balance to the insured's widow. The insured died, leaving the whole of the secured debt unpaid. The claim of his administrator asserted in the suit was that, "the intestate being entitled to redeem the policy by the payment of the secured debt during his lifetime, the same right descends to his legal representative," and that such representative was entitled to the surplus left after paying the secured debt. This contention was overruled, the court deciding that the insured's widow, and not his personal representative, was entitled to the residue of the amount collected on the policy left after the satisfaction of the secured debt. Nothing in the terms of the statute, especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to any one other than the assured himself the power to defeat a direction by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him. The provision does not purport to make every such direction by the assured irrevocable by him, or to invalidate a stipulation in a life policy, giving the assured the right to change the beneficiary at any time during the continuance of the policy. The statute puts a direction by the assured to pay to his widow on the same footing as one to pay to his assignee. If a policy is assigned as security for a debt which the assured pays during his life, certainly the statute is not to be given the effect of putting it out of the power of the assured to change the beneficiary upon the reassignment of the policy to him by the satisfied creditor. Nothing in its terms justifies giving it a different operation or effect in the case of a direction to pay to the widow. We are not of opinion that the provision quoted had the effect of conferring on the bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in policies by the terms of which the beneficiaries could be changed by the bankrupt at any time.

"The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Bankruptcy Act, § 70a.

Under the terms of this section if an existing policy on the life of the bankrupt confers upon him a property interest which prior to the filing of the petition he could by any means have transferred, the trustee is entitled to the policy or its surrender value. Under such policies as those here in question the interest of one who happens to be the beneficiary at the time the bankruptcy of the assured occurs is al-

together contingent, being subject to be extinguished at any time by the assured, the bankrupt, exercising his right to realize on the policy or to continue it with a newly designated beneficiary, just as he may choose. The bankrupt's complete dominion over such a policy makes it his, and it passes, with the rest of his property, to his trustee, subject only to the right conferred on the bankrupt by the proviso to the section just quoted. In re Herr, 182 Fed. (D. C.) 716; In re Bonvillain (D. C.) 232 Fed. 370; Collier on Bankruptcy (9th Ed.) 1014. It is not fairly open to question that, prior to the filing of the petition in bankruptcy, so far as the two Penn Mutual policies were concerned, means were available to the bankrupt of realizing on the policies himself or of transferring them to some one other than his wife.

[3] The New York Life policy, equally with the Penn Mutual policies, is so completely under the dominion of the bankrupt as to make it an asset which passed to his trustee. Does its failure expressly to provide for a present cash surrender value stand in the way of the bankrupt acquiring the right to hold, own, and carry the policy by paying or securing to the trustee an ascertained sum of money? The failure of the policy to provide expressly for a present cash surrender value does not have this effect if in fact it has such a value by the concession or practice of the company issuing it. Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771. A main purpose of the proviso to section 70a was to enable the bankrupt to keep alive insurance on his life in force at the time of his bankruptcy by paying or securing to the trustee the amount in cash presently realizable by him from the insurer on his policy or policies. In the opinion in the case of Burlingham v. Crouse, 228 U. S. 459, 472, 33 Sup. Ct. 564, 567 (57 L. Ed. 920, 46 L. R. A. [N. S.] 148), speaking of this provision, it was said:

"Congress undoubtedly had the nature of insurance contracts in mind in passing section 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance."

In view of the policy evidenced by the proviso it cannot be supposed that it was contemplated by the lawmakers that the privilege extended to the bankrupt of retaining his insurance by paying or securing to the trustee the present value which it has was to be withheld because of

the fact that the amount of that value is obtainable by him from the insurer on the conditional surrender of his policy as the sole security for a loan of the amount, instead of being obtainable from that source only upon an unconditional surrender of the policy. The concern of the trustee is to get the present value of the policy if it is one having such a value, and it seems altogether immaterial how the bankrupt acquires the amount necessary to be paid or secured by him, whether from the insurer or from some other source. The manifest purpose being to enable the bankrupt, when he has insurance on his life possessing a present value realizable by him, to satisfy the trustee's claim in that regard by paying or securing to him the amount of that value, we are of opinion that a policy is to be regarded as one having a cash surrender value within the meaning of the statute when it stipulates for a present value made payable by the insurer on the conditional surrender of the policy as the sole security for a loan of the amount, instead of on its unconditional surrender.

Our conclusions are that each of the policies mentioned passed to the trustee, but, as to each of them, subject to the right of the bankrupt to retain or reclaim it by paying or securing to the trustee the sum which the policy by its terms made available to him at the time of the bankruptcy as a cash asset. It follows that the petitions to superintend and revise should be granted and the decrees complained of reversed; and it is so ordered.

CHAMBERS et al. v. FARNHAM et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2167.

1. BROKERS ⟸85(1)—ACTIONS FOR COMMISSIONS—EVIDENCE.
In an action by plaintiffs for commissions earned as brokers in effecting a sale, evidence that defendants in good faith paid another broker commission, and that after the sale was made he demanded the same, is inadmissible, for those facts would not affect the right of plaintiffs to commissions if earned.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 108, 110, 115; Dec. Dig. ⟸85(1).]

2. BROKERS ⟸85(4)—COMMISSIONS—RIGHT TO.
When a broker finds a prospective purchaser to whom a sale is subsequently made without the negotiations having been terminated, the intervening act of an outsider will not prevent the broker from collecting his commission, though the purchaser may have been finally persuaded to buy through the advice of such outsider. Therefore, in an action by plaintiffs for commissions earned as brokers, evidence that a sale to one first introduced by them was consummated by another is not admissible without showing that such third person was employed to sell the property.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 107; Dec. Dig. ⟸85(4).]

3. TRIAL ⊂⊃143—JURY QUESTION—EMPLOYMENT OF BROKER.
Where, in an action by plaintiffs claiming commissions as brokers, the evidence as to the employment of another broker who effected the sale was conflicting, the question was for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⊂⊃143.]

4. BROKERS ⊂⊃85(4)—COMPENSATION—ACTIONS—EVIDENCE—ADMISSIBILITY.
Where defendants contended that the sale was effected, not by plaintiffs, but by another broker, and his employment was shown, evidence of his representations to the purchaser, who was introduced to defendants by plaintiffs, and his efforts made in effecting the sale, is admissible on the issue of procuring cause.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 107; Dec. Dig. ⊂⊃85(4).]

5. APPEAL AND ERROR ⊂⊃837(12)—REVIEW—OFFER OF PROOF.
In determining the propriety of rejecting an offer of proof, the entire offer, and not isolated portions, should be considered.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3276; Dec. Dig. ⊂⊃837(12).]

6. BROKERS ⊂⊃86(1)—COMPENSATION—OFFER OF PROOF.
In an action for commissions claimed by plaintiffs, where defendant had paid the commission to another broker, an offer of proof that the other broker told one of defendants he had come to buy the property for the purchaser, and offered a sum stated, does not show that the second broker was the agent for the purchaser, though indicating that such broker had previously brought the parties together, for brokers often refer to purchasers as their clients.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 117, 118; Dec. Dig. ⊂⊃86(1).]

7. BROKERS ⊂⊃85(6)—ACTIONS FOR COMMISSIONS—EVIDENCE—ADMISSIBILITY.
Plaintiffs, who first introduced a purchaser to defendants, claimed commissions for a sale subsequently effected, though defendants paid commissions to a second broker on the theory that he was the procuring cause. Statements by the purchaser that he had abandoned all thoughts of buying, until the second broker demonstrated how he could increase the rental, was rejected. *Held*, that such testimony was admissible on the question of abandonment and procuring cause.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 111; Dec. Dig. ⊂⊃85(6).]

8. TRIAL ⊂⊃139(1)—JURY QUESTION—WEIGHT OF EVIDENCE.
The weight to be given testimony is a question for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⊂⊃139(1).]

9. TRIAL ⊂⊃192—INSTRUCTIONS—ASSUMPTION OF FACTS.
In an action for commissions claimed by a real estate broker, where the amount was fixed by written correspondence, and the question in issue was whether plaintiffs were entitled to any commissions, the court may properly charge that the amount of recovery was not in dispute.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432–434; Dec. Dig. ⊂⊃192.]

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

Action by Harry J. Farnham and Edward M. Willoughby, copartners, doing business as Farnham, Willoughby & Co., against Frank R. Chambers, Edward Trowbridge Hall, Patrick F. Griffin, and Frank S.

Turnbull, surviving partners, doing business as Rogers, Peet & Co. There was a judgment for plaintiffs, and defendants bring error. Reversed, and new trial ordered.

Action for real estate broker's commission. Verdict and judgment for plaintiffs.

Plaintiffs in error, herein called "defendants," entered into an agreement with defendants in error, herein called "plaintiffs," brokers, for the sale of defendants' real estate, situated in the city of Chicago. The employment was evidenced by letters. The agency was not exclusive, and other brokers were employed.

Defendants subsequently sold the property to Simon W. Straus, the value of the entire property being figured at $982,000, the value of the leasehold being fixed at $250,000. Negotiations for such sale to Straus were begun by one Bechtel, an independent real estate dealer who shortly thereafter entered the employ of plaintiffs, and negotiations were continued by plaintiffs, who at the time were also engaged in looking after the building. Such negotiations began in September and continued until the latter part of November, during which period the plaintiffs failed to secure a bid satisfactory to the defendants. In the latter part of December one of the defendants, while in Chicago, had a talk with one of the plaintiffs, and on the same trip met a Mr. Thorpe, a real estate broker, who up to this time was a stranger to the defendants. Thereafter Thorpe endeavored to interest Straus in the sale of this property, and continued his endeavors until February 2d, when the deal was consummated in New York; Thorpe and Straus both being present. Both Thorpe and plaintiffs immediately demanded that defendants pay them a commission, and upon defendants' failure to pay plaintiffs this action was brought. The alleged errors arise out of the rejection of testimony and the charge to the jury. Reference to the latter will be made in the opinion.

The court excluded all evidence tending to show Thorpe, and not the plaintiffs, was the procuring cause of the sale. The court excluded evidence which defendants claim tended to show that both plaintiffs and Straus had abandoned their negotiations before Thorpe took up the deal. The court excluded evidence showing that defendants paid Thorpe a commission of $10,000, and also denied defendants' offer to show that Thorpe immediately after the deal was consummated in New York demanded his commission.

Isaac Mayer, of Chicago, Ill., for plaintiffs in error.

Sidney Adler and Charles Lederer, both of Chicago, Ill., for defendants in error.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Complaint is made because the court excluded the proffered proof showing that Thorpe was paid a commission for the sale of this property to Straus. This evidence was properly excluded. Subsequent payment by the defendants to Thorpe, even though made in good faith, could not determine or prejudice the plaintiffs' right to a commission. Nor could the demand for the payment of a commission by Thorpe, after the sale was made, throw any light upon the issues presented by plaintiffs' action.

[2, 3] Complaint is made because the court excluded certain evidence offered for the purpose of showing that plaintiffs had abandoned the deal, and that Straus had abandoned all negotiations with plaintiffs some time prior to the sale on February 2d. Further complaint is made because of the rejection of this and other evidence, tending to show that Thorpe consummated the sale.

Plaintiffs' contention that an outsider, in no way employed to effect a sale, cannot by his acts prevent the broker from recovering a commission (other facts being present to justify a recovery), is supported by the authorities. When a broker finds a prospective purchaser to whom a sale is subsequently made, and the negotiations between such broker and such purchaser have not been terminated, the intervening act of an outsider will not prevent the broker from collecting his commission, notwithstanding the purchaser may have been finally persuaded to buy through the advice of such outsider. Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264; Dowling v. Morrill, 165 Mass. 491, 43 N. E. 295; Rigdon v. More, 226 Ill. 382, 80 N. E. 901.

This being the rule, Thorpe's part in the negotiations leading to this sale became immaterial, unless there was sufficient evidence of the employment of Thorpe by the defendants to raise a jury question. The evidence on this issue is very meager. Satisfactory proof, either direct or inferential, of the actual relation between the defendants and Thorpe, is lacking. Such proof as does appear gives rise to conflicting inferences and conclusions as to Thorpe's employment. Considering all of the evidence, however, we are forced to the conclusion that the question whether Thorpe represented either or any of the parties in the transaction was properly for the jury.

[4] If Thorpe was employed, either by express or implied contract, by the defendants to sell this property, then the rejected evidence was material. The offer to prove the representations made by Thorpe, as well as the efforts by him made, as well as the resulting effect of such services upon Straus, were all relevant upon the issue of procuring cause. Grieb v. Koeffler, 127 Wis. 314, 106 N. W. 113; Brumfield v. Pottier, 4 Misc. Rep. 194, 23 N. Y. Supp. 1025; Whitcomb v. Bacon, 170 Mass. 479, 49 N. E. 742, 64 Am. St. Rep. 317.

[5, 6] Nor can we agree with the plaintiffs' counsel that defendants' offer tended to prove Thorpe was the agent of Straus rather than the agent of the defendants. The entire offer should be considered together, and as such it did not of necessity show Thorpe the agent of Straus.

The particular part of the offer which plaintiffs refer to as showing that Thorpe represented Straus was as follows:

"Defendants further offer to prove a conversation between Mr. Thorpe and Mr. Chambers in New York on the first day of February wherein Mr. Thorpe told Mr. Chambers that he had come down to buy the building for Mr. Straus and that he offered $250,000, etc."

This offer was but a part of a much more comprehensive offer indicating that Thorpe had previously brought Straus and the defendants together to discuss the details of payment, and that the sum of $250,000 had been previously fixed, and the only difference between them was over terms of payment.

If this were all the offer, however, it is our conclusion that the language would not necessarily require the conclusion that Thorpe was acting as the agent of Straus in purchasing this property. A real estate broker not infrequently speaks of the prospective purchaser as

"his client" or "his customer" while he is in fact the broker employed by the seller to dispose of the property.

[7, 8] The court also erred in excluding evidence tending to show abandonment of the negotiations by Straus as well as by the plaintiffs prior to the sale on February 2d.

Plaintiffs do not deny proof of abandonment was relevant. They contend, however, that the proof received, as well as the evidence rejected, failed to establish abandonment of the deal, either by Straus or by the plaintiffs. The District Court concluded otherwise, and submitted to the jury as one of the issues in the case the question of abandonment of the deal on the part of the plaintiffs prior to the purchase by Straus.

This rejected testimony consisted of statements made by Straus to the effect that he was not interested in the building at the time Thorpe put up the proposition to him, and that he had dropped the matter; that he did not become interested again until Thorpe pointed out to him how he could increase the rentals, and agreed to deposit $7,000 to guarantee the statements by him made; that Thorpe produced a tenant willing to pay a higher rent for the ground floor, etc.

It was for the jury to determine the weight to be given such testimony, but such testimony bore upon both issues—abandonment and procuring cause—and should have been received. McGuire v. Carlson, 61 Ill. App. 295; Day v. Porter, 161 Ill. 235, 45 N. E. 1073; Larson v. Thoma, 143 Iowa, 338, 121 N. W. 1059; Mutual Life Ins. Co. v. Hillman, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

[9] Complaint is also made because of the instructions of the court to the jury.

The first complaint is that the court erred in instructing the jury that the amount of the recovery was not in dispute. In so charging the jury, no error was committed. The letters between the parties and their conduct clearly showed the amount of the commission was fixed and determined.

Other objections to the charge need not be specifically considered. If Thorpe was the agent of Straus in the negotiations leading to the sale, or if Thorpe was an outsider in no way employed by the defendants, then the court committed no error in its charge to the jury. If on a new trial upon a full disclosure as to Thorpe's relation with the defendants it appears that he was acting for the defendants, or his actions were knowingly ratified so as to create an implied contract on the part of defendants to pay a commission, then the court should give additional instructions to cover any issue thus presented.

The judgment is reversed, and a new trial ordered.

WEST PENN CHEMICAL & MFG. CO. v. PRENTICE.

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

No. 2109.

1. TRIAL ⊂=343—VERDICT—EFFECT.
A verdict resolves disputed questions of fact in favor of the successful party.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809–812; Dec. Dig. ⊂=343.]

2. CORPORATIONS ⊂=455—AGREEMENT—SEALING.
Though some months after plaintiff and the president of a corporation had entered into an agreement which was signed only by the president, the corporate seal not being affixed, plaintiff, who in the interim had become a director, induced the then secretary to affix the corporate seal and attest the paper, the original status of the instrument was unchanged.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1801–1803; Dec. Dig. ⊂=455.]

3. CORPORATIONS ⊂=406(2)—PRESIDENT—POWERS OF.
While the president of a corporation is its general administrative agent, he cannot bind the corporation to a contract not within the corporate powers.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1612; Dec. Dig. ⊂=406(2).]

4. CORPORATIONS ⊂=376—STOCK—RIGHT TO PURCHASE.
Generally, if its power be not restricted by charter or general law, a corporation may buy its own stock, if the interests of creditors are not adversely affected.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⊂=376.]

5. COURTS ⊂=366(7)—FEDERAL COURTS—PRECEDENTS—DUTY TO FOLLOW.
A decision of a state court construing a state statute, limiting the powers of local corporations, is binding on the federal courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 962; Dec. Dig. ⊂=366(7).]

6. CORPORATIONS ⊂=376—AUTHORITY OF—RIGHT TO BUY IN STOCK.
General Corporation Law (22 Del. Laws, c. 167) § 19, declares that every corporation shall have power to purchase, hold, sell, and transfer shares of its own capital stock, provided that no such corporation shall use its funds or its property for the purchase of its own shares, when such use would cause any impairment of the capital of the corporation. At the time a corporation contracted with one who entered its service as a salesman and purchased a number of shares, to repurchase the shares on the demand of the salesman at any time within a year, the capital of the corporation was already impaired; its funds and property being worth considerably less than its purported capital. *Held* that, as the statute forbids a corporation to buy in its own stock when such would cause an impairment of its capital, the agreement was unenforceable because it would cause a further impairment to the injury of creditors.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⊂=376.]

7. CORPORATIONS ⊂=388(2)—PURCHASING OWN STOCK—PUBLIC POLICY.
Where a corporation was not, under the statute law of its domicile, authorized to buy in its own shares, its capital then being impaired, no estoppel can be raised whereby enforcement of an agreement to buy in its shares can be had; for, while a corporation having received the

benefit may be estopped to deny an ultra vires agreement executed by the other party, the rule is otherwise as to an agreement against public policy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1557; Dec. Dig. ⊂=388(2).]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by George D. Prentice against the West Penn Chemical & Manufacturing Company. There was a judgment for plaintiff, and defendant brings error. Affirmed on condition that plaintiff enter remittitur; otherwise, reversed and remanded.

Robbins & Wyant, of Greensburg, Pa., and O. P. Robertson, of Pittsburgh, Pa., for plaintiff in error.

Ward Bonsall, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This suit between citizens of different states is founded on a written contract signed by George D. Prentice and by the president of the West Penn Company on January 3, 1914. Whether the instrument was binding throughout upon the company is the decisive question on this writ.

[1] Two subjects are dealt with by the writing. First, Prentice is hired as a salesman for one year at a specified salary, and undertakes to give all his services and to perform his duties to the utmost of his skill and ability for the profit and advancement of the company. Upon this branch of the case, little need be said. The employment was the act of the president, but his power to hire a salesman for a year is not denied, and the verdict has settled the disputes arising out of the plaintiff's discharge before the end of the period, and out of his alleged failure to fulfill his duties. The verdict is itemized, and we are able to say with certainty that $208.07 is awarded him on this account. The remainder of the verdict amounts to $2,643.75, and belongs to the other branch of the case, which will now receive our attention.

[2, 3] The writing goes on to provide that Prentice is to buy 250 shares of capital stock at par, paying $2,500 cash therefor, and the company is to give Prentice an option to buy 250 shares additional within six months; but, if Prentice should not be satisfied with the investment, the company agrees to dispose of 250 shares at par at the expiration of the contract, January 3, 1915; "notice of intention of disposal to be given" by Prentice to the company 30 days previously. The option on the second 250 shares lapsed, but Prentice paid in full for the first 250, and gave the required notice. The company neither disposed of the stock nor paid its par value, and in the following February this suit was brought on the contract.

Did such an agreement bind the company? It is denied that the writing is in any proper sense a corporate act, and this aspect of the case is the first reason urged upon us for reversal. While the writing recites that it is made between the company and Prentice, and while the body of it purports to bind the company, it was not executed as a corporate instrument should be executed. The attesting clause is: "In

witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written." And the signature is: "West Penn Chemical & Mfg. Co., [Signed] H. Messmer, Pres. [Seal.]" The corporate seal was not affixed and the secretary took no part in the execution, and, so far as appears, had no share in the transaction. Moreover, on the undisputed evidence no such contract was ever authorized by the stockholders or by the directors, and the instrument was therefore executed by the president on his own responsibility. About nine months afterwards, Prentice, who had meanwhile become a director, persuaded the person, who was then the secretary, to affix the corporate seal and to attest the paper; but neither were these acts authorized by the corporation, and they added nothing to the original status of the instrument. Taking the writing therefore as it stood on January 3d, we think it should be regarded as the act of the president undertaking to bind the company, and in that aspect we shall deal with it.

No doubt the president of a corporation is its general administrative agent, although his powers are by no means without limits. But, even if we assume for the purposes of this case that Messmer might fairly be presumed to have authority to sign such a writing in the name of his company without other evidence of corporate assent, such an act could not bind the company unless the contract were within the corporate powers. 7 Ruling Case Law, § 436; Wait v. Nashua Ass'n, 14 L. R. A. 356, note; Carney v. Insurance Co., 49 L. R. A. 472, note; Lloyd v. Matthews, 7 L. R. A. (N. S.) 376, note. If the corporation itself could not make the contract, Messmer was equally powerless, and we are thus brought to consider whether the West Penn Company itself could directly have made the agreement. This is the point on which the company mainly relies, and in order to appreciate the argument we must turn to the law of Delaware, by which state the company's charter was granted.

[4-6] The prevailing rule in the United States appears to be that a corporation may buy its own stock if the interest of creditors be not adversely affected, and if its power to buy be not restricted by its charter or by general law. 7 Ruling Case Law, § 528 et seq. But, if one examines the cases cited on this subject in the notes to Buckeye Co. v. Harvey, 18 L. R. A. 254, Hall v. Henderson, 61 L. R. A. 621, McGregor v. Fitzpatrick, 25 L. R. A. (N. S.) 50, and Schulte v. Land Co., 44 L. R. A. (N. S.) 156, we think he will conclude that the decision of a particular case depends so largely on its own facts that the foregoing statement of the rule is valid only in a general sense, and admits of several exceptions. It seems safe to say that, where a statute restricts the power to buy, the restriction must be obeyed, although it is true that difficult questions may be met in the effort to determine the statute's meaning and scope. That such a restriction exists by the general corporation law of Delaware (25 Del. Laws, c. 154, § 1) appears in section 19, which provides as follows:

"Every corporation organized under this chapter shall have the power to purchase, hold, sell and transfer shares of its own capital stock; *provided that no such corporation shall use its funds or property for the purchase of*

its own shares of capital stock when such use would cause any impairment of the capital of the corporation."

This gives the power to buy, but a restricted power; the corporate funds may not be so used when the purchase would impair the company's capital. What this means has been recently decided by the Chancellor of Delaware in Re International Radiator Co., 92 Atl. 255. In that case Harris had subscribed for $5,000 of the company's stock, giving his notes therefor. The company had agreed to sell the stock for him at $7,500 before a specified date, but had failed to do so. Harris had paid the notes (which the company had discounted) and thereupon presented a claim for $7,500 in the subsequent receivership. The Chancellor held that the legal effect of the contract was to bind the company to repurchase the shares at $7,500 in case it should be unable to sell them at that price, and then went on to consider the validity of the transaction. Upon that point the opinion has this to say concerning section 19 of the Delaware statute:

"The claim is further affected by the statute in Delaware. By the General Corporation Act, under which the company was incorporated, the company could not use its funds or property to purchase shares of its own capital 'when such use would cause an impairment of the capital of the corporation.' At the time when the agreement was made with Harris, and at the time the receiver was appointed, the capital stock of the company was about $400,000, presumably issued for value, while its assets were appraised at $13,000 by the appraisers in the receivership cause. It is said that about $75,000 of stock was issued for patents, etc. But even adding this sum to the appraised value of the assets of the company, still the payment of the claim of Harris from the assets to come into the hands of the receiver will, of course, deplete the capital.

"Therefore, the question is whether an agreement of a corporation to sell shares of its own capital stock for a stockholder is not, as to a claim by the stockholder for the sum of money at which the company agreed to sell it, a purchase by the company of such shares.

"A claim for the price at which the company agreed to sell the shares is certainly equivalent to an agreement to purchase at that price, and equally within the spirit of the act and equally unlawful, if the enforcement of such an agreement impaired the capital of the company. Any one dealing with the corporation is bound to know the limitations put on it by the statute under which it was created. In the statute the impairment of the 'capital' of the company is mentioned. As here used, this means the reduction of the amount of the assets of the company below the amount represented by the aggregate outstanding shares of the capital stock of the company. In other words, a corporation may use only its surplus for the purchase of shares of its own capital stock. 'Capital' does not, in this connection, mean the assets of the company, for, of course, the assets are reduced when any of it is used by a corporation to purchase shares of its own capital stock. It must have some other meaning then. The statute must mean, therefore, that the funds and property of the company shall not be used for the purchase * * * of its own capital stock when the value of its assets is less than the aggregate amount of all the shares of its capital stock. A use by a corporation of its assets to purchase shares of its own capital stock under such conditions impairs the capital of the company.

"As these conditions existed when the contract was made between Harris and the International Radiator Company the contract is not now enforceable against the assets in the hands of the receiver, and the claim is disallowed."

We think it our duty to follow this decision upon the construction and effect of the Delaware statute, and we find it a controlling authority in the present case. Both at the time the writing was signed, and in

January, 1915, when the West Penn Company was called upon to repurchase the stock, its capital would have been impaired by the use of its funds or property for that purpose. Its capital was $62,500, and upon the undisputed evidence its funds and property at all times during the year were much less than this sum. In a word, its capital was already impaired in January, 1914, and continued so to be, and this is true even if we assume that the paid-in capital was only about $49,000, as the plaintiff's brief asserts. The agreement to repurchase being forbidden by the statute, and the present suit being directly on the contract, the plaintiff cannot recover.

[7] Against this conclusion the plaintiff's chief objection is that the company is estopped from setting up such a defense, and his brief cites many cases on the general subject. We need not review them, nor discuss the doctrine of estoppel in connection with ultra vires acts. Assuming the general rule to be that, where an ultra vires agreement has been executed by the other party in good faith; and where the corporation has derived from the transaction the benefit it desired, the corporate party may be estopped to deny its authority to contract, nevertheless we are of opinion that the particular situation before us falls within a recognized qualification to the rule, namely, that the corporation is not estopped to set up the defense if the agreement has been prohibited by statute, or is immoral, or is otherwise contrary to public policy. So far as the federal courts are concerned, the controlling doctrine is thus expressed by the Supreme Court in De La Vergne Co. v. Savings Institution, 175 U. S. at page 58, 20 Sup. Ct. at page 25, 44 L. Ed. 65:

"Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that, where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received.

"The earliest case in which this doctrine is distinctly laid down is that of Pearce v. Madison & Indianapolis Railroad, 21 How. 441 [16 L. Ed. 184], in which it appears that two railroad companies, which had been consolidated, gave their promissory notes in payment for a steamboat to run in connection with the railroads. It was held that, as there was no authority in the railroad companies to engage in running steamboats, there could be no recovery on the notes, and that, as the plaintiff was not the owner of the boat and had sued upon the notes as an indorsee, there could be no recovery. The same doctrine has been applied to leases ultra vires a corporation, and it has been uniformly held that there could be no recovery upon the lease itself, though there might be in an action for use and occupation of the property. Pittsburgh, Cincinnati, etc., Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 384 [9 Sup. Ct. 770, 33 L. Ed. 157]; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48 [11 Sup. Ct. 478, 35 L. Ed. 55; Pullman's Palace Car Co. v. Central Transp. Co.] 171 U. S. 138 [18 Sup. Ct. 808, 43 L. Ed. 108]; McCormick v. Market Bank, 165 U. S. 538, 550 [17 Sup. Ct. 433, 41 L. Ed. 817]; Thomas v. Railroad Co., 101 U. S. 71 [25 L. Ed. 950]; California Bank v. Kennedy, 167 U. S. 362 [17 Sup. Ct. 831, 42 L. Ed. 198]; Marble Co. v. Harvey, 92 Tenn. 116 [20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71]; Union Pacific Railway v. Chicago, Rock Island & Pacific Ry. Co., 163 U. S. 564 [16 Sup. Ct. 1173, 41 L. Ed. 265].

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should

not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that, if the contract be prohibited by statute, every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized. Zabriskie v. Cleveland, Columbus, etc., Railroad, 23 How. 381, 398 [16 L. Ed. 488]; Thomas v. Railroad Co., 101 U. S. 71 [25 L. Ed. 950]; Pennsylvania Co. v. St. Louis, Alton & Terre Haute Railroad, 118 U. S. 290 [6 Sup. Ct. 1094, 30 L. Ed. 83]; Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1, 25 [9 Sup. Ct. 409, 32 L. Ed. 837]; Railroad Companies v. Keokuk Bridge Co., 131 U. S. 371, 384 [9 Sup. Ct. 770, 33 L. Ed. 157].

"As the action in this case is upon the contract, and as the contract was prohibited by the charter of the refrigerating company, there can be no recovery upon it."

See, also, Bank v. Converse, 200 U. S. 439, 26 Sup. Ct. 306, 50 L. Ed. 537.

It follows that on this branch of the case the District Court should have given binding instructions in favor of the defendant; but, if possible, we desire to avoid a second trial on the other branch, and therefore we shall not now enter a judgment of reversal. If, on or before the 8th day of January, 1917, the plaintiff remit so much of the judgment as exceeds the sum of $208.07, we will affirm the judgment for the remainder, and will then dispose of the question of costs. If the remittitur be not filed, we shall be obliged to reverse the judgment generally and send the case back for another trial.

(See opinion of Judge Bradford, delivered in the Circuit Court of Delaware in 1897, Hamor v. Taylor-Rice Co., 84 Fed. 392.)

BOSTON & M. R. R. v. BAKER.

(Circuit Court of Appeals, First Circuit. November 2, 1916.)

No. 1225.

1. APPEAL AND ERROR ⟸1078(4)—REVIEW—WAIVER OF ERRORS.
The propriety of the refusal of requested instructions will not be determined, where, on the hearing in the appellate court, assignments of error complaining of the refusal were waived.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4259; Dec. Dig. ⟸1078(4).]

2. APPEAL AND ERROR ⟸173(13)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.
In an action against a master for the conscious suffering and death of a servant, brought under the Massachusetts Employers' Liability Act (St. Mass. 1909, c. 514, § 127 et seq.), supplemented by the Workmen's Compensation Act (St. Mass. 1911, c. 751), the contention that the master was entitled to rely, under its general denial, upon a contractual assumption of risk by the servant, as opposed to the voluntary assumption of risk, not having been urged below, cannot be urged on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1103, 1117; Dec. Dig. ⟸173(13).]

3. MASTER AND SERVANT ⟸356—INJURIES TO SERVANT—ASSUMPTION OF RISK.
Where the contract of a freight conductor did not refer to defects in the employer's ways, works, or machinery, he did not, under the Massa-

chusetts Employers' Liability and Workmen's Compensation Acts, contractually assume the risk of injury resulting from the failure of the railroad company to use proper care to provide sufficient spacing between tracks, so as to secure such room between a car standing on one track and a train passing on another as an employé of the passing train had the right to expect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜356.]

4. APPEAL AND ERROR ⊜216(2)—RIGHT TO ALLEGE ERROR—REQUEST FOR INSTRUCTIONS.

Where the court charged on a particular issue, and defendant requested no additional instruction, it cannot on appeal complain that the instructions given were insufficient or erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊜216(2); Trial, Cent. Dig. § 628.]

5. MASTER AND SERVANT ⊜270(10)—INJURIES TO SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for the conscious suffering and death of a railroad conductor, killed when his body came in contact with a stationary car on an adjoining track, the admission of evidence as to standard spacing between tracks from center to center cannot be deemed misleading to the jury, because it could not be applied to converging tracks, for the fact that it was applicable only to parallel tracks is apparent to all.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 920; Dec. Dig. ⊜270(10).]

6. TRIAL ⊜250—INSTRUCTIONS—APPLICATION TO CASE—INJURIES TO SERVANT.

Employers' Liability Act Mass. § 134, provides that an employé, who knew of the defect or negligence which caused his injury, shall not be entitled to recover if he failed within a reasonable time to give information thereof to his employer, or some one intrusted with general superintendence. In an action for the death of a freight conductor, killed when his body came in contact with a car standing on a track adjoining the one on which his train was proceeding, the railroad company did not plead or show any knowledge on the conductor's part of the defect in the spacing of the tracks and improper placing of the car, or his failure to give the required notice. *Held* that, as the matter was one for defense, an instruction on such defense is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. ⊜250.]

7. TRIAL ⊜260(1)—INSTRUCTIONS—REFUSAL.

The refusal of requested instructions, covered by those given, is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⊜260(1).]

8. MASTER AND SERVANT ⊜410—INJURIES TO SERVANT—DEFENSES.

Where, in an action under the Massachusetts Employers' Liability and Workmen's Compensation Acts for the death of a freight conductor, whose body came in contact with a stationary car on a track adjoining the one on which his train was proceeding, the defenses of contributory negligence and assumption of risk were not open to the railroad company, the refusal of an instruction that, though the conductor placed the stationary car himself, there could be no recovery, was proper.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜410.]

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by Mabel M. Baker, administratrix, against the Boston & Maine Railroad. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Archibald R. Tisdale, of Boston, Mass., for appellant.

W. A. Pew, of Salem, Mass. (William D. Chapple, of Salem, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The plaintiff below, a citizen of New York, recovered judgment against the railroad under the Massachusetts Employers' Liability Act (St. 1909, c. 514, §§ 127–135, 141–143), as supplemented by the Massachusetts Workingmen's Compensation Act (St. 1911, c. 751), for the conscious suffering and death of her intestate, John W. Ramsdell, who, on April 12, 1915, while employed by the railroad as a freight conductor and in charge of a moving train, received injuries from which he died April 20, 1915. Riding on the side of a freight car in the moving train, his body came into collision with a stationary car on an adjoining track.

The plaintiff waived all other counts originally in her declaration and the case went to the jury on the first count only, which alleged Ramsdell's injuries and death to have been caused by—

"the defective condition of the defendant's ways, works, or machinery, which condition arose from or had not been discovered or remedied owing to the negligence of the defendant or of a person in the defendant's employ intrusted with the duty of seeing that its ways, works, and machinery were in proper condition."

It was admitted that the railroad had not accepted the Workingmen's Compensation Act, so that it was not a "subscriber" within the meaning thereof. Section 1 of that act, therefore, made unavailable to the railroad the defenses either, (1) that Ramsdell was negligent, (2) that his injury was caused by the negligence of a fellow employé, or (3) that he had assumed the risk of the injury, unless, as the railroad contended, the section "deals only with actions at common law," and for that reason was not applicable to the first count of the declaration upon which the case was submitted as above. Relying on this contention, the railroad had pleaded in its answer, besides a general denial, that Ramsdell's own negligence contributed to his injury and death, and that he "assumed the risks of his employment in this case."

[1] Rulings were requested by the railroad at the trial, in accordance with its above contention, that section 1 did not apply and that the above defenses were open to it, which requests were refused by the court. These refusals it originally assigned as errors; but all these assignments of error it waived at the hearing in this court. The only alleged errors it has here relied on relate to the trial below of the only issue there presented, viz., whether or not defects, existing through negligence on the railroad's part in its ways, works, or machinery, were proved to have caused Ramsdell's injuries.

[2-4] The railroad asked the court below to direct a verdict for the defendant, to rule that on all the evidence the plaintiff could not recover, and to rule that the jury would be warranted in finding that

Ramsdell assumed the risk due to the proximity of the stationary car to the train on which he was hit. Complaining here of the refusal of its above requests, it contends that although the above statute applied, and deprived it of the defense that Ramsdell "had assumed the risk of the injury," it is, nevertheless, entitled to rely, under its general denial, upon a contractual assumption of risk by him, as opposed to a voluntary assumption of risk, which it would have to plead. It relies on Ashton v. Boston & Me. R. R., 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281, and says that upon the evidence such contractual assumption of risk was shown, or at least that the jury might so have found.

But, so far as any instruction regarding assumption of risk is concerned, the above contention is an afterthought on the railroad's part. The record shows that no such contention was raised in or passed upon by the trial court. We cannot regard it as open to the railroad here. Nor if it be regarded as open, can we sustain it. The evidence could not be said to require the finding that Ramsdell assumed by his contract of employment the risk of injury from the proximity of the stationary car. It did not appear that his contract of employment had any express relation, when made, to defects in his employer's ways, works, or machinery, as was the case in Ashton v. Boston & Me. R. R., above referred to. Nor in our opinion was the railroad entitled to have the jury told that they would be warranted in finding according to the terms of the request, which made no distinction between contractual and voluntary assumption of risk.

The jury were instructed, in substance, that the burden was on the plaintiff to satisfy them that due and proper care had not been used by the railroad to provide such spacing between the tracks as would secure such room between a car standing on one and a train passing on the other as an employé performing Ramsdell's duties had a right to expect. The railroad made no request for any further instructions regarding contractual assumption of risk as involved in the question of negligence, and their omission does not, therefore, afford any ground for a claim that the instructions given were insufficient or erroneous in this respect. In view of all the evidence, we cannot hold that the court was bound either to direct a verdict for the defendant or to rule that upon it the plaintiff could not recover.

[5] Evidence was admitted against the railroad's objection tending to show that the standard spacing between tracks, from center to center, was 13 feet. Notwithstanding the obvious fact that no such standard could be applied to converging tracks, we are unable to see in this evidence anything liable to mislead the jury. That it was applicable only in the case of parallel tracks must have been as clear to them as it would be to every one else.

[6] Section 134 of the above Employers' Liability Act (St. 1909, c. 514) provides that an employé who knew of the defect or negligence which caused his injury shall not be entitled to the right of action for damages given by the act if he failed, within a reasonable time, to give information thereof to his employer, or to some one intrusted with general superintendence by such employer. The railroad assigns as

error a refusal by the court to instruct that the plaintiff had no right of action if Ramsdell, having such knowledge, failed to give such notice. The railroad, however, having neither pleaded nor undertaken to prove any such knowledge on Ramsdell's part, or any failure by him to give the notice called for by the statute, we think the requested instruction was rightly refused. It was not part of the plaintiff's case to prove absence of such knowledge, or the giving of such notice. Connolly v. Waltham, 156 Mass. 368, 31 N. E. 302.

[7] We think the instructions given sufficiently covered the requested instructions that the railroad could not be held to have guaranteed the safety of the place of work or the machinery or appliances on which Ramsdell was at work when injured, and that there could be no recovery if the sole cause of his injuries was his own act, whether the defendant was negligent or not. We are unable to believe that the defendant was prejudiced by the omission to instruct in the terms of these requests.

[8] The defenses of contributory negligence and voluntary assumption of risk not being open to the railroad, the refusal of the trial court to instruct that if Ramsdell had himself directed the placing of the stationary car where it was at the time of his injury, there could be no recovery for injuries to him by reason of said car being in that position, was not error.

What has been said disposes of all the errors assigned in the bill of exceptions and not waived in this court.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

CRAMPTON v. MASSIE et al.

In re CAMPBELL.

(Circuit Court of Appeals, Fifth Circuit. November 1, 1916.)

No. 2843.

1. MORTGAGES ⟸298(4)—PAYMENT—EFFECT.
   Generally the payment of a debt secured by mortgage extinguishes the mortgage.
   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 850–854, 864; Dec. Dig. ⟸298(4); Payment, Cent. Dig. § 12.]

2. MORTGAGES ⟸317—VALIDITY—EXTINGUISHMENT.
   In view of Code Ala. 1907, § 4899, declaring that the payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage, a mortgagor, after the mortgage has been paid, cannot, by erasing the satisfaction and returning it to the mortgagee to hold for the benefit of another, who had made another loan to the mortgagor, revive the mortgage.
   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 955; Dec. Dig. ⟸317.]

3. BANKRUPTCY ⟸267—PETITION—RIGHT TO INTERVENE.
   Land of a bankrupt was sold by the trustee, and thereafter a portion of the land, so sold was again sold under decree of the bankruptcy court

to satisfy a mortgage. The original purchaser, contending that the mortgage was invalid, filed a petition to set aside the second mortgage, or in the alternative for an order directing payment of the proceeds of the sale to him. *Held* that, as the prayer of the petition indicated the purchaser's willingness to allow the sale to stand and to look to the proceeds, and as a denial of his right to intervene might result in dissipation of the fund without protection of his rights, the purchaser is entitled to intervene without leave.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 694, 695, 697–709; Dec. Dig. ⟸267.]

Petition to Superintend and Revise from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

In the matter of the bankruptcy of M. B. Campbell. Petition by F. J. Crampton for vacation of sale of property of the bankrupt, or, in the alternative, for payment to him of the proceeds of the sale, opposed by Bessie K. Massie, guardian of the estate of Joel White Massie, and George Stuart, as trustee. The petition was dismissed, and petitioner petitions to superintend and revise. Decree reversed.

See, also, 227 Fed. 49, 50, 840.

Prior to and at the time of the bankruptcy of M. B. Campbell, he owned all of block 2 according to the recorded plat of East Point, in Montgomery county, Ala., except lot 16 of that block. On December 5, 1913, he executed and delivered to T. L. Epps a mortgage on lot 20 of that block to secure a debt of $1,800, which was to mature on March 5, 1914. Afterwards he made other mortgages conveying all the lots in block 2 owned by him, including lot 20, previously mortgaged to Epps. On May 25, 1915, a decree was made in the bankruptcy proceeding directing the trustee to sell all of said block 2, except lot 16, but including lot 20, subject to the incumbrances thereon, and on June 26, 1916, at the sale made pursuant to that decree, F. J. Crampton became the purchaser of all the lots decreed to be sold. The sale was duly confirmed, a deed was made by the trustee to the purchaser, who went into possession of the property purchased, and was in possession when he filed his petition in the bankruptcy proceeding. In October, 1914, prior to his bankruptcy, M. B. Campbell, for the purpose of getting said lot 20 released from the mortgage to Epps, agreed with the latter to give him a note for $1,950, payable at a future date and secured by mortgages on other property, upon the receipt of which by Epps the latter marked the mortgage to him, on lot 20, "Satisfied in full and canceled," and surrendered that mortgage and the note it secured to Campbell. Thereafter, but also prior to the bankruptcy, Campbell borrowed from Bessie K. Massie, as guardian, $750, and to secure that amount sent back to Epps the $1,800 mortgage, from which Campbell had erased the satisfaction and cancellation placed thereon by Epps, and had Epps to sign a transfer and assignment of that mortgage, which had been written upon it by the agent of Bessie K. Massie. Epps received no part of the $750 so obtained by Campbell. On July 24, 1915, after the date of the sale at which Crampton bought, the court in the bankruptcy proceeding made another decree directing the trustee to sell said lot 20, and on August 31, 1915, the trustee sold the same. At that sale J. E. Duskin became the purchaser thereof at the price of $900, which amount the trustee received and was holding at the time Crampton filed his petition. The decree last mentioned was made after the court, on a claim propounded by Bessie K. Massie, guardian, in the bankruptcy proceeding, had decreed that she, as guardian, was the owner of the mortgage to Epps and held the same as security for $750, interest thereon, and attorney's fees, making in all $885. Crampton was not a party to and had no notice of the proceedings leading up to the decree under which Duskin purchased.

Crampton filed a petition in the bankruptcy proceedings, which, after averring the facts above set out, prayed that notice of the petition be given

to all parties in interest, including said Bessie K. Massie, as guardian, that the sale of said lot 20 to said Duskin be set aside, and the amount paid be restored to him, or that, if said sale be confirmed, it be decreed that the proceeds of said sale belong to the petitioner, and that the trustee be ordered to pay the same to petitioner. In response to that petition Bessie K. Massie, as guardian, appeared and moved that the petition be dismissed on the following grounds: "(1) This court has no jurisdiction of said petition. (2) Said Crampton is a stranger to the proceedings to which his petition relates, and has no right to intervene therein. (3) Said Crampton is a stranger to the proceedings to which his petition relates, and had no right to intervene without first obtaining leave of the court, which he failed to obtain. (4) Said petition filed by said Crampton is neither a proceeding at law nor in equity between parties over whom the court would have jurisdiction, and is not authorized by the bankruptcy law." Her motion concluded as follows: "Respondent moves the court to order said money paid over to her." On the hearing of this motion the court decreed that "the petition filed by F. J. Crampton, without permission of the court, be and is hereby dismissed out of this court," and further that the fund realized from the sale of lot 20 be paid by the trustee to Bessie K. Massie, or so much thereof as was required to satisfy the decree in her favor. It is this decree which Crampton seeks to have reviewed on his petition to superintend and revise.

J. Lee Holloway, of Montgomery, Ala., for petitioner.
Fred S. Ball, of Montgomery, Ala., for respondent Stuart.
John M. Chilton, of Montgomery, Ala., for respondent Massie.

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

WALKER, Circuit Judge (after stating the facts as above). [1, 2] In the absence of a statute affecting the question, it is the generally, if not universally, accepted rule that, when a debt secured by a mortgage has been paid, the mortgage becomes functus officio and dead, and it cannot be made to stand as security for a new or different debt between the original parties, or reissued to a different creditor. Bogert v. Bliss, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684; Lamphier v. Desmond, 187 Ill. 370, 58 N. E. 343; Bowman v. Manter, 33 N. H. 530, 66 Am. Dec. 743; 27 Cyc. 1434; 1 Jones on Mortgages (6th Ed.) § 944. An Alabama statute (Code Ala. 1907, § 4899) provides that:

"The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage."

The mortgage to Epps had no legal existence after the payment of the debt it secured and the cancellation and delivery of it by Epps to the mortgagor. Cade v. Floyd, 120 Ala. 484, 24 South. 944; Abbett v. Page, 92 Ala. 571, 9 South. 332. What Campbell did and procured Epps to do amounted to an ineffectual attempt to make a real estate mortgage to a new creditor without a compliance with the requirement of the statute of frauds. The mortgage to Epps was not an existing incumbrance on the land when Crampton made his purchase under the decree of the court. The title which he acquired by his purchase and the conveyance by the trustee pursuant to the decree of the court was not subject to the Epps mortgage as an existing incumbrance.

[3] The record does not disclose any legal obstacle standing in the way of granting the relief which Crampton's petition prayed. The prayer of the petition indicated the petitioner's willingness to let the sale at which Duskin bought stand, and to look to the amount of the purchase price paid into court as a substitute for the lot for which it was paid. The case is that of a fund in court undergoing administration, to which a third party asserts a right, based upon proceedings in the same cause, which would be lost if he is not allowed to intervene before the fund is dissipated. In such a case he has a right to intervene. Credits Commutation Co. v. United States, 91 Fed. 570, 34 C. C. A. 12; Id., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; Ex parte Printup, 87 Ala. 148, 6 South. 418; Ex parte Breedlove, 118 Ala. 172, 24 South. 363. We are not of opinion that the intervention petition was subject to be dismissed on either of the grounds stated in the motion made to that end. On the facts disclosed by the record it was error to dismiss the petition and to decree the payment of the fund in question to the holder of the extinct mortgage to Epps.

The decree complained of is reversed; the costs to be taxed against Bessie K. Massie.

FEELEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1916.)

No. 4536.

INDIANS ⟸34—SALES OF INTOXICATING LIQUORS TO—DEFENSES.

In a prosecution under Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, § 4137), declaring that any person who shall sell intoxicants to any Indian ward of the government under the charge of an Indian agent shall be punished, it is no defense that the seller did not know the purchaser was an Indian ward of the government under charge of an Indian agent, the statute not using the words "knowingly or willfully" in connection with the sale, and the seller is guilty, though he believed the purchaser was a person of another race.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. ⟸ 34.]

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Etta Feeley was convicted of violating Rev. St. § 2139, as amended by Act Jan. 30, 1897, by selling intoxicating liquor to an Indian ward of the government under charge of an Indian agent, and she brings error. Affirmed.

Charles A. Kutcher, of Sheridan, Wyo. (Burgess & Kutcher, of Sheridan, Wyo., and Burke & Riner, of Cheyenne, Wyo., on the brief), for plaintiff in error.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

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

TRIEBER, District Judge. The defendant was indicted and convicted for violating section 2139 Rev. St., as amended by Act Jan. 30, 1897, 29 St. 506 (Comp. St. 1913, § 4137). The facts are that the defendant sold, in the state of Wyoming, intoxicating liquor to an Indian, a ward of the government and under the charge of an Indian agent.

The only defense the plaintiff in error made was that she believed, at the time of making the sale, that the Indian, to whom the liquor was sold, was a Mexican. To sustain this defense she offered to prove by a number of witnesses that this Indian claimed to be a Mexican from Mexico, and by such means entrapped and deceived the defendant into selling him the liquor in question; she believing, in good faith, that he was a Mexican. The court refused to admit any evidence to prove this defense, to which proper exceptions were taken.

The court in its charge to the jury told them that her belief that the person to whom she sold the intoxicating liquor was a Mexican, and not an Indian, was no defense to this indictment, and before she could make the sale she was bound to know whether he was an Indian or a Mexican, and refused to instruct the jury that if she in good faith believed, and had reasonable cause to believe, after making inquiry as to his nationality, that he was a Mexican, and that the sale in question was the result of such mistake, she cannot be convicted. Proper exceptions were saved and assigned as errors in this court.

The statute under which she was indicted provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, * * * to any Indian, a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, * * * shall be punished by, * * *" etc.

It will be noticed that the statute does not require the act to be done "knowingly or willfully," nor are there any other words of equivalent import in the statute. For this reason the numerous authorities cited by counsel for plaintiff in error, arising under statutes making it an offense to do certain acts "knowingly or willfully," have no application.

In United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278, the indictment was founded upon the ninth section of the act of Congress of March 3, 1825 (4 Stat. 104, c. 64) which provides that "if any person shall knowingly or willfully obstruct or retard the passage of the mail, * * *" and it was held that, unless the defendant "acted knowingly and willfully" there could be no conviction.

In Felton v. United States, 96 U. S. 699, 24 L. Ed. 875, the defendant was indicted for violating the act of July 20, 1868, imposing taxes on distilled spirits. 15 St. 131 (Comp. St. 1913, § 6005). The act provided that if any distiller shall "knowingly and willfully" omit to do certain things, and the court held that "knowingly" was one of the material ingredients of the offense.

In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, the indictment was under section 5431, Rev. St., which made it an offense to pass, utter, publish, etc., any counterfeit obligation, etc., with intent to defraud, and the court held that knowledge that the instrument is forg-

ed or counterfeit is essential. Of course, there could be no intent to defraud, unless the party knew the instrument to be counterfeit.

Other cases cited refer to offenses which have a common-law definition, and it has been uniformly held that, where the statute itself does not describe the offense, but merely uses the common-law name, the rules of the common law will govern. Such are larceny, embezzlement, murder, and other grave offenses of that nature. United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Moore v. United States, 160 U. S. 268, 274, 16 Sup. Ct. 294, 40 L. Ed. 422.

The decisions of the highest courts of the states are quite numerous and practically uniform that, when a statute does not require that the act should be done "knowingly or willfully," or other words of equivalent meaning, ignorance is no excuse. Black on Intoxicating Liquors, § 418; Redmond v. State, 36 Ark. 58, 38 Am. Rep. 24; Harper v. State, 91 Ark. 422, 121 S. W. 737, 25 L. R. A. (N. S.) 669, 18 Ann. Cas. 435; Carroll v. State, 63 Md. 551, 3 Atl. 29; O'Flinn v. State, 66 Miss. 7, 5 South. 390; McCutcheon v. People, 69 Ill. 601; Jamison v. Burton, 43 Iowa, 282; Commonwealth v. Gould, 158 Mass. 499, 33 N. E. 656; State v. Baer, 37 W. Va. 1, 16 S. E. 368; State v. Hartfiel, 24 Wis. 60; Seele v. State, 85 Neb. 109, 122 N. W. 686; State v. Gilmore, 80 Vt. 514, 68 Atl. 658, 16 L. R. A. (N. S.) 786, 13 Ann. Cas. 321; State v. Feldman, 150 Mo. App. 120, 129 S. W. 998; State v. Gulley, 41 Or. 318, 70 Pac. 385.

Even the absence of the owner of the saloon at the time of the sale will not excuse him for his employé selling liquor to a minor. Mogler v. State, 47 Ark. 109, 14 S. W. 473.

Under a statute making it an offense to marry a minor without the consent of the parent or guardian, but which does not require that it be done knowingly, it has been held that it is no defense that the parties represented themselves to be of age and the minister acted in good faith, believing that these representations were true. Smyth v. State, 13 Ark. 696; Sikes v. State, 30 Ark. 496.

In People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, it was held that where a saloon was kept open on Sunday in violation of law, the owner may be properly convicted, although it was done without his knowledge or consent. In Haynes v. State, 118 Tenn. 709, 105 S. W. 251, 13 L. R. A. (N. S.) 559, 121 Am. St. Rep. 1055, 12 Ann. Cas. 470, a conviction of one, who sold intoxicating liquors, not knowing it was such, was upheld. In Heath v. State, 173 Ind. 296, 90 N. E. 310, 21 Ann. Cas. 1056, a conviction for rape, by having sexual intercourse with a female under the age of consent, although in ignorance of that fact was affirmed.

The same rule has been applied by this court, and all other national courts, to the Hours of Service Law. In United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136, Judge Van Valkenburgh, speaking for the court, said:

"The act under consideration does not employ the words 'knowingly' and 'willfully.' The carrier is made liable if it requires or permits any employé to be or remain on duty in violation of stated provisions. This case then falls

within that class where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong."

To the same effect is Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, construing the Interstate Commerce Act. It was there held:

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases, within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong."

When a statute enacted under the police power, commands an act to be done or omitted, and does not require it to be done knowingly or willfully, or with a certain intent, the doing of the act prohibited, is a violation of the law, regardless of the knowledge or intent of the offender.

The court committed no error in excluding the testimony offered by the defendant, or refusing to instruct the jury as requested by her.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

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

No. 4541.

MASTER AND SERVANT ⊂=13—REGULATIONS—HOURS OF SERVICE ACT.

Under Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), limiting the hours of service of telegraph operators to only nine hours per day when the office is operated continuously night and day, two telegraph offices, a short distance apart, one of which was used for the day and the other for the night business, must be deemed a single office within the act, the work being transferred from one to the other regularly, and a continuous operation being necessary to the movement of trains, for the act evidently classified offices operated continuously night and day differently from day stations only, because in the former the volume of business would be greater, requiring more concentration, and thus necessitating shorter hours.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂=13.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by the United States against the Atchison, Topeka & Santa Fé Railway Company. There was a judgment for the United States, and defendant brings error. Affirmed.

Robert Dunlap, of Chicago, Ill., for plaintiff in error.

Philip J. Doherty, of Washington, D. C., and W. Boothe Merrill, Asst. U. S. Atty., of Oklahoma City, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. The question in this case is whether the telegraph offices of the railway company at Guthrie and South Guthrie, Okl., constitute a single "office, place or station," within the meaning of the proviso of section 2 of the Hours of Service Act of March 4, 1907 (34 Stat. 1415), that when operated continuously night and day an operator therein shall not be required or permitted to remain on duty more than 9 hours in any 24-hour period. The trial court held they did.

Both places are in charge of the same station agent. They are four-tenths of a mile apart, are within the corporate limits of the city of Guthrie, and are within the railroad district designated by the company as the Guthrie yard. A telegraph operator works at the Guthrie office from 7 p. m. until 7 a. m. During that period he uses the telegraphic facilities in the direction of all train movements into, through, and out of the Guthrie yard. At 7 in the morning he stops his work and goes to South Guthrie, where he personally delivers the train register, train orders, and block sheet, and all undelivered messages to another operator, who goes on duty there at that hour. The latter receipts for the papers delivered to him and from that time until 7 p. m. performs at South Guthrie the same duties in respect of the telegraphic service and the movements of trains as were performed at Guthrie in the preceding half-day period. When his time is up at 7 in the evening, he goes to Guthrie and delivers the train register, etc., to the operator first mentioned and takes his receipt for them. By such continuous alternation the two operators conduct all the telegraphic business in the yard district affecting the movements of the trains of the company in interstate commerce and each of them remains on duty 12 hours. The passenger station is at Guthrie. At South Guthrie, down in the yard, no tickets are sold and no passengers or freight are received or discharged. Each place has its separate complete mechanical equipment for telegraphic work, and each has its separate signal call. They are separately designated and numbered as stations in the company's official list; and in the employés' time-table Guthrie is designated as a night office and South Guthrie as a day office for telegraphic purposes. This course of handling the business was adopted by the company for reasons of convenience, not to evade any law. It began before the passage of the Hours of Service Act, and has been shown in its customary railroad publications.

We think there is such an identity of service performed at the two places and such a close connection between them in the methods of performance that they are in substance and effect a single office, place, or station within the meaning of the statute. While it is not our province to supply apparent omissions in legislation, yet the object sought by it should always be regarded in the construction of the language employed. It was not intended by the Hours of Service Act to burden the railroads to a degree unnecessary to the remedial end in view. In a measure the provision as to telegraph and telephone operators was framed and has been administered along the lines of established railroad practice. But it should not be inferred from this that all exceptional conditions existing prior to the act were approved and confirmed.

In the formulation of the statute it was apparent that some classification of the telegraphic offices, places, and stations was proper in prescribing the duration of permissible service without intervals for rest. Many were naturally unimportant stations, at which the duties were light and unfatiguing. At other more important places the volume and character of the work required a larger degree of care and engrossing attention of the operator. A logical classification, conforming to the practice of the railroads and having regard for their experience of the necessities of the service, was into "daytime" and "night and day" offices; and a maximum of service in a 24-hour period of 13 hours for the former and 9 hours for the latter was prescribed. Obviously the intent of the statute would be defeated if the work at a place of a character requiring attention both day and night were divided between two shifts and performed with separate instruments installed in near proximity. And what could not be done as a new departure would be equally inadmissible as an old custom. The division of the night and day control of train movements in a single restricted district between telegraphic installations in different parts of the same building, or on the north and south sides of the same street, with an oscillation of the paper records and undelivered messages back and forth, would quite clearly not divide the "place" within the intent of the statute. The case here is not different in principle. The work of the two operators, one at Guthrie and the other at South Guthrie, was a unit in all practical aspects, and it was so recognized in the practice of the company. Doubtless there may be in extensive terminals separate offices doing different work, or work of a supplementary character, which should not collectively be regarded as one. It is also true that, when a daytime office is closed, the duties which the operator or his successor would have performed, had it remained open, are so far as necessary otherwise cared for. But the difference between such conditions and those which prevailed at the Guthrie yard is manifest. The meaning of an "office, place or station" within the statute does not depend alone on foot measure, but involves other considerations as well—the character of the work performed, its scope, to what applied, how it is done, and whether, consistently with the remedial object, it is naturally separable or unitary and continuous.

The judgment is affirmed.

WILLAMETTE & COLUMBIA RIVER TOWING CO. v. HUTCHISON.

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

No. 2835.

COURTS ⊂⊃405(17)—FEDERAL COURTS—ASSIGNMENT OF ERRORS—NECESSITY.

Rule 11 requires that the plaintiff in error shall file with his petition for writ of error or appeal an assignment of errors, and declares that no writ of error or appeal shall be allowed until such assignment of errors shall be filed; while rule 24 provides that, when there is no assignment of errors, counsel will not be heard, except at the request of the court, and

errors not specified according to the rule may be disregarded, though the court at its option may notice a plain error not assigned or specified. *Held*, that rule 11 is one of practice and not jurisdiction, and, while the court may notice a plain error not assigned to prevent a miscarriage of justice, the court will not sift the record, and a writ of error will be dismissed, where no assignment of errors was filed in time, and no plain or obvious error appeared on the face of the record; the errors complained of relating to rulings on evidence and instructions.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⟸405(17).]

In error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action between the Willamette & Columbia River Towing Company, a corporation, and Ella A. Hutchison. There was a judgment for the latter, and the former brings error. Writ dismissed.

Senn, Ekwall & Recken, of Portland, Or., for plaintiff in error.

Manche I. Langley, of Forest Grove, Or., Lotus, L. Langley, of Portland, Or., and Fred Olson, of Oakesdale, Wash., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error moves to dismiss the appeal on the ground that no assignment of errors was filed until after the allowance and issuance of the writ of error. The filing of the petition for the writ, the order allowing the same, and the service of the writ were all had on May 18, 1916. The assignments of error were not filed until June 3, 1916. Our rule 11 requires that the plaintiff in error shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, and declares that no writ of error or appeal shall be allowed until such assignment of errors shall be filed. Rule 24 provides that, when there is no assignment of errors, counsel will not be heard except at the request of the court, and errors not specified according to the rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified. Although in the Eighth circuit the Circuit Court of Appeals has announced the hard and fast rule that an assignment of errors is indispensable to the perfection of the appeal (Frame v. Portland Gold Min. Co., 108 Fed. 750, 47 C. C. A. 664; Webber v. Mihills, 124 Fed. 64, 59 C. C. A. 578; Lockman v. Lang, 128 Fed. 279, 62 C. C. A. 550; Simpson v. First Nat. Bank, 129 Fed. 257, 63 C. C. A. 371), we do not understand that the court intended absolutely to deny its jurisdiction to entertain a writ of error or appeal in cases where no assignment of errors was filed in due time, but rather that it intended to hold that the rule was an indispensable rule of practice. This is indicated by the decision of that court in United States v. Goodrich, 54 Fed. 21, 4 C. C. A. 160.

The proper application of the provisions of rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) is indicated, we think, in P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157, in which the Circuit Court of Appeals for the Sixth Circuit held that the purpose of de-

claring that the court at its option may notice a plain error not assigned is to prevent the miscarriage of justice from oversight, and that it does not intend that the court is to sift the record and deal with questions of small importance, but only that it may notice errors which are obvious and of a controlling character. In Hultberg v. Anderson, 203 Fed. 853, 122 C. C. A. 171, the Circuit Court of Appeals for the Seventh Circuit held that the requirement of rule 11 that no writ of error or appeal shall be allowed, unless an assignment of errors has been filed, is not jurisdictional, but is a rule of practice, and that the court may punish the appellant by dismissal for noncompliance with the rule, or it may hear the controversy and decide the merits as justice may seem to require in the particular case. In that case the court noticed a plain error which was apparent upon the face of the decree, and as to which an assignment of error would have served no useful purpose.

The situation referred to in the decision in P. P. Mast & Co. v. Superior Drill Co. is the situation which we find in the case at bar. No plain and obvious error appears on the face of the record, and the assignments of error all relate to the rulings of the trial court in admitting evidence and giving and refusing instructions to the jury, and their consideration requires an examination of the whole record in order to ascertain whether error has been committed. There is nothing in the record to bring the present case within the rulings of this court in Tyee Consol. Min. Co. v. Langstedt, 121 Fed. 709, 58 C. C. A. 129, or Moore v. Moore, 121 Fed. 737, 58 C. C. A. 19, cited by the plaintiff in error. The requirements of rule 11 must be complied with. No injustice is done by the enforcement of rule 24, subd. 5 (150 Fed. xxxiii, 79 C. C. A. xxxiii), in the present case, for we have examined the record sufficiently to see that no substantial error was committed by the trial court.

The writ of error is dismissed.

PROCTOR COAL CO. v. UNITED STATES FIDELITY & GUARANTY CO.

UNITED STATES FIDELITY & GUARANTY CO. v. PROCTOR COAL CO.

(Circuit Court of Appeals, Fifth Circuit. October 26, 1916. Rehearing Denied December 1, 1916.)

No. 2908.

1. APPEAL AND ERROR ⊕=843(1)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Where assignments of error on a cross-writ were contingent and in the alternative, they need not be reviewed, where judgment for defendant, which sued out the cross-writ, was affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3335, 3337–3341; Dec. Dig. ⊕=843(1).]

2. APPEAL AND ERROR ⊕=537—RECORD—BILLS OF EXCEPTION—TIME OF MAKING.
Bills of exception, allowed long after the term at which judgment was rendered and adjourned, cannot be considered, where there was no order,

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

agreement of counsel, or rule of court extending the time for exceptions beyond the term at which the judgment was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. ⊂⊃537.]

3. APPEAL AND ERROR ⊂⊃637—RECORD—BILLS OF EXCEPTION—ASSIGNMENTS OF ERROR—CONSIDERATION.

Where during the trial the parties submitted the cause to the judge, and there was no agreed statement of facts, or any special finding of facts, and bills of exception were not taken in such time that they could be considered, assignments of error, complaining of the sustaining of a demurrer to the petition and of the rendition of judgment in favor of defendant, must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829; Dec. Dig. ⊂⊃637.]

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit by the Proctor Coal Company against the United States Fidelity & Guaranty Company. There was a judgment for defendant, and plaintiff brings error, while defendant assigned errors in the alternative on a cross-writ. Affirmed.

James Quarles, of Louisville, Ky., for plaintiff in error.

Alex W. Smith and T. A. Hammond, both of Atlanta, Ga., for defendant in error.

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

PARDEE, Circuit Judge. This is a suit on a guaranty bond. The errors assigned in the main writ are as follows:

"(1) The court erred in its ruling of June 25, 1913, sustaining the defendant's demurrer to the petition, and in holding that the plaintiff could recover only for loss sustained during the period covered by the last renewal of the guarantee bond sued on.

"(2) The court erred in rendering judgment in favor of the defendant on the question of liability of defendant to the plaintiff.

"(3) The court erred in rendering a judgment awarding a recovery of costs against the plaintiff."

[1] The assignments of error on the cross-writ are contingent and in the alternative, and in the view we take of the case need not be considered.

[2, 3] During the progress of the trial, the parties waived a trial by jury and submitted the cause to the judge, who made a general finding in favor of the defendant. There was no agreed statement of facts, nor any special finding of facts. The opinions of the judge, filed during the progress of the trial, are argumentative, and can in no sense be taken as special or general findings of fact in the case. The bills of exception found in the record were not seasonably taken, the same being allowed long after the term of court at which the judgment was rendered was adjourned. The record discloses no order, agreement of counsel, nor rule of court extending the time for exceptions beyond the term at which the judgment complained of

was rendered. See United States v. Thibodeaux, 232 Fed. 92, — C. C. A. —, and generally Sierra Land & Live Stock Co. v. Desert Power & Mill Co., 229 Fed. 982, 144 C. C. 264.

None of the assignments of error on the main writ are well taken, and under the circumstances disclosed by the record we are constrained to affirm the judgment; and it is so ordered.

BLACKWELL v. UNITED STATES. *

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

No. 4376.

1. INDIANS ⊕38(5)—INDIAN COUNTRY—INTRODUCTION OF INTOXICATING LIQUORS—EVIDENCE.

In a prosecution under Act March 1, 1895, c. 145, 28 Stat. 693, for introducing from outside intoxicating liquors into that part of the state of Oklahoma which was formerly the Indian Territory, testimony as to what was defendant's business at the time of his arrest is admissible.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 66; Dec. Dig. ⊕38(5).]

2. CRIMINAL LAW ⊕1043(2)—OBJECTIONS—REVIEW.

An objection that testimony was incompetent, irrelevant, and immaterial is insufficient basis for review on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. ⊕1043(2).]

3. CRIMINAL LAW ⊕1169(3)—APPEAL—HARMLESS ERROR.

In a prosecution under Act March 1, 1895, for introducing from outside intoxicating liquor into that part of the state of Oklahoma which was formerly the Indian Territory, where a witness testified that accused was engaged in hauling whisky at the time of his arrest, but on cross-examination stated that all he meant was that accused was engaged in hauling whisky the day he was caught, the admission of the testimony was not prejudicial; accused having admitted he was hauling whisky when caught.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3139; Dec. Dig. ⊕1169(3).]

4. INDIANS ⊕38(5)—INDIAN COUNTRY—INTRODUCTION OF INTOXICANTS—EVIDENCE—SUFFICIENCY.

In a prosecution under Act March 1, 1895, for introducing from outside intoxicating liquor into that part of the state of Oklahoma which was the Indian Territory, evidence *held* to warrant a conviction.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 66; Dec. Dig. ⊕38(5).]

In error to the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Louis Blackwell was convicted of introducing from outside intoxicating liquor, in violation of Act March 1, 1895, into that part of the state of Oklahoma which was formerly the Indian Territory, and he brings error. Affirmed.

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

*Rehearing denied December 18, 1916.

James C. Denton, of Muskogee, Okl., for plaintiff in error.

Paul Pinson, Sp. Asst. U. S. Atty., of Atoka, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Blackwell was convicted of introducing intoxicating liquor from outside the state of Oklahoma into that part of the state which was formerly Indian Territory. Act March 1, 1895, c. 145, 28 Stat. 693. But two grounds are urged for a reversal of the sentence:

[1-3] First. That the court erred in allowing Welch, a witness for the government, to answer a question as to what defendant's business was about the time of his arrest. He answered that defendant was engaged in hauling whisky. But the question was proper. Moreover, the objection was merely that it was incompetent, irrelevant, and immaterial. Finally, on cross-examination the witness testified that all he meant was that defendant was engaged in hauling whisky the day he was caught, and that was true, as defendant admitted.

[4] Second. It is contended that there was not sufficient evidence to convict. We think there was substantial evidence that defendant got the whisky described, 192 quarts and a five-gallon cask, at Coffeyville, Kan., instead of at South Coffeyville, Okl., and that therefore there was an introduction from outside the state, instead of a mere hauling within its borders. The jury were warranted in believing this from the facts and circumstances developed in the testimony of the government's witnesses, as against the claim of the defendant that he got the whisky at the hamlet of South Coffeyville.

The sentence is affirmed.

THE D. J. SAWYER.

(Circuit Court of Appeals, First Circuit. November 17, 1916.)

No. 1227.

1. COURTS ⇐350—FEDERAL COURTS—DEPOSITIONS—NOTICE—SUFFICIENCY.
Where claimants of a vessel libeled had notice of a deposition taken under Rev. St. § 863 (Comp. St. 1913, § 1472), but did not appear or cross-examine a witness, they had sufficient opportunity for objection, either to the taking or to the interrogatories or answers, and could not complain that they were not notified of the filing of the deposition; it not clearly appearing, under the local law of Porto Rico, where the deposition was used, whether they were entitled to notice of filing.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. ⇐350.]

2. ADMIRALTY ⊜41—LIBELS—ADDITION OF PARTIES.
A vessel libeled was released on a stipulation signed by sureties. At trial, leave was given to amend the libel, so as to make the original libelant and another joint parties libelant as partners, instead of the original libelant individually. *Held* that, as amendment of the answer of claimants by adding a denial of the partnership was allowed, and as the cause of action was not changed, or the liability of the sureties increased, claimants cannot complain.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 350–368; Dec. Dig. ⊜41.]

3. ADMIRALTY ⊜66—LIBEL—AMENDMENTS.
Where leave to make trial amendments to the libel and answer is obtained, such amendments should be put in form and entered of record before final decree is entered.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 519–538; Dec. Dig. ⊜66.]

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Libel by Eduardo Lutz and another against the schooner D. J. Sawyer, which was claimed by Ofelia Martinez and others. From a decree for libelants, claimants appeal. Affirmed.

E. Ramirez Nadal, of Mayaguez, Porto Rico (Pascusio Fajardo Martinez, of Mayaguez, Porto Rico, on the brief), for appellants.

Jose R. F. Savage, of San Juan, Porto Rico, for appellees.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. [1] We find no error either in the admission of Diaz's deposition or of Exhibit K annexed thereto. This deposition, taken six months before, at Pensacola, under Rev. St. § 863 (Comp. St. 1913, § 1472), was filed January 18, 1916, at the trial which took place on that day, at Mayaguez. It appears to have remained unopened until then, in the clerk's custody, since its return. The only objection made at the trial to its admission was, according to the record, that the appellants' proctor had had no notice of its being taken. The complaint made here is that he had had no notice of its being filed; that he was duly notified of its taking, he admits. The objection made here, however, would seem to have been passed upon by the District Judge, who states in his opinion that the local rules applicable require no notice of the filing. The question is thus, at most, one of compliance with local rules, after examination of which we are not satisfied that the court wrongly understood or applied them. If the appellants had due notice of the taking of the deposition, they have had all the opportunity for objection, either to the manner of taking or to the interrogatories or answers, to which they were entitled. Notwithstanding the notice, they did not appear, and there was no cross-examination of the witness.

[2] Nor do the appellants satisfy us that there was error in granting leave at the trial to amend the libel, so as to make Lutz and Diaz, as partners, joint parties libelant, instead of Lutz individually.

Amendment of the answer by adding a denial of the partnership thus alleged was allowed at the same time. That another libelant was thus joined, neither prejudiced the appellants' rights nor increased the liability undertaken by the sureties in the stipulation given for release of the schooner. No new cause of action was added. If her owners were liable for breach of the charter party sued on, it could make no difference to them whether they were liable to Lutz only, or to Lutz and Diaz as partners.

[3] Though the record shows that the parties had leave to amend their respective pleadings as above, it does not show that said amendments were in fact put in form or entered of record before the final decree was entered. We do not approve of this practice, but as no error has been assigned in respect of this omission, and as the appellants were not prejudiced, we do not deem it of sufficient importance to justify disturbing the decree.

Much of the appellants' argument here is to the effect that the proofs did not support the finding below that Lutz and Diaz were in fact partners under the name of E. Lutz. This finding has not been separately and specifically assigned as error, and even if the question be regarded as open to the appellants under their general assignments, we see no reason to doubt that the District Court was right in its conclusion. It was a partnership according to the laws of Florida that had to be shown, not according to the laws of Porto Rico, as the appellants contend.

The District Court held that the schooner had failed, without adequate excuse, to complete performance of the charter-party after making one voyage under it. The amount of damage to the charterers (whoever they were), caused by said failure to make the other agreed voyages, was determined by the court, and a decree entered therefor, with interest and costs. Except as above stated, the appellants have not contended here that any error was committed. If, as we hold, the grounds which have been urged before us are insufficient for reversal, the decree below must stand.

The decree of the District Court is affirmed, with interest, and the appellees recover costs of this appeal.

FREY et al. v. MARVEL AUTO SUPPLY CO.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1916.)

No. 2805.

1. PATENTS ⟸66—INVENTION—PRIOR ART.
Prior patents are part of the prior art only by what they disclose on their face.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

2. PATENTS ⟸26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
Although every element in a patented combination is old, there may still be invention, if by the combination a new and useful result is produced, or an old result in a new and materially better way.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⟸26(2).]

3. PATENTS ⟸16—INVENTION—QUESTION OF FACT.
The question of invention, as distinguished from mechanical skill, is one of fact.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸16.]

4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—APPARATUS FOR COMPRESSING AIR.
The Frey patent, No. 1,001,132, for an apparatus for compressing air, specially designed for inflating automobile tires through power furnished by the automobile engine, discloses patentable novelty and invention, and is of such merit as to entitle it to a liberal construction. Claim 3 also *held* infringed.

5. PATENTS ⟸112(1)—CONSTRUCTION—EFFECT OF REJECTION OF CLAIMS.
Where the Patent Office rejects a claim on its merits, and the rejection is acquiesced in, and the patent issues, the patentee cannot afterwards be permitted a construction of the claims allowed broad enough to embrace the claim which was rejected; but, to be estopped, he must be shown to have surrendered something which he now claims to obtain that which was allowed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 162; Dec. Dig. ⟸112(1).]

6. PATENTS ⟸87—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE.
The rule that abandonment of an invention is not to be presumed, but must be clearly proven, applies to abandonment claimed because of proceedings in the Patent Office.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 112; Dec. Dig. ⟸87.]

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

Suit in equity by Herbert H. Frey and the Mayo Manufacturing Company against the Marvel Auto Supply Company. Decree for defendant, and complainants appeal. Reversed.

Lynn A. Williams and Robert M. See, both of Chicago, Ill., for appellants.

M. G. Norton, of Cleveland, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of patent No. 1,001,132, August 22, 1911, to plaintiff Frey. Plaintiff Mayo Manufacturing Company is the exclusive licensee under the patent, which is for an improvement for apparatus in compressing air. The invention is specially designed for inflating the tires of an automobile. It consists of an air-pump intended to be substituted for the spark-plug of one of the cylinders of the automobile gas engine. The defenses are non-invention, lack of novelty, and non-infringement. The District Court found the patent valid, but denied infringement, and dismissed the bill. The appeal is from that decree.

The construction and operation of the patented device are shown by reference to the patent drawings here reproduced:

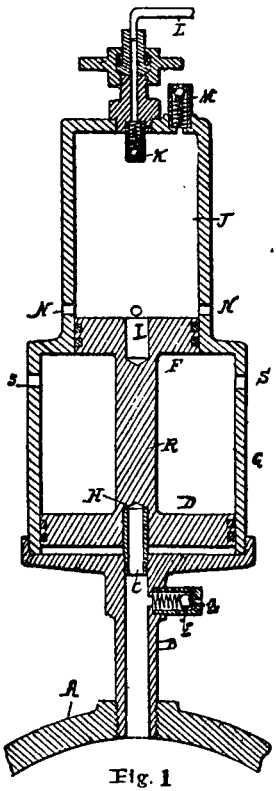


Fig. 1

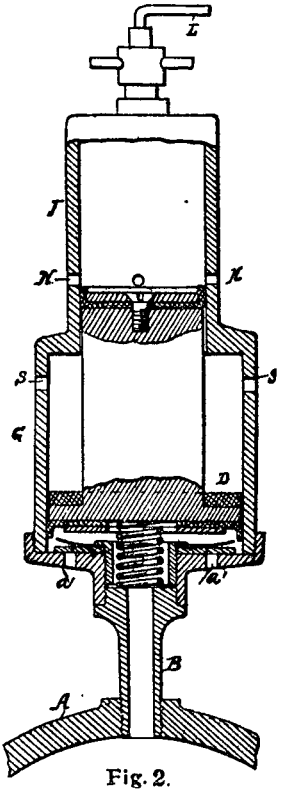


Fig. 2.

The pump proper consists of a lower cylinder *G*, in which is operated a piston *D*, and an upper cylinder *J*, in which a piston *F* operates, the two pistons being connected by a stem *E*. Air is admitted into the upper cylinder by an inwardly-opening automatic valve *M* at the upper end of that cylinder. A pipe or conduit *B* extends from the lower pump-cylinder to the automobile engine-cylinder. When a vacuum exists in the engine-cylinder, the pistons *F* and *D* are forced to the lower end of their travel; compression in the motor-cylinder forces

the two pistons to the upper ends of their respective strokes, so compressing the air in the pump-cylinder and forcing it out through the pipe *L*, whence it is conveyed to the tire. The area of the upper pump piston being much less than that of the lower piston, the pressure in the upper pump-cylinder is of course greater than in the engine-cylinder. Openings *N–N* in the upper pump-cylinder admit air to that cylinder at the lower end of the stroke of its piston, and permit the discharge of air from the lower pump-cylinder on the up-stroke of the pistons. There are also air passages *S–S* in the lower pump-cylinder. In the pipe or conduit *B*, leading from the engine-cylinder to the lower pump-cylinder, there is shown in Fig. 1 a non-return valve *a* (entering the nozzle *b*), which admits air for the purpose of supplementing the pressure of gas from the engine-cylinder, which, when the engine is idling (as is intended in practice), is naturally small. The compression in the engine-cylinder with which the pump is connected may thus be normal, while in the other cylinders it may be materially subnormal.

The device illustrated by Fig. 2 differs from that of Fig 1, so far as here material, in this respect: Instead of the air valve *a* opening directly into the conduit or pipe *B*, two non-return air valves a^1–a^1 are shown opening directly into the space in the lower pump-cylinder below the lower limit of the piston's travel. By the device of the patent no change is effected in the engine or its cylinders, except that the spark plug of one cylinder is temporarily removed, and in its place inserted the lower end of the pump. The pump is operated without explosion in the connecting engine-cylinder.

The prior art discloses numerous power pumps, both air and water, with differential pistons and cylinders, and with inlet and outlet valves; but, with four exceptions, none of these devices are intended for or seem adaptable to use for inflating automobile tires through power furnished by the automobile engine. Michelin, No. 795,531 (1905), and Serne, British patent No. 13,571 (1906), show differential cylinders and piston air pumps for inflating tires. Each of these devices, however, is intended to be operated by the explosive pressure of the engine, and neither has the non-return valve *a* or a^1 of Frey or the equivalent thereof. In Michelin, No. 854,371 (1907), two of the motor-cylinders are disconnected from the gas supply and converted into air-pumps, the reciprocating of the pump-piston being effected by the alternate action of the two engine-cylinders. Swain, No. 938,522 (1909), shows a compression tire-inflating cylinder air-pump with differential pistons, operating without explosion. Swain, however, has no means for admitting air directly to the communication between the engine-cylinder and the lower pump-cylinder (or the piston of that cylinder when at the lowest limit of its travel). It seems impossible that his open ports, not valves, in the upper part of his lower pump-cylinder, can admit any appreciable quantity of air into that communicating space.

[1] Prior patents are part of the prior art only by what they disclose on their face. Naylor v. Alsop Process Co. (C. C. A. 8) 168 Fed. 911, 920, 94 C. C. A. 315; Munising Paper Co. v. American, etc., Co. (C. C. A. 6) 228 Fed. 700, 703, 143 C. C. A. 222. We are satisfied that

Swain's air inlets do not have the effect of Frey's non-return valve referred to.

[2, 3] The claims in suit are Nos. 2 and 3, which we print in the margin.[1] We have no difficulty in finding the claims in suit valid as against the defenses of lack of novelty and lack of invention. Notwithstanding every element in plaintiff's device were old, invention would still exist if by the combination of those old elements there is produced a new and useful result, or if an old result is effected in a new and materially better way. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Ferro Concrete Constr. Co. v. Concrete Steel Co. (C. C. A. 6) 206 Fed. 666, 669, 124 C. C. A. 446; Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 121, 127, 144 C. C. A. 418. The question of invention, as distinguished from mechanical skill, is one of fact. Herman v. Youngstown Co. (C. C. A. 6) 191 Fed. 579, 582, 112 C. C. A. 185; Ferro Co. v. Concrete Steel Co., supra; Proudfit Co. v. Kalamazoo Co., supra. The record shows that, prior to Frey's invention, many persons were unsuccessfully attempting to solve the problem which Frey solved. We agree entirely with the conclusion of the District Court that "Frey was the first to devise a commercially practical and feasible device to accomplish what must be recognized as an important result." The device of the patent has met with pronounced commercial success and public favor.

[4] The important question relates to infringement. The alleged infringing device is the equivalent of the device of the patent unless in this respect and to this extent: The non-return air valve, which is an element of both claims 2 and 3 of the patent, does not, in defendant's structure, open directly into the conduit or pipe *B* which leads from the engine-cylinder to the lower pump-cylinder, as shown in Fig. 1 of the patent drawings; instead, it has two non-return valve openings in the lower wall forming part of the enclosure of the lower pump-cylinder, substantially corresponding to the valves a^1–a^1 of Fig. 2 of the patent drawings. The non-return valves of defendant's structure perform the same functions as the non-return valve of Fig. 1 of the patent, and accomplish the same result. In the commercial structure of the predecessor of plaintiff Mayo Manufacturing Company, the non-return valves were in the same location as those of defendant. The District Court was of opinion that but for the office history of the patent application, as disclosed by the file wrapper and contents, the defendant's

1 "2. The combination of a cylinder *G*, a passage forming a communication between said cylinder and a cylinder *A*, in which compression is to take place, a piston in the cylinder *G*, a second cylinder *J* of less diameter than the cylinder *G*, a piston in the cylinder *J*, and means for connecting said pistons, a passage communicating with the outer air located between the cylinder *G* and the compression apparatus, and a non-return valve opening inward in said passage."

"3. The combination of a cylinder *G*, a passage forming a communication between said cylinder and a cylinder *A* in which compression is to take place, a piston in the cylinder *G*, a second cylinder *J* of less diameter than the cylinder *G*, a piston in the cylinder *J*, and means for connecting said pistons, inlet and outlet passages to said cylinders and a non-return valve opening inward into the communication to the compression means."

structure would be deemed the equivalent of the structure of the patent in the respect mentioned, and so would infringe. With this conclusion we entirely agree, at least as to claim 3.

The non-return valve of claim 3 is substantially described as opening into the "passage forming a communication" between the engine-cylinder and the lower pump-cylinder (that of claim 2 as opening into a "passage communicating with the outer air located between" those cylinders, and, as described in the specification, connecting with the pipe *B*). The term "passage forming a communication" does not necessarily mean a mere pipe or conduit. One definition of "passage" given by the Century Dictionary is "*a means of* entrance, exit or *transit*"; and one of the definitions of "passageway" is "a road, avenue, path or *way* affording *means of communication.*" The conspicuous feature of plaintiff's device is the introduction of air between the engine-cylinder and the piston of the lower pump-cylinder when at the lowest limit of its travel. For the purposes of such operation it is immaterial whether the air is introduced *directly* into the pipe or conduit *B*, or *indirectly* thereto, as in Fig. 2 and in defendant's structure. In either case it is, through the compression in the engine-cylinder, applied directly to the piston of the lower pump-cylinder. In the absence of limitations other than appear on the face of the patent, the space remaining in the cylinder, as mechanically constructed, below the pump-piston, and communicating directly with the conduit, is in substance a part of the communication between the engine-cylinder and the piston of the pump-cylinder, and thus the equivalent of the "passage forming a communication between" the two cylinders referred to. We think the merit of the invention, and the length of the step taken by the inventor, entitle the patent to such liberality of construction.

The controlling question is whether plaintiffs are estopped by what occurred in the Patent Office to claim such equivalency. The Patent Office history, so far as here material, is this: The application as presented contained ten claims. Claims 1, 2, 3, 4, 5, and 7 were held by the examiner to be anticipated by Swain, and were all canceled. That action has no apparent bearing upon the issue here. Claims 9 and 10 were rejected as "anticipated by Swain, in view of Michelin" (1907 patent), certain lines of the specification of that patent being referred to. Both these claims were canceled. Original claims 6 and 8 read as follows:

"6. The combination of a cylinder *G*, means for placing said cylinder in communication with a cylinder in which compression is to take place, a piston in the cylinder *G*, a second cylinder *J* of less diameter than the cylinder *G*, a piston in the cylinder *J*, and means for connecting said pistons, a passage communicating with the outer air located between the cylinder *G* and the compression apparatus, and a non-return valve opening inward in said passage."

"8. The combination of a cylinder *G*, means for placing said cylinder in communication with a cylinder in which compression is to take place, a piston in the cylinder *G*, a second cylinder *J* of less diameter than the cylinder *G*, a piston in the cylinder *J*, and means for connecting said pistons, inlet and outlet passages to said cylinders and a non-return valve opening inward into the communication to the compression means."

Claim 6 was criticized as "indefinite and confused in phraseology. It is not clear what is covered by 'means for placing said cylinder in communication with a cylinder,' and the cylinder mentioned appears to be directly connected with the pump-cylinder also enumerated in said claim." No mention was made of claim 8. Neither claim 6 nor claim 8 were ever rejected; they were voluntarily amended by the applicant, and were allowed as claims 2 and 3 of the patent, being the claims here sued upon—claim 1 (not in suit) being new. Claim 9 so rejected by the examiner, is printed in the margin.[2] It contained, as a part of the applicant's description, these words: "the cylinder, *G*, being provided with means to admit atmospheric air to the communication with the gas-engine cylinder." The learned judge who heard the case in the District Court was of opinion that the clause just quoted was referable only to the valves, a^1–a^1, of Fig. 2 of the patent drawings, which construction is described in the specification as "perforated," with a flap valve covering the perforations, and as "adapted to take the place of the nozzle and valve *B* and *A*, of Fig. 1," and that as claim 2 expressly, and claim 3, by natural implication, provide for an opening of the non-return valve into the passage between the engine-cylinder and the pump-cylinder, it results from the rejection and cancellation of claim 9, and the allowance of claims 2 and 3, that the latter claims were in effect limited to the construction shown in Fig. 1, that is to say, having the air-valves located in the pipe or conduit, *B*, and expressing regret at the necessity of so deciding (doubtless in view of the meritorious nature of plaintiff's invention) held defendant's device not to infringe. The case turns upon the correctness of this conclusion as to the effect of the Patent Office history.

[5] It is the broad, general rule that where the Patent Office rejects a claim covering a device on its merits, and the rejection is acquiesced in and the patent issues, the applicant cannot afterwards be permitted a construction of the claims allowed wide enough to embrace the claim which was rejected. Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500; Royer v. Coupe, 146 U. S. 524, 532, 13 Sup. Ct. 166, 36 L. Ed. 1073; Thomas v. Spring Co. (C. C. A. 6) 77 Fed. 420, 430, 23 C. C. A. 211. Thus, where the applicant, in order to get his patent allowed, is compelled to accept a claim narrower than contained in his original application, such claim cannot be construed to cover what was rejected by the Patent Office. Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95; Campbell v. Amer. Shipbuilding Co. (C. C. A. 6) 179 Fed. 498, 502, 103 C. C. A. 122, and cases there cited. But to be estopped by the action of the Patent Office, a patentee must be shown to have surrendered something which he now claims in order to obtain that which

[2] "9. The combination with a gas engine cylinder, of a cylinder *G* communicating therewith, a pump cylinder communicating with the cylinder *G*, a piston adapted to reciprocate in cylinder *G*, a piston adapted to reciprocate in the cylinder *J*, means connecting said pistons, the cylinder *G* being provided with means to admit atmospheric air to the communication with the gas engine cylinder."

was allowed. Bundy Mfg. Co. v. Detroit Time Register Co. (C. C. A. 6) 94 Fed. 524, 542, 36 C. C. A. 375.

The pivotal question is: Why was claim 9 rejected and the amendment of claim 6 required? Was it because of a requirement that the non-return valve be limited in location to the conduit or pipe *B*, or was it because claim 9 was broader than the state of the art permitted, in that no specific means for admitting the air to the communication with the engine-cylinder were stated, and because claim 6 was indefinite in the respects later referred to? Claim 9 called for providing the cylinder *G* "with means for admitting atmospheric air to the communication with the gas-engine cylinder." It did not mention the means of such admission. Under a fairly liberal range of equivalents it would, standing alone, be broad enough, in our opinion, to cover a non-return air-valve anywhere in the communication between the pump-cylinder and the engine-cylinder.

As already said, the claim was rejected on reference to "Swain in view of Michelin" (1907), with reference to certain lines of Michelin's specification. The ground of the reference was not otherwise stated. The rule on which estoppel is based required the examiner to point out the meaning of his objection. Failing to do this, we can only look to the matter referred to to determine the meaning. Vrooman v. Penhollow (C. C. A. 6) 179 Fed. 296, 102 C. C. A. 484. Swain shows airports opening directly into the lower pump-cylinder, but above the piston when at the lowest limit of its travel. No air *valves* of any kind are shown. As we have already said, it seems impossible that air so admitted could, at least in appreciable amount, reach the communication between the engine-cylinder and the pump-cylinder. The lines of Michelin's specification referred to by the examiner related to the two-way cocks in the motor-cylinders, turned so as to cut off the supply of gas and permit the admission of air thereto. Claim 6, before its amendment, called for (as its last two elements) "a passage communicating with the outer air located between the cylinder *G* and the compression apparatus, and a non-return valve opening inward in said passage," and claim 8 for "inlet and outlet passages to said cylinders and a non-return valve opening inward into the communication to the compression means"; and this language was not amended or criticized.

The amendments made to claims 6 and 8 substitute for the second element (viz. "means for placing the" cylinder *G* "in communication with" the compression-cylinder) the words "a passage forming a communication between said cylinder [*G*] and the cylinder [*A*]" in which compression is to take place. It is noticeable that neither of the claims, originally or as amended, in express terms calls for the location of the non-return valve in a "pipe" or "conduit," and the Patent Office never in terms criticized either of the three claims in question for not so limiting the location of the valve. It thus does not, we think, definitely and clearly appear that claim 9 was rejected, and claims 6 and 8 so amended, because of a requirement of the Patent Office that the location of the non-return air-valve be limited to the pipe or conduit. It is, we think, not impossible or even highly improbable that claim 9 was rejected because broad enough to cover the construction disclosed by the Swain and Michelin patents taken together, that is to say, as

disclosing air-ports or cocks generally permitting the introduction of air into the compression cylinder, and that the criticism of claim 6 as "indefinite and confused in phraseology" was intended to be limited by the reason expressed therefor, viz.:

"It is not clear what is covered by 'means for placing said cylinder in communication with a cylinder,' and the cylinder mentioned appears to be identical with the pump-cylinder also enumerated in said claim."

As lending force to such construction, it is to be noted that claim 1, which was included with claim 6 in the criticism stated, had the same second element as claim 6, while it contained no air-valve element whatever; also that, with the exception of the rejected claim 9, none of the claims, presented or allowed, use language broad enough to cover the valve *M*, or the air-ports *N* or *S*—claim 10 (rejected in connection with claim 9) containing the element "apertures through the walls of the pump-cylinder *J* and the cylinder *G*." It is also to be noted that claims 6 and 8 are the only claims calling for non-return air-valves in the communication between the engine-cylinder and the pump-cylinder, or in any other place. It is also, we think, significant that neither claim 6 nor claim 8 were ever canceled or rejected, or claim 8 (now claim 3) even criticized, by the Patent Office. We think also some weight is due the consideration that Fig. 2 was not stricken out, nor the express reference in the specification to that figure and to the location of the valves in the lower wall of the pump-cylinder. True, Fig. 2 directly illustrates the construction last referred to, and we appreciate the force of the consideration that the clause in claim 9 to which we have referred, read literally, is illustrated by Fig. 2, and not by Fig. 1. But giving to claim 3 at least the liberal interpretation which its language allows (in view of the history of the art), and the range of equivalents permitted, claim 3, in the absence of the claimed estoppel, would plainly read upon both Fig. 1 and Fig. 2.

[6] We think the rule that abandonment of an invention is not to be presumed, but must be clearly proven, applies to abandonment based upon proceedings in the Patent Office, such as here relied upon. Sly Mfg. Co. v. Russell (C. C. A. 6) 189 Fed. 61, 110 C. C. A. 625. And in view of the considerations to which we have called attention, and under the applicable rules of law referred to, we are constrained to the opinion that the patentee is not affirmatively shown to be estopped by what occurred in the patent office from construing at least claim 3 as covering the construction shown in Fig. 2 of the patent, and thus the alleged infringing device of defendant. By the "passage communicating with the outer air" of claim 2 into which the non-return valve opens is apparently meant the nozzle *b* of Fig. 1; and, if so, it may be that defendant's structure should not be held to infringe that claim. But as the final result of this appeal is the same, whether or not claim 2 is held infringed, we find it unnecessary to determine that question.

The decree of the District Court is accordingly reversed, with costs, and the record remanded to that court, with directions to enter decree in accordance with this opinion, finding claims 2 and 3 valid, and claim 3 infringed, and for further proceedings not inconsistent with this opinion.

DETROIT IRON & STEEL CO. v. CAREY.

(Circuit Court of Appeals, Sixth Circuit. October 13, 1916.)

No. 2883.

1. PATENTS ⇐78—PERSONS ENTITLED TO PATENTS—PRIOR USE.
Where an applicant for a patent fails to pay the final fee within six months after its allowance, a renewal application made within two years, as permitted by Rev. St. § 4897 (Comp. St. 1913, § 9443), is to be deemed merely a continuance of the first, which under the statute has been held in abeyance, and the two years' prior public use which will defeat the right to the patent is to be reckoned from the date of the original application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 99, 100; Dec. Dig. ⇐78.]

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—CONCRETE DOCK.
The Ferguson patent, No. 1,089,405, for a reinforced concrete dock, was the invention of the patentee, and discloses patentable invention; also *held* infringed.

3. PATENTS ⇐226—SUIT FOR INFRINGEMENT—DELAYED ISSUE OF PATENTS.
Rev. St. § 4897 (Comp. St. 1913, § 9443), provides that an applicant who has failed to pay the final fee after allowance of his patent may file a new application therefor within two years, "but no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent." *Held*, the latter provision only prevents recovery of damages accruing previous to the issue of patent, and not a remedy by injunction and damages if the use is continued subsequent to issue.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⇐226.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by James D. Carey against the Detroit Iron & Steel Company. Decree for complainant, and defendant appeals. Affirmed.

G. B. Marty and C. R. Miller, both of Cleveland, Ohio, for appellant.

A. L. Lawrence, of Cleveland, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of patent No. 1,089,405 to plaintiff, as assignee of Ferguson, for improvements in reinforced concrete docks or piers. Defendant denies the validity of the patent, as well as liability to decree for infringement. The district court held the patent valid and infringed. The appeal is from this decree.

[1] 1. The original application for patent was filed March 5, 1909. It was allowed March 21, 1911. The final fee not being paid within six months, renewal application was filed on November 1, 1912, as permitted by Rev. St. § 4897. The patent issued March 10, 1914. June 15, 1907, public use was begun by the Cleveland Furnace Company of a dock constructed by plaintiff's company according to the invention of the patent, and January 1, 1910, like public use by defendant was begun of a dock also built by plaintiff's company according to the same invention. Each of these uses began more than two years before the renewal application, but neither was begun more than two years before (one being after) the original application.

Defendant contends that such prior public use defeats the patent. The pivotal question upon this branch of the case thus is whether the two years public use is to be reckoned from date of the original application or from that of the renewal application. The answer to this question depends upon whether the first application is regarded in law as "forfeited" or "abandoned" after the lapse of the six months period, and the second application in effect a new application, or whether the original application is merely held in abeyance pending the lapse of the two years, and the second application thus a continuance of the first.

The rule previous to the statute was well settled that, where an application has not been abandoned, subsequent applications and amendments constitute merely a continuance of the original proceeding; and the two years public use or sale which avoids a patent must be reckoned from the time of the first application, and not from the filing of subsequent applications or amendments. Godfrey v. Eames, 1 Wall. 317, 17 L. Ed. 684; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Graham v. McCormick (C. C.) 11 Fed. 859; Henry v. Francestown Co. (C. C.) Fed. Cas. No. 6,382. In Godfrey v. Eames, Smith v. Goodyear Co., and Henry v. Francestown, the original application was in each case rejected by the Patent Office, and a new application filed. In Graham v. McCormick (decided by Judge Drummond) the claims in controversy had been withdrawn from the original application and made the subject of a second application, patents issuing on each application. In each case it was held that the two years prior use must be reckoned from the date of the first application.

True, neither of these cases involved the statute here invoked; in the case of each of them the Patent Office proceedings antedated the statute. But that the aim of the statute was to preserve generally the rights of the inventor as of the time of his original application we think clearly appears from the history of the statute. The act of March 3, 1863 (12 Stat. 796, c. 102) provided that if the final fee were not paid within six months "the patent shall be withheld, and the invention therein described shall become public property, as against the applicant therefor." No period of grace for payment of the fee was provided. To remedy this harshness the act of March 3, 1865 (13 Stat. 533, c. 112), was passed, giving substantially the right con-

ferred by present section 4897 (printed in the margin of this opinion [1]), viz. a right on the part of any person in interest to make a second application within two years after the allowance of the original application. The amendments to the statute of 1863 have taken away the provision making the invention public property on failure to pay the final fee, and upon the filing of the second application the question of abandonment is expressly made one of fact. In the light of this history we must presume that Congress did not intend a rule less favorable to an inventor whose application had been allowed than to one whose application had been rejected, and who thereafter withdrew the same. On the contrary, the purpose of the existing statute was plainly "remedial, and to confer added privileges upon the inventor," as held by Commissioner Moore in Ex parte Lambert, 135 O. G. at p. 1583. By the statute the applicant is entitled as of right to a patent "for the asking at any time within two years" (Cutler v. Leonard, 31 App. D. C. at page 303), subject to the question of abandonment, which is not presumed but must be affirmatively shown (Cutler v. Leonard, supra; Saunders v. Miller, 33 App. D. C. 456, 468).

Our conclusion that the statute has not changed the previously existing rule, that the second application is deemed merely a continuance of the first, and that the two years statute must be reckoned from the date of the first application, is, we think, supported by the decisions both of the Patent Office and of the courts. In Ex parte Livingston, 20 O. G. 1747, 1749, Commissioner Marble seems to have held, in 1881, that a new application filed within two years after the first allowance is to be deemed merely a continuance of the first one, which is neither rejected nor abandoned, but simply held in abeyance. In Thompson v. Waterhouse (an interference proceeding) 30 O. G. 177, the second application was held, by Commissioner Butterworth, to be "in its nature like a motion or petition for the revival of a judgment that has become dormant." In Ex parte Lambert, supra, the application is spoken of as lying "dormant" during the eighteen months following the expiration of the six months provided for payment of fee. Sibbald v. Cassidy, 61 O. G. 1165, 1166, illustrates the liberality with which section 4897 is construed by the Patent Office.

In Ligowski Clay Pigeon Co. v. American Clay Bird Co. (C. C.) 34 Fed. 328 (decided by the late Judge Sage of this circuit), the

[1] "Sec. 4897. Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact."

applicant had failed to pay the final fee within six months, but had filed a new application within two years. It was held that the two years public use and sale must be reckoned from the date of the original application. True, the statute was not referred to, but it is not to be supposed that the learned judge overlooked it. This case is cited with approval in Walker on Patents (4th Ed.) § 147. It has also been cited in more than one decision with apparent approval. It has been frequently held that upon a second application under section 4897 the original application must be considered a reduction to practice, on the ground that the second application is merely a continuance of the first. Cain v. Park, 14 App. D. C. 42 (86 O. G. 797); Duryea v. Rice, 28 App. D. C. 423; Ex parte Luten, Commissioner's Decisions 1913, pp. 165, 168 (192 O. G. 990); Field v. Colman, 40 App. D. C. 598 (193 O. G. 221). And see Cutler v. Leonard, 31 App. D. C. at page 302; Henderson v. Kindervater, 203 O. G. 601. We think the principle upon which these holdings are based applies equally to the specific question we are considering.

In view of these considerations we think it clear that the right given by section 4897 to renewal applications, "the same as in the case of an original application," does not mean that the two years public use is to be reckoned from the renewal date; nor can such be the result of Patent Office rule No. 176, that the second application will not be regarded "for all purposes as a continuation of the original one." The rule itself makes certain limitations; perhaps there are others. We are cited to no persuasive holdings opposed to the conclusion we have reached. Judge Blodgett's somewhat obiter suggestion in Weir v. Morden (C. C.) 21 Fed. 243, 246, that the two years public use should be computed from the renewal application, was disregarded by the Supreme Court (125 U. S. 98, 8 Sup. Ct. 869, 31 L. Ed. 645), where the case was affirmed entirely upon other considerations.

Decisions to the effect that if the application has been abandoned under section 4894 (Comp. St. 1913, § 9438) for failure to prosecute seasonably after rejection, the two years public use is to be reckoned from the new application (Lay v. Indianapolis, etc., Co. [C. C. A. 7] 120 Fed. 831, 57 C. C. A. 313; Hayes-Young Co. v. St. Louis Transit Co. [C. C. A. 8] 137 Fed. 80, 82, 70 C. C. A. 1), have no application to renewal proceedings under section 4897, relating to allowed applications. Indeed, in the Hayes-Young Case it is expressly stated that where there has been no abandonment the two years public use and sale is to be reckoned from the presentation of the first application. In support of this proposition there are cited, among other decisions, Godfrey v. Eames, supra, Smith v. Goodyear Co., supra, Cain v. Park, supra, and Ligowski v. American Clay Bird Co., supra. The Hayes-Young and Lay Cases are in accord with Ex parte Livingston, supra, where it is held that a new application filed after the expiration of the two years (as under section 4894) is to be treated as new, and that the two years prior use runs from its date, although, as we have

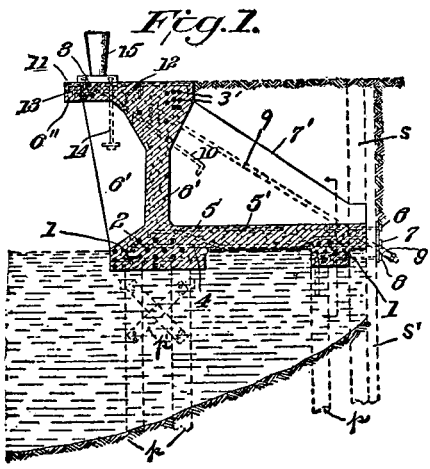
seen, such is not the rule stated in Ex parte Livingston as to applications under section 4897.

The holding of Assistant Attorney General Hall (69 O. G. 639) that failure to pay the fee within six months worked a forfeiture or abandonment of the right to a patent seems to have been withdrawn as erroneous. Ex parte Lambert, supra, at page 1583.

In the instant case the record is barren of evidence tending to show abandonment of the invention of the patent in suit. The patent is, in our opinion, valid as against the defense of prior public use.

[2] 2. The primary purpose of the invention is the construction of an integral reinforced concrete dock, supported primarily by piling driven below the waterline, the reinforcing metallic elements to be so arranged as to sustain the various strains carried by it. A prominent feature is the reinforced concrete subfloor, which forms, with the dock wall, a continuous foundation for the dock, in which foundation the upper ends of the piles are imbedded, so distributing weight or shock over a series of piling. This subfloor is connected to a suitable shore anchorage, and is designed to carry, in whole or in part, the weights incident to the structure and its use, including filling or backing, as well as apparatus, cargoes, etc.; and through this subfloor, below the dock level, are to be transmitted to the shore anchorage, wholly or partially, strains or shocks from the waterside, thereby minimizing "any tendency toward the displacement of the dock." Economy in construction is also an object in view.

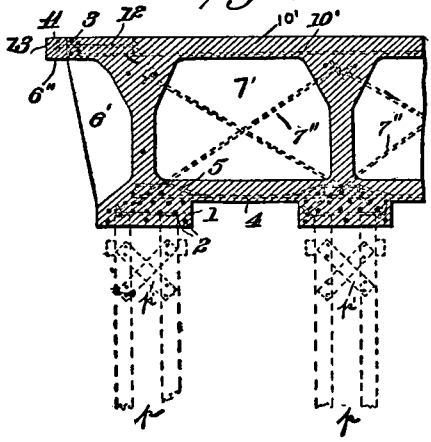
Fig. 1 of the patent drawings (reproduced below) illustrates in cross-section the dock of the patent as adapted to be built "closely adjacent to the shore line." The front wall is seen to be, in cross-section, in the form of a large reinforced concrete I-beam, having an overhanging portion on the water side (carrying a wooden bumper), the base resting upon a double row of piles, above which are laid reinforcing rods *1*, *2*, embedded in the concrete. Integral with the front wall is the reinforced concrete subfloor, also resting upon a double row of piles, and by means of rods *6*, *7* and *8* anchored at the shore end to stay piles *s* and beams *s'*. It has also bracing walls *7'* between the front wall and the subfloor, within which are imbedded metal ties in the form of tension members, extending from the top of the wall to the shore anchorage. The front wall is shown reinforced with rods *3-3* distributed throughout the structure, and the subfloor is reinforced by tension rods *4* and suspension or sheer members *5*, as well as rods *5'* within



the upper portion of the floor and adjacent to the front wall, to meet "negative or binding strain."

Fig. 2 requires no mention. Of Fig. 3 it is enough to say that it illustrates a supporting of the rear portion by anchorage piers instead of stay piling and beams. Fig. 4 (also here reproduced) illustrates in cross-section a portion of a dock similarly constructed, designed for extending "over indefinite areas, and at a distance into the water, or over marshy ground and the like," the shoreward section with which it is intended to be provided not being shown.

Fig. 4.



Defendant contends that Ferguson was not the inventor of the alleged improvement, and that the patent is void because its subject-matter was known to the Cleveland Furnace Company and others before Ferguson's alleged invention. The Osborn Engineering Company represented the Cleveland Furnace Company in the obtaining of plans for the dock built by plaintiff's company, before referred to. We are satisfied that the Carey Company's plan, according to which the dock was built, embraced the invention of the later patent. Before the Carey Company's plan was finally accepted, the Osborn Company had submitted a plan of its own, which defendant urges embodied the alleged invention and antedated Ferguson's conception.

The Osborn plan showed a reinforced concrete structure resting on piles, with concrete embracing their upper ends, an overhanging portion formed on the wall carrying a wooden bumper, together with bracing walls on the shoreward side. It had, however, no concrete subfloor. The floor back of the girder wall was to consist of a wooden beam bolted to the piles at its front end, the rear end being bolted to upright timbers, to which also anchor bolts extended from mooring posts on top of the girder. It is insisted that there was no invention in substituting a reinforced concrete floor for the proposed Osborn wooden floor, or in place of an alleged nonreinforced concrete floor of Hennebique (thought to be disclosed by publication), in view of the lack of novelty in the use of timber piles for supporting concrete construction surrounding their heads, as well as of Mouchel's reinforced concrete dock patent. Of the Hennebique disclosure it is enough to say that it is not a dock, but a reinforced concrete retaining wall with pile foundations, and, so far as disclosed by publication, shows nothing which can properly be likened to the subfloor of the patent in suit. Mouchel's construction embraced piles formed of or encased in reinforced concrete. It does not disclose the invention of

the patent in suit, including the loaded subfloor forming, with the dock wall, a continuous foundation for the dock. Indeed, Mouchel's piling constitutes its only front "wall."

Respecting the Osborn plan: Assuming that there would be no invention in substituting a concrete floor for the timber floor merely as a floor, yet the subfloor of the patent is not merely a floor, but is a part of an integral construction embracing girder and base and concrete bracing walls, strengthened by reinforcing which forms a continuous connection from the front of the girder to the anchorage in the rear, so greatly increasing the strength and stability of the dock. This function the proposed Osborn floor, having in view the method of its construction and attachment to the front portion of the dock, could not as completely perform.

But apart from these considerations, we are satisfied that Ferguson did not get his idea from the Osborn plans. He has carried his invention back prior to July 10, 1906, at which time he submitted his first plan for the Furnace Company's dock, antedating the Osborn plan (Aug. 16, 1906); Ferguson's latest plan (dated Aug. 29, 1906) being the one accepted by the Furnace Company, and approved by the Osborn Company over its own. True, the drawings of Ferguson's earliest plan do not show a subfloor in use for carrying purposes, but the rear end was "to be made to suit conditions at site," and it satisfactorily appears, as we understand the record, that Ferguson's plan was intended from the first to have a subfloor carrying a fill, the shore side to carry a locomotive and train of cars.

We think the defense that Ferguson was not the real inventor is not made out. It seems scarcely necessary to say that the knowledge of the Osborn Company's plan obtained by those to whom it was submitted in connection with the obtaining of plans for the Furnace Company's dock cannot invalidate the patent.

3. The claims in suit are Nos. 4, 6, 10, 11, 12 and 16, which we print in the margin.[2] Defendant contends that these claims, as limited by

[2] "4. A concrete dock comprising a base, a front wall integral with said base, an overhanging portion formed on said wall, spaced webbed portions connecting said overhanging portion with the base, metallic rods passing through said overhanging portion and the webbed portions, metallic rods passing through the front wall and said overhanging portion, and means for anchoring said base and wall to the shore, substantially as set forth."

"6. In a concrete dock, the combination with rows of piles driven substantially to the water level, of metallic reinforcing members, extending across said piles, a concrete wall erected thereon, and embracing said reinforcing members within its base, additional reinforcing members embedded adjacent to the upper front and rear portions thereof in approximately a horizontal plane, whereby two rectangular reinforced beams are produced in effect, and a reinforced concrete floor associated therewith for supporting the backing, cargo and other load, substantially as set forth."

"10. In a dock or pier of the class described, a shore section comprising a loaded subfloor positioned upon a suitable foundation adjacent to the water level, and an integral longitudinal wall and transverse bracing walls all formed of concrete, shear and tension members positioned within the concrete subfloor and bridging the foundation supports, series of reinforcing members coextensive with the longitudinal wall, and positioned within the

the prior art, are not infringed by its structure. The absolute invalidity of the claims is, at most, but faintly asserted. When Ferguson entered the field, reinforced concrete retaining walls were old, as illustrated for example, by the patent considered by us in City of Akron v. Bone, 221 Fed. 944, 137 C. C. A. 514. Manifestly, retaining walls do not furnish complete analogy to dock structures, for their problem is merely the resistance of strain from the shore side tending to overturn the wall or slide it into the water; while in the case of a dock its protection against strains from the waterside, as well as noninterference, so far as possible, with the flow of the stream, are important considerations. Ferguson was not the first to devise a reinforced concrete structure resting upon piles having their heads surrounded by the reinforced concrete, nor to use bracing walls for strengthening the front wall. Reinforced concrete floors, as such, were not new. See Trussed Concrete Steel Co. v. Goldberg (C. C. A. 6) 222 Fed. 506, 138 C. C. A. 106. But neither the prior patents cited nor the prior drawings of or publications concerning dock or other structures disclose devices anticipating the claims in suit; nor do these references, in our judgment, so far suggest the salient and distinguishing features of Ferguson's conception as to deny the presence of invention in these claims. For instance, the Hennebique publication seems to disclose only a retaining wall, without cargo floor or subfloor. The Schiekald "quay wall" publication is not shown to antedate Ferguson's actual invention, and it shows no means for bracing to shore and thus resisting shock from docking boats. The American Steel & Wire Company's docks (built after and not the subject of publication before Ferguson's invention) appear to have been of mass construction and to have wholly

upper and lower portions thereof, a suitable shore anchorage, and means connecting said integral concrete structure thereto, substantially as set forth.

"11. In a concrete pier or dock, the combination with a plurality of series of piling driven substantially to the water level, of an integral concrete structure erected thereon, comprising a subfloor loaded at its shoreward edge, reinforced foundations and longitudinal walls respectively erected above each series of piling, bracing walls positioned at intervals there between, tension and shear members within the subfloor, diagonal tension members within the bracing walls, tension members positioned adjacent to the outer edge of said dock, shore connections, and means for tying the shoreward section of the dock thereto, substantially as set forth.

"12. In a reinforced concrete dock, the combination with suitable subsurface supporting means, of a load-supporting concrete floor with tension and shear members therein bridging the supporting means, a longitudinal concrete wall integral with said floor, and reinforcing members within the upper and lower portions thereof, concrete bracing walls disposed at intervals between said wall and floor and integral with the structure thereof, whereby the concrete is availed of for compression strains, suitable shore anchorage, and connecting means uniting said dock therewith, substantially as set forth."

"16. In a reinforced concrete box, the combination with a series of piles positioned beneath the front of the dock, of a concrete wall erected thereon, reinforcing members imbedded therein and adapted to distribute the superimposed load, shoreward supporting means, a horizontal concrete floor integral with said wall and extending to said supporting means, reinforcing members imbedded within said floor adapted to distribute the load or impact, and means securing the structure to the shore, substantially as set forth."

lacked the subfloor of Ferguson. The Cedar Creek (Almirante) wharf also postdates Ferguson's actual invention and lacks the distinctive subfloor features. But even if every element in plaintiff's device were old, invention would still exist if by the combination of those old elements there is produced a new and useful result, or if the old result is affected in a new and materially better way—as in the case here.[3] As said by the District Judge, Ferguson, so far as appears from the record, was the first in this country to construct or design a wholly integral reinforced concrete dock not of mass construction. The history of the construction of the Cleveland Furnace Company's dock shows that more than 50 per cent. in cost was saved by the more open construction involved in the device of the patent. The weighted floor below dock level, integral with the entire dock structure in front of it, is one of its distinguishing and valuable features. The utility of the dock is clearly shown by the acceptance of the plans therefor by the Cleveland Furnace Company in 1906 over all competitors; by several months testing of a section built prior to the building of the complete dock; by defendant's selection of the dock prior to January 1, 1910; by its use thenceforward, and yet again by defendant's extension of the dock in 1913—the alleged infringement (after at least three years use of the original section)—by adding another section exactly like the one constructed by plaintiff's company.

Defendant's structure differs from that shown by Fig. 1 of the patent drawings in these respects only: Instead of having one wall (I-beam in cross-section) it has two walls, connected by bracing of reinforced concrete therebetween; it has a subfloor in the rear of the front section on a level about midway vertically of the rear main wall and integral with that wall, and likewise carried upon piles. A portion of this subfloor contains a filling or backing over which a locomotive and cars run, another portion being used for the storage of cargo; the subfloor terminates at its rear in a concrete beam (similar to the two beams of the main dock) likewise resting upon piles. It is urged that this dock lacks the subfloor of the patent called for in all the claims in suit except claim 4.[4]

We see no merit in the proposition that this structure lacks the subfloor of the patent. True, it is not directly connected with the wall at the extreme front; but the patent clearly contemplated that there might be more than one wall of that construction in front of the subfloor. The

[3] Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Ferro Concrete Constr. Co. v. Concrete Steel Co. (C. C. A. 6) 206 Fed. 666, 669, 124 C. C. A. 466; Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 121, 127, 144 C. C. A. 418; Frey v. Marvel Co., 236 Fed. 916, —— C. C. A. ——, decided by this court October 3, 1916.

[4] The references in the various claims to the subfloor are these: In claim 6, "a reinforced concrete floor associated therewith for supporting the backing, cargo and other load, substantially as set forth;" in claim 10, "a shore section comprising a loaded subfloor positioned upon a suitable foundation adjacent to the water level;" in claim 11, "a subfloor loaded at its shoreward edge;" in claim 12, "a load-supporting concrete floor;" in claim 16, "a horizontal concrete floor integral with said wall."

patent expressly declares that the structure of Fig. 4 may be "employed for extending the same over indefinite areas, and at a distance into the water, or over marshy ground and the like"; also that "it may be extended indefinitely to afford a pier or dock of the desired area, carried upon a series of piling and superposed reinforced concrete foundation"; also that the structure of that figure is preferably provided with a rear or shoreward section such as shown in Fig. 1, "which affords the weighted subfloor and suitable anchorage." Defendant's structure performs the functions of the subfloor of the patent as declared therein, including the carrying thereon of "filling or backing which may be placed rearwardly of the front wall, and also the weight of apparatus, cargoes, etc., which is supported upon the subfloor." The patent expressly declares that the forms illustrated by the figures are merely preferred forms.

Nor are we impressed by the objection that defendant's structure lacks the transverse bracing walls called for by claims 10, 11 and 12.[5] While there is no substantial bracing wall directly connecting the rear longitudinal wall and the subfloor (a slight bracing being shown), we think the reinforced concrete braces between the two longitudinal walls, in connection with the subfloor integrally connected with the rear longitudinal wall, and thereby with the front wall and its superstructure, is the equivalent of the bracing walls called for by the claims referred to. The bracing between the two longitudinal walls completely performs the function of the bracing called for by the patent.

It is also urged that defendant's dock lacks the means securing the structure to the shore, called for by claims 4, 10, 11, 12, and 16.[6] The shoreward section of defendant's dock, instead of being anchored to stay piles and beams fastened to the rear of the shoreward section, and thus indirectly to the piling on which the structure rests, is anchored only through the medium of a rear longitudinal wall carried by the piles sustaining the shoreward end of the dock; there is thus no independent structure for anchorage only. The contention is that the patent office history of the application limits the method of anchorage to that shown in either Fig. 1 or Fig. 3. That history is this: The amended specification stated that within the "walls *7'* [the bracing walls] there are imbedded land ties in the form of tension members *9* which extend from the top of the wall *8'* [the front longitudinal wall] to any suita-

[5] The language of claim 10 in this regard is: "And an integral longitudinal wall and transverse bracing walls [between the longitudinal wall and the subfloor] all formed of concrete." Claim 11: "Bracing walls positioned at intervals therebetween" (that is, between the longitudinal walls—thus recognizing more than one longitudinal wall). Claim 12: "Concrete bracing walls disposed at intervals between said wall [the longitudinal wall] and floor [the subfloor] whereby," etc.

[6] These means are thus called for by the various claims: Claim 4, "means for anchoring said base and wall to the shore, substantially as set forth;" claim 10, "means connecting said integral concrete structure thereto [to the shore anchorage] substantially," etc.; claim 11, "means for tying the shoreward section of the dock thereto, substantially," etc.; claim 12, "connecting means uniting said dock therewith [with suitable shore anchorage] substantially," etc.; claim 16, "means securing the structure to the shore, substantially," etc.

ble shore anchorage." The examiner stated that the matter just referred to is new "so far as any tension members 'which extend from the top of the wall 8 to any suitable *shore anchorage*' is concerned," and that "if these claims which include 'a shore anchorage' are to stand, then the description must be made to unmistakably define just what is meant thereby." The applicant thereupon struck out from the specification the words "any suitable," and substituted "the," and his attorney, in accompanying letter to the department, said:

"Two forms of 'shore anchorage' well known in the art are respectively illustrated in Figs. 1 and 3, and this term has seemed preferable to the former 'connected with the shore,' which previously was found acceptable. Inasmuch as various forms of shore anchorage are well known in the art, it is believed that the objection will be withdrawn and the claims passed to issue."

The claims thereupon passed to issue without amendment. It is not suggested that the anchorage of defendant's dock is not one of the forms of shore anchorage well known in the art. We are unable to see anything in the history of the Patent Office application which estops the patentee from construing the claims in suit according to their natural and obvious meaning.

It is urged that defendant's dock has not the "shear and tension members" called for by claims 10, 11 and 12.[7] Figs. 1 and 4 of the patent drawings show horizontal tension members in the subfloor, also members "*5*" designated as "suspension or shear members," "contacting or coinciding with the [tension rods] throughout the central lower portion of the floor, but angularly bent to lie in a plane, adjacent to the upper portion of the floor, in positions above the supporting piling." The subfloor of defendant's dock is above the base of the rear main wall. It has no reinforcing members of angular shape, but has three courses of metal bars (not contacting with each other) extending longitudinally through the subfloor, in vertically parallel planes, and connecting with the rear walls of the shore section and front section respectively, both of which walls have vertical reinforcements. The patent declares that many of the reinforcing members specifically mentioned "may be dispensed with, or modified to meet varying conditions of service." The claims in suit do not call for tension members as distinct from shear members, nor for any particular method of reinforcement for resisting tension and shear strains; the requirement is only that the reinforcement have such function; the form of such reinforcement is not a distinctive feature of the patent. We are disposed to think that defendant's reinforcing members do furnish substantial resistance to shearing strains, and so should be considered as responding to the call for "shear and tension members" within the subfloor, especially in view of the testimony as to the then state of the art.

These considerations lead us to the conclusion that the defendant's structure infringes each of the six claims in issue.

[7] The language of the claims in this regard is this: Claim 10, "shear and tension members positioned within the concrete subfloor," etc.; claim 11, "tension and shear members within the subfloor;" claim 12, "a load-supporting concrete floor with tension and shear members therein bridging the supporting means."

[3] 4. As already said, defendant's original dock was built by plaintiff's company in 1910, after the filing of original application for patent, but before allowance. The dock was plainly marked to show that patent had been applied for. The infringing section of dock was built after the renewal application, but before patent issued. Section 4897, already quoted, provides that:

"No person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent."

Defendant construes this to mean that one who begins the use of the subject of the patent prior to its issue is forever relieved of all liability therefor or interference therewith, notwithstanding its use subsequent to the patent. Having in mind the intent of the statute to favor rather than to prejudice the applicant, we cannot agree with this construction. We think the language should be strictly construed, and not extended beyond its necessary meaning, which we think forbids recovery for damages accruing previous to the issue of patent, but does not forbid remedy by injunction and damages if use is continued subsequent to issue. It seems reasonable that the clause was inserted to repel a construction, perhaps otherwise possible, that liability should date from the time the patent was first allowed. It is noticeable that the statute does not relieve from liability to injunction (which, of course, could not issue until after patent issues). The decree of the District Court expressly found infringement "since the grant of said letters patent," and decreed injunction and accounting, which, it is assumed, was intended to relate to such damages only.

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

MOON-HOPKINS BILLING MACH. CO. et al. v. DALTON ADDING MACH. CO. et al.*

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

No. 4560.

1. PATENTS ⊜202(2)—SUIT FOR INFRINGEMENT—ESTOPPEL OF ASSIGNOR.
While the assignor of a patent is estopped to deny that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, the estoppel goes no further, and does not preclude the defense of noninfringement, nor as a necessary corollary does it prevent him from insisting that the patent be put in its proper position in the art, and its meaning and scope determined accordingly.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 289; Dec. Dig. ⊜202(2).]

2. PATENTS ⊜178—RIGHT TO EQUIVALENTS—STATUS OF PATENT IN THE ART.
The right of patentee to the mechanical equivalents of his structure or device is proportional to the position of his invention in the art to which it relates. If the invention is a pioneer or primary one, his right is broad and comprehensive; if but for a slight improvement, it is correspondingly narrow; and between the two extremes the measure of equivalents varies accordingly.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. ⊜178.]

3. PATENTS ⊜168(1)—CONSTRUCTION—LIMITATIONS BY PROCEEDINGS IN PATENT OFFICE.
When an applicant for a patent inserts limitations and restrictions to comply with rulings of the Patent Office, he cannot afterward have a construction of his patent as though the limitations and restrictions were not contained in it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243½; Dec. Dig. ⊜168(1).]

4. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—ADDING MACHINE.
The Hopkins patent, No. 1,039,130, for an adding and writing machine, as limited by the proceedings in the Patent Office, is of very narrow scope. As so construed, *held* not infringed.

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

Suit in equity by the Dalton Adding Machine Company and another against the Moon-Hopkins Billing Machine Company and others. Decree for complainants, and defendants appeal. Reversed.

For opinion below, see 223 Fed. 51.

Frederick R. Cornwall, of St. Louis, Mo., for appellants.

Thomas A. Banning, of Chicago, Ill. (Rippey & Kingsland, of St. Louis, Mo., and Samuel W. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., on the brief), for appellees.

Before HOOK, Circuit Judge, and REED and BOOTH, District Judges.

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

*Rehearing denied January 19, 1917.

HOOK, Circuit Judge. This is a suit by the Dalton Adding Machine Company and the Addograph Manufacturing Company against the Moon-Hopkins Billing Machine Company and John C. Moon and Hubert Hopkins, its president and vice president, for infringement of patent No. 1,039,130, dated September 24, 1912, for a new and useful improvement in adding and writing machines. The plaintiffs were awarded a decree of injunction upon final hearing ([D. C.] 223 Fed. 51), and the defendants appealed. There are two questions in the case: (1) Whether defendants are estopped from questioning the patent in suit and if so the extent of the estoppel; (2) whether defendants infringe.

The question of estoppel arises in this way: Hubert Hopkins, one of the defendants, assigned his application upon which the patent in suit was issued to the plaintiff Addograph Company, in which he was interested. Soon afterwards he severed his connection with that company and participated in the organization of defendant the Moon-Hopkins Company. The latter commenced the manufacture of the machine held to infringe. Hopkins' application for the benefit of the Addograph Company, his assignee, was filed January 24, 1903. The patent was not granted until September 12, 1912. The efforts to secure the patent during the nine years intervening were conducted by counsel for the Addograph Company. Hopkins' application as first filed contained 62 claims; the patent finally granted contained 284. As against the assertion of estoppel defendants say the claims in Hopkins' original application are not the claims of the patent issued, and that the latter are not justified by the disclosures of the former. We shall not go into this, but shall assume that the defendants, corporate and individual, are estopped from contesting the validity of the patent in suit.

[1] The estoppel, however, does not preclude the defense of noninfringement, nor as a necessary corollary does it prevent defendants from insisting that the patent be put in its proper category, and its meaning and scope scrutinized accordingly. As was said by the Circuit Court of Appeals of the Sixth Circuit in Noonan v. Chester Park, etc., 39 C. C. A. 426, 99 Fed. 90:

"But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor, and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger."

In Johnson Furnace, etc., Co. v. Western Furnace Co., 102 C. C. A. 267, 178 Fed. 819, we applied the rule of estoppel to a person who was not an assignor, but had negotiated the assignment and participated in the consideration. Upon examination of the file wrapper and con-

tents in the Patent Office, we found that the applicant had modified his claim to get it by, and held the plaintiffs were limited to the precise structure described, and were not entitled to a broad interpretation to cover structures made according to the claims rejected.

[2, 3] The right of a patentee to the mechanical equivalents of his structure or device is proportioned to the position of his invention in the art to which it relates. If the invention is a pioneer or primary one, his right is broad and comprehensive; if but for a slight improvement, it is correspondingly narrow. Between the two extremes the measure of equivalents varies accordingly. This rule is fundamental in the patent law. The plaintiffs' patented combination is far from being a pioneer. The field was largely occupied by Burroughs, Sandherr, Chamberlain, Helmick, and others; and the protracted, difficult effort to secure a patent on the Hopkins application, and the many changes made to conform to adverse rulings of the Patent Office, disclosed in the 400 pages of file wrapper and contents, show the very narrow character of the patent finally issued. That it is entitled to any substantial range of mechanical equivalents is quite inadmissible. It is settled that, when an applicant for a patent inserts limitations and restrictions to comply with rulings of the Patent Office, he cannot afterwards have a construction of his patent as though the limitations and restrictions were not contained in it. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; Royer v. Coupe, 146 U. S. 524, 13 Sup. Ct. 166, 36 L. Ed. 1073; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 10 Sup. Ct. 409, 33 L. Ed. 663; Cotto-Waxo Chemical Co. v. Perolin Co., 107 C. C. A. 373, 185 Fed. 267.

[4] In the light of the above principles and conditions we turn to the patent in suit. Claims numbered 240, 241, 250, 65, 153, and 200 are stipulated as representative of all involved. In examining the prior art, to determine the scope of these claims, we have not found it necessary to go outside the history of the application in the Patent Office. Claim 240 is as follows:

"In an adding and writing machine, word printing mechanism having a platen, type carriers separate from the word printing mechanism, type on said carriers, hammers for driving the type against the platen aforesaid, a single ribbon serving said word printing mechanism and said type carriers, devices for drawing the hammers away from the type after operation, and tabulating mechanism for moving the platen to receive records in different vertical columns.

The specifications of the patent show the "devices for drawing the hammers away from the type after operation." The hammers are actuated by springs connecting them to the frames. "After each operation the hammers are restored to the position by a rod *91* which is carried by two arms *92* rigid with the shaft *85*, and rests under the rear ends of said hammers." The operation of the rod is then described. In defendants' machine there are no springs directly connected with the hammers. The actuating mechanism does not follow the

hammers through their entire movement, but after the blow is made the hammers have a slight rebound, and, by being weighted, gravity completes their restoration to place. The difference is substantial, both in mechanical construction and operation.

In claim 241 the second and third elements are:

"Trains of typewriting mechanism operable to print any desired words on said paper," and "means for causing each of said trains to print in upper and lower case type as desired."

It is sufficient to say that defendants' machine has no lower case type, and therefore no means of operating such type.

In claim 250 the fourth, fifth, and sixth elements are:

"Keys arranged in a keyboard," "a carriage controlled by said keys," and "mechanism controlled by said carriage to control the operation of the recording mechanism."

In defendants' structure the stops are set by a power-driven mechanism, and not directly by finger keys, as in plaintiffs'.

Claim 65 is as follows:

"In an adding machine, a carriage, movable parts in said carriage, means for adjusting said parts to represent numbers, a member mounted above said carriage, and means for moving said carriage in said member so that the movable parts in the carriage which had been adjusted to represent numbers will contact with and be restored to idle position by said member, substantially as specified."

The member referred to in the fourth and fifth elements of this claim is mounted above the carriage, and the restoration of the raised parts of the carriage to an idle position is done by passing the carriage under the superposed member. Other adding machines prior to the patent in suit had various devices to accomplish this result, and there was difficulty in having this claim, as well as others in question, allowed. In the defendants' machine the restoration of the movable parts is not accomplished in that way at all. Defendants' pins or movable parts are held in position by being latched over the upper portion of the frame, and the unlatching and restoration to idle position is done by cams, which disengage the projections of the latches from the pin frame. Complainants' device could not be used on defendants'. Of course, in a broad primary sense it might be said that every method of restoring to an idle position parts which had been raised in operation would be mechanically equivalent to complainants' device; but complainant was not given such a broad claim. The Patent Office, in view of the prior art, limited the patentee to the very narrow arrangement specified.

Again, the carriage which is the first element in claim 65 does not find a mechanical counterpart or equivalent in the pin frame of defendants' machine. They are mechanically different, and though in respect of the matter in question they accomplish the same result, still they do not do it in the same way. The first element of claim 153 is the carriage of claim 65, and what has been said regarding the difference applies also here. The seventh element of claim 200 is the carriage mentioned in 65 and 153.

There are other differences between the elements in the six claims above mentioned and the related parts of defendants' machine. Most of them are slight, it is true; but it is very clear that, if the same measure of equivalence which plaintiffs now invoke had been applied to Hopkins' application, in view of the prior art, the patent in suit could not have been granted.

The decree is reversed, and the cause is remanded, with direction to dismiss the bill.

OUTLOOK ENVELOPE CO. et al. v. WHITING-PATTERSON CO. et al.

(District Court, E. D. Pennsylvania. October 31, 1916.)

No. 1565.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—ENVELOPE-MAKING MACHINE.
The Slater patent, No. 893,105, for an envelope-making machine for making outlook or window envelopes, *held* valid and infringed on motion for preliminary injunction.

In Equity. Suit by the Outlook Envelope Company and others against the Whiting-Patterson Company and others. On motion for preliminary injunction. Injunction granted.

J. Bonsall Taylor and E. H. Fairbanks, both of Philadelphia, Pa., and George H. Kennedy, Jr., of Worcester, Mass., for plaintiffs.
Fenton & Blount, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This bill voices the complaint of a trespass upon the proprietary rights of the plaintiff and its appeal for protection. The right is the one conferred by letters patent No. 893,-105, known as the Slater patent.

The claims in issue are 5, 14, and 15. A prima facie case is made out through the grant of the letters, general acquiescence in the recognition of the right thus conferred, the adjudication of the validity of the patent, and proofs of the infringing acts. The answer is a negation of this validity, an avoidance of the legal effect of the adjudication, and a denial of infringement. The adjudications are of value to us, not merely because of the formal necessity of such adjudication, or its equivalent in general acquiescence, but also because such adjudication (at least for the purposes of the present motion) settles the question of exclusive right to the subject-matter of the patent and reduces the issue to one of infringement. The patent relates to envelopes so designed as not to require addressing. This is accomplished by having a part of the envelope made transparent, so that the name of the addressee on the paper inclosed shows through this transparent part and answers all the purposes of the address. The envelope practically addresses itself. The invention claimed is that of a machine for mak-

ing such envelopes, and the claim is made "for a new and useful improvement in envelope-making machines." The envelopes made on such machines are known as outlook or window envelopes.

The application was filed July 6, 1903, and the letters issued July 14, 1908. Some time later complaint was duly made that the Samuel Cupples Envelope Company had infringed this patent. The bill of complaint was dismissed by the District Court for the Southern District of New York by decree entered December 3, 1913, which decree was in turn reversed by the Circuit Court of Appeals, Second Circuit, 223 Fed. 327, 138 C. C. A. 589. This latter decree adjudged the patent to be valid and infringed. This settles for us, upon this motion, all questions thus decided. A finding was there made of utility, although this is not in dispute, and the usefulness of the machine is perhaps disclosed by the fact now adverted to. It is a not incurious fact that the advantages of the window envelope itself were not at first recognized. A patent for them was taken out as early as 1862. The advantages of their use were clearly comprehended and fully described by the inventor, but the envelope did not commend itself and did not come into general use. The efforts subsequently made to extend its use were hampered by the fact that there were machines for making the ordinary envelope, but there was none to make this. In consequence the increased cost was prohibitive of extended use. The value of the Slater machine lies in the fact that he found a means of adapting the ordinary envelope machine to the accomplishment of the work of adding the window feature to the ordinary envelope. The further finding, therefore, was that he was a pioneer and had created a new industry, and because of this his patent should have a liberal construction. The invention was of the primary class.

It sufficeth for present purposes to know that the court sustained claims 5 and 15, and they were held to be infringed by the Kniester machine, which had itself been patented. This ruling was followed in another case, and all the claims now in issue were upheld and found infringed. These rulings, with the proofs of a like infringement submitted, require us to turn to the defendant to have supplied some reason for the rulings thus made not being now followed.

The first observation made of the aged character of the elements of construction in this machine is true only in a sense. In the sense in which it is true, it is so, necessarily, because the task which Slater set himself was to take an old machine with all its parts and transform it into something wholly and entirely new. The machine he constructed was in no sense old, but absolutely new in purpose and accomplishment. We say it was "wholly and entirely new," because as a whole and in its entirety it was new; not that every part of it, and every element of it, or every function of it, was new. This right to what he invented does not depend upon the indefensible claim of exclusive right to a result, however accomplished; but the right is to his means and equivalent means of accomplishing that result. In view of this, the point now made that the patent is invalid, because the claims are for an

aggregation, as distinguished from a combination, and that this defense was not before presented, rests upon distinctions too fine to be given recognition on this motion.

The same thing, although with less force, may be said of the defense of noninfringement. Indeed, the defense now presented was urged in the second case cited. If not a defense on final hearing, a fortiori it is not an answer to the present motion. All that need now be ruled is that on this motion plaintiff is entitled to the remedy invoked, and this we say mindful of the point made that defendant has the benefit of a responsive answer.

As the case must be tried upon its facts, we deem it proper to follow the rule of refraining from their discussion at this time. The point made that the injunction should not include the individual defendants is well taken, and the writ is refused as to them, with leave to plaintiff to renew its motion, should justification for it arise.

Let the injunction issue against the Whiting-Patterson Company upon the filing of the usual injunction bond in the sum of $5,000.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DE FOREST RADIO TELEPHONE & TELEGRAPH CO. et al.

(District Court, S. D. New York. September 20, 1916.)

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPHY—DETECTOR.

   The Fleming patent, No. 803,684, for an instrument for converting electric currents into continuous currents, specifically as limited by disclaimer for an incandescent lamp detector for use in the receiving station in a system of wireless telegraphy, discloses invention, and is entitled to a liberal construction. Claims 1 and 37 also *held* infringed.

2. PATENTS ⊂=328—INFRINGEMENT—WIRELESS TELEGRAPHY—DETECTOR.

   The De Forest patents Nos. 979,275, 867,876, 867,877, 867,878, 824,637, 836,070, and 841,386, all relating to detectors for use in the radio art, construed, and *held* not infringed.

3. PATENTS ⊂=157(1)—CONSTRUCTION—MEANING OF WORDS USED.

   When the language of a patent is to be interpreted, the documents must be construed as a whole, and words cannot be isolated from their context, to give them a more comprehensive meaning than was originally intended.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⊂=157(1).]

4. WORDS AND PHRASES—"CHARACTERISTIC CURVE."

   The term "characteristic curve," as used in describing an instrument for converting alternating electric currents into continuous currents, is a curve plotted between voltage applied to the detector and the current through the detector, resulting from the application of this voltage. It is obtained by connecting a circuit containing a battery and a galvanometer or ammeter and a resistance, whereby the potential of the battery may be varied to the hot and cold elements of the detector.

In Equity. Suit by the Marconi Wireless Telegraph Company of America against the De Forest Radio Telephone & Telegraph Company and Lee De Forest. On final hearing. Decree for complainant against corporation defendant. Dismissed as to individual defendant.

See, also (D. C.) 225 Fed. 65.

Suit for infringement of claims 1 and 37 of United States letters patent No. 803,684, for "instrument for converting electric currents into continuous currents," filed April 19, 1905, and issued November 7, 1905, to plaintiff as assignee of John Ambrose Fleming of London, England. Counterclaim by defendants on various claims of ten patents of Lee De Forest. At the opening of the trial plaintiff confessed judgment as to claims 4 and 6 of United States letters patent No. 841,387, and defendants withdrew from issue claim 5 of the same patent. Plaintiff also confessed judgment as to the claims in issue of United States letters patent No. 879,532, and defendants withdrew United States letters patent No. 837,901. Of the counterclaim there remain in issue certain claims of seven patents as follows:

Number.	Claims.		Filed.	Issued.
979,275—	8, 16, 20, 29 & 35		Feb. 2, 1905	Dec. 20, 1910
867,876—	3, 4, 5, 6, 7, 14, 18	Orig.	Feb. 2, 1905	Oct. 8, 1907
		Div.	April 4, 1906	
867,877—	4	Orig.	Feb. 2, 1905	Oct. 8, 1907
		Div.	June 12, 1907	
867,878—	2	Orig.	Feb. 2, 1905	Oct. 8, 1907
		Div.	June 12, 1907	
824,637—	8		Jan. 18, 1906	June 26, 1906
836,070—	5, 6, 7, 8	Orig.	Jan. 18, 1906	Nov. 13, 1906
		Div.	May 19, 1906	
841,386—	1, 2, 3, 13, 15, 20, 21		Aug. 27, 1906	Jan. 15, 1907

Sheffield & Betts, of New York City (J. Edgar Bull, Ramsay Hoguet, and L. F. H. Betts, all of New York City, of counsel), for plaintiff.

Philip Farnsworth, George F. Scull, and Samuel E. Darby, all of New York City, for defendants.

MAYER, District Judge. Whatever differences may exist between men of science in respect of the theories by which they account for the movement and action of the unseen forces about which so much has been testified and argued in this case, the solution of the points of the controversy, with a single exception, is not difficult. This, because courts, in an art of this kind, place their decisions upon things demonstrable, and cannot speculate as to theories in regard to which there is not a common agreement among recognized authorities.

In endeavoring to resist plaintiff's attack, defendants have proceeded on the theory that, beginning with his parent patent, No. 979,275, antedating Fleming, De Forest gradually developed his first conception until finally it found practical exemplification in the two so-called three-electrode "Audion" devices as to which plaintiff has confessed judgment. In line with this plan of defense, defendants have elaborately built up an unsteady theoretical structure, and upon this have superimposed an observatory from which they can see in the mind's eye only that which they call "Audion" action. Therefore, in

these circumstances, it is desirable, in order to avoid confusion, to consider first the patents in issue, and then the question of infringement; for, when their true value is assigned to the patents, the controversy as to infringement will be better understood. The patents deal with those instrumentalities which, in the art, are aptly named detectors.

"The purpose of the detector," as explained in simple language by Waterman, plaintiff's expert, "is to enable some indicating instrument to respond to and thus reveal the presence of the high-frequency oscillatory currents which are the result in the receiving system of the transmission of the wireless waves. These wireless waves are of the same nature as light, but are of greater wave length. We have sense organs for perceiving ether waves of the length known as light, also sense organs for perceiving that range of wave lengths known as radiant heat; but we have no means of detecting ether waves of those lengths which are employed in wireless telegraphy, and it is therefore necessary that their presence should be detected and indicated to us through some means that we can perceive. A wireless telegraph transmitter is thus a sort of lighthouse, which emits light of an invisible nature, and the receiver must furnish the eye to detect the waves which are emitted. * * * If we go back for the moment to the figure of the lighthouse, we see that, if we think of light sent out from it, then the receiving antenna casts a shadow. The energy which it receives corresponds to that shadow, just as, when a material object casts a shadow of light, it absorbs the energy of the light which it intercepts, so that receiving antenna absorbs the minute amount of energy which it intercepts in the moving wave. On account of their excessive frequency and minute energy, the oscillatory charges which are set up in the receiving antenna are not, generally speaking, able to affect directly any known measuring or indicating apparatus. They therefore must make their presence felt indirectly, by producing some local effect which will permit of a signaling or indicating apparatus to be operated in accordance with a sufficiently definite code so that intelligible signals may be sent. Hence a detector, as the term is used in wireless telegraphy, is a means of causing the oscillations to produce or vary a local current, in accordance with variations of the waves produced at the sending station, and of such a character that an indicating instrument can respond to them."

See, also, Pierce's Principles of Wireless Telegraphy (1910) page 142.

As the practical radio art developed, there was a constant effort to improve the detector in three directions: First, and most important, in sensitiveness to received signals; secondly, in reliability; and, thirdly, in ease of manipulation by the receiving operator. There were many types of detectors prior to Fleming, the most useful of which were known as the coherer, the microphone, the magnetic, the electrolytic, and the crystal. Some detectors, such as that of Hertz and the hot wire barretter of Fessenden, were never of any commercial utility, and may be disregarded.

The coherer was in standard use for a fairly long period. It consisted of a glass tube with metal filings, and its operation was caused by the cohering of the filings, due to high-frequency oscillations, thus transforming a practically nonconducting device into a conductor and permitting a local battery current. The coherer lacked sensitiveness to feeble waves, and required to be shaken or otherwise moved to restore the contact to its sensitive condition after the receipt of a signal. See Pierce, supra, p. 143 et seq.

The microphone consisted of a loose contact of two terminals, preferably dissimilar in character, such as carbon and steel, and operated by reason of a change of contact resistance effected by the incoming oscillations. This device was used both with and without a local battery. Its failure to attain any large commercial use was due to the delicacy and difficulty of adjustment.

Of the magnetic detectors, that of Marconi was widely used and displaced the coherer. This magnetic detector consists, in substance, of a moving band of soft iron passing in front of two magnets, which magnetize the iron. A coil is so connected to the antenna that the oscillations demagnetize the iron band and are thus detected. Although still useful, because of simplicity of operation and indifference to static discharges, this type lacked the keen sensitiveness which has become so important to the increasing usefulness of the art.

The electrolytic consisted of a cell containing an electrolyte (usually 20 per cent. nitric acid, but, in any event, any electrolytically conductive liquid, such as common salt solution, dilute sulphuric acid, or caustic soda) and having two immersed electrodes. One form was the Shoemaker cell, where the two elements were dissimilar, and another was where the elements were of the same material, such as fine platinum wire. In the first form a local battery was not used, while in the second it generally was. Though this detector was highly sensitive, it was extremely difficult of adjustment, especially on shipboard, and the fine wire was liable to be burned out by strong signals or static discharges.

The crystal detector, invented by Bose, opened up a new line of experiment and investigation, to which, among others, Gen. Dunwoody, of the United States Army (retired), defendants' expert Pickard, and Pierce, of Harvard, later (and after the Fleming date) made valuable contributions. Detectors of this class consist of a self-restoring high resistance between solid bodies, one of which is usually crystalline in character, such as carborundum and molybdenite. The operation depends upon the phenomenon that, when a contact is made with certain crystals, current will flow more easily in one direction than another.

The crystal detector, particularly because of ruggedness of material, is still in extensive use; but, as is generally accepted and was fully demonstrated in the courtroom, it is somewhat unsatisfactory by the reason of the necessity of taking time to feel around, as it were, sometimes for a sensitive point, and sometimes for the best point on the crystal, and the liability that such a point may be destroyed, or its sensitiveness impaired, by a strong incoming signal, by static, or by the local sending station.

These criticisms or defects of one kind or another in the detectors prior to Fleming—or since, for that matter—will be fully appreciated when it is realized that efficiency in this art consists in attaining accuracy and quickness in reception of signals, as well as distance, whether the radio message is across the ocean, from one merchant

to another, from a vessel in distress, calling for help from land or sea, or from a naval officer to the ships under his command.

[1] With the state of the art as briefly outlined, supra, John Ambrose Fleming disclosed the incandescent lamp detector. While the United States patent application was filed April 19, 1905, the effective date is that of the British specification, filed November 16, 1904. Fleming is a British scientist of the highest standing, and, as appears from his patent and his papers read before learned societies, is and long has been recognized as a man or major accomplishments, with the ability to make clear what he intends to convey.

Stripped of technical phraseology, what Fleming did was to take the well-known Edison hot and cold electrode incandescent electric lamp and use it for a detector of radio signals. No one had disclosed, nor even intimated, the possibility of this use of a device then long known in another art. Cohering filings, magnets, electrolytes, and sensitive crystals, *at that time,* failed to give any hint of the utility in this art of the Edison lamp. What led Fleming to his result was his adherence to the theory of the "rectified" alternating currents. In his patent specification he put his proposition thus:

"This invention relates to certain new and useful devices for converting alternating electric currents, and especially high-frequency alternating electric currents or electric oscillations, into continuous electric currents for the purpose of making them detectable by and measurable with ordinary direct-current instruments, such as 'mirror galvanometer' of the usual type or any ordinary direct-current ammeter. Such instruments as the latter are not affected by alternating electric currents, either of high or low frequency, which can only be measured and detected by instruments called 'alternating current' instruments of special design. It is, however, of great practical importance to be able to detect feeble electric oscillations, such as are employed in Hertzian wave telegraphy by an ordinary movable coil or movable needle mirror galvanometer. This can be done if the alternating current can be 'rectified'; that is, either suppressing all the constituent electric currents in one direction and preserving the others, or else by changing the direction of one of the sets of currents which compose the alternating current, so that the whole movement of electricity is in one direction. * * * I have discovered that, if two conductors are inclosed in a vessel in which a good vacuum is made, one being heated to a high temperature, the space between the hot and cold conductors possesses a unilateral electric conductivity, and negative electricity can pass from the hot conductor to the cold conductor, but not in the reverse direction. As the hot conductor should be heated to a very high temperature—say near to the melting point of platinum (1700° centigrade)—it should be of carbon, preferably in the form of a filament, such as is used in any ordinary incandescent electric lamp. The cold conductor may be of many materials; but I prefer a bright metal, such as platinum or aluminum, or else carbon. The two conductors are inclosed in a glass bulb similar to that of an incandescent lamp, and I generally heat the carbon filament to a high state of incandescence by a continuous electric current, the electrical connection to the filament and the cold conductor being made by platinum wires, sealed air-tight through the glass."

He clearly described the necessity for a high degree of vacuum and a highly incandescent filament. Fleming patent, page 1, line 96, and page 2, line 5.

[4] In his lecture before the Royal Society, read February 9, 1905 (Proceedings of the Royal Society, vol. 74, particularly pages 477,

481–485; also see Waterman's testimony, page 1083 et seq.), he described the mode of operation of his device, making equally clear what he had set forth in his patent specification, and, further, illustrated his views by a sheet of "characteristic curves." The "characteristic curve" is a curve plotted between voltage applied to the detector and the current through the detector, resulting from the application of this voltage. It is obtained by connecting a circuit containing a battery and a galvanometer or ammeter and a resistance whereby the potential of the battery may be varied to the hot and cold elements of the detector. Connected across the detector is a voltmeter to measure the applied local battery voltage. I agree with plaintiff that this sheet disclosed to one skilled in the art everything necessary to obtain a complete knowledge of the operation of the device. It showed that, as the incandescence of the filament increases, this detector device becomes more sensitive, and logically, therefore, the device should be operated at a high degree of incandescence, obtainable by whatever were known means therefor. Why the device thus operates successfully to detect signals is not as yet surely understood, but that it does so operate is an unescapable fact.

Fleming called the operation "rectification," and held that, substantially speaking, the current will flow through the lamp in one direction only; i. e., from the cold cylinder to the hot filament. In his 1905 lecture he said:

"Perfect rectifying power, however, does not exist. There is not an infinite resistance to movement of negative electricity from the metal cylinder to the hot filament through the vacuum, although this resistance is immensely greater than that which opposes the movement of negative electricity in the opposite direction. * * * Returning, then, to the vacuum valve, we may note that the curves in Fig. 3 show that the vacuum space possesses a maximum conductivity corresponding to a potential difference of about 20 volts between the electrodes, for the particular valve used. The interpretation of this fact may, perhaps, be as follows: In the incandescent carbon there is a continual production of electrons[1] or negative ions by atomic dissociation. Corresponding to every temperature there is a certain electronic tension or percentage of free electrons. If the carbon is made the negative electrode in a high vacuum, these negative ions are expelled from it; but they cannot be expelled at a greater rate than they are produced. Therefore there is a maximum value for the outgoing current, and a maximum value for the ratio of current to electromotive force; that is, for the conductivity."

Whether right or wrong in his theory, the result of Fleming's invention was to give the art a new, valuable, and easily obtainable detector, which has gone into important commercial use. This Fleming detector is highly sensitive, quickly adjusted by an operator of even inferior skill, and only momentarily disturbed by static or strong signals. The thoroughness and earnestness of this litigation is its most significant testimonial. Nothing in the prior art urged by de-

[1] Note.—Eccles in his "Handbook of Wireless Telegraphy and Telephony" defines "electron" as "the 'atom' of negative electricity, the smallest quantity of electricity known to take part in electrical phenomena."

fendants in negation of invention calls for extended discussion. The Tesla patent (No. 645,576) and the Fessenden patents (Nos. 706,742, 706,743, and 706,744) were far removed from the incandescent lamp and were commercially useless; and nothing could be learned for this purpose from the Valbreuze and Zehnder tubes.

Rectifiers of low frequency oscillations, such as those of Wehnelt and Cooper-Hewitt, taught nothing. These are rectifiers for commercial power frequencies, and it was not common knowledge, as of Fleming's date, that rectifiers of low-frequency oscillations would rectify radio waves; nor is it a fact that all rectifiers of low frequencies are likewise rectifiers of radio high frequencies. Further, it was not common knowledge, as of Fleming's date, that a rectifier of radio oscillations would act as a detector. For instance, Pickard first attributed the action of crystal detectors to thermo-electric effects; but, when Pierce published his investigations in 1907, Pickard amended many of his patent applications to conform with Pierce's theory of rectification. See Pierce supra, page 162, and testimony of Pickard.

In the absence of a well-accepted theory of operation which needed merely some physical embodiment, and in the absence, also, in the art of the physical device itself, at a time when men of great skill were constantly endeavoring to bring forth an advance in this branch of the art, the contribution of Fleming was clearly invention, and is entitled to liberal interpretation and consideration—unless impeded by De Forest.

[2] This brings us to the parent patent of De Forest, No. 979,275, to which, on the evidence, the effective date of November 4, 1904, must be accorded. Plaintiff is well justified in calling this and the divisional applications the Bunsen burner patents. Nowhere is there a suggestion of an incandescent electrode. On the contrary, in the specification and the drawings it is entirely apparent that De Forest pointed out only what the layman understands as heating gas. This De Forest stated in language which sounds impressive. He said:

"I have discovered that, if two bodies adapted for use as electrodes or conductive members be electrically separated partially or wholly, after the manner common in analogous devices, the separation between them may be neutralized sufficiently to enable them to act as a detector of electrical oscillations, if the intervening or surrounding gaseous medium be put into a condition of molecular activity, such, for instance, as would be caused by heating it in any manner, as by radiation, conduction, or by the combustion of gases in the space which surrounds the poles. Such condition or molecular activity causes what would otherwise be a nonsensitive device to become sensitive to the reception of electrical influences. I am thus enabled to employ as such sensitive member devices which would otherwise be of no value, or to make those devices now used more sensitive to the electrical waves. This principle is embodied in the apparatus illustrated in the various figures shown."

Translated into plain English, this meant:

"I will try to make the gas conductive between two electrodes by heating it to the dissociating point."

It was attempted to read incandescence into the specification, or rather to infer much that later knowledge has taught; but incandescence had long been a word of art, and Fleming had no trouble in using it, either in his specification or his Royal Society paper. Why not De Forest? Merely because the incandescent lamp detector was the farthest from his thoughts.

[3] True, gas is a generic term of wide meaning, as is clear from the very beginning of J. J. Thomson's notable "Conduction of Electricity through Gases"; but, when the language of a patent is to be interpreted, the document must be construed as a whole, just like any ordinary contract, and words cannot be isolated from their context to give them a more comprehensive meaning than was originally intended. What defendants have attempted is to establish that De Forest described in these patents ionization by impact as distinguished from dissociation by flame, and thus forestalled Fleming, on the hypothesis that De Forest was the first to realize the value and effect of electronic emission. No better confirmation of the negligible character—in this connection—and, perhaps, obscurity of the disclosure can be found than the testimony of Pickard, in answer to the court's questions (Q. 925 et seq.).

An elaborate discussion, at this juncture, of electronic action might be interesting, for the subject is really fascinating; but it is unnecessary, for the simple reason that the patent discloses merely the heating of the gas, without any direction from which the most learned scientist of that day could have gleaned any further information.

In the divisional patent, 867,876, the expression is used, "This gas may be air, or the electrodes may be inclosed"; but how this device works is still to be explained, for the experiment at High Bridge with the Nernst lamp was not in accordance with the disclosure of the patents. This burner detector of De Forest has never been commercially used, and thus has not made any impression on the art. A mere inspection of the device in operation will show that this flickering flame is impractical. The most that can be said is that it may contain the germ of an idea which, in this rapidly progressing art, may hereafter be utilized in some way. While, therefore, it is not necessary to declare this patent and its three subsidiaries invalid, they may be eliminated from this case for all practical purposes.

Before considering the patent, No. 824,637, and its division, No. 846,070, filed originally January 18, 1906, it must be remembered that De Forest in December, 1905, knew of Fleming's Royal Society paper of March, 1905, as appears from a reference to that effect in his application for a certain patent not here in issue (No. 823,402), where he used the expressions "exhausted vessel" and "heated to incandescence." Further, on December 21, 1905, he instructed his solicitor to "look out for Fleming's recent patent."

The point is that what in effect defendants urge inter alia is that De Forest's idea of employing a local battery, which has come to

be known as "Battery B," in any event, imparts invention to his patents, and its use by plaintiff amounts to infringement, or, if that contention be not sustained, then finally defendants do not infringe. With his knowledge of Fleming's theory, it should have been very easy to describe the incandescent lamp detector plus battery B, but, in 824,637 De Forest now had in mind a receptacle inclosing a gaseous conductive medium. He said:

"With these objects in view, my invention comprises a receptacle inclosing a sensitive gaseous conducting medium, the conductivity of which does not necessarily depend upon the heat of combustion, although such conductivity may be increased by heating said gaseous medium, and which in some cases requires practically no heating at all, a wave-intercepting means associated with said gaseous conducting medium, whereby the feeble electrical currents or oscillations resulting from the energy absorbed from electromagnetic signal waves may be impressed upon said gaseous conducting medium to alter its conductivity, and a signal-indicating device operatively connected with said gaseous conducting medium, whereby alterations in the conductivity of the latter may be made manifest."

The only possible reference to a vacuum is at page 1, lines 101–105, as follows:

"In all embodiments of the present invention the electrodes are inclosed and are surrounded by a *suitable gas*, and they may be inclosed in a receptacle which *may* be partially exhausted."

The only reference to incandescence is in one compound word at page 2, line 4, as follows:

"In Fig. 1 two filaments, C, which *may* be ordinary incandescent-lamp carbon filaments, are sealed into the receptacle, B. * * *" [2]

These "mays" at best are meager disclosures, but that these patents dealt only with the heated gas idea is clear from De Forest's correspondence with his solicitor in December, 1905 and January, 1906, from his ordering incandescent lamps from one McCandless in the same December and January, with his thereafter change of phraseology and tone (see No. 841,386, and his January 20th letter to his solicitor, "Keep it dark, but the new receiver is the best yet"), but most convincingly from the patent itself.

According to Pickard's theory of ionization by impact, there must be a source of electrons; but in this patent no electron producing nor impelling means are shown. On the contrary, Figures 4, 5, and 6 show two cold electrodes, and, referring to Figure 4, De Forest specifically dispenses with both heated electrodes (page 2, line 72), an inconsistency with defendants' theory which cannot be reconciled (XQ. 1147 et seq.). These patents (Nos. 824,637 and 836,070) were never of any commercial utility and at best can be sustained only within the limits of their precise disclosures.

The so-called selective per se patent, No. 841,386, is so utterly useless that it might well be declared invalid; but it will suffice in this suit to construe it as limited to a structure selective per se and irre-

[2] Note.—Italics mine.

spective of any circuit connections. It follows, of course, that plaintiff does not infringe any of defendants' patents and that the counterclaim will be dismissed.

We now come to what I think is the only substantial question in the case—the infringement claimed against defendants. The Fleming patent was originally framed in rather broad language, so that it might have been construed as applying to other than radio uses, in addition to its use in the radio art. By disclaimer, filed in the Patent Office November 17, 1915, plaintiff disclaimed the combination of claims 1 to 6, inclusive, and claims 10 to 15, inclusive, except as the same are used in the radio art, and to certain correlated words in the specification.

The claims selected to sue upon were Nos. 1 and 37, because typical. They read:

"1. The combination of a vacuous vessel, two conductors adjacent to, but not touching, each other in the vessel, means for heating one of the conductors, and a circuit outside the vessel connecting the two conductors."

"37. At a receiving station in a system of wireless telegraphy employing electrical oscillations of high frequency a detector comprising a vacuous vessel, two conductors adjacent to, but not touching, each other in the vessel, means for heating one of the conductors, a circuit outside of the vessel connecting the two conductors, means for detecting a continuous current in the circuit, and means for impressing upon the circuit the received oscillations."[3]

Claim 1, as limited by the disclaimer, is a broad claim for the incandescent lamp as a radio detector. Claim 37, in respect of which disclaimer was unnecessary, covers the detail applicable to a radio system; i. e., a local circuit containing means for detecting a continuous (direct) current, such as a telephone or galvanometer, and means of impressing high-frequency oscillations on the detector, such as the secondary of the oscillation transformer.

Fleming's theory, as has already been stated, was that of rectification; while defendants account for the action of their "Audion" on the theory that it is a telephone relay, or, in other words, that its products are alternating currents of "audio" frequency and of the local energy, and not of the "input" energy. As a result of these differences, the effect and relation of the local battery was one of the sharply contested points in controversy.

It was satisfactorily proved that, for some reason not yet understood, incandescent lamps possess idiosyncrasies of operation, as demonstrated by a batch of a dozen lamps of identical dimensions, made of identical stock, pumped at the same time for a vacuum, and sealed at the same time. Farrand's testimony; Waterman, 1244 and 1820 et seq. Of these, some worked best at the negative end (i. e., without a battery), some with a small amount of battery, some with a battery equal to the battery for lighting the filament, and some with a battery in addition to that used for lighting the filament.

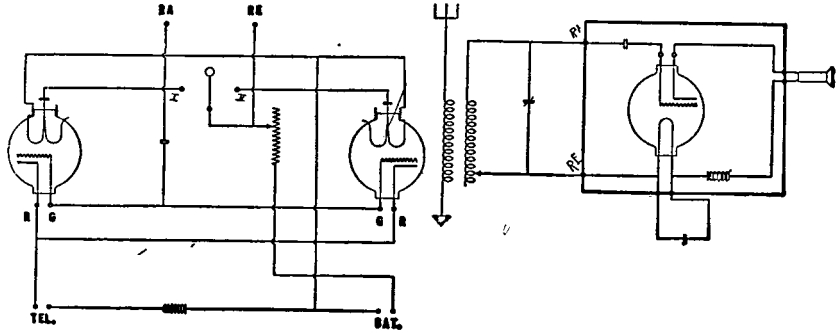
[3] Note.—In construing claim 37, it must be remembered that "continuous current" is used in its English sense of 1905 of a direct current, whether intermittent, varied, or not. See, also, page 2, line 109, of Fleming patent. By a recent convention, continuous current now means a direct current of unvarying value.

While, with care and time, lamps could be selected which would work best without a local battery, such a course would obviously be foolish commercially, and unnecessary, when a simple and well-known means could be employed to utilize all the lamps, whatever their idiosyncrasies. This means was a local battery, and a potentiometer, whereby a varying local potential may be applied to the lamps. The potentiometer is a resistance connected across the lighting battery of the detector, so that any fraction of the lighting battery may be tapped off and applied to the local circuit. The local battery is used to bring the lamp detector to the sensitive point of its characteristic curve, and the potentiometer is the simple and effective device which, varying the local battery, accomplishes this task. Nearly all prior art detectors were used in this way—the coherer of Marconi and Lodge; the microphone of Hughes and Branley; the electrolytic of Fessenden, Vreeland, and others; and the crystal of Bose. Plaintiff's Exhibits 77 and 82.

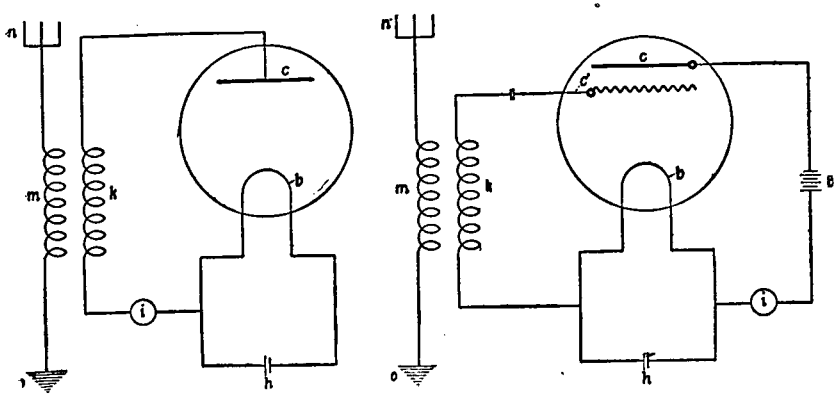
The use of the local battery to locate the sensitive point on the characteristic curve was well known and accepted as of Fleming's time, and, as appears by his 1905 lecture, was fully understood by him. See, also, particularly, Vreeland patent, No. 780,842, Plaintiff's Exhibit 82. Plaintiff is undoubtedly entitled to use the Fleming detector with a well-known instrumentality, and therefore to employ the variable local battery, for practically all the prior art detectors required local batteries to locate the operating points. Plaintiff is likewise entitled to use the Fleming device in the ordinary detector circuits of the prior art. The circuits of the Marconi patent, No. 627,650, are the specific circuits which plaintiff has used, and the modern operative Fleming device has simply been substituted for the coherer in old and familiar circuits (Q. 145, 146, et seq.).

Defendants' alleged infringing device is the so-called P. N. Type Audion De Forest Detector. Plaintiff's Exhibits 11 and 12 are drawings reducing to the simplest form the P. N. circuits and comparing Fleming with De Forest.

Simplified Circuits of "P. N." Detector.



Fleming and De Forest Compared.



Waterman's description (in part) states in simple language plaintiff's view of this P. N. device as follows:

"The defendant's apparatus is an incandescent lamp detector of high-frequency oscillations for wireless telegraph purposes, and consists of an incandescent lamp with the usual high vacuum, a filament, and a cold element, which in the particular construction here shown is divided into two portions, one a plate and the other a wire gridlike structure placed between the plate and the filament, both having leads brought out through the glass for exterior connection. * * *"

In the diagram of the Fleming patent there is missing the grid found in the De Forest structure.

"In other words, the two functions which are essential in the incandescent lamp detector, namely, impressing on the space the received oscillation and the detecting of what happens as a result, are performed by a single circuit, in which are located the oscillation transformer and the indicator. In this De Forest circuit, as the devices are arranged, * * * two circuits are used, and the cold element is correspondingly divided up. These are two well-known, standard, equivalent circuits. You may use either device in either circuit."

Of all the explanations of the action of the De Forest, that of Armstrong in the Electrical World (December 12, 1914, Plaintiff's Exhibit 45) seems most convincing, and that article, for purposes of brevity, may be regarded as being read into this opinion. See, also, Dr. Austin's Bulletin of the Bureau of Standards of the Department of Commerce and Labor. In reading this literature, it must be remembered that both sides agree that the De Forest two-element and three-element bulbs operate on the same principle.

As Armstrong was on the stand and subject to cross-examination, his article is to be treated, not merely as a scientist's essay, but as equivalent to testimony. Its details cannot be satisfactorily abstracted, but the result is that the weight of the evidence points to the conclusion that defendants' device is one of unilateral conductivity, or, in other words, a rectifier permitting current to flow in one direction only, viz. from plate to filament and from grid to filament.

The two circuits used are, as Waterman said at the beginning of the case, a division of Fleming's single circuit, the grid-element division being the branch for impressing the oscillations on the detector, and the plate-filament division being the branch for indicating the signal; and it is established with reasonable certainty that defendants' device, in order to operate, must have a heated electrode connected to the negative terminal of the local battery. See, also, Fleming's Technics article, Plaintiff's Exhibit 22 and Waterman's experiment at High Bridge, testimony, 1566 et seq. and 1481a et seq. See, also, transcript of oral argument of Mr. Hoguet at pages 30–34, expressing briefly the views which I accept as to the action of defendants' device and the controverted points as to the galvanometer and telephone.

In Exhibit 123, plaintiff has compiled some 20 articles to show the identity of the Fleming and De Forest detectors. Of course (except Armstrong's article, because he testified), these articles do not prove plaintiff's proposition; but they do show the point of view and the opinions entertained by many scientific authors. Against all these we find Pickard standing alone, except in so far as the interesting theoretical exposition of Dr. Davis supports him.

Pickard has developed the theory that the local battery changes the mode of operation of the incandescent lamp from rectifier to relay; but, while many experiments were made and much testimony was given, this theory is still in the realm of speculation, and certainly has not been satisfactorily demonstrated. Indeed, it was necessarily stated by Waterman, and admitted by Pickard, that the ultimate mechanism of the subject-matter is not known, and that physicists are compelled to change their theories from time to time in the light of later investigations.

In order to reconcile the explanation of the action of the De Forest grid detector with the language of De Forest's earlier patents, so as to work out the idea that De Forest's two and three electrode detectors were simply the logical development of an original thought, Pickard advanced the theory that the action of the De Forest grid was by ionization by impact, and therefore that it was necessary to have a local battery to impel electrons at a high speed on their journey of succeeding collisions. But this theory is shattered, or at least impaired, by the tests, which showed that, when ionization by impact occurred, the detector showed a blue glow and stopped operation. If anything was shown in this regard, it was rather, as plaintiff contends, that the device operates in spite of, and not because of, ionization by impact.

Within the limits of an opinion it is, of course, impossible to analyze at length a mass of experiments, tests, and theses, and an infinity of detail necessarily involved in the testimony of experts, in an art of this kind; but, if plaintiff's theory that its own device and that of defendants operate on the same principle has not been proved (and I think it has as far as such proof is yet possible), at least defendants' theory has not been satisfactorily demonstrated, and, finally, the physical facts all support plaintiff's claims. Here, as is so often the case in lawsuits, resort is had to the story of events and the outcroppings of human nature.

De Forest had long been proceeding on a theory different from that of Fleming. Having read Fleming's article, he began to experiment with the incandescent lamp. He probably doubted its efficacy at first, but within a very short space of time—perhaps a week, perhaps a month—he changed his mind, and, discovering that Fleming was right, wrote his solicitor, after he had filed his application for No. 824,637, that the "new receiver is the best yet." Thereafter he used the language of the incandescent lamp, and in an address on October 20, 1906, before the American Institute of Electrical Engineers, really described fundamentally the Fleming lamp detector, although using phraseology which has since become Audion vocabulary. Thus the physical ocular fact is that in the alleged infringing P. N. device, the Fleming detector, and not the Bunsen burner, is used, and the broad claim No. 1 of the Fleming patent is infringed, precisely the same as if a patented crystal has been placed in some old or new type of circuit with a local battery—such, for instance, as the Weagant and Armstrong circuits.

In respect of claim 37, defendants' device does not escape because the circuit outside the vessel is divided into two branches, nor because Fleming's detector of a "continuous current" was a galvanometer and De Forest's is a telephone long well known in the art. De Forest in his three-electrode Audion has undoubtedly made a contribution of great value to the art, and, by the confession of judgment in respect thereof, defendant company may enjoy the just results of this contribution; but, on the other hand, Fleming's invention was likewise a contribution of value, and is to be treated liberally, and not defeated, either by unconfirmed theory or by association in apparatus, where later developments have taught how other useful adjuncts can be employed.

Claims 1 and 37 of plaintiff's patent are valid and infringed by defendant company; defendants' counterclaim will be dismissed, and, as there is no evidence against De Forest individually, the bill as to him will be dismissed.

SAFETY GAS LIGHTER CO. v. FISCHER BROS. & CORWIN.

(District Court, D. New Jersey. July 29, 1916.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—GAS IGNITER.
   The Pomeroy patent, No. 1,011,643, for a gas igniter, conceding it to be not anticipated, and to disclose invention, is so limited by the prior art that it must be given a narrow construction, and, as so construed, *held* not infringed.

2. PATENTS ⟸64—ANTICIPATION—"FOREIGN PATENT."
   A German Gebrauchsmuster, although not printed, the title and a general description of the invention only being given in the official publication, is a "foreign patent," and as such available as a reference to anticipate or limit a later United States patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 79; Dec. Dig. ⟸ 64.
   For other definitions, see Words and and Phrases, Foreign Patent.]

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3. PATENTS ⟸69—ANTICIPATION—"DESCRIBED IN PRINTED PUBLICATION."
The notice of such a patent, however, as printed in the Patent Blatt, is not such a description in a printed publication as will invalidate a later United States patent, under Rev. St. § 4886 (Comp. St. 1913, § 9430); but on the question of invention the description is in the prior art and charges a subsequent patentee with knowledge that a patent has been granted and of so much of the nature of the invention as the description discloses.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. ⟸69. For other definitions, see Words and Phrases, First and Second Series, Describe.]

4. PATENTS ⟸328—INVENTION—GAS IGNITER.
The Gould patent, No. 1,021,363, for a gas igniter, *held* void for lack of invention, in view of the prior art.

In Equity. Suit by the Safety Gas Lighter Company against Fischer Bros. & Corwin. On final hearing. Decree for defendant.

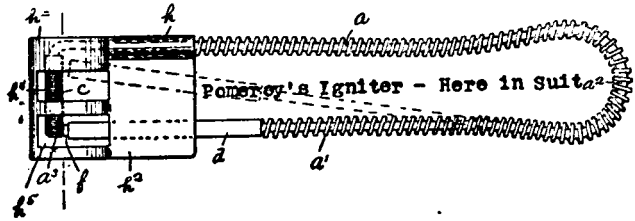
Louis H. Harriman and William Quinby, both of Boston, Mass., for plaintiff.

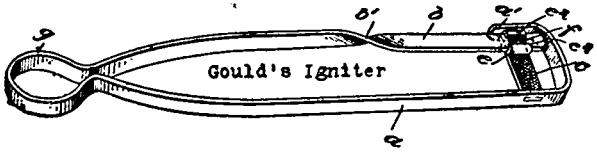
James Hamilton, of New York City, for defendant.

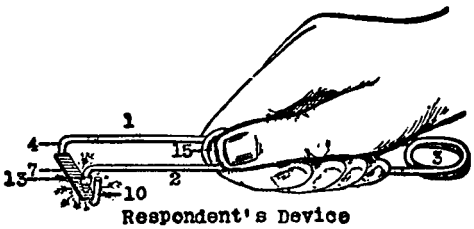
HAIGHT, District Judge. The plaintiff is the owner of patent No. 1,011,643, issued to it as assignee of Frederick H. Pomeroy on December 12, 1911, and patent No. 1,021,363, issued to Matchless Lighter Company, as assignee of Joseph B. Gould on March 26, 1912, and subsequently assigned to the plaintiff. Both patents relate to hand-operated devices for igniting gas. The defendant is engaged in the manufacture and sale of such a device, which, it is claimed, infringes claims 1, 2, 3, 9, 10, 11, and 12 of the Pomeroy patent, and claims 2, 3, and 5 of the Gould patent.

The devices of the patents in suit, as well as that of the defendant, differ only in minor details of construction. In principle they are the same. Some time prior to the summer of 1903 Baron von Welsbach, a celebrated Austrian chemist, discovered a metallic alloy, consisting of cerium and iron, which upon abrasion will give forth a shower of sparks capable of igniting gas. He applied for, and there were issued to him, patents thereon in Austria, France, and this country. The French patent was published on April 4, 1904; the Austrian on February 25, 1905; and on November 27, 1906, the United States patent was issued. The devices of each of the patents in suit were designed to utilize that metal for the purpose before mentioned. Each of them, as well as that of the defendant, consists, broadly speaking, of a contrivance to be held in the hand, made in the form of tongs, one arm of which carries Welsbach's pyrophoric alloy, and the other a file; the arms being so arranged that by pressing the two together with the fingers of the hand the alloy is brought into frictional engagement with the file, and as it is moved along the surface thereof gives off the sparks. They are designed to be held over a gas jet, and when operated will ignite the escaping gas.

The following cuts show the devices of the patents in suit, defendant's igniter, and that of the first Pomeroy patent:







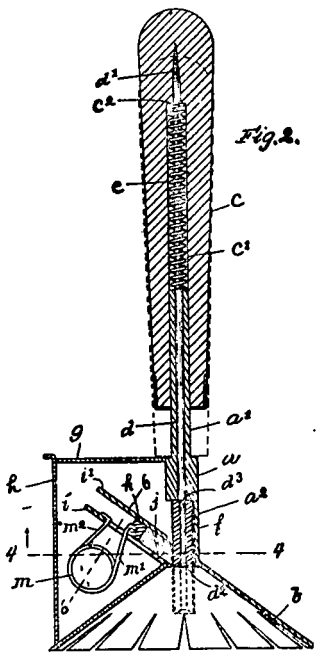


Fig. 2.

Igniter of Pomeroy's Patent No. 940,276.

The device is simple, and no doubt has proved very useful, especially in lighting gas stoves, as it does away with the necessity for matches, as well as the danger incident to their use. During a number of years preceding Welsbach's discovery, many contrivances were devised and patented in this and other countries, whose object was to eliminate the use of matches in lighting gas, cigars, etc., as well as devices which, while using matches as igniting means, sought to effect the ignition thereof automatically. The prior art exhibits a number of devices wherein an electric spark, flint, etc., were used. It was to be expected, therefore, as was the case, that as soon as Welsbach's discovery was made generally known many devices for utilizing it for the purposes before mentioned would be evolved.

[1] The Pomeroy patent in suit was not applied for until February 18, 1910, although the same inventor had applied on November 19, 1908, and there had been issued to him on November 16, 1909, a patent (No. 940,276) for a gas lighter in which the Welsbach alloy was used, but which, structurally, was quite different than that of the later patent. The Gould patent was applied for on May 14, 1910. The dates of the applications for the patents are, of course, prima facie the dates of invention, respectively, of the devices therein described. It was established, however, by a stipulation filed in the case, that lighters hereinafter referred to as the "Blitz," and which were of the same general design, utilized the same alloy, and operated on the same principle as those of the patents in suit, were imported from Germany into and placed on sale in this country as early as November 1, 1909. The plaintiff then deemed it necessary, as it undoubtedly was, if it was to succeed in this suit, to show that the inventions of its patents were made prior to that date.

It is claimed that the Pomeroy invention was conceived and reduced to practice in the month of March, 1908, and the Gould invention "not earlier than the summer and not later than the fall of 1909." Whether or not it is the rule that the plaintiff must establish that the date of the inventions were prior to the time when the Blitz lighter was placed on sale in this country, "beyond a reasonable doubt," as some cases hold Thayer v. Hart, 20 Fed. 693 (C. C. S. D. N. Y.), I think it has failed to prove by evidence "strong and convincing," or "to the satisfaction of the court" (Hunnicutt Co. v. Gaston Co., 218 Fed. 176, 134 C. C. A. 56 [C. C. A. 3d Cir.]; Clark Thread Co. v. Willimantic Co., 140 U. S. 481, 492, 11 Sup. Ct. 846, 35 L. Ed. 521), that Gould's invention, at least as to the form described in the patent, was made prior to April 15, 1910. Although the inventor of the Pomeroy device and his father claim that the lighter, described and illustrated in the Pomeroy patent in suit, was finished in the early part of March, 1908, and the plaintiff has produced the original, and although a number of witnesses swear that a similar, if not the same, lighter was exhibited to them by the father of the inventor as early as March, 1908, the evidence by no means satisfies me that this or any other such lighter had been constructed by Pomeroy at that time, or in fact before the latter part of September, 1908, at the earliest. It, admittedly, was not even conceived until after

the elder Pomeroy had read an article in the Scientific American about the Welsbach alloy, and had sent abroad for a sample thereof, and had received the same. The article in question appeared in the issue of February 8, 1908.

The elder Pomeroy's story is that he read this article at a public library about the time that it came out; that his son, the inventor, was then at work on an electric gas lighter; that the thought occurred to him that the alloy might be useful for making a gas lighter, as, indeed, the article indicated it would be; that he wrote Welsbach, who was mentioned in the article as the person who had made the discovery, at Treibach, Austria, where the article stated the alloy was made, for a sample; that shortly thereafter he received such a sample and exhibited it to his son, who experimented with it, and, within a few days thereafter, built the device of the Pomeroy patent in suit. He further states that shortly thereafter he exhibited the device so made to a number of people in the city in which he lived, a majority of whom, I think, were called to corroborate him. After he had testified, the defendant introduced in evidence a letter which the elder Pomeroy wrote on April 15, 1908, to the writer of the Scientific American article, a Mr. Gilbert, in which he referred to the article and asked that he be advised of the address of the maker of the metal, or be informed as to where he could get a "sample" of it. There was also produced another letter, written by him on June 1, 1908, to the Treibacher Chemische Werke, of Treibach, Austria, the manufacturer of the metal, inclosing a dollar, and asking that there be sent to him by mail "a sample of best grade of pyrophoric metal for lighting gas." A copy of the money order which was inclosed in this letter was also produced. On September 26, 1908, he wrote the same concern, advising it that the sample of the metal had just been received, and stating that he did not understand the cause of the long delay. In the same letter he ordered $5 worth of the metal.

The elder Pomeroy was recalled to explain the apparent contradiction of his testimony which these letters made, but his explanation is disingenuous and unconvincing. He claims that the quantity of metal which he received on the order of February seemed to indicate that the price was very high, and that he then determined to communicate with the writer of the Scientific American article, with the idea of finding out whether he had ordered it from the proper concern. Yet he testified that the sample which he first received came from the Treibacher Chemische Werke, the same concern to which he wrote on June 1st for a sample. If he had already received a sample from that concern, it is inconceivable why he should write for another. In the letter to Gilbert he expresses a desire to procure "a sample of the metal." Nor did he in that letter state that he had written to Welsbach, and had received a sample of the metal, and that he was uncertain as to whether he had ordered it from the proper person, or something similar, as would be expected. Nor is there any record of a money order having been sent by him in February or March, 1908. In addition, one of the persons connected

with the Treibacher concern testified that the first shipment to Pomeroy was that which he acknowledged in his letter of September 26th. Pomeroy further testified that, when the first piece of metal arrived, the fact that he had sent for it had escaped his mind. This is entirely reasonable, if the time which elapsed between the order and the receipt is considered to be that from June 1st to the 26th of September, but absolutely unreasonable if he received it so soon after reading the article of February 8th as to have enabled his son to conceive and complete the device of his first patent by the 1st of March.

Further, one of the witnesses called to corroborate him testified that he saw the device for the first time "in the fall of the year." All of the witnesses testified several years after the event, and although each gave some reason why he was able to fix the time, none of such reasons can be said to be such as would definitely fix a date in one's mind, and many of them would be quite as applicable to one year as another. The records of the Haverhill Fire Department, which were introduced to show the date of a fire, which it was claimed by some of the witnesses enabled them to fix the date when they first saw the lighter, prove, I think, that the circumstance of the fire could not have been an accurate means of fixing the date when they saw the lighter, for one of them, who relies upon that circumstance, testified that it was not more than a week after the fire that the lighter was shown to him. The records show that the fire occurred on February 11, 1908, only three days after the article appeared in the Scientific American. Manifestly Pomeroy could not even have received the metal, even if his story as to the time when he sent for it was correct, at the time this witness' recollection, based on the episode of the fire, is that he saw the completed device. Of course, as the testimony of the witnesses whom plaintiff produced to fix the date when they first saw the device of the patent is proven to be incorrect in that respect, doubt is cast upon all of their testimony, as it is likewise, and to a greater degree, upon the testimony of the Pomeroys.

I do not feel at liberty, however, to absolutely disregard the testimony of such a number of witnesses, when I have not had the benefit of seeing them or hearing them testify, and when I can readily understand that, in their zeal to assist their friend Pomeroy, they may have innocently misstated the date, and at the same time have really seen the device of the patent at some later time. Unquestionably Pomeroy conceived the idea of making a gas lighter to use the Welsbach metal, and constructed one or more specimens, some time between the 26th of September, 1908, and the 19th of November of the same year, when he filed the application for his first patent. It would be natural for the elder Pomeroy to exhibit to his friends the first specimen of a lighter rather than a subsequent one. I think, therefore, that I must find that between those dates he conceived the lighter described in the first patent in suit, and that it was exhibited to those witnesses shortly after it was made. It then becomes necessary to consider the prior art in respect to the Pomeroy patent as the same existed before Sep-

tember 26, 1908, and as respects the Gould patent before April 15, 1910.

As before mentioned, lighters of various kinds had been made and patented before the Welsbach metal was discovered. The Welsbach patents and the articles subsequently written about the metal described therein pointed out that it would produce sparks which would ignite gas, and thus one of the uses to which it could be put. The problem, therefore, before any one who wished to utilize the metal for lighting purposes, was merely the form of the device in which to use it. Therein only, if at all, was the field for invention. Even the use of a file to produce the sparks had been revealed. It was to be expected, of course, that the devices would differ according to the number of persons interested in designing them. One of the earliest of such devices is described in a German patent (No. 177,951) issued to Pintsch on September 17, 1905, and published on November 9, 1906. This was in form a hand lighter, in which the alloy was brought in frictional engagement with an abrader by means of a hand-operated plunger partly controlled by a spring. Another is that described in the French patent, No. 361,519, issued to Lux on May 29, 1906, and published on July 29, 1906. This was an attachment to be affixed to a gas lamp and manually operated. Still another is shown in the French patent granted to d'Ysarn & Bonnassies on April 8, 1908 (No. 386,314). This was similar in form to the Pintsch device. On April 14, 1908, there was issued to Fillunger a German Gebrauchsmuster (336,878) for a lighter of the tongs type, wherein the arms were pivotally connected together at one end and normally held apart by means of a spring; one arm, bent almost at right angles, carried the abrader, which was in the form of a file, and the other the pyrophoric alloy, as in both of the patents in suit. The sparks were made by pressing the arms together and thus forcing the alloy over the abrader. The alloy was held yieldingly against the abrader by means of a spring in the container in which the alloy was inserted. On April 16, 1908, there was issued to Fillunger another Gebrauchsmuster for another form of lighter employing the Welsbach alloy, which differed from the former only in that shears were used instead of tongs. On May 6, 1908, there was published in the German Patentblatt a notice of the registration of the first Gebrauchsmuster patent as follows:

"Ignition device for gas burners, consisting of two tongs-like movable arms which carry, respectively, an abrading surface and a pyrophoric metal pressed against the same."

On the same date there was likewise published a notice of the registration of the other patent, identical in form, except that it was said to consist "of two shears-like movable arms."

[2] It is contended by the plaintiff, on the authority of Steiner v. Schwarz, 148 Fed. 868 (C. C. S. D. N. Y.), that a German Gebrauchsmuster is not a patent, within the meaning of section 4886 of the Revised Statutes (Comp. St. 1913, § 9430), and hence that the two Gebrauchsmusters before referred to have no effect on this case. Although it is with extreme hesitation that I venture to express a view contrary to that entertained by so distinguished a jurist as Judge

Holt, I am unable, in view of the evidence in this case and in the light of the recent decision of the Circuit Court of Appeals of the Second Circuit in Sirocco Engineering Co. v. Sturtevant Co., 220 Fed. 137, 143, 136 C. C. A. 91, to concur in his view. In the latter case it was held that all that the statute requires is that the device be *patented* in a foreign country, that it is patented there the moment it is sealed or enrolled, that whether or not it is printed is immaterial, and that it is enough that the officials have acted upon the application and granted the patent. It would also seem to be immaterial in what form it is issued, providing the specifications and drawings are accessible to the public. See Ireson v. Pierce, 39 Fed. 795, 798 (C. C. D. Mass.) and Elizabeth v. Pavement Co., 97 U. S. 126, 131, 24 L. Ed. 1000.

The rights conferred on an inventor by a German Gebrauchsmuster, except as to time, seem to be quite as extensive as those guaranteed by a patent in this country. Its grant is the act of the government. Although only the title is published, in the sense that it is printed in an official publication, the specifications and drawings of the patent are open and accessible to the public, as are also the claims, which measure the scope of the protection afforded to the inventor, as soon as the title, date of application, and registration are published in the Patentblatt. As it is not essential that a foreign patent, to have the effect mentioned in section 4886 of the Revised Statutes, should be printed, but that the act of the officials in granting it and accessibility of its disclosures to the public are the decisive factors, I am at a loss to understand how the fact that only a title is printed, or how the scope of the invention which it protects, or that the examination made in the Patent Office before it is granted is limited, can have any effect on it under our laws. If these patents are considered, as I think they should be, as in the prior art, the Pomeroy patent in suit, if not anticipated by them, or void for lack of invention over them, must be given such a narrow construction that I think the defendant's device does not infringe. In this connection it should be borne in mind that neither the plaintiff nor the defendant makes and sells the form of device described in either the Pomeroy or Gould patents, but each has adopted the form of a lighter subsequently imported from Germany.

[3] But the defendant contends that, even if the Gebrauchsmusters cannot be considered in the prior art, the notice thereof published in the Patentblatt on May 4, 1908, is sufficient to negative novelty in both of the patents in suit. I think, however, that the description in that publication did not "contain a substantial representation of the invention of the patent in suit in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to practice the invention of the patent in suit without the necessity of making experiments," and hence the publication does not have the effect contended for. Hanifen v. Godshalk, 84 Fed. 649, 28 C. C. A. 507 (C. C. A. 3d Cir.); Ward Baking Co. v. Weber Bros., 230 Fed. 142, 147, 144 C. C. A. 440 (D. C. N. J., affirmed C. C. A. 3d Cir.). But on the question of invention this description, such as it is, was in the prior art, and Pomeroy was charged thereby with notice that there had been devised gas-lighting devices consisting of two tongs-like mov-

able arms and shears-like movable arms carrying respectively an abrading surface and a pyrophoric metal pressed against the same. Being charged with knowledge of that description, and by the Scientific American article, as well as the Welsbach patents, with knowledge that sparks would be emitted when the metal was scratched with a file, and the tongs construction shown in the Wright patent (No. 666,618), designed to light by an electric spark, and the Hartley patent (No. 875,348), the question arises at once, irrespective of the Gebrauchsmusters, did it involve invention to conceive and design the device of the patent? If it did, I have also no doubt that the invention was of such a narrow scope, and hence that the claims in suit must be given such a correspondingly narrow construction, as will relieve the defendant's device from infringement. I am constrained to find, therefore, that even if the claims in suit of the Pomeroy patent can be held to be valid, the device of the defendant does not infringe them.

[4] In view of the fact that the Gould patent is later than the Pomeroy patent in suit, and in view, also, of the fact that Fillunger was granted a patent in Austria (No. 36,627) for the two devices covered by the Gebrauchsmuster patents beforementioned, which antedates what I have found to be the date of Gould's invention, and the fact that the Blitz igniter was on sale in this country also before Gould's invention, it follows that the field of invention at the time Gould conceived the device of his patent was narrower than that which existed when the first Pomeroy device was designed. The only novelty exhibited by that patent over the prior art is the bending over and doubling back of one of the arms to act as a holder for the file, as well as a stop for the arms, and the method of holding the file. It is inconceivable that these very slight differences would not occur to any ordinary mechanic, and that they are not the natural changes which were to be expected in the development of such a simple contrivance as this. To hold that these changes constitute invention would, I think, violate settled principles. The Gould patent is also clearly anticipated by the form of device referred to in the testimony as the "Squeeze-It," and which the evidence would seem to indicate was for sale in this country in January, 1910.

It follows, therefore, that the bill must be dismissed, with costs.

ALASKA S. S. CO. v. INTERNATIONAL LONGSHOREMEN'S ASS'N OF PUGET SOUND et al.

(District Court, W. D. Washington, N. D. September 5, 1916.)

No. 95 E.

1. CONSPIRACY ⊜1—WHAT CONSTITUTES.
A conspiracy is a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1–5; Dec. Dig. ⊜1.

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

2. CONSPIRACY ⊜2—NATURE OF CONSPIRACY—DEFENSES.
No formal agreement is necessary to a conspiracy, a tacit understanding being sufficient; and it is not essential that each conspirator have knowledge of the details, the means to be used, or that the agreement be enforceable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 2; Dec. Dig. ⊜2.]

3. CONSPIRACY ⊜13—ACTS OF AGENTS—LIABILITY OF PRINCIPALS.
The acts of agents and employés in furtherance of a conspiracy are the acts of the principal.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. ⊜13.]

4. TORTS ⊜10—STRIKES—PICKETS.
Where a picket around an employer's place of business is established by union strikers, the picket is the agent of the union, and efforts to dissuade others from accepting employment offered by the former employer should go no further than peaceable persuasions and inducements.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. ⊜10.]

5. TORTS ⊜10—STRIKES—ORGANIZATION—RIGHTS OF TRADE UNIONS.
Laborers may combine, forming unions to protect their rights, and they have the right to persuade others, when they have gone on strike, not to work for the employer; such rights being given under the freedom of action guaranteed by the federal Constitution.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. ⊜10.]

6. TORTS ⊜10—EMPLOYERS—RIGHTS OF.
While laborers, members of a union, may strike, and may picket their employer's business, the employer is entitled to free access to his place of business for himself and other employés, and such rights cannot be interfered with.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. ⊜10.]

7. INJUNCTION ⊜101(3)—STRIKES—INTERFERENCE BY FORCE.
Act Oct. 15, 1914, c. 323, § 20, 38 Stat. 730, declares that no restraining order or injunction shall be granted in any case between an employer and employés, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning the terms or conditions of employment, unless necessary to prevent irreparable injury to property or property rights, and that no such restraining order shall prohibit any person or persons, whether singly or in concert, from terminating any employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceable means to do so. Em-

ployés of complainant, a ship company, engaged as a common carrier, which also carried the mails, struck, and defendants, composing the union of which they were members, picketed the wharves of complainant and intimidated other laborers from accepting complainant's offers of employment. Defendants threw rocks on the wharves, and in other ways interfered by violence with complainant's business and access to its ships. Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (Comp. St. 1913, § 8565), and section 10, as amended by Act March 2, 1889, c. 382, § 2, 25 Stat. 857 (Comp. St. 1913, § 8574), respectively declare that every common carrier subject to the provisions of the act shall afford reasonable facilities for the exchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and that any common carrier which shall willfully omit to do any act or thing required to be done shall be guilty of a misdemeanor. *Held* that, though defendants were authorized under the statute to persuade third persons to decline complainant's offers of employment, and to refuse to deliver goods to complainant, or to patronize it, their interference with complainant's transportation business by violence was unlawful and will be enjoined, as it would not only expose complainant to loss, but to prosecution for violations of law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. ⊂⊃101(3).]

8. TORTS ⊂⊃10—STRIKES—LIABILITY FOR ACTS OF UNION.

A trade union, conducting a strike, is liable for the unlawful acts of members and others associating themselves with the strikers, unless such acts be disavowed, and, in the case of members, the offenders be disciplined or expelled.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. ⊂⊃10.]

In Equity. Bill by the Alaska Steamship Company against the International Longshoremen's Association of Puget Sound and others. Injunction granted.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for plaintiff.
Thomas B. MacMahon, of Seattle, Wash., for defendants.

NETERER, District Judge. The complainant alleges, in substance, that it is a foreign corporation doing business in the state of Washington, and doing a common carrier business of passengers and freight; that it owns, controls, and operates a steamship line extending from the ports of Puget Sound to divers ports in the territory of Alaska, and at such ports in the territory of Alaska it has connections with lines of railroads and other lines of steamships and facilities for the interchange of traffic, and that it is subject to the provisions of the act of Congress known as the "Interstate Commerce Act," and its amendments; that in the conduct of its business it employs a large number of men in and about its docks and piers, for the purpose of receiving and discharging freight, and in the handling of the passenger traffic, and that it was and is operating from Piers 2 and A in Seattle; that the defendants are citizens of Washington, domiciled in this district; that J. A. Madsen is secretary of the Longshoremen's Association, and M. E. Wright, assistant secretary, and M. Myers, president of the local union thereof in Seattle, known as "Local 38—12"; that George Whistler is secretary of said local union, and the defendants Smith and Conners are members and officers thereof; that on the 1st day of

June its employés, engaged in the handling of freight at said piers, were members of the defendant union and were known as longshoremen, and without complaint on said day all employés quit work, and thereafter submitted demands for certain concessions as to hours of service and compensation, which demands were granted, and on the 10th of June following they returned to work; that on the 22d of June, without any demand or statement of grievance, and without notice, all of said member employés again quit work and have since remained away from such service; that immediately upon the employés ceasing to labor the plaintiff, "in order to * * * discharge its duties as a common carrier and perform its obligations under the laws of the United States," employed other workmen; that thereupon, "and at the time of the strike of June 22, 1916, the defendant association and the officers thereof, and the other defendants who are parties hereto, and other officers and members of said association to plaintiff unknown, combined and conspired with each other, and combined and conspired with other organizations, * * * to prevent the plaintiff from carrying on its business, * * * and in pursuance of such combination and conspiracy endeavored, and are endeavoring, unlawfully to force and compel the workmen now in the employ of the plaintiff to leave its service; * * * that by threats, display of numbers, jeers, and by other unlawful means" defendants intimidated and prevented, and continued so to do, the employés from remaining in plaintiff's service; that they have assaulted the employés of the plaintiff, stoned them in the streets as they approached Pier 2, and have driven away those about to enter the employment of plaintiff, and "have turned back and driven away from said piers passengers who were going thereto to take passage upon the vessels of plaintiff, and have stopped wagons carrying equipment for said vessels from entering said piers, and have forced them to drive away, so that said equipment could not be loaded upon said vessels;" and other like conduct is set forth, and it alleges the threatened destruction of the property of the complainant.

Upon motion of the complainant, based upon the verified bill, a temporary restraining order was issued on the 7th of July, and the matter set for hearing on July 15th on application for temporary injunction, and the order directed to be served upon the defendants, with notice to appear at said time and show why a temporary injunction should not be granted. At the appointed time the defendants appeared and filed answers, denying all of the charges of the complaint, and announced readiness for trial upon the merits. Upon the consent of both parties the case was set for trial on the 27th day of July, and the restraining order continued until that time. Testimony at said time was submitted on the part of the complainant and the defendants, and the cause taken under advisement, and by consent of both sides was continued to September 5th, the restraining order remaining in force.

The testimony shows that the International Longshoremen's Union is a voluntary association, divided into districts, each district having its organization and affiliation with the international body; that the

Pacific Coast comprises one district, of which J. J. Foley, of San Pedro, Cal., is president, and J. A. Madsen, of Portland, Or., secretary, and that M. E. Wright, is an employé in the office of the secretary, who attends to the business of the office during the secretary's absence; that C. Conners and S. C. Smith are members of the executive board, and M. Myers, president, and George Whistler, secretary, of the Riggers' and Stevedores' Union; that the district association has series in each port which are designated from 1 to 59, some having ceased to exist, but 40-odd local organizations are now in existence, the Pacific Coast district being known as "Local 38," and the number and series of the Seattle organization is "Riggers' and Stevedores' Local Union No. 38—12," which has a membership of 700 or 800. May 1, 1916, at a convention held at Seattle of the district association "Local 38," a scale of wages and hours of employment was adopted. This was to be presented to the employers for acceptance, and "it was decided to enforce a wage scale and working rules." "The men were to cease work for those firms that declined to pay the scale, on June 1st, 6 a. m." On May 25th demand was presented to the complainant company "for an increase of wages and working conditions." The demand being ignored, the employés quit work on June 1st. Thereafter complainant "granted all the demands that were asked," and the men returned to work June 10th. The executive board of the defendant association negotiated the terms upon which the men returned to work with the Employers' Union of San Francisco, which also represented the Employers' Union of Puget Sound. On the 22d day of June, without notice or further demand, the employés again quit work, and have not since returned. Mr. Wright, upon inquiry, told Pierson of complainant company:

"That the strike of the Alaska Steamship Company was not intended; that they did not have orders to strike on the Alaska Steamship Company, and * * * that he would have the matter straightened out by 5 o'clock that afternoon; but I never heard anything from Mr. Wright until the afternoon of the 24th, when he * * * and Barry * * * came down to Pier 2 and said that unless we could guarantee to give them all the work at the smelter they would still stay out on our vessels"

—the smelter referred to being the smelter at Tacoma, with the operation of which plaintiff had nothing to do. The complainant company employed from 90 to 120 men, and Mr. Pierson, the general manager, stated that after the strike was called—

"they [the strikers] gathered in front of Pier 2 and also Pier A in large numbers, sometimes more than 100, and they would stop any one that looked like a workman, question him whether they would let him go on the dock or not. Even passengers of our ships with tickets were stopped." "They would stop a man, or take hold of him, and want to know where he was going, what business he had on the dock, whether he was looking for a job."

In reply to the inquiry, "Were any of the employés attacked in any way going to or from the dock?" he said, "Well, I don't know that there was any one beaten up, but they were stopped." This witness further stated that quarters were provided by complainant for the men employed in the steamer Dolphin at an expense to the complainant

of approximately $10,000 a month, and that "when we had them employed on the docks close in to the head of the dock they [employés] were stoned, not once, but dozens of times," and that immediately upon the temporary restraining order being issued all trouble ceased, and he also stated, "We did have a wagon or so stopped." On cross-examination, he said that he saw stones thrown, but he did not know who threw them; that no one was arrested; that no complaint was made, except to the officers on the dock; that no person could be identified, except "they were all button men mostly"; but he could not identify the button as the longshoremen's button. When asked how he knew that the defendants threw the stones, he stated:

"Because I know those men went on a strike, and they were doing everything they could to prevent us doing business. Q. Aside from the stones that were thrown, that you said did no damage either to the car or to the dock, and the matches that were burned, which you did not own, nothing happened? A. No; nothing."

A Mr. Cushing was assaulted a day or two after a member of the strike committee heard him ask a third party whether he wanted work and tell this party he could obtain work at Pier 2 "and receive 50 cents an hour day time, 75 cents overtime, and free board and room." He was assaulted by men who wore "buttons," and the witness thought they were longshoremen's buttons.

Carl King, an employé, as he was leaving the plaintiff's plant, was accosted by two men, who took hold of him and asked what he was doing, and, after stating that he was a wireless operator, was asked to produce his license. Not having it with him, he was permitted to go, after presenting a student's identification card of the University of California, of which he had been a student.

Mr. O'Connor, an employé of complainant, was assaulted on Occidental avenue, between Main street and First avenue, by four men, one of whom knocked him down with brass knuckles. Three longshoremen were arrested and are awaiting trial.

George Miles, driving a truck for the Carmen Manufacturing Company, attempted to deliver a load of mattresses to complainant, and was told by some of the men on strike that he "had better not go in there, and to take the load back," and thereupon returned.

John Smith, chief stevedore of complainant company, testified that a large number of longshoremen intimidated a crew employed by him on the Admiral Evans while she was unloading at Stacy Street Dock No. 1, by entering upon the vessel and compelling the laborers to go into the hold of the ship. Other acts were disclosed by the testimony which need not be detailed. There was a strike upon all of the docks and piers in the city of Seattle, except the port commission, which had entered into some arrangement with the strike committee, and the strike was ordered by "38—12," except as to plaintiff's docks, but was afterwards extended to these docks, and pickets were placed upon the various docks in the city of Seattle, and a strike committee and bail committee appointed.

A number of witnesses were examined on the part of the defense, in which denial is made of any participation in any of the acts complained

of, but only one member of the picketing committee was called and testified.

[1-3] A conspiracy is defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner. Pettibone v. United States, 148 U. S. 205, 13 Sup. Ct. 542, 37 L. Ed. 419. No formal agreement is necessary. A tacit understanding is sufficient, and it is not essential that each conspirator have knowledge of the details of the conspiracy, the means to be used, or that the agreement be enforceable. Acts of agents and employés in furtherance of the conspiracy are the acts of the principals. United States v. Keitel, 211 U. S. 379, 29 Sup. Ct. 123, 53 L. Ed. 230.

[4-6] A picket may be considered an agent of a labor organization, and where a picket is established it could go no further than interviews, peaceable persuasion, and inducements; and slight violence or intimidation will have much weight with a chancellor in determining the character of a picket, or the acts of men under its direction, since a picket, under the most favorable consideration, is for the purpose of interference between one who wishes to employ and those seeking employment. No fair-minded, unprejudiced person should desire to place any obstacle in the way of the lawful operation of labor organizations, or do any act prejudicial to such associations. There are always found, however, some reckless and revengeful persons among the membership of such organizations, and vicious and lawless persons sometimes take advantage of labor strikes to commit acts of violence against persons and property, or induce others to do so, for the purpose of wreaking a personal vengeance, or casting suspicion upon and creating public sympathy against strikers, so that great caution should be taken by labor organizations on declaring a strike, and those doing picket duty, to see that no rights of others, by their members, are transgressed. Courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and such right is recognized by the Unlawful Restraint and Monopoly Act. Organized labor is organized capital, consisting of brains and muscle, and has as lawful a right to organize as have the stockholders and officers of corporations who associate and confer together with relation to wages of employés or rules of employment, or to devise other means for making their investments more profitable. Organized labor and organized capital have equal lawful rights to associate, consult, and confer with relation to wages and rules of employment. Ames v. Union Pacific (C. C.) 62 Fed. 7; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 62 Fed. 803. Justice Holmes, in Vegelahn v. Guntner, while sitting on the Supreme Court of Massachusetts, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, said:

"If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to * * * bestowal or refusal of those advantages which they otherwise lawfully control."

It is not unlawful for persons to combine merely to regulate their own conduct with relation to legitimate competition, although others may be indirectly affected thereby. The right of property and liberty of action is guaranteed by the Constitution of the United States to every citizen of this country, and is not confined to political rights, but extends to activities in and about the daily business of life, whether it be of employé or employer. The laborer may organize for protection, and his privilege to work for whom and when he desires is granted, and the right of the employer to employ whom he elects at a satisfactory price is not denied, and neither can secure more, and must not accord less. The employer is also accorded the freedom of access to the place where his work is done, and when access is through a public street, unobstructed access is not inconsistent with any right striking laborers have to use such street for the lawful conduct and peaceable assembling in a lawful manner and for lawful purposes; but any person, while engaged in a lawful endeavor of advancing his interest and securing the greatest benefit in a lawful manner, must not attempt to secure such ends by infringing the rights of others, and when that is done it is the duty of the court, when the matter is properly presented, to intervene. Courts cannot create rights, or initiate new powers or privileges, and can only define existing rights, and apply to them the recognized powers and privileges within its limitations. The creation of new rights or powers is not a judicial function. That is a matter of legislation.

The defendants had the right, if they so desired, to cease to work. Whether they had good cause or not is not for this court to say. On the other hand, the complainant had the right, upon the defendants ceasing to work, to employ whom it elected, and to be protected against overt acts of defendants against such employés, and to have the unobstructed use and enjoyment of its property. The rights of the several parties, as stated, are reciprocal, and are measured by the same rule.

[7, 8] In determining the rights of the parties in this issue, consideration must be given to section 20, chapter 323, 38 Stat. at Large, page 730, which provides:

"That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employés, or between employers and employés, or between employés, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from

recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

With this provision should be considered section 3 of the Interstate Commerce Act (24 Stat. 379), which provides:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable * * * facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith."

Also section 10 of the same act, as amended (25 Stat. 857), which says:

"Any common carrier * * * or any * * * agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, * * * shall willfully do or cause to be done, * * * or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, * * * or shall aid or abet * * * such omission or failure, * * * shall be deemed guilty of a misdemeanor."

Sections 3 and 10 supra impose duties on complainant, with penalties attached for violation. The testimony shows that the complainant company is a carrier of interstate commerce. It likewise carries United States mail from the port of Seattle to the various ports and places in the territory of Alaska, at which ports the commerce and mails are delivered to the various connecting lines of transportation, and as such carrier sustains a special relation to the public. It is clearly established that the defendants did co-operate and confederate together and with others for the purpose of preventing the plaintiff from carrying on its business as a carrier of interstate commerce and United States mail. It is also established that the acts done went beyond the privilege extended and license granted to defendants by section 20, supra, and infringed upon the rights of complainant, and that these acts are attributable to defendants. The settlement of the strike on June 1st was brought about by some of the defendants with the Employers' Union of San Francisco and of Puget Sound. They negotiated a status with the port commission of Seattle, and directed the strike in Seattle, if not against the complainant, against other employers of their labor upon the docks of Seattle, acting through strike committees, who were given charge of the conduct of the strike, and who appointed members to do picket duty, which strike extended to complainant's property, and was recognized by the defendants and carried on by them. It further shows that strikers congregated in large numbers about the plant and place of business of the complainant company; that they jeered persons going in and out, not using any vile language, however, to or in the hearing of persons approaching the piers; that several persons employed by plaintiff were assaulted; that rocks were thrown upon the docks of complainant, where men

were employed, either by longshoremen or by some persons who mingled with the men on strike and must have been known to the strikers, and no action was taken to suppress such conduct, or to apprehend the parties, or disavow such acts; that the freedom of movement of persons going upon complainant's docks was interrupted by members of the defendant union; that these acts continued until the granting of the restraining order.

While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation, and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. When persons or parties set in motion machinery for the purpose of shaping sentiment, they cannot take the benefits, without also being burdened with responsibilities. Such parties thereby assume the burden of controlling such agency, if within their power; and if, perchance, some persons unauthorized, acting with defendants, commit unauthorized acts, it is incumbent upon the defendants to show such fact, and, if committed by members under the control of the association, to disavow such acts by causing such offending members to be disciplined or expelled. The testimony before the court does not show that any attempt was made to destroy the property of the complainant, except the revenues for transportation of traffic; nor does the evidence justify the conclusion that the defendants unlawfully prevented "wagons carrying equipment for said vessels from entering said piers." The testimony of the driver of the wagon shows that the request was not to deliver, and was clearly within the license granted by section 20, supra. I think it is clearly shown that the rights of the complainant as an interstate commerce and United States mail carrier were violated, that defendants exceeded the privileges granted by the Anti-Trust Act, supra, and the duty imposed upon plaintiff by the Commerce Act was jeopardized.

It is not the purpose of this court to undertake the policing of the city of Seattle with relation to the employés of complainant, but the issue here is limited to Piers 2 and A and approaches thereto. Nor is it the purpose of the court to abridge any of the rights given by section 20 of the Anti-Trust Act, supra. Defendant officers and members of defendant association will be enjoined from unlawfully causing, inducing, or in any way forwarding any of the acts complained of as limited herein, and in accordance with the view herein expressed.

A decree may be presented.

UNITED STATES v. DEVIL'S DEN CONSOL. OIL CO.

SAME v. LOST HILLS MINING CO. (two cases).

(District Court, S. D. California. October 4, 1916.)

Nos. A-37, A-52, A-57.

1. MINES AND MINERALS ⟸38(2)—MINING CLAIMS—SUIT BY UNITED STATES TO CANCEL CLAIM.

The mere acceptance by the Land Office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is not a bar, during the pendency of the matter in the Land Department, to a suit by the government to cancel and annul the interest of the applicant, if any, and determine his right to possession, and to extract and market the mineral, on the ground that the application and proceedings are fraudulent and unlawful.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½; Dec. Dig. ⟸38(2).]

2. MINES AND MINERALS ⟸38(2)—MINING CLAIMS—SUIT BY UNITED STATES TO CANCEL CLAIM.

Proceedings to obtain a patent for mineral land are ex parte as to the government, and while the Land Department is vested with exclusive jurisdiction to determine the rights of adverse claimants, and until it has exhausted its jurisdiction by the issuance of a patent a court will not assume which of two rival claimants is entitled to the property, the government is not precluded from maintaining a suit at any time to determine the rights of a claimant in possession, and to protect the property from waste and spoliation pending such determination.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87½; Dec. Dig. ⟸38(2).]

3. MINES AND MINERALS ⟸38(7)—MINING CLAIMS—SUIT BY UNITED STATES FOR CANCELLATION—RECEIVER.

On a bill by the United States, alleging that defendants are in possession of public mineral lands, claiming under entries which are fraudulent and unlawful, and are extracting and selling oil therefrom, the court may properly, on a substantial showing of such facts, appoint a receiver for the property pending final determination of the suit.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 91; Dec. Dig. ⟸38(7).]

In Equity. Suits by the United States against the Devil's Den Consolidated Oil Company, and against the Lost Hills Mining Company. On motions for preliminary injunctions and receivers. Motions for receivers granted.

Frank Hall and E. J. Justice, Sp. Asst. Attys. Gen., for the United States.

Joseph D. Redding, Edmund Tauszky, Peter F. Dunne, and Earl H. Pier, all of San Francisco, Cal., for defendants.

BEAN, District Judge. These suits are brought by the government for decrees that the several tracts of land described in the bills, amounting in the aggregate to about 2½ sections, together with their mineral contents, are the property of the United States, free from any claims of the defendants, or any of them, and restraining the de-

fendants from trespassing thereon, or extracting the oil therefrom, and for an accounting. The legal title to the property involved is in the United States, and except one-half section is included in the Presidential withdrawal order of September 27, 1909. The land is chiefly valuable for its oil contents, and the larger area thereof is now and has been for some time operated by the defendants as oil-producing property, and large quantities of oil have been and are now being extracted therefrom.

No discovery of oil on any of the lands had been made at the date of the withdrawal order referred to, nor was any one in possession of any part thereof at that time actually engaged in drilling or prospecting for oil. In the spring of 1907, however, divers parties entered upon the lands in controversy and a large number of other tracts in the same vicinity, and posted thereon and caused to be recorded in the county in which the land is situated notices claiming the same under the placer mining laws of the United States, and subseqently conveyed their interests to the defendants. Thereafter, and during the year 1911, the defendants in cases A–37 and A–52 each filed in the local land office at Visalia an application for a patent under sections 2325 and 2326, Revised Statutes (Comp. St. 1913, §§ 4622, 4623), alleging in substance that their predecessors had entered upon the land in February, 1907, and, having theretofore discovered thereon gypsum and other placer minerals, did then and there locate the same as consolidated placer mining claims, by marking the boundaries on the ground and posting and recording the required notices; that ever since said time the applicant and its predecessors in interest have been in actual bona fide possession of the property, working and holding the same as a placer mining claim, and have done the necessary amount of assessment work. The application was accompanied by divers and sundry affidavits and papers in support thereof, all requirements of the statutes and the rules and regulations of the Land Department in the matter of an application for a patent for a mining claim being complied with. After the 60 days' publication had expired, no adverse claim having in the meantime been filed or made by any private party, the applicant paid to the receiver of the local land office the purchase price, and such receiver issued and delivered his receipt therefor, stating that the money was received in connection with such application, and a recital that it "is evidence only of the receipt of the money included without regard to the subsequent allowance or rejection of the application, due notice of which will be given." The application and accompanying documents together with a copy of the receiver's receipt was immediately forwarded to the Commissioner of the General Land Office by the register of the local land office.

No further action was taken in the matter until December, 1915, when, by direction of the Commissioner of the General Land Office, a special agent of the department filed charges against the validity of the entry on the ground: (1) That no discovery of oil or gas had been made at the time the land was withdrawn from entry; (2) That neither the applicants nor their predecessors in interest were in the actual bona

fide possession of the property and prosecuting work looking to discovery at the date of such withdrawal. (3) That no valid discovery of gypsum had been made on the property prior to the withdrawal ordered, and that the claim that the land contained valuable deposits of gypsum is and was a mere pretense and not made in good faith, with the bona fide intention of developing and marketing the gypsum, but as a mere subterfuge for obtaining title to the land on account of its oil contents. (4) That the location of the land involved in suit A–37 was not made by the so-called locators in good faith for their own use and benefit, but for the use and benefit of the defendant, the Devil's Den Consolidated Company, and with the purpose and intention of it securing thereby a greater area of mineral land than may be lawfully entered in a single location by a corporation. The defendants were duly notified of such charges, and filed denials thereof, and requested that a hearing be ordered thereon. Thereafter these suits were commenced, based upon substantially the same grounds as the charges filed against the entries in the local land office.

[1] The defendants plead the pendency of the proceedings before the land office in bar, the contention being that the acceptance by the officers of the local land office of defendants' application for a patent and the purchase price of the land was in effect a judgment in rem and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the Land Department, and until such judgment is annulled by the proper authorities within the Land Department the defendants are entitled to the possession of the property, with the right to extract and dispose of the minerals thereof.

In a contest between private parties over the title or right to the possession of mining property for which patent has not been issued, the doctrine invoked would no doubt be applicable. Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land, and no adverse claim has been filed, the applicant becomes vested with the equitable title and a prima facie right to a patent immediately upon the payment of the purchase price, and the delay of the department in issuing patent "does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." Benson M. Co. v. Alta M. Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; El Paso Brick Co. v. McKnight, 233 U. S. 250, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113. But such a proceeding does not divest the government of its title, nor is it an adjudication as between the claimant and the government. In such a case there is no adjudication by the Land Department of any questions arising on the application for patent. Nor has it been allowed or approved by the government or any of its officers, and no final certificate has been issued. But if the application had been allowed and passed to patent, it would not have been conclusive against the government. Wash. Securities Co. v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220. All that has been done in the instant cases is the receipt by the officers of the local land office of the application for patent and the purchase price, the trans-

mission by them of the same to the General Land Office, and a subsequent filing of objections to the issuance of patent by an agent of the department. The broad question, then, is whether the mere acceptance by the land office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is a bar during the pendency thereof in the Land Department to a suit by the government to cancel and annul the interest of the applicant, if any, and determine his right to possession, and to extract and market the mineral, on the ground that the application for patent and the proceedings connected therewith were and are fraudulent, wrongful, and unlawful.

In my judgment it is not. The proceedings are wholly ex parte as to the government, and can have no greater effect than if the patent had actually issued; and it is settled law that the issuance of a patent under such circumstances is not a bar to a suit by the government to vacate or annul such patent, if fraudulently and unlawfully obtained, or issued by mistake or inadvertence of the officers of the Land Office. Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Germania Iron Co. v. United States, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. Ed. 754; Washington Securities Co. v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220; Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725. I do not think any greater virtue should be accorded to a mere ex parte preliminary proceeding.

[2] It is insisted, however, that as the applications for patents are now pending and undetermined in the Land Department, the court will not assume jurisdiction, even if such applications are fraudulent and unlawful, until they are finally disposed of by the department. The Land Department is vested, conformably to the acts of Congress, with the exclusive jurisdiction to determine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent a court will not assume to determine which of two rival claimants is entitled to the property. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800. But the government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights, or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants, and not the government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the patent. But (section 2325, R. S.) "if no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter." If, however, an adverse claim is filed during the period of publication, the adverse claimant is

required by section 2326 to commence within 30 days thereafter proceedings in a court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the statute is to make the proceeding binding on private parties and not the government.

There is no reason to be found in the relation of the government to such a proceeding which will deprive it of the same right to relief if the proceedings are fraudulent or unlawful as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the aid of a court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local land office; for, as said by Mr. Justice Miller in United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110:

"In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly ex parte. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant, there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

I am of the opinion therefore that the court has jurisdiction to try the questions involved in these cases. If, however, I am mistaken as to the extent of the jurisdiction, the government is clearly entitled, upon the allegations of the bill and the showing made, to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the court. Nor. Lumber v. O'Brien (C. C.) 124 Fed. 819; El Dora Oil Co. v. United States, 229 Fed. 946, 144 C. C. A. 228. Even where land has ceased to be public land by pre-emption, homestead, and like claims, but to which claimant has not perfected his title, they are still so far public lands of the United States that the government may protect them from waste. Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231.

The Land Department has no general equitable power. It cannot grant injunctions, appoint receivers, nor by its orders or decrees prevent trespass upon or protect the public domain from spoliation. It is true under the act of Congress of August 25, 1914, the Secretary of the Interior is authorized in his discretion to enter into agreements with a certain class of applicants for patents for oil and gas lands included within an order of withdrawal, relative to the disposition of oil or gas produced therefrom. This is a discretionary power, probably intended for the benefit and to protect from liability as trespassers those who, in

the judgment of the Secretary, have mistakenly trespassed upon land not open to entry and in good faith expended money in prospecting for oil and in the development and the improvement of the property. In one of the cases now under consideration an application for such a contract has been made, and denied by the Secretary on the ground and for the reason that suit was then pending in this court. His reasons for refusing to enter into the contract are not the subject of review here. It is enough that no such contract has been made.

[3] The remaining question is whether the motion for an injunction and the appointment of a receiver should be allowed. No discovery of oil had been made on any of the property at the time of the withdrawal order of September 27, 1909, and as there can be no location of a mining claim valid as against the government until the discovery of mineral within the limits of the claim (sections 2320 and 2329, R. S. [Comp. St. 1913, §§ 4615, 4628]), it follows that the defendants have no right or claim to the property included in such order which they can assert against the government, unless it shall appear that valid locations were made prior thereto on account of the gypsum contents, or the defendants or their predecessors in interest were at the date thereof bona fide occupants and in diligent prosecution of work leading to the discovery, within the meaning of the saving clause of the act of June 25, 1910.

The government claims and alleges that the land does not contain gypsum of any substantial value, and that it was sought to be located solely for its oil contents; that the alleged discovery of gypsum is a mere subterfuge, designed to avoid the effect of the withdrawal order; and that the alleged location of the property involved in suit A–37 was made by the so-called locators for the use and benefit of the defendant company, and not for themselves. On this preliminary hearing it is not necessary that the court express its opinion upon these questions. Indeed, it would be improper for it to do so, except to say that the showing made indicates very clearly that there is substantial ground for the government's position.

The defendants, however, are in possession and actually engaged in extracting and threatening to extract large quantities of oil, thus destroying the very substance of the estate. They are disposing of the oil at much less than its current market value. Their holdings consist principally of the property in controversy, and it is not probable that they would be able to respond in damages if they lose the property. Moreover, it is shown that the marketing companies will not purchase oil from the disputed land without the consent of the government, because of these suits. Under these circumstances, it appears to me that either an injunction should issue to prevent further operations pendente lite, or a receiver should be appointed, with authority to operate or cause the property to be operated. An injunction would probably result in serious damage to, if not the substantial destruction of, the property by the infiltration of water and otherwise, and would be of much greater injury to the defendants, if the property should ultimately be awarded to them, than the appointment of a receiver.

I am of the opinion, therefore, that a receiver should be appointed for the property in controversy, except the southern half of section 22.

The complaint alleges that this latter tract was within the withdrawal order of September 27, 1909, but the proof shows this to be an error. A part thereof has already passed to patent, and the remainder is described in the withdrawal order of October 5, 1910; but there is no allegation in the bill that oil had not been discovered thereon prior to that time. In fact, the inference is to the contrary, as the bill, impliedly at least, admits the discovery of oil in July, 1910. The defendants, however, acting under the advice, no doubt, of learned counsel, have in good faith—at least, with no apparent intention of defrauding the government—expended large sums of money in improving and developing the property, and I am not satisfied that they are not now operating it economically and carefully. The receiver, therefore, to be hereafter appointed, should permit the defendants to continue the operation under his supervision, and should make no change in the present status or operation of the property without the consent of the defendants, unless by order of the court made after notice to the defendants, other than such as may be necessary to enable him to ascertain the present condition of the property, and receive the output thereof, and to keep a record and accounting thereof.

Decrees may be prepared accordingly.

GOLDFIELD CONSOL. WATER CO. v. PUBLIC SERVICE COMMISSION OF NEVADA et al.

(District Court, D. Nevada. October 9, 1916.)

No. A-53.

1. EMINENT DOMAIN ⟸84 — WATER COMPANY — REGULATION OF RATES — "PROPERTY."

The use of a water distributing plant is itself "property" and is protected against confiscation by the Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. ⟸84.]

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

2. WATERS AND WATER COURSES ⟸203(10)—WATER COMPANIES—REGULATION OF RATES.

What a water company is entitled to demand in order that it may have a just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public service, provided no more is exacted than its services are reasonably worth.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 294; Dec. Dig. ⟸203(10); Constitutional Law, Cent. Dig. § 847.]

3. WATERS AND WATER COURSES ⟸203(10)—WATER COMPANIES—VALUATION OF PROPERTY.

The original cost of the plant of a water company, the value fixed for taxation, the aggregate value of the company's issued bonds and capital stock, and the amount honestly and prudently invested, cannot any one of them alone be regarded as invariably or necessarily equivalent to present value for rate-fixing purposes; the fact that the plant is in operation and circumstances and conditions which indicate the future

increase, diminution, or entire loss of its business, are also factors to be considered.

[Ed Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 294; Dec. Dig. ⟸203(10); Constitutional Law, Cent. Dig. § 847.]

4. WATERS AND WATER COURSES ⟸203(10)—WATER COMPANIES—REASONABLENESS OF RATES.

Unless in exceptional cases, depreciation in value of the property of a water company already accrued should not be charged upon future consumers.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 294; Dec. Dig. ⟸203(10); Constitutional Law, Cent. Dig. § 847.]

5. WATERS AND WATER COURSES ⟸203(10)—WATER COMPANIES—PUBLIC REGULATION OF RATES.

Evidence considered, and *held* insufficient to warrant a finding that rates fixed by a state commission to be charged by a water company were confiscating in advance of an actual test.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 294; Dec. Dig. ⟸203(10); Constitutional Law, Cent. Dig. § 847.]

In Equity. Suit by the Goldfield Consolidated Water Company against the Public Service Commission of Nevada, J. F. Shaughnessy, H. F. Bartine, and W. H. Simmons, as members of and constituting the Public Service Commission of Nevada. On motion for preliminary injunction. Denied.

James F. Peck and Peck, Bunker & Cole, all of San Francisco, Cal., and Henry M. Hoyt, L. A. Gibbons, and L. N. French, all of Reno, Nev., for complainant.

George B. Thatcher, Atty. Gen., and H. F. Bartine, of Carson, Nev., for defendants.

FARRINGTON, District Judge. Since January 1, 1907, complainant has been engaged in developing, selling, and distributing water, and receiving and disposing of sewerage in the town of Goldfield and vicinity. The Public Service Commission of Nevada having made an order fixing the maximum rates which might be charged for such service, the company asks that the enforcement of the order be restrained permanently, as well as during the progress of the suit, and that the order itself be adjudged to be unjust, unreasonable, and confiscatory, and therefore void and of no effect.

The application for an injunction pendente lite is now before the court. It is alleged that the water and sewerage systems have actually cost $452,147.81, and that this amount should be increased 10 per cent. to cover interest and engineering expenses during the period of construction; that the cost of reproducing the plant with a daily capacity of 250,000 gallons would be $325,037.97, and the cost of reproducing the plant with its present capacity of 430,000 gallons per day would reach $400,000, which is its fair value; that the plant was constructed and installed when Goldfield had four or five times its present population; that mining is the only productive business of Goldfield, and, as the ore bodies will be entirely exhausted within a period of eight or nine years, complainant's property will have no value at the end of

that time; that during the past eight years, at the present rates, complainant "has earned * * * an average of 8.4 per cent. net on the cost of construction, and deducting bond interest 11½ per cent. on the capital actually invested with no allowance for depreciation, which should be 12½ per cent. per annum"; that the order complained of, if enforced, would cause a reduction of $7,500 in the company's net income, leaving a net profit of no more than 5.2 per cent. upon the fair value of its property, or 4.8 per cent. on the balance over bonded indebtedness, and that, too, without any allowance for depreciation. Assuming that the future profitable and productive life of Goldfield will not exceed eight years, the company asserts that it is entitled to water and sewerage rates sufficient to pay all its expenses, and yield for depreciation 12½ per cent. on its present reproduction cost, interest at the rate of 6 per cent. on its bonded indebtedness, amounting to $249,000, and also a profit of 10 per cent. per annum on a sum which shall be equal to the difference between the bonded indebtedness and the reproduction cost.

In this controversy the court cannot act as a commission. It is not vested with the power to make rates, or to substitute its judgment as to what the rates should be, for the judgment of the rate-making body. Its jurisdiction is invoked on the ground that the new rates are confiscatory. If it be not made to appear that the rates will result in taking complainant's property for public use without just compensation, the court will refrain from interference.

[1] What the public in Goldfield is receiving from the water company is the use of the company's plant. This in itself is "property," and is protected by the Constitution. It is no more subject to public appropriation without just compensation than the plant itself. If the enforcement of the order complained of results in subtracting anything from that which under the circumstances is just, but no more than just, compensation for the use of the company's property, there is an invasion of its constitutional rights. To hold otherwise is to hold that the Constitution protects a portion but not all of one's private property. Spring Valley Water Co. v. San Francisco (C. C.) 165 Fed. 667.

[2] "What the company is entitled to demand [in order] that it may have a just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public" service, provided no more is exacted than its services are reasonably worth.

This rule is supported by a multitude of decisions, and by practically all the federal courts. Its significant feature, in view of the unusual circumstances of the present case, is that the value to be ascertained is present value, value at the time the property is being used, or, as Mr. Justice Peckham says in Wilcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034:

"The value of the property is to be determined as of the time when the inquiry is made regarding the rates."

It was this principle which led the Supreme Court to say in Knoxville v. Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371:

"The cost of reproduction is one way of ascertaining the * * * value of a plant like that of a water company, but that test would lead to obviously incorrect results, if the cost of reproduction is not diminished by the depreciation which has come from age and use."

[3] In nearly every case of this kind, original cost, the value fixed for taxation, the aggregate value of the company's issued bonds and capital stock, and the amount honestly and prudently invested, have been urged as measures of value; but it is impossible to regard any one of them as invariably or necessarily equivalent to present value. A prudent, well-informed man, who is figuring on what he can afford to pay for a plant such as the one under consideration, would naturally inquire as to every such matter; he would also investigate, among other things, all circumstances and conditions which tend to increase or diminish the demand for, and the value of its services, and the probable duration and constancy of such demand. Unquestionably, the fact that complainant's plant is actually doing business, and is a going concern, is an important element of value. National Waterworks Co. v. Kansas City, 62 Fed. 853, 864, 10 C. C. A. 653, 27 L. R. A. 827; Spring Valley Water Co. v. San Francisco (C. C.) 192 Fed. 137, 166; Whitten on Valuation of Pub. Service Corp. § 520 et seq.; Pond on Pub. Utilities, §§ 473, 474.

In many cases the courts have declined to give this element an independent and distinct expression, but have preferred rather to consider it as a characteristic of the plant, the value of which is affected by the circumstance that it is or is not a going concern. Brunswick Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537, 538.

It has been said that the cost of reproduction new, less depreciation, when properly considered, is the same as fair present value. This may be true in normal cases of property located in settled communities where values are stable, but here the problem is complicated by the fact that at the present time the town of Goldfield has not more than one-third the population it had when complainant's plant was acquired and constructed. Since then the value of substantially all other fixed property in that locality has fallen at least 50 per cent. No reason has been advanced why complainant's fixed property values have not shrunk in the same ratio.

It is difficult to conceive how there can be a reliable estimate of fair present value which is not controlled to some extent by the fact that the plant is in operation, and by circumstances and conditions which indicate the future increase, diminution, or entire loss of its business.

Complainant's plant is capable of supplying 13,000,000 gallons of water per month; but, at the time these proceedings were initiated before the defendant commission, the average monthly sales were no more than 5,000,000 gallons.

The life of Goldfield, as of every mining camp, is uncertain; sooner or later the ore deposits will be exhausted, and the mines abandoned. Complainant avers that when this occurs, at the expiration of eight or nine years, its property will have no value. The bulk of this depreciation will have been caused, not by age, use, or action of the

elements, but by the failure of the mines; there will be no market in Goldfield for complainant's water, or any considerable demand for its services. If depreciation of this character must be provided for in the rates, as complainant demands, it is no more than just that it should be considered in determining the present reasonable value of the property.

Complainant alleges a present value of $400,000, and a total actual cost of $496,345.74. Charles G. Patrick, general manager of the water company, testifies to an actual money expenditure, as shown by accounts regularly kept, of $452,147.81, which he says should be increased 10 per cent. to cover incidental construction costs, and interest on capital expended during the period of construction. He states, however, that he is content to call the reproduction cost $400,000 for the purposes of this inquiry. For the purposes of taxation, the same witness swears that the value of the property since 1912 was not more than $75,000. This he explains by saying:

"I make my basis of $75,000 as the assessed valuation as being 60 per cent. of the valuation of the property, * * * for the simple reason that is all the property will bring. It is only earning approximately 10 per cent. on that valuation at this time. I maintain, on the other hand, that the investors in this property are entitled to earn and consequently are entitled to a rate-making valuation in proportion to the investment they have actually made; that they are not responsible for the depreciation in those values which make the property only worth for assessment purposes upon what it will earn, which is about $125,000."

A. G. H. Curry, an engineer, for certain patrons of the water company testified that the plant could be reproduced new for $308,960, and that its reproduction value in its present condition is $212,450.

W. K. Freudenberger, engineer for the Public Service Commission, testifies that the actual reproduction value new of the plant as a whole is $339,282, and that at the present time, in its depreciated condition, the actual reproduction value is approximately $233,600, and the actual commercial value no more than $151,000.

The present water company has been in existence since 1907. The face value of its issued stock is $988,966. Its issued and outstanding bonded indebtedness amounts to $232,000. Mr. Patrick testifies that the bonds sell for a little over 50 cents on the dollar, and that there is absolutely no market for the stock. In the pleadings defendants admit a valuation of $233,600.

There is no evidence before the court at the present time which will justify a higher present commercial valuation than that testified to by Mr. Freudenberger.

As to complainant's demand for a 10 per cent. profit on a sum which shall be equal to the difference between its bonded indebtedness and the reproduction cost of the plant, it is unnecessary at the present time to announce any definite conclusion. There is some force in the suggestion that the bank rate of interest in Goldfield is not a reliable criterion, because it represents gross rather than net return for the use of money. On the other hand, it must be remembered that in a mining camp a prudent loan is much less hazardous than an invest-

ment in fixed property, or property which cannot be moved except at a cost which consumes its value.

For several reasons the rate demanded for depreciation seems to me to be too high.

First, complainant has a plant which, according to the bill, is capable of supplying 13,000,000 gallons of water per month to the people of Goldfield. The expense of delivery, including taxes, in June, 1915, was 62 cents per thousand gallons. At the present time the company is selling no more than 5,000,000 gallons of water per month, of which about 4,500,000 gallons are delivered to some nine large concerns for an average price of about 59 cents per thousand gallons, while about 500,000 gallons are furnished to some 500 domestic customers, hotels, and saloons at an average price of more than $5 per thousand gallons. Thus it appears that the company's profit, as well as the allowance for depreciation, will be drawn, if present rates continue, from patrons who are using no more than 4 per cent. of the water which complainant is able to supply.

[4] Second. For eight years, while its mines have been yielding $65,000,000, Goldfield has been wonderfully prosperous. During that time the company apparently has had a free hand in the matter of fixing rates, but it has collected nothing for depreciation. The commercial value of its property has diminished more than 50 per cent. It seems unfair that this burden of accrued depreciation should be added to current depreciation and cast upon the present retail consumers of the company. Save in exceptional cases—and this is not an exceptional case—depreciation properly chargeable to one period should not be collected from the customers of another period. Puget Sound Electric Ry. v. Railroad Com., 65 Wash. 75, 117 Pac. 739, 748, Ann. Cas. 1913B, 763; Harris v. South Side Gas & Electric Co., P. U. R. 1915F, 747, 759; Whitten on Valuation of Pub. Service Corp. § 483 et seq.

Third. The claim is made that complainant's plant at the expiration of the next eight years will have become valueless, for, in consequence of the exhaustion of the mines at that time, there will be no market for water. For all that appears in the bill or in evidence, the plant may be as efficient then as now, and its water supply may be needed for other purposes. Furthermore, the total depreciation cannot exceed the difference between the present value of the plant and its salvage value at the expiration of eight years.

Fourth. Speculation as to the probable life of Goldfield will not lead to any conclusion substantial enough to be controlling. Unquestionably the present life of the mines is uncertain. This is a hazard which every investor, not only in Goldfield but in any other mining camp, knows and appreciates. This risk is reflected in rates of interest, and in prices generally. In my judgment, it should be taken care of in the rates; but it is impossible by judicial decree to fix the date when the productive life of any group of mines will come to an end.

While the company is entitled to a fair return on the reasonable value of its property, the public has a right to demand that no more

shall be exacted than the services are reasonably worth under the circumstances.

"The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Compensation for the services of a public utility "must be just to the public, and should be just to the company; but, if it cannot be just to both, it must in any event be just to the public." This is clear, because one who has voluntarily devoted his property to the service of the public cannot complain that he is the victim of confiscation if he receives all that the service is worth. Covington & L. T. R. Co. v. Sandford, 164 U. S. 578, 597, 598, 17 Sup. Ct. 198, 41 L. Ed. 560; Water Dist. v. Water Co., 99 Me. 371, 59 Atl. 537; Southern Pac. Co. v. Bartine (C. C.) 170 Fed. 725, 767; Puget Sound Electric Ry. v. Railroad Com., 65 Wash. 75, 117 Pac. 739, 744; Whitten on Valuation of Pub. Service Corp. § 1012; Pond on Pub. Utilities, §§ 453, 454.

[5] Does the evidence overcome the presumption that the rates fixed in the order of the commission constitute a reasonable return for the services of the company?

It must be borne in mind that the reduction complained of will affect only retail customers. This is very clearly shown by tables D and F set out in Commissioner Shaughnessy's opinion. From table D it appears that in June, 1915, 4,533,852 gallons were sold to nine wholesale customers for 58.6 cents per thousand gallons; 172,984 gallons were delivered to 401 domestic users for $6.20 per thousand gallons; 171,385 gallons were delivered to 101 commercial patrons for $5.53 per thousand gallons; and 96,875 gallons were supplied for 85 lawns at a price of $2 per thousand gallons. Elsewhere in the record it is shown that the principal mining and milling company in the district and the Tonopah & Goldfield Railroad Company pay a net rate of 50 cents per thousand gallons. The total receipts from sales of water were $4,869.27 for the month. During the same month, 137 users of the sewer paid an average monthly charge of $5.24, or a total of $717.85.

The order complained of fixes the maximum charge per thousand gallons for retail customers at $3, and for wholesale customers at $1; the charge for each sewer connection for residences cannot exceed $2 per month, or for commercial service $5 per month.

Mr. Freudenberger, in his affidavit, states that 620 consumers are buying water from wagons in Goldfield, for which they are paying from $3 to $7 per thousand gallons. The company's average operating expenses, including taxes, per thousand gallons, in 1915 were 62 cents. Thus the company was selling to at least two customers water at 12 cents per thousand gallons less than cost.

The following statement of fact taken from the opinion of the commission fairly illustrates prevailing conditions in Goldfield:

"The record shows that a rooming and boarding house, which on the average takes care of from 15 to 16 patrons, has a monthly water bill, at the present time, of approximately $26; compared with which, it shows that during 1906 a rooming and boarding house, with 65 to 80 patrons and 4 employés, had secured water from water wagons at a monthly charge ranging

between $24 and $26. Again, it was shown that a residence consumer having one bath, toilet, wash bowl, and kitchen sink, with five in his family, paid during a five-month period, for an average of 3,000 gallons per month, an average charge of $14.70 per month, and also a charge of $3.75 per month for sewer service, making the average monthly bill for water and sewer service $18.45 covering said period. The consumption in this case, considered in connection with the maintenance of a modern house or cottage and a family of five members, appears to be reasonable and necessary from the standpoint of a reasonably adequate supply for domestic and sanitary purposes.

"From the statement furnished for the month of June, 1915, we find that respondent's residence consumers use an average of only 432 gallons of water at an average charge of $2.68 per month, within which the consumption ranges from approximately 150 gallons to 3,000 gallons of water, and the monthly charges from $1.60 to $15. Again, we find that the business or commercial consumption ranges from 500 gallons to 16,000 gallons, and the monthly charges from $3 to $65."

The sewerage service appears to have been operated under similar conditions, and exhibits the same contrast between capacity and actual service. The monthly charges for domestic sewer service are from $2.25 to $3.75 for each connection per month, and for commercial service from $3 to $10. Of the company's 511 water consumers, only 137 make any use of the sewer.

In explanation of the low wholesale rate at which water is given to the mining and railroad companies, Mr. Patrick testifies that they are obliged to fix a low rate, otherwise the companies will supply their own water.

If the mining company and the railroad company can produce their own water at a cost which precludes a charge against them of more than 50 cents per thousand gallons, if 620 of the 1,130 consumers in Goldfield are supplied from water carts at prices ranging from $3 to $7 per thousand gallons, and if in a town of 4,000 or 5,000 inhabitants there are but 137 sewer connections, the only reasonable inference is that the prevailing rates exceed the reasonable worth of the services rendered and unduly discourage consumption of water. Commissioner Shaughnessy intimates that the effect of the rates has been to restrict the use of water in Goldfield to an average of about two gallons per capita per day for domestic purposes, a quantity which in the judgment of those best informed in such matters is insufficient for proper sanitation. When this is considered in connection with the fact that the plant is capable of supplying more than twice as much water as the people of Goldfield are using, it is difficult to put aside the suggestion that lower rates should at least be fairly tested, and that a minimum charge should entitle the consumer to an amount of water which is reasonably sufficient for domestic and sanitary purposes. These observations will apply to the sewerage charges as well.

I am of the opinion that the evidence is insufficient to overcome the presumption in favor of the reasonableness of the rates fixed in the order complained of.

An injunction pendente lite will therefore be denied.

Each party will have 20 days within which to take such steps as it may be advised.

In re LEE.

(District Court, E. D. Michigan, S. D. October 30, 1916.)

1. ALIENS ⟸68—NATURALIZATION—DECLARATION—PETITION—TIME—STATUTES—PROVISO.

Under Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), providing that an alien may be admitted to citizenship only in the following manner: First, he shall make a declaration of intention in a prescribed manner, provided, that no one who in conformity to the law in force at the date of his declaration has declared his intention shall be required to renew his declaration; and, second, not less than two years nor more than seven years after he has made such declaration he shall file a petition in a prescribed form—though a declaration filed before has the same force and effect as one filed after passage of and in conformity with the act, a petition must be filed not more than seven years after the act takes effect; the proviso relating only to the sufficiency of the declaration.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

2. ALIENS ⟸68—NATURALIZATION—STATUTES—RETROACTIVE EFFECT.

Act June 29, 1906, c. 3592, § 4, in providing that petition shall be filed not more than seven years after the making of declaration of intention to become a citizen, is not retroactive in any proper sense, as to one who filed his declaration before passage of the act, as it will be construed to give him seven years after the act took effect.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

Petition of John Wortley Rastrick Lee to be admitted to citizenship. Denied, without prejudice.

TUTTLE, District Judge. The petitioner herein, an alien, made and filed his declaration of intention to become a citizen of the United States before the enactment of the present Naturalization Act, and in conformity with the law then in force. More than seven years after such act took effect said alien filed his petition for citizenship, without having made any further declaration of intention.

[1] The sole question involved is whether an alien who, before the date of the taking effect of the present Naturalization Act, duly declared his intention to become a citizen of the United States, and, without renewing such declaration, filed his petition for citizenship more than seven years after such act took effect, may now be admitted to citizenship. The answer to this question depends upon the proper construction of said Naturalization Act. This is Act of June 29, 1906, c. 3592 (34 Statutes at Large, pt. 1, p. 596). The provisions thereof material here are the following portions of section 4:

"Section 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to

become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting."

It will be noted that under the express provisions of this section and by two different paragraphs thereof, two separate and distinct acts on the part of the alien are required before he may be admitted to citizenship: First, he must declare his intention to become a citizen; second, he must make and file his petition for citizenship. Each of these steps must be taken by every alien who desires to become an American citizen. The section first provides that such alien "shall declare on oath," in a manner specifically prescribed, his intention aforesaid. It is clear, in view of the explicit provision that "an alien may be admitted to become a citizen of the United States in the following manner and not otherwise," that if there were no proviso to such first paragraph the declaration of intention filed by the petitioner herein would be insufficient, as it is not made and filed in accordance with the requirements of this act, and it would be necessary for petitioner to renew such declaration, although it was made and filed in conformity with the law in force at the date of its filing. To avoid such a result, however, Congress limited the application of this paragraph by adding thereto the proviso already quoted, as follows:

"Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

The effect, and, in my opinion, the only purpose, of this proviso is to give to a declaration filed before such act became a law, and in conformity with the law in force at the date of such declaration, the same force and effect as if it had been filed in conformity with, and therefore subsequent to, the passage of such act. The alien seeking

citizenship was still required to file a declaration of intention, but if such declaration had already been filed in conformity with the former law, that declaration would take the place, and be accepted in lieu, of the particular kind of a declaration otherwise required, notwithstanding the fact that such aforesaid declaration was a different kind of declaration than that described and prescribed in said act. This, in my opinion, is the meaning of such proviso.

Having, however, thus provided for the making and filing of a declaration of intention in the manner and subject to the requirements mentioned, Congress, in the second paragraph of said section, provided, as a further requirement, that:

"Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate,"

—a petition complying with certain formalities specifically prescribed. It seems to me that this language clearly evinces an intention to require that this petition shall be filed not more than seven years after the making of the declaration provided for in the first paragraph already referred to, whether such declaration was made and filed in the manner prescribed by this act or was made and filed before such act took effect, but in conformity with the law in force at the day of its filing, and therefore accepted as sufficient under the statute, although not made in the manner provided.

It is urged that the proviso quoted above exempts from the seven-year limitation declarations filed before the statute took effect. I cannot agree with this contention. I think that said proviso relates only to the sufficiency of the declaration of intention, and that its sole purpose is to give to a declaration filed before this statute became operative, if sufficient under the previous law, the same force and effect as if it had been filed in accordance with the requirements of such statute.

"It is a rule that a proviso is strictly construed, and should be confined to what precedes it, unless it clearly appears to have been intended to apply to other matters also. Suth. St. Const. § 223; Potter, Dwar. St. 272; End. Interp. St. § 186; Wayman v. Southard, 10 Wheat. 30 [6 L. Ed. 253]; U. S. v. Dickson, 15 Pet. 141–145 [10 L. Ed. 689]." Boston Safe-Deposit & Trust Co. v. Hudson, 68 Fed. 758, 15 C. C. A. 651.

"It is a familiar doctrine that a proviso is to be strictly construed, and that it should be confined to what precedes it, unless it clearly appears to have been intended to apply to other matters also." Carter, Webster & Co. v. United States, 143 Fed. 256, 74 C. C. A. 394.

"This conclusion is in harmony with the general rule that a proviso should be construed with reference to the subject-matter of the sentence of which it forms a part, unless it clearly appears to be designed by the Legislature for a broader or more independent operation. Suth. Stat. Constr. § 223; Savings Bank v. United States, 19 Wall. 227, 236, 22 L. Ed. 80; Boston Safe Deposit & Trust Co. v. Hudson, 68 Fed. 758, 15 C. C. A. 651." United States v. Bernays, 158 Fed. 792, 86 C. C. A. 52.

"An exception or proviso in a statute affects and relates to the paragraph or clause in which it is found, or to which it is annexed, only, and not to the entire statute, or to other sections, paragraphs, or clauses in it, unless a different intention or purpose on the part of the Legislative body is clearly disclosed by the enactment." Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265.

If this proviso had followed, not preceded, the provision prescribing the seven-year period of limitation, there would be much force in the contention made. Such provision, however, follows said proviso, and, admitting that it is inconsistent therewith, must control. In re Richards (D. C.) 96 Fed. 935. As was pointed out in the case of United States v. Jackson, 143 Fed. 783, 75 C. C. A. 41:

"Another well-settled rule of construction applicable to these cases is that, where there is an irreconcilable conflict between different parts of the same act, the last in the order of arrangement will control."

The words "such declaration of intention" used in the last-mentioned paragraph obviously refer to the declaration required by the first paragraph. What declaration is required by such paragraph? Clearly, either a declaration made and filed under the terms of this act, or, in lieu thereof, a declaration made in conformity with the law in force at the date of such declaration. But, a declaration, of one kind or the other, having been filed, the provision is mandatory that "Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate" the petition therein mentioned. In the words of the Circuit Court of Appeals of the Second Circuit, in the case of Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67:

"A declaration made prior to the act of 1906 is valid, no matter how long prior thereto it may have been made, but after the date of the passage of that act the person who made the declaration has no superior rights to one who declares thereafter. In both cases action must be taken within seven years. It seems to us that this is what Congress intended. In effect the act says to the alien who has made his declaration prior to 1906: 'Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the act.'"

As was said in the case of In re Goldstein (D. C.) 211 Fed. 163:

"It is evident that no petition for final hearing can be made except under the provisions of the present law. An applicant who had filed one of the old declarations could use that at once, and hence could avoid waiting two years after filing a new declaration, but must still use the old form of declaration as a basis for his compliance with the present law in other respects. This satisfies the requirement that no new declaration will be needed in addition to the old one, but does not mean that the old paper is of any greater effect, or has any wider use, than the new one. The provision that no new declaration is needed, and that the old declaration may be used, is followed by the provision that 'such declaration' must be used within seven years. These words 'such declaration' expressly include the declarations of that class of applicants who need not sign their name because they have declarations made before the passage of this act. The beginning of the period of seven years in such cases cannot be postponed beyond the date when the law made all old declarations in effect as if taken out on or dated from the day when the new law went in force. From that date all declarations capable of use under the new law are covered by a seven-year statute of limitations. The Congress might have provided that a new declaration be taken out by all applicants, or the law might have been made to read that no naturalization at all should be possible, and thus repeal the previous statute in toto. This was evidently felt to be undesirable, and the present act was designed to provide for and protect those who already had first papers. But no intention on the part of Congress is indicated to vary the limitation of time after which a new state-

ment of intention will be required as a prerequisite from any applicant for final papers."

To the same effect are Harmon v. United States, 223 Fed. 425, 139 C. C. A. 19 (C. C. A. First Circuit), and In re Wehrli (D. C.) 157 Fed. 938.

[2] It is urged that the effect of such a construction is to make the statute retroactive, and that, therefore, such construction should not be adopted unless clearly necessary to carry out the intention of Congress. If such contention were, in my judgment, sound, I should still be of the opinion that the construction indicated was the proper one. I do not, however, agree with the contention that such construction renders the statute retroactive, in the proper sense of the word, or that it unjustly deprives any person of rights existing when such statute was enacted. Under well-settled rules of statutory construction it will be presumed, in the absence of a clearly expressed contrary intention, that the operation of such a statute was not intended to commence, as against rights accruing before its passage, until the date of such passage. The rule and the reasons therefore are so well stated in the opinion of Mr. Justice Bradley, speaking for the United States Supreme Court in Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737, that I quote therefrom somewhat at length, as follows:

" 'Words in a statute,' says Justice Paterson, 'ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. United States v. Heth, 3 Cranch, 413 [2 L. Ed. 479].' And this rule is repeated by this court in Harvey v. Tyler, 2 Wall. 347 [17 L. Ed. 871], where it is said: 'It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.' The plaintiff contends that the application of this rule to the statute in question would have the effect of restricting its application to actions accruing after the passage of the act. But this is not a necessary conclusion. A statute of limitations may undoubtedly have effect upon actions which have already accrued, as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the Legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires —which reasonable time is to be estimated by the court—leaving all other actions accruing prior to the statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or,

as to them, is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of Ross v. Duval, 13 Pet. 62 [10 L. Ed. 51], and Lewis v. Lewis, 7 How. 778 [12 L. Ed. 909]. In those cases certain statutes of limitation—one in Virginia and the other in Illinois—had originally excepted from their operation nonresidents of the state, but this exception had been afterwards repealed; and this court held that the nonresident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. 'The question is,' says C. J. Taney (speaking in the latter of the cases just cited), 'from what time is this limitation to be calculated? Upon principle, it would seem to be clear that it must commence when the cause of action is first subjected to the operation of the statute, unless the Legislature has otherwise provided.' It is true, that in the subsequent case of Murray v. Gibson, 15 How. 421 [14 L. Ed. 755], this court followed the decisions of the Supreme Court of Mississippi in its construction of a statute of that state, and held that it applied only to actions accruing after the statute was passed. But that decision was made in express deference to those of the state court, which were regarded as authoritative. In the present case we are not bound by any decisive construction of the state court on this point."

Assuming, therefore, that the privilege of applying for citizenship is a right or cause of action within the protection of the Constitution, which is, in my opinion, exceedingly doubtful, the present statute should be construed as beginning to operate upon such rights only at the date of its taking effect, so that any alien who had duly declared his intention under the former law and prior to the last-mentioned date was allowed seven years after such date within which to file his petition for citizenship. I agree with and adopt, in this connection, the following language of the opinion in the case of In re Wehrli, supra:

"It is true, the right of an alien to become naturalized is a mere privilege which Congress can grant upon such terms as it deems proper, or withhold entirely, but no act of Congress should be so construed as to deprive an alien of that privilege unless the language is so clear and unambiguous that there can be no doubt of its intent. In my opinion, the language of the statute does not justify such a construction, and the true intent of Congress was that aliens declaring their intention to become naturalized after the passage of the act must file their final application within seven years after * * * the declaration of intention, and as to those who filed the declaration of intention before the enactment of the statute they must make their final application within seven years from the enactment of the act."

It results from the views herein expressed that the petition must be, and it hereby is, denied, without prejudice to the right of the petitioner to make and file a new declaration of intention in accordance with and subject to the requirements of said statute.

UNITED STATES v. O'TOOLE et al.

(District Court, S. D. West Virginia, at Huntington. September 21, 1916.)

1. CONSPIRACY ⟸28—RIGHT TO VOTE—FEDERAL LAWS—PROTECTION.
The right of an elector having the requisite qualifications to vote for a member of the House of Representatives, or for United States senator, being derived from the Constitution and laws of the United States, is protected by Criminal Code (Act March 4, 1909, c. 321) § 19, 35 Stat. 1092 (Comp. St. 1913, § 10183), declaring that, if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, they shall be fined, etc.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⟸28.]

2. ELECTIONS ⟸126(1)—NOMINATIONS—FEDERAL RIGHTS.
While Congress may provide rules regulating the primaries for United States senators and members of the House of Representatives, yet unless it has provided such rules directly or by necessary implication, a candidate can have no federal right in the indorsement which any political party may undertake to give under the state laws.

[Ed. Note.—For other cases, see Elections, Dec. Dig. ⟸126(1).]

3. ELECTIONS ⟸120—PRIMARIES—FEDERAL LAWS.
That Congress has provided for expenses to be incurred in primary elections by candidates for the House of Representatives and the Senate, is no adoption as federal legislation of state laws on the subject.

[Ed. Note.—For other cases, see Elections, Dec. Dig. ⟸120.]

4. STATUTES ⟸1—ADOPTION—EFFECT.
Congress may adopt state legislation and thus give it the sanction of federal legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 1; Dec. Dig. ⟸1.]

5. CONSPIRACY ⟸28—PRIMARY ELECTIONS—OFFICES—RIGHTS PROTECTED—"ELECTIONS."
Act June 4, 1914, c. 103, 38 Stat. 384, providing a temporary method for conducting the nomination and election of United States senators, declares that at the next regular election in any state next preceding the expiration of the term for which any senator was elected, at which election a representative to Congress is regularly by law to be chosen, a senator shall be elected by the people, and that in any state wherein a senator is to be elected, the nomination of candidates for such an office shall be made and the election held as near as may be in accordance with the laws of such state regulating the nomination of candidates for representatives at large, but, if no such provision be made, the procedure shall follow the laws respecting the election of ordinary executive officers and that candidate receiving the highest number of votes shall be deemed elected. The act provided that it should expire three years from its approval. At the time of its adoption the state of West Virginia had no act upon the subject. Defendants were charged with conspiracy in procuring unqualified persons to vote in an election for the nomination of a senator from West Virginia and of casting illegal votes, the indictments being under Criminal Code (Act March 4, 1909, c. 321) §§ 19, 37, 35 Stat. 1092, 1096 (Comp. St. 1913, §§ 10183, 10201), respectively, declaring that where persons conspire to injure any citizen in the free exercise of any right secured by the federal Constitution or laws, such persons shall be punished, and that if persons conspire to commit any offense against the United States or to defraud the United States they shall be punished. *Held* that, as there was no act regulating the nomination of senators, and

as the word "election," as used in the act, must be deemed to mean a general, instead of a primary, election, the federal laws did not protect the rights of candidates for senators at primary elections, and hence the conspiracy did not fall within either section.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⊂=28.

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

Edward O'Toole and others were indicted for violating Criminal Code, §§ 19, 37, and they demurred. Demurrer sustained.

D. E. French, Sp. Asst. U. S. Atty. Gen., and W. G. Barnhart, U. S. Dist. Atty., of Charleston, W. Va.

Holt, Duncan & Holt and John H. Holt, all of Huntington, W. Va., and McClintic, Mathews & Campbell, W. G. Mathews, Brown, Jackson & Knight, and Malcolm Jackson, all of Charleston, W. Va., for defendants.

WOODS, Circuit Judge. The defendants have demurred to two indictments found against them. The first charges that in a primary election held throughout the state of West Virginia on June 6, 1916, for the nomination of United States senator and certain other officers of the United States, the defendants, Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, by procuring about one thousand unqualified voters to vote in said election, and by repeating 400 of their votes, conspired to injure and defraud Albert B. White, Howard Sutherland, and Ben L. Rosenbloom, candidates for such offices, in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and laws of the United States, namely, the right to have only the duly qualified Republican voters of West Virginia to vote for the nominees, and for them to vote only once. This indictment is brought under section 19 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1913, § 10183]), which provides:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, * * * they shall be fined," etc.

The second indictment charges that in a primary election held throughout the state of West Virginia on June 6, 1916, for the nomination of United States senator and certain other officers of the United States, the defendants named in the above indictment, by procuring about 1,000 unqualified voters to vote in said election, and by repeating 400 of their votes, conspired to defraud the United States in the matter of its governmental right to have the candidates of the true choice and preference of the Republican and Democratic parties nominated for the office of senator, and one of them elected and returned to the Senate and given the salary lawfully attaching to the office to the exclu-

sion of all other persons. This indictment is brought under section 37 of the Criminal Code of the United States, which provides:

"If two or more persons conspire either to commit any offence 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," etc.

[1-5] The first and comprehensive question raised by the demurrer is whether the citizens of the United States are protected by the Constitution and laws of the United States in the electoral rights conferred by the laws of the state of West Virginia providing for the selection of candidates of political parties for the office of United States senator to be voted for at the general election. The right of an elector having the requisite qualifications to vote for a member of the House of Representatives or for United States senator, and to have his vote counted, is derived from the Constitution and laws of the United States and is protected by section 19 of the Criminal Code above quoted. Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 59 L. Ed. 1355.

Up to a recent date there were no state laws regulating the methods of nomination of political parties. These parties were founded on voluntary association of citizens, and they made their nominations and conducted their affairs without legislative sanction. The candidates were named by caucuses, conventions, or primary elections as the several parties determined. The nomination by a political party, whether by caucus, convention, or primary, is nothing more than an indorsement and recommendation of the nominee to the suffrage of the electors at large. In passing statutes regulating primary elections, a state recognizes the important fact that candidates go into the general elections with indorsements of political parties, and it merely provides the conditions upon which that indorsement is to be received. The indorsement of the primary contributes nothing to the legal eligibility of a candidate at the general election. It may be that every citizen eligible under the Constitution of the United States has a political right to be a candidate for United States senator, but he has no political right derived under the Constitution or statutes of the United States to present himself to the electorate with the advantage of indorsement of any political party, nor has he any right to question the method by which any other person may obtain such an indorsement. It may be true, also, that the Congress of the United States has the legislative power to provide rules regulating the primaries for United States senators and members of the House of Representatives, but unless it has provided such rules, either directly or by necessary implication, a candidate can have no federal right in the indorsement which any political party may undertake to give under the laws of a state.

It certainly cannot be successfully contended that the incidental recognition of the existence of primaries by providing for the expenses to be incurred therein by candidates for the House of Representatives

and the Senate is an adoption as federal legislation of state statutes on the subject. The Congress may adopt state legislation, and thus give it the sanction of its own legislative power (In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; Ex parte Siebold, 101 U. S. 371, 25 L. Ed. 717; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274); and it is insisted by the prosecution that Congress has acted and adopted the state statutes by the following enactment of June 4, 1914:

"Chap. 103.—An act providing a temporary method of conducting the nomination and election of United States senators.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that at the regular election held in any state next preceding the expiration of the term for which any senator was elected to represent such state in Congress, at which election a representative to Congress is regularly by law to be chosen, a United States senator from said state shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

"Sec. 2. That in any state wherein a United States senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the Legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be in accordance with the laws of such state regulating the nomination of candidates for an election of members at large of the national House of Representatives: Provided, that in case no provision is made in any state for the nomination or election of representatives at large the procedure shall be in accordance with the laws of such state respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire state; and provided further, that in any case the candidate for senator receiving the highest number of votes shall be deemed elected.

"Sec. 3. That section two of this act shall expire by limitation at the end of three years from the date of its approval. Approved June 4, 1914."

Act June 4, 1914, c. 103, 38 Stat. 384.

At the time this statute was passed the state of West Virginia had no act upon the subject. If it applied to West Virginia at all, it applied by its terms only until the state of West Virginia passed an act providing a primary election for the selection by the several political parties of the candidates to be presented by them for the suffrage of the people at the general election. After the state Legislature acted, the federal statute by its terms could have no application to that state. The provision that the federal statute should cease to be operative as soon as state legislation on the subject was enacted, the provision that the act should expire by its own limitation at the end of three years from the date of its approval, together with the title of the act, show plainly that it was intended to meet a temporary exigency; also these provisions show a distinct purpose by Congress to relinquish all control and leave to the states absolute authority over the selection of party candidates for the United States Senate as soon as they had actually passed laws on the subject. There is no other constitutional provision or federal statute relating to federal control over primary elections.

We think it may be said both on reason and authority that, where the word "election" is used without qualification, the reference is to a general election, as distinguished from a primary election. State v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; Montgomery v. Chelf, 118

Ky. 766, 82 S. W. 388; Gray v. Seitz, 162 Ind. 1, 69 N. E. 456. Certainly it cannot be contended that the choosing or election by the qualified electors provided for by section 2 of article 1 of the Constitution of the United States includes the selection of party candidates by primary election, for at that time such elections were unknown. We can find no provision of the Constitution of the United States or of an act of Congress which either directly or by implication warrants the court in holding that the protection of the federal government extends to the right of any citizen to participate in a party indorsement of a candidate through a primary election or otherwise. The right is created by party rules or state legislation, and the remedy, if there be one, must be derived from the same source.

We conclude that the indictments charge no conspiracy to injure, oppress, threaten, or intimidate a citizen in the free exercise and enjoyment of any right secured to him by the Constitution or statutes of the United States, or because of having exercised the same, or to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.

The demurrers are therefore sustained.

LEWIS, ANDERSON, FOARD & CO. v. KOTZEBUE TRADING & TRANSPORTATION CO. (LINDEBERG, Garnishee).

(District Court, W. D. Washington, N. D. September 8, 1916.)

No. 2898.

1. SHIPPING ⟸53—CHARTERER—OWNER.

Where, under the terms of a charter party, the owner furnished the captain and crew of a vessel, though the general direction in which it should proceed was to be determined by the charterer, and the captain and crew were to be paid by him, the owner retained control and navigation of the vessel, and the charterer did not become the owner pro hac vice, so as to become liable for the negligence of the master and crew.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 214–218, 225; Dec. Dig. ⟸53.]

2. SHIPPING ⟸124—LOSS OF CARGO—NEGLIGENCE.

Though a vessel became stranded, and part of the cargo was jettisoned by the master's orders, the master and crew cannot be found guilty of negligence in navigating the vessel, where there was no testimony showing want of skill or negligence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 458, 466; Dec. Dig. ⟸124.]

3. SHIPPING ⟸138—CHARTERER—MARINE RISK.

Under Harter Act, Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031), declaring that, if the owner of any vessel transporting merchandise or property shall use due diligence to make the vessel in all respects seaworthy and properly equip the same, neither the vessel nor her owner shall be held for damage or loss resulting from faults or errors in navigation, or in management of the vessel, or for losses arising from dangers of the sea, act of God, etc., a charterer of a vessel, though the owner retained control of navigation, assumed the marine risk on the cargo, and

cannot, where the vessel was stranded and the cargo jettisoned without negligence of the master and crew, hold the owner liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂⊃138.]

In Admiralty. Libel by Lewis, Anderson, Foard & Co. against the steamship Corwin, which was claimed by the Kotzebue Trading & Transportation Company, and in which Jafet Lindeberg was summoned as garnishee. Decree for libelant, and for claimant over against garnishee.

James Kiefer, of Seattle, Wash., for libelant.

George D. Schofield and C. D. Murane, both of Seattle, Wash., for garnishee.

Andrew J. Balliet, of Seattle, Wash., for respondent.

NETERER, District Judge. On September 4, 1914, the Kotzebue Transportation & Trading Company executed and delivered to Jafet Lindeberg a charter party for the steamship Corwin, as follows:

"That the owner * * * agrees to let, and does let, said S. S. Corwin * * * to the charterer for the term of thirty (30) days from, and including the 4th day of September, 1914, for a voyage from the port of Nome to Wrangle or Harold Islands in the Arctic Ocean. * * *"

"The charterer shall pay for the use and hire of said vessel, the sum of one hundred dollars ($100.00) per day from and including the said 4th day of September, 1914, until said vessel is returned to the port of Nome, and for a period not to exceed thirty (30) days; it being distinctly understood that, if said vessel does not return to said port of Nome within thirty days, that the charterer's liability for said hire of said vessel shall cease and terminate after such period.

"The charterer shall provision and supply said vessel for said voyage, and shall pay the master and crew, the regular wages which they receive on said vessel, for said voyage, and in the event of said vessel being caught in the ice, or for any reason being unable to return to the port of Nome during the present open season of navigation, the charterer agrees to pay said master and crew of said vessel their said wages until they are returned to the port of Nome, and for a period not exceeding one (1) year.

"The owner shall furnish said vessel with a master and full crew of competent officers and seamen to man and navigate said vessel on said voyage, the wages of such crew and master to be paid by the charterer as aforesaid. And the owner assumes all liability for any injury or damage sustained by said vessel on said voyage, or the crew of said vessel while on said voyage; and the owner further assumes all risks of the loss of said vessel on said voyage."

Upon the execution and delivery of said agreement, Lindeberg delivered to the captain of the steamship the following instructions, in writing:

"As charterer of your ship I hereby direct you to proceed with all possible speed consistent with prudence to the rescue of the members of the Steffanson Expedition now marooned on Wrangle and Harold Islands. You will render the United States revenue cutter Bear all assistance possible, and keep said ship advised of your whereabouts and successes or failures. If desired by Captain Cochran or Captain Bartlett, you will carry the latter or any other persons from the Bear that you may be able to. You are provisioned and equipped for one year, such provisions and equipment to be used by you as necessities may arise, the balance, if any, to be returned to me at Nome. Besides the crew of your ship, I am sending with you a dog driver, who will

have charge of the dog teams to be used under your direction. You will also carry two skin boats as part of your equipment. In case you are unable to return within chartered time, present wages are to continue, not exceeding one year, same to be paid to Corwin office in Nome and disbursed as directed by the persons entitled to such wages, and such direction should be left before departure."

The libelant commenced an action to recover $1,320.88 for supplies furnished to the steamer prior to the date of the charter party, and had a writ of garnishment served upon Lindeberg. Denial of liability was made by Lindeberg, upon which issue was joined, and cross-libel was filed by the claimant against the garnishee to recover balance due, to which issue is taken by Lindeberg, and the matters at issue were referred to the commissioner to take testimony and report his findings. It is stipulated that there is due to the libelant the sum of $1,319.48, less $176.91, heretofore paid in the way of dividends.

The commissioner found as a fact that at the time the charter party became operative the steamship had on board engine room stores, oils, etc., $307.55 in value; meats for use of crew, $339.08; that the garnishee, for the purposes of the expedition, placed on board the steamship merchandise, provisions, lumber, wireless outfit, etc., $7,500; oils, meats, etc., $2,768.78; that $50 of the $7,500 was expended for wireless outfit and $175 for a victrola, which two last articles were retained on board the steamship after the termination of the charter party; that it is contended by Lindeberg that goods to the value of $4,843.38 were lost or jettisoned during the stranding of the vessel en route; that Lindeberg paid on account of the charter party $2,752.10, and paid the further sum of $345 for use of the launch in lightering cargo, and $60 to stevedores; also paid $505 to O. D. Cochran, attorney for the respondent, being a claim for attorney's fees, and had assigned to him such account; that $307.55 worth of oils and engine room stores and $339.08 worth of meat, the property of the respondent, were used during the operation of the vessel under the charter party, and that $97.25 was paid by the respondent for launch and lighterage services during the charter party; that Lindeberg had possession of the vessel for 25 days.

The testimony shows that the respondent paid $1,741.80, less $23.25, being $1,718.55, to the master and the men for services rendered upon the vessel during the voyage in issue.

Exceptions were filed by the several parties to some of the findings, and the matter is now before the court upon such exceptions, and the further determination of the court as to the sum earned under the charter party and the liability of the respective parties for the indebtedness set out.

Lindeberg contends that the charter party was a mere contract of affreightment, and that the respondent agreed to furnish competent officers and crew, and that it did not do so, and by reason of incompetency the vessel became stranded, resulting in loss of stores placed upon the vessel, which were jettisoned by the master's orders, and that in any event the respondent is liable in general average, and no

recovery can be had, as the value of the vessel would preclude recovery.

Libelant and respondent contend that the charter party amounts to a demise of the vessel, and that if the crew was negligent, which is denied, that it was the charterer's negligence, and that there is a balance due on account of the charter party and costs and expenses paid by the respondent chargeable to the charterer.

[1] The manager of the respondent, and who executed the charter party agreement with Lindeberg, testified that the vessel was to be in the possession of the respondent and it was also to control its navigation; that Captain Healy was acting on behalf of the owner of the vessel. I think it is plain that the control and navigation of the vessel remained with the owner, although the general directions in which it should proceed were determined by the charterer. I think this case clearly falls within the decision of the Supreme Court in New Orleans-Belize Royal Mail & Central American Steamship Co., Ltd. v. U. S., 239 U. S. 202, 36 Sup. Ct. 76, 60 L. Ed. 227. The contention of the libelant that the charterer became the owner pro hac vice can therefore not be sustained.

[2, 3] I think the contention of the charterer as to negligence of the seamen in navigating the vessel must fail. There is no testimony upon which to predicate any act of omission or commission showing want of skill or relation of conduct to show negligence. I also think that the charterer assumed the marine risk on the cargo, and under section 3 of the Harter Act (27 Stat. 445) no liability is disclosed in this case by the testimony under any circumstances.

The testimony shows that there was due from Lindeberg, on account of the charter party, $307.55, engine room stores, etc., and $339.08, meats for crew, etc.; $2,500 for the use of the vessel for 25 days; $1,718.80 on account of the crew; total $4,865.43; that he paid on account $2,752.10, leaving a balance unpaid of $2,113.33. From this should be deducted the claim held by Lindeberg, purchased from Cochran, $505, and $225 for victrola and wireless apparatus retained on the vessel, leaving a net balance of $1,386.33. Judgment and decree should be awarded to libelant, and against respondent and Lindeberg as garnishee, for $1,142.57, and in favor of respondent, and against Lindeberg, for $243.76, the balance of the sum found due.

A decree may accordingly be presented.

UNITED STATES v. LOUISVILLE & JEFFERSONVILLE BRIDGE CO.

(District Court, W. D. Kentucky. November 18, 1916.)

1. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACT—"TRAIN."

Safety Appliance Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (Comp. St. 1913, § 8605), provides that from and after the 1st day of January, 1898, it shall be unlawful for any railroad engaged in interstate commerce to use locomotives in interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, so that the speed of the train can be controlled without use of the common hand brake. Amendatory Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (Comp. St. 1913, § 8613), declares that the act shall be held to apply to all trains used on any railroad engaged in interstate commerce, and section 2 (Comp. St. 1913, § 8614) gives authority to the Interstate Commerce Commission to make rules for the safe-guarding of employés and passengers. A rule of the Interstate Commerce Commission of June 6, 1910, declares that after September 1, 1910, not less than 85 per cent. of the cars of any train operated with power or train brakes shall have their brakes used and operated by the engineer, and all power-braked cars shall have their brakes so used and operated. *Held* that, the act being for the protection of employés and passengers, it does not apply to mere switching operations, where cars as such are moved to and fro and the string of cars does not constitute a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.

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

2. RAILROADS ⟸229—OPERATION—SWITCHING OPERATIONS.

Under such acts, the movement of a string of cars for some distance through the yards on tracks used by regular trains in interstate commerce, was not, the string being transferred from the yards of one company to those of another, a mere switching operation, and the string of cars must be considered a train, so that the operation without connecting the power brakes on 85 per cent. of the cars with the engine, was in violation of the acts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.]

At Law. Action by the United States against the Louisville & Jeffersonville Bridge Company. Judgment for the United States for the full amount claimed.

Perry B. Miller, U. S. Dist. Atty., of Louisville, Ky., and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C.

Humphrey, Middleton & Humphrey, of Louisville, Ky., for defendant.

EVANS, District Judge. In this action the United States seeks, in 12 separate paragraphs, to recover 12 separate sums, of $100 each, for 12 separate violations of the Safety Appliance Act. The defendant has admitted its liability for 2 of the penalties claimed, namely, those set up in the eighth and eleventh paragraphs of the petition, but contests its liability for the other 10.

The parties, pursuant to the statute, have, by a stipulation in writing, submitted the case to the judgment of the court without the inter-

vention of a jury. They have, also in writing, stipulated the facts upon which the court is to determine the right of the United States to recover; it being admitted that, if the plaintiff is entitled to recover upon 1 of the other 10 paragraphs, it is entitled to recover upon all of them, the facts being the same.

[1] The statute under which the liability of the defendant exists, if it exists at all, is an act to promote the safety of employés and travelers upon railroads, etc., approved March 2, 1893 (27 Stat. 531), as it was amended by the act approved March 2, 1903 (32 Stat. 943). Section 1 of the act first referred to provides:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 1 of the amendatory act approved March 2, 1903, provided that the original act "shall be held to apply to all trains * * * used on any railroad engaged in interstate commerce," and section 2 thereof gave authority to the Interstate Commerce Commission to make, and on June 6, 1910, it made, an order as follows:

"It is ordered that on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent. shall have their brakes so used and operated."

The plaintiff in its petition in substance alleges that the defendant, at all the times when it was doing the things complained of, was a common carrier engaged in interstate commerce by railroad in the state of Kentucky, and that in violation of the statutes and order above set forth, and at the various times mentioned in the petition, it operated in interstate commerce trains on its line of railroad, which trains were drawn by locomotive engines and operated with power or train brakes. It is further alleged that the defendant operated each of the trains referred to in the petition over its line of railroad in and about Louisville, in Kentucky, and did so when none of the cars in the train had their brakes used and operated by the engineer of the locomotive drawing the train, and when less than 85 per cent. of the cars which composed the train had their brakes used and operated by the engineer of the engine drawing the train.

The defendant's answer by proper denials put in issue all the plaintiff's averments which charge any wrongful acts or acts violative of the statutes and order above set forth.

At the trial all of the testimony heard was embraced in a stipulation in writing and an accompanying map, and the portions of the testimony upon which we think the case must turn will be summarized further along.

At the hearing the case for defendant was put upon the proposition that the movements of defendant's cars described in the testimony were, in fact, mere "switching operations," and upon the theory of law that they did not, for that reason, come within the reach of section 1 of the Safety Appliance Act, as amended, requiring that its provisions shall be "held to apply to all trains * * * on any railroad engaged in interstate commerce." The latter contention of the defendant was mainly based upon the soundness of the theory referred to, and, while plaintiff's argument did not, in terms, concede that the law of the case must turn on that issue, it did not appear to contest it.

It is important, therefore, to ascertain whether that theory has been authoritatively established by decisions construing the statute, and, at the threshold of the inquiry, the case of United States v. Erie Railroad Co. takes the place of first importance. That was a suit brought by the United States in the United States District Court for the District of New Jersey for the recovery (among other things not necessary to mention) of penalties incurred by the Erie Railroad Company upon facts analogous to those set up in those parts of the petition in this case which are now under consideration. The District Court held that the railroad company was liable, and the jury returned a verdict accordingly. Judgment having been rendered on the verdict, the case was carried to the Circuit Court of Appeals for the Third Circuit. That court, speaking through Judge Buffington (197 Fed. 287, 116 C. C. A. 649), reversed the District Court upon the ground that the act did not apply to the switching operations of a railroad. The case was again tried, and the District Court, yielding, of course, to the requirements of the ruling of the Circuit Court of Appeals, directed a verdict for the railroad company, and, judgment having been rendered accordingly, the case was again taken to the Circuit Court of Appeals, and was there affirmed. 212 Fed. 853, 129 C. C. A. 307. The case then went to the Supreme Court, and its opinion thereon is found in 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019. The judgment of the Circuit Court of Appeals and of the District Court were reversed, and a new trial directed.

The Circuit Court of Appeals, in an able opinion, had vindicated the construction of the statute upon which it had held that switching operations by a railroad company were not within section 1 of the Safety Appliance Act, as amended, and the Supreme Court so far yielded to the general proposition as to say, on pages 407, 408, of 237 U. S., on page 624 of 35 Sup. Ct., 59 L. Ed. 1019:

"It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and

grabirons are of broader application, and embrace switching operations as well as train movements, for both involve a hauling or using of cars."

The court, however, said that it was persuaded that the use of the transfer trains in that case were not in fact switching operations, but that the assemblages of cars there coupled and hauled were "trains" which came within the purview of the air-brake provisions of the statute, and on page 408 of 237 U. S., on page 624 of 35 Sup. Ct., 59 L. Ed. 1019, said:

"They were made up in yards like other trains, and then proceeded to their destinations over main line tracks used by other freight trains, both through and local. They were not moving cars about in a yard, or on tracks set apart for switching operations, but were engaged in main line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks, and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should 'be held to apply to all trains.' We therefore conclude and hold that it embraced these transfer trains."

In United States v. C., B. & Q. R. R. Co., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. 1023, the question was whether the air-brake requirements of the statute were applicable to the transfers described in the record in that case. The District Court's judgment that they were was reversed by the Circuit Court of Appeals for the Eighth Circuit, and the case was taken to the Supreme Court. In its opinion reversing the judgment of the Circuit Court of Appeals, and affirming that of the District Court, the Supreme Court (237 U. S. 412, 413, 35 Sup. Ct. 634, 635, 59 L. Ed. 1023) said:

"The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed, respectively, of 42, 36, and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent. of the cars in a train. [In re Power of Train Brakes] 11 Interst. Com. Com'n R. 429, 437. Giving effect to the views quite recently expressed in United States v. Erie Railroad Company, 237 U. S. p. 402 [35 Sup. Ct. 621, 59 L. Ed. 1019], we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares 'shall be held to apply to all trains * * * on any railroad engaged in interstate commerce.' According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect."

Thus it would seem that the Supreme Court approved rather than otherwise the proposition announced by the Circuit Court of Appeals

in the Erie Railroad Case, 197 Fed. 287, 116 C. C. A. 649, to the effect that the Safety Appliance Act did not apply to the switching operations of a railroad, and differed from the Circuit Court of Appeals only upon the question of fact as to whether what had been done in that case constituted switching operations or was the use of "trains" in interstate commerce. The Supreme Court held it to be the latter and not the former.

[2] Assuming, as we must, that while what are really switching operations in the proper sense do not come within the air-brake requirements of section 1 of the Safety Appliance Act, we are brought to the question whether the transfers in this case by the defendant were in fact "switching operations," and therefore not within the act, or whether the "strings of cars" were "trains" and within its provisions. The tests by which we must be guided in reaching a conclusion are supplied in the cases we have cited.

The facts in previous cases were, of course, different in detail from those disclosed here. The latter may be shortly stated as follows:

After a so-called "drag or string," consisting of 26 or more cars, was assembled in the Hancock street yard, a locomotive engine was attached to carry it westwardly to Preston street, which it crossed at grade, and then moved northwestwardly to Floyd street, which it also crossed at grade. From Floyd street it was carried further westwardly, for about the length of the drag or string, upon the track leading up to and over a slight incline called the "hump" between Floyd and Brook streets. Then it was stopped, and, the switches in its rear being thrown, it was pulled or pushed back by the locomotive eastwardly until it repassed the switch near Floyd street, when it was again stopped, and, the switches being thrown so that it could be done, it was carried westwardly again into the Illinois Central yard between Floyd and Brook streets. The locomotive was then detached, and the transfer of the cars in the string, from the Hancock street yard to the Floyd street yard, was completed; the two yards being about three city blocks apart.

The stipulated facts are that this transfer from the Hancock street yard to the incline called the "hump" was over tracks used for the main line movements of the Big Four passenger trains in both directions, and that the transfer from the incline to Floyd street and west thereof was over the tracks used by the Big Four and Chesapeake & Ohio for main line passenger trains in both directions and also for the movement of freight trains by the Illinois Central between its various yards. Further stipulated facts are that, while all of the cars were equipped with power or air brakes, yet that during their movements over the tracks none of them had such brakes used and operated by the engineer, the speed being controlled by the use of power brakes on the engine and tender, because of the fact that the air hose through which the air is applied for the operation of the power or train brakes was not coupled. It thus appears that the brakes on the cars were not used and operated by the engineer of the locomotive drawing the train, and that 85 per cent. of them could not have been used and operated

by him as required by the order of the Interstate Commerce Commission.

The map shows many tracks through the region between Hancock and First streets (a distance of five city blocks), but those used for the movement of the drags or strings of cars are not isolated from the other tracks, nor are they specially set apart for the operation of the "drags," but are tracks devoted to the main line movement of passenger trains of the railroads mentioned, as well as to the movement of freight trains by the Illinois Central. The distance over which the transfers were made here was not so great as those in the cases cited at the argument, but we think the length of the track used is not the material factor. Rather that factor is the character of the other uses to which the track is put. The other uses are the things which increase the dangers against which the law provides a measure of protection.

When the purposes for which the safety appliance legislation was enacted are considered in connection with the cases we have analyzed and others that might be mentioned, it seems to be clear that the facts stipulated bring this case within the provisions of the act as amended, and we are constrained to the conclusion that the operations described in the stipulations of facts are not switching operations as that phrase has been defined, but that the strings of cars used in those operations were "trains" to which the provisions of the act must be applied. Being trains in this sense, the testimony shows that in respect to each of them there was a violation of the order of the Commission.

This being our conclusion, judgment must go against the defendant, not only for the $200 admitted to be due, but for the entire $1,200 claimed in the petition.

UNITED STATES ex rel. SAMUEL HASTINGS CO. v. LOWRANCE et al.

(District Court, E. D. Arkansas, Jonesboro Division. November 28, 1916.)

1. MECHANICS' LIENS ⟸5—LIEN LAW—CONSTRUCTION.

Mechanics' lien laws are to be liberally construed, for the purpose of protecting contractors, workmen, and materialmen.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. ⟸5.]

2. UNITED STATES ⟸67(2)—CONTRACTS—BONDS—CONSTRUCTION—"MATERIAL."

The bond of a contractor, constructing a levee under contract with the United States, given under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), provided that the contractor should be responsible for paying all liabilities incurred for labor or material in the prosecution of the work. Plaintiff furnished a subcontractor feed for mules used in building the levee. *Held* that, while the act should be liberally construed as a mechanic's lien law, for the bonds required were to take the place of mechanics' liens, feed furnished for the mules did not fall within the purview of the bond, not being "material" used in the prosecution of the

work, as the animals would have had to have been fed, though not used in constructing the levee.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⇐67(2).

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

At Law. Action by the United States, on the relation of the Samuel Hastings Company, against W. T. Lowrance and others. On demurrer to complaint. Demurrer sustained.

Marsilliot & Chandler, of Memphis, Tenn., for plaintiff.

Craft & McBee, of Memphis, Tenn., for defendants.

TRIEBER, District Judge. The plaintiff seeks to recover from the defendants W. T. Lowrance & Co. and their sureties on the bond executed to the United States under the provisions of Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, for grain, hay, salt, and feed sold and delivered to a subcontractor of W. T. Lowrance & Co.

The material allegations in the complaint are that the principal defendants, W. T. Lowrance & Co., procured a contract from the United States for the construction of a levee, in this division of the Eastern district of Arkansas, and executed a bond, with their codefendants, M. J. Roach and C. T. Lowrance, as sureties, in accordance with the form prepared by the government officials, and in accordance with the requirements of the acts of Congress. Article 8 of the bond provides:

"The contractor shall be responsible for paying all liabilities incurred for labor and material in the prosecution of the work."

The proceedings are in conformity with the requirements of the act of Congress of 1905, but no other person than the plaintiff has made himself a party to this proceeding by filing a claim, although due notice, in the manner required by the act of Congress, was given.

[1, 2] Defendants demur to the complaint upon the ground that grain, hay, salt, and feed, which was fed to the horses and mules used by the subcontractor while engaged in the construction of the levee work, are not materials within the meaning of the act of Congress, and therefore there is no liability on the bond. That is the only question before the court.

There can be no doubt but that these acts should be as liberally construed as mechanic's lien laws, for, as stated by the Supreme Court:

"In view of the fact that it was evidently designed to furnish the obligation of a bond as a substitute for the security which might otherwise be obtained by attaching a lien to the property; said lien not being permissible in the case of government work." Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; Hill v. American Surety Co., 200 U. S. 197, 203, 26 Sup. Ct. 168, 50 L. Ed. 437.

That mechanic's lien laws are to be liberally construed, for the purpose of protecting workmen, contractors, and materialmen, is the general rule, and especially in this circuit. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81, 92, 49 C. C. A. 229, 240;

Russell v. Hayner, 130 Fed. 90, 64 C. C. A. 424; Mellon v. St. Louis Union Trust Co., 225 Fed. 693, 699, 140 C. C. A. 567, 575.

The only reported case which the court has been able to find in which the identical question was determined by any court under this act of Congress, and that was the act of 1894, is United States v. Fidelity & Deposit Co., 169 Ill. App. 1. In that case it was held, in a very carefully prepared opinion, reviewing numerous authorities, that such articles are not materials furnished in the prosecution of the work, within the meaning of this statute, and therefore no liability on the bond for them.

There are a number of decisions of the national courts, some by Circuit Courts of Appeals, others by Circuit and District Courts, which, while not directly in point, the material there furnished, and for which a recovery was sought on the bond executed under these Acts, being other than such as are involved in this action, yet in the opinion of the court the principles established in those cases are by analogy applicable to the question involved in the instant case. The last reported case on that question is National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99 (6th Cir.). In that case one of the questions involved was whether groceries and provisions furnished to a boarding house of a contractor, and consumed by his laborers while employed on the work under contract, were materials within the meaning of the act of Congress secured by the contractor's bond, and it was held that they were not. The opinion of the court is a very able one and reviews a large number of cases, theretofore decided. A petition for certiorari was denied by the Supreme Court. Brogan v. National Surety Co., 241 U. S. 670, 36 Sup. Ct. 721, 60 L. Ed. 1230.

Cases in which similar questions were involved and which counsel have cited to the court, are Standard Oil Co. v. City Trust Co., 21 App. D. C. 369; American Surety Co. v. Lawrenceville Cement Co., 110 Fed. 717 (C. C.); United States v. Morgan, 111 Fed. 474 (C. C.); United States v. Kimpland, 93 Fed. 403 (C. C.); United States v. Hyatt, 92 Fed. 442, 34 C. C. A. 445 (5th Cir.); City Trust, etc., Co. v. United States, 147 Fed. 155, 77 C. C. A. 397 (2d Cir.); Title Guaranty, etc., Trust Co. v. Puget Sound Engine Works, 163 Fed. 168, 89 C. C. A. 618; United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409. All of these arose under this same act of Congress, although some before the amendatory act of 1905, which in no wise affects the issues in this case.

In Standard Oil Co. v. City Trust Co., the material furnished, for which the claim was made, was lubricating oil used in the operation of a dredge, and it was held that, as the oil was used for the preservation of the dredge, and not for the purpose of doing any of the contracted work, the claim could not be sustained.

In United States v. City Trust Co., 23 App. D. C. 153, the same court disallowed a claim for coal furnished for the operation of a dredging machine employed in the work.

The correctness of these rulings is doubted by the United States Circuit Court of Appeals for the Second Circuit, in City Trust Co. v. United States, 147 Fed. 155, 77 C. C. A. 397, and in my opinion properly so,

as coal and oil used in operating the machinery employed for the purpose of performing the contracted work, and consumed at the time, may well be classed with the so-called "powder cases," hereinafter referred to.

In the Hyatt Case, it was held that a railway company, carrying stone to the place where the work was being done, was not entitled to maintain an action on the bond for freight charges.

In American Surety Co. v. Lawrenceville Cement Co., supra, claims for fitting out a steam launch used in transporting merchandise for the work contracted, the construction of dump cars, skips, grout tubs, and conveyors for use on the work, were held not materials within the meaning of the statute.

In United States v. Morgan, the following articles were held not to be within the meaning of the law; nails used for the construction of a camphouse, and repairs on a steam launch used for transporting material; construction of dump cars and other articles of a similar nature to those in the Lawrenceville Cement Co. Case; rails, spikes, and fish plates for a track to transport the earth and rock excavated; wire, steel, and rope for setting up and sustaining derricks for hoisting and excavating; material for sheds used for storing the articles used in the contracted work; tools, shafting, pulleys, and material of that nature used to operate the mixer of the cement; materials used in constructing sheds and premises for storing the material used.

In the Kimpland Case, board and lodging furnished laborers employed on the work was held not within the meaning of the act.

In Puget Sound Engine Works Case, a claim for patterns used for the castings which went into the vessel was made, and it was held that it should be allowed upon the same ground that the work of erecting scaffolding upon which carpenters stand in doing their work upon the actual construction of a ship entitles it to a lien.

In the Illinois Surety Co. Case, it was held that "this statute covers, not only labor * * * that goes directly into the completed structure, but all labor and material furnished 'in the prosecution of the work,'" and therefore rent for the use of cars employed in the performance of the contract are within the meaning of the act.

As it has been uniformly held that the bond provided for by these statutes is a substitute for the lien of the mechanic's lien laws (National Surety Co. v. United States, 228 Fed. loc. cit. 581, 143 C. C. A. 99), the construction placed upon such statutes, especially by the courts, which hold that such statutes should be liberally construed, justify a reference to these decisions, when the statutes construed employ language similar in effect to that used by Congress in this act.

When we come to examine these authorities, we find that the great weight of authority, if not all of them, hold that while powder and coal, and in some cases lubricating oil, used in the operation of machinery in the performance of the work, are materials entitled to the lien, the rule is otherwise as to materials not made a part of the work, or necessary for the prosecution of the work, and not consumed, while employed in the performance of the work, but which are used solely for the preservation of the machinery or materials. In such cases it

has been uniformly held that there can be no lien claimed. Leading cases, in what are usually referred to as the "powder cases," are Schaghticoke Powder Co. v. Greenwich, 183 N. Y. 386, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443; Rapauno v. Greenfield Railroad, 59 Mo. App. 6; Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 Pac. 419; Hercules Powder Co. v. Knoxville R. R., 113 Tenn. 382, 83 S. W. 354, 67 L. R. A. 487, 106 Am. St. Rep. 836; Giant Powder Co. v. Ry. (C. C.) 42 Fed. 470, 8 L. R. A. 700. That there can be no claim for articles not going into the construction and becoming permanent part thereof, or not consumed in the performance of the work, as are powder and explosives, and oil and coal for operating steam machinery employed in the work, the following are some of the many authorities: Armour & Co. v. Western Construction Co., 36 Wash. 529, 78 Pac. 1106; St. L., I. M. & S. Ry. Co. v. Love, 74 Ark. 528, 86 S. W. 395; Dudley v. Railroad, 65 Mich. 655, 32 N. W. 884; Stewart-Chute Lumber Co. v. Missouri Pacific R. R. Co., 33 Neb. 29, 49 N. W. 769; Basshor v. Baltimore & Ohio R. R. Co., 65 Md. 99, 3 Atl. 285; Knapp v. St. Louis, etc., R. R., 6 Mo. App. 205; O'Brien v. Guaranty Co., 159 Mich. 334, 123 N. W. 1127; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. Rep. 746, 9 Ann. Cas. 305; Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575; Carson v. Shelton, 128 Ky. 248, 107 S. W. 793, 15 L. R. A. (N. S.) 509. The reasoning in these cases is very convincing, but it will serve no useful purpose to quote from them, as they can be easily examined.

The coal and powder cases are clearly distinguishable from such cases as the one at bar. Explosives used in excavations of rock, or other hard substances, are substitutes for labor, which otherwise would have to be performed by workmen, and are entirely consumed in the prosecution of the work, leaving nothing for any other use. Fuel and lubricating oils used in operating machinery employed in the contract work are equally necessary for performing the work, as without them the machinery could not be utilized, and the work would have to be done by manual labor. They are consumed in the performance of the work, and are not necessary for the preservation of the machinery, as additions and repairs are, so that they may be preserved for use in other work undertaken at a later day. It is only when the materials furnished are necessarily incident to the performance of the contract that they are within the purview of the statute. Feed for mules cannot be distinguished from food and lodging for the laborers while employed on the work, and all authorities agree that the latter are not protected by the bond.

As stated in National Surety Co. v. United States, supra:

"These * * * cases stand on reasoning peculiar to themselves. The powder, or similar explosive, is a direct substitute for manual labor, and it is expended or used directly and immediately on the construction work."

Or, as stated in United States v. Fidelity Deposit Co., 169 Ill. App. 1, 6, in distinguishing the powder and coal cases from a case where feed is furnished for mules employed in the work:

"Coal purchased by a contractor doing such work would only be used in operating machinery, while engaged in actually prosecuting the work, but the teams would have to be fed, whether they were working or not."

In American Surety Co. v. Lawrenceville Cement Co., supra, the court, in distinguishing between these items of materials, said:

"The underlying principle which has governed the master is correct, in that he has discriminated between labor and materials consumed in the work or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for this, but for other, work."

The demurrer to the complaint is sustained.

CHARROIN v. ROMORT MFG. CO. et al.

(District Court, W. D. Washington, N. D. June 29, 1916.)

No. 3256.

1. REMOVAL OF CAUSES ⟸102—JURISDICTION—FEDERAL COURTS—RIGHT TO RAISE QUESTION.

As the jurisdiction of the federal District Court is limited, and lack of jurisdiction will defeat an action whenever discovered, the court may, on its own motion, raise the question of jurisdiction and remand the action to the state court whenever it appears it is without jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. ⟸102.]

2. REMOVAL OF CAUSES ⟸25(1)—JURISDICTION—FEDERAL COURTS—DETERMINATION.

The cause of action, the subject of the controversy, is for all purposes whatever the plaintiff declares it to be in his pleadings, so, where the complaint alleged that defendants willfully conspired together to destroy plaintiff's business, and for the purpose of injuring plaintiff and as a part of the conspiracy maliciously wrote and circulated letters that the purported invention of plaintiff, for which patents was pending, was an infringement of a patent owned by one of the defendants, but no adjudication was sought with reference to letters patent or patent infringement, the action is one for conspiracy, and, no other ground of jurisdiction appearing, it could not properly be removed from the state to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. ⟸25(1).]

At Law. Action by Frank B. Charroin against the Romort Manufacturing Company, a corporation, and others. Removed from the state court to the federal District Court. Remanded to state court on court's own motion for lack of jurisdiction.

Brown, Peringer & Thomas, of Bellingham, Wash., for plaintiff.

Raymond D. Ogden and Barnes & Barnes, all of Seattle, Wash., for defendants.

NETERER, District Judge. This action was commenced in the state court and removed to this court upon the petition of the defendants. A motion was presented, directed against the complaint, and

the issue determined by the court upon the statement of counsel and without examination of the pleadings. Amended complaint has been filed and demurrers to the amended complaint presented on behalf of the defendants. The court took this issue under advisement, and an examination of the amended complaint discloses that the plaintiff is a citizen of the state of Washington; that the defendants Romort Manufacturing Company, a corporation, and the Broadway State Bank, a corporation, are each organized under the laws of the state of Washington, and the defendants Guy Walker and L. B. Walker are officers of the Broadway State Bank. The complaint alleges that the defendants, "willfully conspired together as hereinafter set forth; that said unlawful conspiracy was entered into for the purpose of destroying the plaintiff's said business and to render assistance to the said Romort Manufacturing Company * * * and the said Broadway State Bank, through its officers, for the purpose of injuring the plaintiff in his said business and as a part of said conspiracy, willfully, fraudulently, and maliciously wrote and caused to be written certain letters; * * * that because the said defendants wrote and caused to be written the said letters, * * * and by reason thereof a large number of plaintiff's customers * * * refused to continue to purchase and sell the said 'Evertite Valve' * * *"—and then alleges damages in the sum of $25,000, and prays judgment in said sum.

The defendants in their petition for removal stated that the plaintiff in his action alleges "that he is the owner of an invention covering automatic air valves, and that an application for patent in such invention is now pending in the Patent Office, and that the letter sent out by the defendants falsely stated that the air valve called the 'Evertite Valve,' being the purported invention of the plaintiff, was an infringement of the patent owned by the defendant Romort Manufacturing Company; * * * that section 711 of the Revised Statutes of the United States vests sole jurisdiction in matters relating to patent rights in the federal courts of the United States of America, * * *" and by reason of such facts the defendants prayed removal of this cause to this court, and tendered their bond, and order or removal was duly entered.

[1] No motion to remand has been made by the plaintiff. The question of jurisdiction, however, is one which the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties. Mansfield, etc., Ry. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Chicago, Burlington & Q. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521. The jurisdiction of the court is limited, and the court is powerless to determine an issue not within its jurisdiction, and lack of jurisdiction will defeat an action, even though such lack may not be discovered until the cause finally appears before the Supreme Court of the United States. In Graves v. Corbin, 132 U. S. 572, 590, 10 Sup. Ct. 196, 202 (33 L. Ed. 462), the court said:

"* * * If, in any suit removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at

any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed, as justice may require, this court has held that when it appears to this court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below, and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. Williams v. Nottawa, 104 U. S. 209 [26 L. Ed. 719]. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court, in Turner v. Farmers' Loan & Trust Co., 106 U. S. 552, 555 [1 Sup. Ct. 519, 27 L. Ed. 273]; Mansfield, etc., Railroad v. Swan, 111 U. S. 379, 386 [4 Sup. Ct. 510, 28 L. Ed. 462]; Farmington v. Pillsbury, 114 U. S. 138, 144 [5 Sup. Ct. 807, 29 L. Ed. 114], and King Bridge Co. v. Otoe Co., 120 U. S. 225, 226 [7 Sup. Ct. 552, 30 L. Ed. 623]."

Judge Baker, in State of Indiana v. Tolleston Club of Chicago (C. C.) 53 Fed. 18, and Judge Thayer, in Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81, on their own motion, remanded cases to the state court, where the lack of jurisdiction in the federal court appeared, and the same proceeding was had in Harrington v. Great Northern Ry. Co. (C. C.) 169 Fed. 714.

[2] This court said, in Wright v. Ankeny, 217 Fed. 985:

"The cause of action is the subject of the controversy, and that is for all of the purposes of the action, whatever the plaintiff declares it to be in his pleadings. Louisville & Nashville Rd. Co. v. Ide, 114 U. S. 53 [5 Sup. Ct. 735, 29 L. Ed. 63]; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535 [7 Sup. Ct. 1265, 30 L. Ed. 1235]; Torrence v. Shedd, 144 U. S. 527 [12 Sup. Ct. 726, 36 L. Ed. 528]."

And in Trana v. C., M. & P. S. Ry. Co., 228 Fed. 824:

"The cause of action is the subject of the controversy, and that is whatever the plaintiff declares it to be in his complaint and is the basis for order of removal."

And to the same effect is Deutsch v. Alaska Gastineau Mining Co., 237 Fed. 215, filed December 20, 1915.

The subject of the controversy in the instant case is conspiracy. No adjudication is sought with relation to letters patent or patent infringement. Adjudication upon letters patent is an equitable proceeding upon which the right of the letters patent is sought to be adjudicated and parties infringing enjoined. This is a law action to recover damages sustained by the plaintiff because of the conspiracy of the defendants to injure his business, the amount of which is placed by the complaint in the sum of $25,000. The fact that the business is based upon a monopoly given by the patent laws does not change the right or status of the parties. No diversity of citizenship appearing, this court has not jurisdiction, and the cause will be remanded to the state court.

STERN v. TRUAX.

(District Court, W. D. Washington, N. D. June 26, 1916.)

No. 3255.

BANKRUPTCY ⊜211—PROCEEDINGS—RIGHT OF TRUSTEE.

An assignment for the benefit of creditors was valid, and not subject to attack on account of the assignor's bankruptcy; the petition not having been filed within four months thereafter. The state court entered an order declaring that the assignee was the owner of a stock of merchandise assigned, subject to a chattel mortgage, that the bankrupt had no interest therein, and that the assignee should dispose of the same subject to the approval and confirmation of the court. The order further recited that it was without prejudice to assertion by any creditor of any right he might have as against the assignee. The trustee in bankruptcy of the assignor claimed the proceeds of the stock on the ground that the order gave a preference to creditors in violation of the Bankruptcy Act. *Held*, that the judgment was not a preference, but merely confirmed the title of the assignee, and the trustee must, if entitled to relief, seek it in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊜211.]

At Law. Action by L. M. Stern, trustee in bankruptcy of A. Bridge, against P. B. Truax, administrator. Decree for defendant.

L. M. Stern, of Seattle, Wash., in pro. per.

Oldham & Goodale, of Seattle, Wash., for defendant.

NETERER, District Judge. This court heretofore (In re Bridge, 230 Fed. 184) held that the deed of assignment for benefit of creditors of A. Bridge on the 13th of August, 1913, was valid, and that, no petition in bankruptcy having been filed within four months, the adjudication in bankruptcy did not avoid the assignment and vest title to the property in the trustee in bankruptcy. The plaintiff, as trustee in bankruptcy, now seeks to recover from the assignee in the deed of assignment the sum of $1,750, received for a stock of merchandise sold by the assignee under order of the state court entered on the 15th day of October, 1915, in which order it is adjudged and decreed:

"(1) That the assignee herein is the owner of all of the stock, furniture, and fixtures, and accounts receivable now in the store situated at 423 Pike street, in the city of Seattle, and that he be and is hereby directed to hold, manage, protect, sell, and administer the same as a part of the assets of this estate.

"(2) That the title of the assignee herein to said property is subject to a certain chattel mortgage in favor of the Union Label Clothing Company, and that the amount remaining due on said mortgage is $3,181.78 principal, together with interest from May 24, 1915, at the rate of 7 per cent. per annum, amounting all together to $3,290.84.

"(3) That neither A. Bridge nor Bertha Bridge, his wife, the assignors herein, * * * have any interest in the property herein referred to. * * *

"(4) That the assignee be and he is hereby ordered to proceed forthwith to sell the stock of goods and the fixtures herein referred to on such terms and at such price as he shall deem just and advantageous to the estate, subject to the approval and confirmation of this court. It is further ordered that this order is without prejudice to any creditor asserting and having any right which he may have in or to said merchandise as against said assignee."

It is contended on the part of the plaintiff that the judgment cannot be given consideration upon this trial, as it was giving a preference to creditors, violative of the Bankruptcy Act. An examination of the judgment, considered in the light of the evidence presented in this case, convinces me that this contention cannot be sustained. The judgment is not a judgment of preference in the light of the act. It is a judgment confirming title in the assignee under the deed of assignment, which by this court has been held operative. The property was not property which would pass to the trustee in bankruptcy, as the title to the money which purchased the goods had passed from the bankrupt many months prior to adjudication under the deed of assignment. The fact that money which passed to the assignee was used to purchase a stock of goods does not change the assignee's right. The title vesting in the assignee, the judgment of the superior court, being merely confirmatory thereof, must be given recognition. The state court having adjudicated in favor of the assignee and against the bankrupt, no interest passed to the trustee, and the trustee cannot proceed in this court independent of that judgment; but his relief, if the judgment is erroneous, must be from the operation of the judgment through the state court.

In re GILSONITE MINES CO.

(District Court, M. D. Pennsylvania. August, 1916.)

1. BANKRUPTCY ⟸200(3)—ADJUDICATION—EFFECT OF.

Under Bankr. Act, July 1, 1898, c. 541, § 67c, 30 Stat. 564 (Comp. St. 1913, § 9651), a pending attachment secured within four months of the bankrupt's adjudication is dissolved, and the lien discharged and released, by reason of the adjudication; the property passing to the trustee as part of the estate of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 206–300; Dec. Dig. ⟸200(3).]

2. BANKRUPTCY ⟸205—ATTACHMENTS—DISCHARGE—ESTOPPEL.

Within four months of adjudication, corporate stock belonging to the bankrupt was attached. After adjudication, the trustee and attaching creditors entered into negotiations, which continued until the attaching creditors obtained a judgment in the attachment proceedings, whereupon they levied on the stock and advertised it for sale. During the negotiations there was no denial of the right of the trustee to the stock, or refusal to deliver it, but rather a failure to do so for want of proper authority on the part of the creditors. *Held*, that as the lien of the attachment was dissolved, under Bankr. Act, § 67c, the right of the trustee to claim the stock cannot be denied on the theory that, as he allowed the creditors to persist in their action, he was estopped to deny their right, for that would open the door to fraud on the part of the trustee, and the creditors persisted in their action with knowledge of the adjudication and the rights of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⟸205.]

In Bankruptcy. In the matter of the Gilsonite Mines Company. Application by the trustee in bankruptcy for an order on the executors

of F. G. Yorks, deceased, and another, requiring them to deliver to the trustee a certificate for shares of the capital stock of another corporation. On motion for judgment on petition and answer. Motion denied, and respondents directed to deliver stock.

L. J. Stark, of Denver, Colo., and H. R. Van Deusen, of Scranton, Pa., for trustee.

Fred Ikeler, of Bloomsburg, Pa., for respondents.

WITMER, District Judge. This is an application by the trustee in bankruptcy for an order on the executors of F. G. Yorks, deceased, and B. F. Rice, sheriff of Columbia county, Pa., requiring them to deliver to the trustee a certain certificate for 12,000 shares of the capital stock of the Castle Peak Asphalt Mining Company. The matter is for determination on petition and answer.

It appears that the Gilsonite Mines Company is a corporation organized under laws of the state of Wyoming, and that during the year 1914 M. K. Yorks, of Bloomsburg, Pa., was its secretary and treasurer; that on July 6, 1914, the said M. K. Yorks and others, executors of the estate of F. K. Yorks, deceased, brought an action in the court of common pleas of Columbia county against the Gilsonite Mines Company, and a writ of foreign attachment was issued, attaching this stock of the Castle Peak Asphalt Mining Company, being the property of the Mines Company in the possession of its treasurer. The attachment was levied on July 9, 1914, and on November 3, 1914, the company was adjudicated a bankrupt in the United States District Court for the State of Wyoming, and the petitioner was chosen trustee. Barring all that has been said by counsel about the negotiations following, having in view the delivery of this stock to the trustee, it has been made to appear that the trustee made demand for it on the sheriff and on counsel for trustee during the latter part of the year, or the beginning of 1915, and that in the correspondence that followed there was no denial of his right to it, nor refusal on their part to deliver same—rather a failure to do so for want of proper authority or direction to turn over. The matter was allowed to drag along for reasons that are not fully disclosed, when finally the respondents persisting in the attachment proceedings obtained judgment, whereupon they levied the stock and advertised it for sale. On petition this rule to turn over was granted and the sale restrained.

[1, 2] The position of the respondents is anomalous. They do not deny the legal title and ownership of the bankrupt to the stock, but they assert that by reason of the long-continued delay of the trustee, and especially his failure to assert his right to the stock gave the respondents reason to believe that he did not intend to press his claim for it, thereby encouraging them to spend large sums of money in the prosecution of their suit, wherefor the trustee is now equitably estopped from his right to such stock, or from interfering with the respondents in making sale thereof under their writ of execution. This position is untenable, since by section 67c of the Bankruptcy Act the pending attachment was dissolved, and the lien, secured within four months

of the bankrupt's adjudication, was wholly discharged and released, passing the property to the trustee so freed as a part of the estate of the bankrupt, and, having been invested with such tentative or constructive title to this property, the trustee, representing the creditors and the court, can be divested only by a sale thereof under order of court, or by a disclaimer filed with its consent.

To affirm the doctrine advanced would tend to assist a dishonest trustee in bankruptcy to do by indirection what he would not be permitted to do directly—to abandon the bankrupt's property to the injury of creditors and to the advantage of the bankrupt and others. Then, again, even if the trustee had not elected to take this property earlier, why should he be prevented from reducing it to possession now? Title to it having vested in him freed from the lien of the attaching creditor, it remains in him now, notwithstanding the effort to divest it by a proceeding dissolved by operation of the Bankruptcy Law. Finally, the estoppel advanced against the trustee does not come with force from the respondents. Whatever they did, since the demand by the trustee for the stock in suit, was with knowledge of the pending bankruptcy proceedings and the attempt to secure at long range its possession. Having failed in their effort, their complaint will not avail them. The respondents are required to turn over on demand to the trustee or his authorized attorney the 12,000 shares of the capital stock of the Castle Peak Asphalt Mining Company in their possession.

The motion for judgment is denied.

Ex parte CHIN DOE TUNG.

(District Court, W. D. Washington, N. D. July 27, 1916.)

No. 3378.

ALIENS ⟸32(13)—PROCEEDINGS FOR DEPORTATION—REVIEW BY COURTS.

The sufficiency of the evidence to support an order of the immigration authorities deporting an alien cannot be reviewed, where there is evidence in support of their determination and the alien appears to have had an impartial hearing; the authority of the courts extending only to the determination of whether the alien had such hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸ 32(13).]

In the matter of the application of Chin Doe Tung for a writ of habeas corpus. Writ denied.

Hugh C. Todd, of Seattle, Wash., for petitioner.

Clay Allen, U. S. Atty., and Albert Moodie, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

NETERER, District Judge. I think the petition must be dismissed and the writ discharged. This court, in Ex parte Moola Singh et al., 207 Fed. 780, at page 782, said:

"The authority of the immigration officers and the jurisdiction of the courts depend upon power conferred by Congress. It is a matter of legislation. No discretion is vested in the courts. Congress has the right to legislate upon the subject, prescribe rules, fix limits, and confer authority where it deems wise in legislating upon the subject at hand. The supreme authority is conferred upon the immigration officers. The jurisdiction of the court is limited to ascertaining whether the petitioners were denied a hearing."

An examination of the record does not disclose the denial of any right of the petitioner. The contention that the conclusion of the immigration officers is not warranted by the testimony presented is not for the court to determine; nor can the court say that the contention of the petitioner that the Secretary of Labor determined the appeal upon a ground other than the charge upon which petitioner was ordered deported is well founded, as testimony was taken upon the paternity and minority of the applicant; also as to whether or not the alleged father is a domiciled merchant, and also upon the marriage of the petitioner and the relation he bore to the household of the alleged father. The court's inquiry is limited as to whether the applicant was accorded an impartial hearing, and cannot inquire into the sufficiency of probative facts or consider reasons for the conclusions reached by the immigration officers. The question is not, Would the court have come to the same conclusion? but, Was the petitioner accorded a fair hearing? Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

The court cannot say that he was not.

MEMORANDUM DECISIONS.

ATLANTIC COAST LINE R. CO. v. RUTLAND. (Circuit Court of Appeals, Fifth Circuit. October 25, 1916.) No. 2950. In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Stanley S. Bennet and L. W. Branch, both of Quitman, Ga., for plaintiff in error. Claude Payton, of Atlanta, Ga., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We find none of the assignments of error well taken. Judgment affirmed.

In re BARNETT. BALBACH v. SURPRISE. (Circuit Court of Appeals. Seventh Circuit. May 23, 1916. Rehearing Denied July 18, 1916.) No. 2321. Appeal from the District Court of the United States for the District of Indiana. In the matter of the bankruptcy of Max Barnett. Proceeding between Paul A. Balbach and Charles L. Surprise, trustee. From an order of the referee, affirmed by the District Court, Paul A. Balbach appeals. Affirmed. Frank P. A. Brunswick, of Chicago, Ill., for appellant. Louis Dulsky, of Chicago, Ill., for appellee. Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. The only substantial question involved in the case is whether or not the evidence justified the conclusion of facts, made by the referee and affirmed by the trial judge, that both parties intended, not an actual business transaction, a delivery of the grains bought and sold at the future time des-

ignated for delivery, but only a settlement of the difference between the contract price and the market price at the time fixed for delivery. From an examination of the evidence we are satisfied that the conclusion reached by the referee and affirmed by the District Court was proper. The order is therefore affirmed.

In re KUPFER CORPORATION. (Circuit Court of Appeals, Ninth Circuit. October 11, 1916.) No. 2844. Petition to Revise Certain Orders of the District Court of the United States for the Southern Division of the Southern District of California. H. Broadshaw Birchby and Herbert Cutler Brown, both of Los Angeles, Cal., for petitioner.

PER CURIAM. The above-entitled matter came on to be heard on the said petition for revision, and it appearing that the petitioner herein has failed to comply with the provisions of rules 23 and 24 of the rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi), in that the petition has not been printed as required by said rule 23, and it further appearing to the court that counsel for the petitioner has failed to file with the clerk of this court a printed brief at least 15 days before the matter was called for argument, as required by said rule 24, and that, according to this rule, the petitioner is in default, and that as prescribed by section 5 thereof the case may be dismissed, on consideration whereof, it is now here ordered and adjudged by this court that the petition for revision in this matter be and hereby is dismissed, for the noncompliance by the petitioner with the provisions of rules 23 and 24 of the rules of practice of this court. It is further ordered and adjudged by this court that the respondent recover against the petitioner for its costs herein expended and have execution therefor.

LEE LING HING v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 3, 1916.) No. 2863. In Error to the District Court of the United States for the Southern Division of the Southern District of California. Albert Schoonover, U. S. Atty., and J. Robert O'Connor, Asst. U. S. Atty., both of Los Angeles, Cal.

PER CURIAM. This cause came on regularly to be heard on the motion of counsel for the defendant in error to dismiss the writ of error therein for the noncompliance by the plaintiff in error with the provisions of subdivision 1 of rule 16 of the rules of practice of this court (208 Fed. ix, 124 C. C. A. ix), and was duly submitted, and it appearing to the court that the plaintiff in error has failed to file a record thereof and to docket the case by or before the return day, and has failed to comply with the said rule, and that, pursuant to the said rule, the defendant in error has docketed the case and produced and filed a certificate of the clerk of the said district court, stating the case and certifying that a writ of error therein had been duly sued out, on consideration whereof, and pursuant to the provisions of subdivision 1 of rule 16 of the rules of practice of this court, it is ordered and adjudged by this court that the said motion be and hereby is granted, and that the writ of error in this cause be and hereby is dismissed.

LUSE LAND & DEVELOPMENT CO., Limited, v. GANNON. (Circuit Court of Appeals, Eighth Circuit. October 20, 1916.) No. 4642. In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge. Action by the Luse Land & Development Company, Limited, a corporation, against Hugh Gannon, who counterclaimed. Judgment for defendant, and plaintiff brings error. Affirmed. S. D. Catherwood, of Austin, Minn., and Charles N. Dohs, of St. Paul, Minn. (Edgerton & Dohs, of St. Paul, Minn., and Catherwood & Nicholsen, of Austin, Minn., on the brief), for plaintiff in error. W. B. Douglas, of St. Paul, Minn. (Douglas, Kennedy & Kennedy,

of St. Paul, Minn., on the brief), for defendant in error. Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This action was brought by the Luse Land & Development Company, Limited, as plaintiff, against Hugh Gannon, as defendant, to recover an installment due upon contracts for the purchase of seven quarter sections of land in Saskatchewan, Canada. The answer admits the liability as charged in the complaint, and sets up by way of counterclaim a cause of action for deceit in the sale of the lands, and asks judgment therefor in the sum of $24,640. The reply denies the making of the representations charged, and alleges that defendant had a full opportunity to examine the land, and in fact made such examination, and in no way relied upon any representations that were made. The issue was presented by this counterclaim and reply. Evidence was adduced by the respective parties in support of their contentions. At the conclusion of the case plaintiff moved for a directed verdict, which was denied, and the case submitted to the jury in a charge to which no exceptions have been saved. The jury returned a verdict in favor of the defendant for $2,240, for which judgment was entered. Plaintiff brings error. The error mainly relied on is the denial of the motion for a directed verdict. We have carefully examined the record, and think the ruling of the trial court was clearly right. No good purpose would be served by setting forth the evidence at length in the discussion of this pure question of fact. There are also several assignments of error based upon the reception and rejection of evidence. We have also examined them with care, and do not think any error was committed. If the case were to be again tried, there would be justification in discussing each of these alleged errors in detail; but, as that is not to occur, we do not feel called upon to extend this opinion for that purpose. The judgment is affirmed.

MOSAIC TILE CO. v. JOSEPH S. MILLER CO. Appeal of GORMAN et al. (Circuit Court of Appeals, Third Circuit. October 12, 1916.) No. 2131. Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge. John F. Gorman, of Philadelphia, Pa., for appellant. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The only matter before us is the correctness of Judge Thompson's action in granting the restraining order of April 10, 1916; and, as we see no error in what was done, the order is now affirmed. But this is without prejudice to the right of either of the appellants to apply to the District Court for such other relief as may seem appropriate.

NEVADA NORTHERN RY. CO. v. HOUSTON. (Circuit Court of Appeals, Ninth Circuit. October 2, 1916.) No. 2826. In Error to the District Court of the United States for the District of Nevada. Chandler & Quayle, of Ely, Nev., and Curtis H. Lindley, of San Francisco, Cal., for plaintiff in error. Dixon & Miller, of Reno, Nev., for defendant in error.

PER CURIAM. This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Nevada, and upon the oral motion of counsel for the plaintiff in error to dismiss the writ of error herein, and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this court that the writ of error in this cause be and hereby is dismissed, with costs in favor of the defendant in error and against the plaintiff in error. It is further ordered and adjudged by this court that the defendant in error recover against the plaintiff in error for his costs herein expended and have execution therefor.

PECOS MERCANTILE CO. v. RAYNOLDS et al. (Circuit Court of Appeals, Fifth Circuit. November 20, 1916.) No. 2884. Appeal from the District Court of the United States for the Western District of Texas; Thos. S. Maxey,

Judge. J. A. Gillett, of El Paso, Tex., for appellant. Wm. H. Burges and Robert L. Holliday, both of El Paso, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. After a full consideration of this case, we conclude that the decree appealed from is correct, and it is therefore affirmed.

THE PRUDENCE. (Circuit Court of Appeals, Fourth Circuit. November 7, 1912.) No. 1092. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. Libels by Rosa Lee Cherry, administratrix of Benjamin Luther Cherry, deceased, and by Lena E. Harper, administratrix of Lee Harper, deceased, against the steam tug Prudence. From decrees for libelants (191 Fed. 993), defendant appeals. Affirmed. Edward R. Baird, Jr., of Norfolk, Va., for appellant. Henry Bowden and E. R. F. Wells, both of Norfolk, Va., for appellees. Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

PER CURIAM. We reach the conclusion that the court below properly viewed the conflicting evidence on which its decree was based, and that its disposition of the case under all the circumstances attending it is without error. Affirmed.

RODEN v. DETTERING. (Circuit Court of Appeals, Ninth Circuit. September 11, 1916.) No. 2708. In Error to the District Court of the United States for the Northern Division of the Western District of Washington. Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, Wash., for plaintiff in error. Griffin & Griffin, of Seattle, Wash., for defendant in error. Ordered, upon due consideration, writ of error dismissed, with costs in favor of defendant in error and against plaintiff in error.

SAVANNAH & N. W. RY. v. UNION TRUST CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 3, 1916.) No. 2841. Appeal from the District Court of the United States for the Southern District of Georgia; W. W. Lambdin, Judge. Suit by the Union Trust Company against the Great Eastern Lumber Company, in which the Savannah & Northwestern Railway intervened. From the decree in favor of complainant, intervener appeals. Modified and affirmed. Robert M. Hitch and Remer L. Denmark, both of Savannah, Ga., for appellant. William L. Clay and Frederick T. Saussy, both of Savannah, Ga., for appellees. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. This is an appeal from a final decree against the Savannah & Northwestern Railway, intervener in a suit for foreclosure of mortgage on real and personal property, wherein the Union Trust Company was complainant and the Great Eastern Lumber Company was respondent. The decree appealed from is in favor of the Union Trust Company, foreclosing a certain contract of purchase by the Savannah & Northwestern Railway from the Great Eastern Lumber Company of part of the property covered by the mortgage sought to be foreclosed in the main suit. The record shows that the Union Trust Company was fully entitled to a decree of foreclosure against the Savannah & Northwestern Railway. The decree rendered in the case, however, is apparently more in the nature of a forfeiture than the foreclosure to which the Union Company was entitled, and is erroneous in that respect, and should be modified, so as to make the decree rendered read as follows: It is therefore ordered, considered, and adjudged that all the right, title, and interest of the Savannah & Northwestern Railway in the properties of the defendant under the contract of purchase referred to in said intervention, and particularly all of its right, title, and interest of, in, and to the properties, rights, and oppositions hereinbefore described in this decree, and particularly on pages 102, 103, and 104 in paragraph (b), parcel (2), are terminated and foreclosed. It is further ordered, adjudged, and decreed that unless the Savannah & Northwestern Railway, within 10 days from the date of this decree,

pay the amount herein adjudged due and payable by the Savannah & Northwestern Railway, to wit, the sum of $24,238.02, with interest thereon at the rate of 7 per cent. per annum from January 1, 1915, into the registry of the court, an order of sale issue to the special master herein appointed, directing him, after due advertisement, to sell the said property, rights, and oppositions herein described, free from all and any right, equity, interest, or claim whatsoever of the Savannah & Northwestern Railway in and to the same. The proceeds of said sale to be applied to the payment of the said amount of $24,238.02, with interest thereon at the rate of 7 per cent. per annum from January 1, 1915, and all costs justly taxable against the Savannah & Northwestern Railway, and any balance to be paid to the said railway. For any deficiency judgment may be entered in favor of the receivers in this cause against the Savannah & Northwestern Railway for the same, and execution issue therefor. This modification is ordered, and, so modified, the decree appealed from is affirmed, with costs of appeal to be paid by the appellees.

SOO HOO SONG v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 3, 1916.) No. 2806. In Error to the District Court of the United States for the Southern Division of the Southern District of California. Paul W. Schenck and Richard Kittrelle, both of Los Angeles, Cal., for plaintiff in error. Albert Schoonover, U. S. Atty., of Los Angeles, Cal.

PER CURIAM. This case having been reached for argument, counsel for the defendant in error moved the dismissal of the writ of error therein for the noncompliance by the plaintiff in error with the provisions of rules 23 and 24 of the rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi), which motion was duly submitted to the court for consideration and decision. And it appearing to the court that the record herein has not been printed as required by said rule 23, and it further appearing to the court that the counsel for the plaintiff in error has failed to file with the clerk of this court a printed brief at least 15 days before the case was called for argument, as required by said rule 24, and that, according to this rule, the plaintiff in error is in default, and that, as prescribed by section 5 thereof, the case may be dismissed on motion, on consideration whereof, it is now here ordered and adjudged by this court that the said motion be and hereby is granted, and that the writ of error in this case be and hereby is dismissed, for the noncompliance by the plaintiff in error with the provisions of rules 23 and 24 of the rules of practice of this court.

STANDARD STEEL CO. v. ALABAMA & G. S. R. CO. et al. (Circuit Court of Appeals, Fifth Circuit. October 31, 1916.) No. 2840. In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. Augustus Benners, of Birmingham, Ala., for plaintiff in error. J. T. Stokely and A. G. Smith, both of Birmingham, Ala., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. The only assignment of error presented in this case is that "the court erred in instructing the jury in writing at the request of defendants to find a verdict for them." We have considered the evidence in the light of briefs of counsel, and conclude that the evidence fully justified the direction complained of. The judgment of the District Court is affirmed.

THOMSON ELECTRIC WELDING CO. et al. v. BARNEY & BERRY, Inc. (Circuit Court of Appeals, First Circuit. June 14, 1916.) No. 1115. Appeal from the District Court of the United States for the District of Massachusetts. Application for leave to apply to District Court for leave to amend answer. Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. We have carefully examined the Bouchayer French patent, No. 330,200, relied upon by the defendants, in their application for leave to

apply to the District Court to amend their answer, as an anticipation of the patent in suit, No. 1,046,066, issued to Harmatta, and are of the opinion that it is not material upon the question, or at the least, that it does not present such clear and convincing proof as is calculated to bring about a different result from that reached in our opinion handed down in this case on the 5th day of October, 1915 (227 Fed. 428, 142 C. C. A. 124). It seems rather to present a device, the essential features, mode of operation, and the result of which are entirely different from those disclosed in the Harmatta patent. Application denied.

TRUST CO. OF GEORGIA et al. v. BLAKELY OIL & FERTILIZER CO.* (Circuit Court of Appeals, Fifth Circuit. October 25, 1916.) No. 2959. In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge. Clifford L. Anderson and Daniel W. Rountree, both of Atlanta, Ga., for plaintiffs in error. B. R. Collins, of Blakely, Ga., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On examination of the record, in connection with the briefs of counsel, we find no reversible error in the rulings of the trial judge, either as to the admission of evidence or in his charge or refusals to charge the jury. The verdict seems to be responsive to and supported by the evidence. The judgment of the District Court is affirmed.

*Rehearing denied December 18, 1916.

END OF CASES IN VOL. 236

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